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Slippages of the Public/Private in Resource Wars

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Abstract

This paper demonstrates that the public/private distinction that undergirds the view that States have a monopoly of violence of the means to wage war while inaccurate continues to inform contemporary debates in international law in the context of conflicts over resources like diamonds. It shows how the sharp distinctions and boundaries between public and private realms in relation to the monopolization of violence contributes to the ambivalent commitments of the global legal order—and of international law in particular—in dealing with non-state actors engaged in initiating or starting wars in the context of resource wars. In short, my claim is that international law is split at the root—it is split at a number of levels: first, it is split in proceeding from the premise that the use of force (violence) can only be evaluated for its lawfulness if it fulfills certain criteria that relate to the conduct of a State, but where it involves the conduct of non-State actors such violence/use or use of force largely—though not exclusively—falls outside the scope the rules of *jus ad bellum*.

Second, contemporary international law is also split at its root because it has traditionally underplayed the role of private actors in creating and conducting the use of force/violence. Yet, eighteenth and nineteenth century chartered trading corporations in the colonies were explicitly mandated to wage war to expand the commercial interests of European states consistently with prevailing understanding of international law at the time. The resource conflicts of the 20th and 21st centuries, which also primarily involve non-State actors, have strikingly similar parallels with mercantile-chartered trading corporations in the colonies—although today international law arguably proceeds from the premise that only States have the monopoly of the means and the right to lawfully engage in violence/war. In short, the resource conflicts of today are analogous in many respects with the use of violence by chartered companies. Like the chartered companies of earlier periods, the roving bandits, mercenaries and guerillas controlling resource zones seek, protect and expand their commerce in a manner in that demonstrates that violence is has not been de-democratized, de-marketized and de-territorialized, contrary to international law’s premise that States have a monopoly of violence.

Ultimately, rules of international law relating to the resort the use of force artificially separate the legality of the use of force as used by States, from the use of forcible measures by non-State actors even when the history of the role of international law is deeply implicated in acquiescing to and legitimating the spread of commerce and the acquisition of territory through the use of force. What is more, to the extent that there are standards being developed to govern the extraction of mineral resources, this has involved developing ‘soft’ rather than hard norms. That is to say that those standards being formulated to govern the role of private actors in resource conflicts as evidenced by the Kimberley Transparency Initiative with regard to ‘blood diamonds’ which is not legally binding like those relating to the resort to use of force by States.

This failure so far to establish explicitly categorical and enforceable rules prohibiting the use of force in the activities of local and transnational actors engaged in resource extraction in the third world is striking given the hardness of the rules prohibiting the use of force and regulating the use of force when the actors involved are States. What makes these differences all the more striking is that the prohibitions on resort to force where States are involved are predicated on
safeguarding the territorial integrity and political independence of States, precisely the twin concerns that arise with resort to the use of force by non-State actors. In short, non-state actors threaten the territorial integrity and political independence of states much the same way that resort to the use of force does with reference to State actors, and yet rules of international law have been slow to begin addressing the use of force by non-state actors in the same way.

In effect, the emerging regimes of ‘soft’ or voluntary rules and standards may be argued to have the effect of ineluctably facilitating the activities of local and transnational actors to extract mineral resources in so far as they do not categorically impose binding international legal sanctions on these non-state actors not to use force in the same way that they apply to States. This arguably results in the facilitation of the commercial interests of transnational and local actors. Even if one was not persuaded that the absence of a strict norm prohibiting non-State actors from engaging in forcible measures, it is clear that the thriving global trade in resources like diamonds and hard wood timber benefit directly from the forcible extraction of these resources at lower costs than if these resources were peaceably extracted. This is because wars make it difficult for weak States to build institutions that can enforce the collection of taxes and royalties. Without the income that taxes and royalties generate from resources, these States have no income to build the kind of institutions necessary to provide alternative and legitimate avenues of resource extraction.
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Slippages of the Public/Private in Resource Wars

Introduction

International law and international relations theory assume that States monopolize the means and the right to wage war.\(^1\) Thus international law evaluates whether war is legally permissible given the role a State plays in initiating or conducting the war.\(^2\) On this view, violence affecting international security not attributable to a State raises difficult issues of responsibility as Judge Koijmans noted in his separate opinion in the ICJ’s 2005 decision, Democratic Republic of Congo v Uganda.\(^3\) For example, there is no agreement among States, judges of the international court of justice or scholars of international law on

\(^1\) John W. Meyer, *The World Polity and the Authority of the Modern State*, in *STUDIES OF THE MODERN WORLD SYSTEM*, 118-20 (Albert Bergesen ed., 1980); Gerth, H. H. and Mills C. W., *From Max Weber: Essays in Sociology* 78 (1946) citing Max Weber arguing that “a state is a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory.”; Nobert Elias, 1982; II, 104 (arguing that the “modern age is characterized by a certain level of monopolization. Free use of military weapons is denied the individual and reserved to a central authority of whatever kind…and likewise the taxation of the property or income of individuals is concentrated in the hands of a central social authority. The financial means thus flowing in this central authority maintain its monopoly of military force, while this in turn maintains the monopoly of taxation.”); Charles Tilly, *War Making and State Making As Organized Crime, in BRINGING THE STATE BACK IN*, 169, (Peter Evans, Dietrich Rueschmeyer and Theda Skocpel eds., 1985) (arguing that the consolidation of state power in Europe was accompanied by the monopolization of violence by the State. Notably, Tilly argues that third world states of today do not resemble 16th or 17th century states in their monopolization of violence, id. Even early international law scholars like Grotius distinguished between public and private war and noted that public war could only be waged by those with the authority or sovereign power to conduct it, while private war was ‘an impermissible exercise of autonomy,’ see discussion in David Kennedy, *Primitive Legal Scholarship*, 27 HARV. INT’L L.J., 1, at 33 and 89 (1986). See also DAVID KENNEDY, OF LAW AND WAR (2006) (addressing how international law is mobilized to create sharp distinctions and formal boundaries including of course the public/private distinction).

\(^2\) In Nicaragua v. U.S., the ICJ held that the right of self defense under Article 51 of the United Nations Charter requires as a precondition that an armed attack be attributable directly or indirectly to a State. *Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. (June 27)*. In Congo v. Uganda, the ICJ grappled with the complex conflict in the eastern part of the DRC where groups whose conduct could not be attributed to the conduct of either the DRC or Uganda were involved in wars that clearly violated both jus ad bellum and in bellum rules. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. (Dec. 19).

whether a State has an international law right to use force in self defense where an armed attack emanates from a non-State actor as opposed to a State.\(^4\)

The assumption that States monopolize the use of force is misleading if not entirely inaccurate, particularly with regard to sham or collapsed States outside the West. Unlike their Western counterparts,\(^5\) many non-Western States do not have a monopoly on the use of violence within their territory.\(^6\) Yet, rules of international law continue to be predicated on the assumption that States monopolize the use of violence. Some of the clearest examples of the prevalence of war/violence outside the control of States, other than the obvious example of terrorist groups, include the use of force by bands of guerillas and mercenaries who control mineral resources like diamonds often with no goal of capturing State power or without advancing a political cause where they operate. In such areas of lawlessness and minimum governance, the line between profit which is often unrestrained, and murderous plunder over mineral resources is blurred. The disorder and violence caused by non-State groups therefore challenges international law’s assumption that war is the business of States, rather than of private actors. It also

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\(^5\) On the monopolization of violence in Western states, see *Janice Thompson, Mercenaries, Pirates and Sovereigns: State-Building and Extraterritorial Violence in Early Modern Europe* (1994).

demonstrates the extent to which violence has been democratized and marketized as a commodity beyond the presumed monopoly of the State.\(^7\)

For example, in the context of resource wars in weak or collapsed States, non-State actors involved in the violent extraction of valuable minerals are linked to petty traders and ultimately to global chains of commerce.\(^8\) These links are possible because of the demand for these minerals or resources as well as the fact that weak or collapsed States are not only administratively incapable, but also “badly financed, organizationally inept, corrupt, politically divided, and poorly informed about goings-on at the local level.”\(^9\) In such contexts, the Westaphalian State with exclusive territorial jurisdiction, control and jurisdiction has been the exception than the norm.\(^10\) Yet, though conflicts over valuable tradable resources are often non-international, access to global trade networks ensures these resources reach the world market.\(^11\) Thus ‘domains of prosperity and order’ in the markets where these minerals are sold “feed off, and perpetuate, zones of scarcity and violence” in collapsed, weak and sham States.\(^12\)

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\(^7\) For an insightful analysis, see LAW AND DISORDER IN THE POSTCOLONY (Jean and John Comaroff et al. eds., 2006) (book shows that while most postcolonies thrive on disorder, they still fetishize the law).

\(^8\) As Jean and John Camaroff argue, there are “dangerous liaisons between north and south, about the ways in which ‘respectable’ metropolitan trade gains by deflecting the risks and moral outlaw of commerce ‘beyond the border,’” Jean and John Comaroff, “An Introduction,” Law and Disorder in the Postcolony: An Introduction, in Jean and John Comaroff, (eds.) Law and Disorder in the Postcolony, id at 17


\(^10\) Miles Kahler, “Territoriality and Conflict in an Era of Globalization,” in Miles Kahler and Barbara F. Walter, (eds.) Territoriality and Conflict in an Era of Globalization, 2006, 1 argues that “Scrutiny of the concept of territoriality leads to a more contingent and mutable formulation of unit variation rather than the conventional static view of territoriality within international relations – a ‘Westaphalian’ system populated by precisely delimited territorial states,” id.

\(^11\) Miles Kahler, “Territoriality and Conflict in an Era of Globalization,” in Miles Kahler and Barbara F. Walter, (eds.) Territoriality and Conflict in an Era of Globalization, 2006, 14

\(^12\) Jean and John Comaroff, Law and Disorder in the Postcolony: An Introduction, in Jean and John Comaroff, (eds.) Law and Disorder in the Postcolony, supra note _ at 18
As such, an attribution analysis of where responsibility for the violent conduct of non-State actors lies, rather than revealing or merely revealing State actors, a whole array of non-State actors involved in commerce would surface. Unfortunately, \textit{ad bellum} rules of international law relating to the illegal use of force are not designed to track responsibility to non-State actors where their conduct cannot be tracked back to a State. While international law’s \textit{jus in bello} rules certainly apply even to non-international armed conflict, the very efficacy of these rules is called into question by State weakness, since States are primarily charged with the enforcement of these norms.

This paper seeks to demonstrate that the public/private distinction that undergirds the view that States have a monopoly of violence of the means to wage war while inaccurate continues to inform contemporary debates in international law in the context of conflicts over resources like diamonds. What is more, the doctrine of Statehood guarantees States that have no effective control of their territory the benefit of Statehood in relations with other States and with international institutions while indeed they are sham States. Donors and international institutions such as the Bretton Woods institutions that continue their relations with sham States therefore contribute to the façade under which stateless groups

\begin{itemize}
  \item \textsuperscript{13} For example, one author notes that “smuggling within respected channels of the diamond trade is, like all else related to it, a very well-organized and long standing system. The largest cutting and polishing centers in the world, in Bombay and Surat, India, were founded on smuggled goods that made their way from DTC customers in Belgium via German courier, with the finished stones then being smuggled back,” Greg Campbell, Blood Diamonds: Tracing the Deadly Path of the World’s Most Precious Stones, 38, 2004
  \item \textsuperscript{14} See Article 17(a) and (b) of the Rome Statute, which respectively provide that a case will be inadmissible before the International Criminal Court if: (a) “The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.” This paper is not about the \textit{jus in bello} law that applies in resource conflicts.
\end{itemize}
operate under the shadow of sham States. States like Somalia which have had no functioning central government with any amount of control over its territory for more than a decade continue to be represented in international bodies like the United Nations, thereby legitimizing their sham existence.\(^{15}\) William Reno, who refers to these sham States as shadow states, argues that they are “the product of personal rule, usually constructed behind the façade of de jure state sovereignty.”\(^{16}\) In these sham States non-State actors tend to exercise abundant authority often threatening the very existence of these weak States. In turn, political actors in these States prefer to exercise authority through the market for resources such as minerals within their States.\(^{17}\) Resource wars in weak States therefore exhibit competing factions of State and non-State actors all connected to networks of transnational commerce which buy their booty. Though the rules of international law prohibiting the use of force are directed against States, clearly non-State actors are no less capable of using force and violence in the same way States do in the scramble for control and extraction of resources to make the money that sustains their existence. Indeed, the history of international law is replete with the involvement of non-state actors using war and violence to advance commercial and other goals as this paper shows.

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\(^{15}\) Paul Collier, The Bottom Billion: Why the Poorest Countries Are Failing and What Can be Done About It, 2007 at pages 4-5. William Reno notes, “Nearly all governments recognize shadow states as interlocutors in global society and conform to the practice of extending sovereignty by right to former colonies. This principle applies I cases where formal state capacity is practically nil. For example, Somalia holds a seat in the United Nations, exists as an entry in World Bank tables, and presumably has access to foreign aid, provided an organization there can convince outsiders that is the rightful heir to Somalia’s existing sovereignty…Jackson observed that this leads to external support for de jure sovereignty of states with very weak internal administrations, relieving rulers of the need to strengthen institutions to protect productive groups in society, from which regimes could extract income,” William Reno, “Shadow States and the Political Economy of Civil Wars,” in Mats Berdal and David M. Malone, Greed and Grievance: Economic Agendas in Civil Wars, 2000 at 45.


\(^{17}\) Id. at 44
A major purpose of this inquiry is to show how the sharp distinctions and boundaries between public and private realms in relation to the monopolization of violence contributes to the ambivalent commitments of the global legal order—and of international law in particular—in dealing with non-state actors engaged in initiating or starting wars in the context of resource wars. In short, my claim is that international law is split at the root—it is split at a number of levels: first, it is split in proceeding from the premise that the use of force (violence) can only be evaluated for its lawfulness if it fulfills certain criteria that relate to the conduct of a State, but where it involves the conduct of non-State actors such violence/use or use of force largely—though not exclusively—falls outside the scope the rules of both *jus ad bellum*.

Second, contemporary international law is also split at its root because it has traditionally underplayed the role of private actors in creating and conducting the use of force/violence. Yet, eighteenth and nineteenth century chartered trading corporations in the colonies were explicitly mandated to wage war to expand the commercial interests of European states consistently with prevailing understanding of international law at the time. The resource conflicts of the 20th and 21st centuries, which also primarily involve

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non-State actors, have strikingly similar parallels with mercantile/chartered trading corporations in the colonies – although today international law arguably proceeds from the premise that only States have the monopoly of the means and the right to lawfully engage in violence/war.\(^{19}\) In short, the resource conflicts of today are analogous in many respects with the use of violence by chartered companies. Like the chartered companies of earlier periods, the roving bandits, mercenaries and guerillas controlling resource zones seek, protect and expand their commerce in a manner in that demonstrates that violence is has not been ‘dedemocratized, demarketized and deterritorialized’\(^{20}\), contrary to international law’s premise that States have a monopoly of violence.

Ultimately, rules of international law relating to the resort the use of force artificially separate the legality of the use of force as used by States, from the use of forcible measures by non-State actors even when the history of the role of international law is deeply implicated in acquiescing to and legitimating the spread of commerce and the acquisition of territory through the use of force.\(^{21}\) What is more, to the extent that there are standards being developed to govern the extraction of mineral resources, this has involved developing ‘soft’ rather than hard norms.\(^{22}\) That is to say that those standards being formulated to govern the role of private actors in resource conflicts as evidenced by the Kimberley Transparency Initiative with regard to ‘blood diamonds’ which is not legally binding like those relating to the resort to use of force by States.

\(^{19}\) My argument is not that these private actors are not involved in war, in fact they are as I show in this paper. Further, my argument is not to simply suggest that these private actors are involved in war especially in supporting their commercial interests and therefore that international law needs to catch up. Rather, my argument is an exposition of the discipline’s pretense and therefore acquiescence as it were of the private uses of otherwise prohibited violence if it were meted out by States.

\(^{20}\) THOMPSON, supra note 5, at 4.

\(^{21}\) Of course today the acquisition of territory through the use of force is prohibited under international law.

\(^{22}\) Except perhaps in areas like in the war against terrorism.
This failure so far to establish explicitly categorical and enforceable rules prohibiting the use of force in the activities of local and transnational actors engaged in resource extraction in the third world is striking given the hardness of the rules prohibiting the use of force and regulating the use of force when the actors involved are States. What makes these differences all the more striking is that the prohibitions on resort to force where States are involved are predicated on safeguarding the territorial integrity and political independence of States, precisely the twin concerns that arise with resort to the use of force by non-State actors. In short, non-state actors threaten the territorial integrity and political independence of states much the same way that resort to the use of force does with reference to State actors, and yet rules of international law have been slow to begin addressing the use of force by non-state actors in the same way.

In effect, the emerging regimes of ‘soft’ or voluntary rules and standards may be argued to have the effect of ineluctably facilitating the activities of local and transnational actors to extract mineral resources in so far as they do not categorically impose binding international legal sanctions on these non-state actors not to use force in the same way that they apply to States. This arguably results in the facilitation of the commercial interests of transnational and local actors. Even if one was not persuaded that the absence of a strict norm prohibiting non-State actors from engaging in forcible measures, it is clear that the thriving global trade in resources like diamonds and hard wood timber benefit directly from the forcible extraction of these resources at lower costs than if these resources were peaceably extracted. This is because wars make it difficult for weak States

23 See discussion of resource wars below.
to build institutions that can enforce the collection of taxes and royalties. Without the income that taxes and royalties generate from resources, these States have no income to build the kind of institutions necessary to provide alternative and legitimate avenues of resource extraction.

Wars over resources in these countries coincides with the promotion of free markets in mineral extraction activities. For example, the World Bank has proposed mineral rich countries should have minimal regulatory restrictions in the mining sector. On this view African governments have been advised to shed their ‘public sector orientation’ in mineral extraction activities by privatizing government owned mines so that the private sector with experienced multinational firms can take the lead in the operation and management of these mines. The World Bank further recommends that these firms should not be encumbered with a taxing regime based on output but rather one based on earnings.\(^\text{24}\) The Bank further calls for better regulation of informal mining activities.

This laissez faire regulatory regime being recommended together with the soft norms that are being formulated to oversee mineral extraction involving the use of force by private actors in turn illustrates the split within international law between public and private uses of violence. As this paper will demonstrate, the distinction between between state and non-state violence\(^\text{25}\) is hardly sustainable.\(^\text{26}\)


\(^{25}\) See notes 61 ff and accompanying text below.

\(^{26}\) American legal realism has long challenged distinctions such as those between public/private, state/market and so on, *see, e.g.*, Duncan Kennedy, *The Stages in the Decline of Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982).
Though I emphasize the nature of sham States and the manner in which they are overwhelmed by non-state actors that have a higher capability to mete out violence, than State militaries, to achieve their objectives, I do not subscribe to the view that the solution to these challenges is to expand the right of self defense to give States a right to defend themselves if attacked by non-State actors. Neither do I subscribe to the view that third States should have the right to forcibly intervene on behalf of these sham States. I also do not want to be read as advocating for a re-colonization of these sham States. Rather, I am calling attention to the particular valence of the State form and its connections to transnational commerce in sham States.

To achieve the foregoing objectives, I track two genealogical antecedents to today’s resource wars. First, I trace the role of mercantile companies with a special focus on King Leopold II’s International African Association. Thereafter, I examine the acquisition of territory in Swaziland by the British through an examination of the legal skirmishes over a violation of a concession to reserve certain territory to the Swazi’s as European settlement advanced. Finally, I briefly examine today’s resource wars with special reference to the ‘blood’ diamond trade. The paper ends with a conclusion.

Genealogical Antecedents to Today’s Resource Wars

Antecedent One: Mercantile Companies With Special Reference to King Leopold’s International African Association
One of the major ways in which European countries established colonial rule was through chartering mercantile companies. These companies used their private capital to establish trading and commercial monopolies over territories in the New world as well as in Asia and Africa. In sub-Saharan Africa at the end of the nineteenth century, various mercantile companies were engaged in a scramble for the vast unexplored hinterlands. Examples of such companies abound – from the East India Company; the Imperial British East Africa Company and so on.

European states chartered these mercantile corporations empowering them with ‘military, judicial and diplomatic power.” For example, the Dutch’s East India Company was authorized “to make war, conclude treaties, acquire territories and build fortresses.” Though they were for the most part privately financed, these mercantilist corporations were therefore hardly private organization since they exercised quasi-sovereign authority. The importance of these mercantile corporations for European states lay in the fact that the States did not have the economic wherewithal or political support at home to pursue territorial acquisitions or trade monopolies. As such, by chartering mercantile corporations these States could then evaluate whether to assume sovereignty

28 THOMPSON, supra note 5, at 10.
29 Quoting Id. at 10-11.
over the territories and trade monopolies acquired by mercantile companies. As Janice Thompson has persuasively argued, the conduct of mercantile companies broke down distinctions between “the economic and political, non-state and state, property rights and sovereignty, [and] the public and private.”

Take the example of King Leopold II of Belgium. Since Belgian law prohibited him from spending State funds to pursue territorial conquests and trade monopolies abroad, he established a private company, the International African Association. King Leopold then funded Mr. Henry M. Stanley a naturalized American explorer to ‘discover’ the mineral rich Congo region and the source of the Congo river while entering into hundreds of treaties with African chiefs. Stanley delivered these treaties to King Leopold’s private company, the International African Association.

King Leopold II then began seeking international legal recognition of his International African Association by European States as well as by the United States. He used the Berlin conference of 1884 at which European countries were defining their spheres of influence in the African continent to promote his vision of a Congo Free State. To achieve his objectives, he worked hard to convince the

31 THOMPSON, supra note 5, at 10-11.
32 Id.; see also LUCY SUTHERLAND, THE EAST INDIA COMPANY IN EIGHTEENTH CENTURY POLITICS 51 (1957) (where in analyzing the workings of the East India Company notes: “The crucial weakness of the eighteenth century standard of political morality, seen through the eyes of its successors, was that private and public interests of those taking part in the political life were insufficiently distinguished either by the sanctions of political organization or by the influence of informed public opinion. To make a comfortable life fortune in the public service and to establish those dependent on him in situations of profit was the major…and the legitimate ambition of the ordinary politician.”).
33 Stanley was born in Britain. SYBIL E. CROWE, THE BERLIN WEST AFRICA CONFERENCE 1884-1885, 14 (1942).
34 Stanley had procured these treaties from over 2,000 treaties which in part specified that the rights these chiefs had ceded “would be conceded by all to have been indisputable, since ages of succession, by real divine right.” ARTHUR B. KEITH, THE BELGIAN CONGO AND THE BERLIN ACT 49 (1919).
United States delegation to the conference of his vision of the Congo as a free state open to the commerce of all European States as well as the United States.

The United States was represented at the Berlin conference by three people. Mr. Henry S. Sanford, a credentialed associate delegate and a close confidant of King Leopold II of Belgium\(^\text{35}\); Mr. John A. Kasson, the American Ambassador to the conference\(^\text{36}\); and Mr. Henry M. Stanley the explorer who had been procuring treaties for King Leopold II in the Congo. Like Mr. Sanford, Stanley shared King Leopold’s stated goal of establishing free trade in the Congo river and free navigation of the Congo and Niger rivers and attended the conference as a technical advisor.\(^\text{37}\)

Although this delegation did not officially represent the U.S., the State Department and Congress endorsed the conference’s primary goal of ensuring liberty of trade in the Congo basin particularly by U.S. citizens.\(^\text{38}\) This endorsement followed intense lobbying on behalf of King Leopold by Henry Sanford who had hosted President Chester A. Arthur in his Florida ranch\(^\text{39}\)

\(^{35}\) Arthur B. Keith, The Belgian Congo and the Berlin Act 35-6 (1919). Keith described Sanford as appearing to “have had a truly American enthusiasm for noble sentiments of philanthropy, as well as a keen appreciation of the business possibilities of opening to trade the Congo, and who won for the enterprise the respectful sympathy of the U.S.” Id. at 35-6.

\(^{36}\) Sybil E. Crowe, The Berlin West Africa Conference 1884-1885 97 (1942) (describing Mr. Kasson as having been distinguished “more by verbosity than by brains [and] an ardent sympathizer with Leopold’s designs, as understood in American through the propaganda of Colonel Sanford”).

\(^{37}\) Crowe, supra note 25, at 81. According to Crowe, “Stanley remained throughout Leopold’s faithful henchman, and only served the interests of the United States in so far as these were themselves subservient to those of the King of the Belgians.” Id.

\(^{38}\) Message from President of the United States to the House of Representatives on the Congo Conference at Berlin, 48th Cong. (2d Sess. 1884-1885) 29 H.R. EXEC. Docs. No.247 at 179.

who had for a long time supported the Republican party. President Chester endorsed the benevolent mission of the International African Association in the Congo in a report to Congress that closely tracked a draft that Sanford had prepared for him.

After the first preliminary report on the conference reached the United States Senate, on April 10 1884, the Senate decided to recognize the flag of the International Association of the Congo, (the new name of King Leopold’s International African Association), and appointed a commercial agent for the Congo basin. Sanford procured this recognition from the Senate thorough an intensive campaign that has been described as “probably the most sophisticated piece of Washington lobbying on behalf of a foreign ruler in the nineteenth century.” Sanford had wined and dined members of the Senate in Washington to achieve this support. He in particular procured the support of Senator John Tyler Morgan of Alabama a former confederate brigadier general. Senator Tyler supported Sanford’s claim that the International Association of the Congo’s goal of establishing freedom of commerce within a free African state would

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40 Id. at 77.
41 Id. at 78.

42 The Senate resolution read in part that the “prospective rich trade in the Congo valley should be opened to all nations on equal terms.” Id. at 3. Mr. Kasson was instructed that the U.S.’s most important objective was “free participation in the trade and intercourse of that newly opened country by vessels and citizens of the U.S.” Id. at 5. This resolution was largely based on Henry Sanford, the U.S. Trade Representative in Belgium whose business interests coincided with King Leopold’s design of a free trade zone in the Congo. Id. at 80. On October 22, 1884, the US Secretary of State issued a letter recognizing the International Association of the Congo. The letter inadvertently referred to the Association by its old name, the International African Association, see Thomas Packenham, The Scramble for Africa: White Man’s Conquest of the Dark Continent, 1876-1912, 1991 at 246

provide a home for freed black slaves in the U.S. so that white America would not be threatened by their dreams of equality.\textsuperscript{44}

The recognition of the Association by the U.S. was a huge diplomatic victory for King Leopold who sought to legitimize Belgian claims in the Congo. This recognition goes to fortify a major theme of this paper, that without the close collaboration between the private entities like the International Association of the Congo and State recognition by the United States and European States, the expansion of territorial, trade and commercial presence that was often accompanied with the use of violence in the Congo and elsewhere may not occurred as it did.

In fact, it was the recognition of the private International Association of the Congo by these States that legitimized King Leopold’s ever-growing claims in an area interior part of the Continent that rival European powers had little prior knowledge.\textsuperscript{45} King Leopold had appealed to the Senate and the President in a variety of ways and in particular by proclaiming his support for unrestricted free trade and by representing the Association as having similar goals of establishing a state in the Congo like Liberia, then only recently established by former U.S. slaves.\textsuperscript{46} In addition, he promised to suppress the slave trade\textsuperscript{47} and

\textsuperscript{44} Id. at 79.
\textsuperscript{45} Id. at 86.
\textsuperscript{46} See HOCHSCHILD, supra note 28, at 77-8 (noting that the choice of Liberia could not have been better “since it had not been the United States government that had resettled ex-slaves in Liberia, but a private society, like Leopold’s International Association of the Congo”). On the establishment of the American backed Liberian state and its subsequent related decay into anarchy. See IKECHI MGBEOJI, COLLECTIVE INSECURITY: THE LIBERIAN CRISIS, UNILATERISM AND GLOBAL ORDER (2003).
to secure the welfare of the barbarous people of the Congo under European tutlege.\textsuperscript{48} It is noteworthy that King Leopold was making these promises only about two decades after the banning of the Atlantic Slave Trade by treaty and two decades after the emancipation proclamation in the U.S. As S.E. Crowe\textsuperscript{49} and Adam Hochschild\textsuperscript{50} have shown, Stanley and Sanford were crucial to Leopold’s procurement of the support of the American government for the proclaimed beneficient goals of his private company and Belgium’s ultimate acquisition of the Congo as a colony.

The recognition of King Leopold’s company by the U.S. gave Belgium the visibility before Portugal, Britain, France and Germany which were all interested in extending their colonial conquests into the Congo but did not have as much information about the Congo as King Leopold had from Stanley’s travels. The conflicting ambitions of these powers over the Congo laid the basis of Leopold’s adroit suggestion at the Berlin conference for the formation of an independent state, the International Congo Commission, in Central Africa that would guarantee all European countries and the U.S. freedom of commerce in the Congo.\textsuperscript{51} The Berlin conference was taking place against a backdrop of growing mistrust and mutual suspicion particularly of the designs of King Leopold’s scheme of acquiring the Congo about which Stanley’s travels had started revealing in the European and American press. There was suspicion

\textsuperscript{47} Crowe, supra note 25 at 80; Hochschild, supra note 28, at 78.
\textsuperscript{48} Hochschild, supra note 28, at 80.
\textsuperscript{49} See generally Crowe, supra note 25.
\textsuperscript{50} See Hochschild supra note 28, at 61-87.
\textsuperscript{51} See Crowe, supra note 25 at 84-5. According to Crowe, “The combination of Bismarck’s wholehearted support of the International Association, born out of his fear of French tariffs on the Congo, with Great Britain’s half-hearted support of it, born out of the same fear, qualified by an instinctive mistrust of Leopold…was destined to have important results at the conference.” Id. at 90.
about whether King Leopold would ultimately convert his private International African Association into the internationally recognized International Association of the Congo and ultimately into a State – the international Congo Commission – which he had advocated as a neutral territory free of any national interest to be governed on the basis of the idealism of philanthropists and explorers like Stanley.\(^52\)

In this episode then, we see how the establishment of a private company\(^53\) by King Leopold and his private funding of Stanley to conduct an expeditionary force\(^54\) disguised his plans to get an African colony.\(^55\) Thus through a private association, King Leopold was doing what other European States had been doing in the rest of Africa - acquiring African territory or trading interests through private groups or chartered companies which then sought the imprimatur of their governments.

Leopold’s hiring of Stanley as his personal employee goes to show how private groups and chartered companies were jostling not simply for territorial administrative control, but rather jurisdiction over the fiscal resources with a view to sustaining a free trading system, that they had been establishing for decades before,

\(^52\) Leopold managed to payoff journalists in Europe and the U.S. about the Association’s mission of “rendering lasting and disinterested services to the cause of progress.” HOCHSCHILD supra note 28, at 66.

\(^53\) Id. at 65.

\(^54\) Id. at 63.

\(^55\) According to HOCHSCHILD id., at 61 and 63, King Leopold II entered into five year contract with Stanley under which Stanley would be paid 25,000 francs a year for time spent in Europe and 50,000 francs for time spent in Africa leading an expeditionary force there and setting up posts as he made his way into the interior of the Congo, id. As already noted before, King Leopold changed the name of the essentially non-existent International African Association into the International Association of the Congo just ahead of the Berlin Conference of 1884, CROWE, supra note 25 at 13.
unencumbered by the cost of territorial administration. Further, this example also shows that these private entities were not too far off removed from the power of the European States of the time. Indeed, the nature of European rivalries in the last part of the nineteenth century was to open up new areas to European commercial activity or to consolidate existing commercial routes, stations and trading posts which were previously controlled and managed extra-territorially by strong rules safeguarding the property rights of these European nationals rather than simply capturing territory for administration. Once private groups or chartered companies managed to procure trade and commercial monopolies, they approached their home States to buy them off. For example, the Imperial British East Africa sold its commercial and trade monopoly over East Africa for £250,000 in 1895 to the British government after British government refused to finance the operations of the Company. This sale ended the Imperial British East Africa Company’s seven-year trade and commercial monopoly. The directors of the Imperial British East Africa Company decided to sell the Protectorate to the British government to make the company’s commercial and trading ventures profitable, since the British government would assume thereafter task and cost of administering the territory.

57 Id.
59 See id. at 205.
60 See id. at 204-05.
What then is the lesson of the International Association of the Congo’s experience and this brief rendition of the Imperial British East Africa Company? Through private entities both Britain and Belgian acquired colonies and all the mineral territory and mineral resources that came with these territories. In Belgium’s case, once Belgium had acquired Congo, the stage was then set for one of the most brutal episodes of colonial governance and economic plunder. Clearly, the connections not only between the public and private as well as the commercial and the violent came very well together in the colonial context. These instances show that far from being distinct, public and private collaboration and violence often worked together to achieve the goals of commercial expansion and territorial acquisition.

Antecedent Two: The Acquisition of Swazi Territory By the British and the Sobhuza II Case

The main issue in the Sobhuza case arose in relation to a claim of trespass by a British corporation owned by two settlers over territory that had been reserved for use the sole and exclusive use of Swazi natives under a concession to the company made by the King of Swaziland on December 17th, 1890. As a protectorate, Swaziland was outside the jurisdiction of the Crown and was therefore considered a foreign country. However, the Privy Council held that de facto, Swaziland “approximated in constitutional status to a Crown Colony” and was therefore de jure within the jurisdiction of the Crown. This status in turn gave the Crown the power to make laws for the peace, order and good

61 The Court mentions the names of those granted the concession as Thorburn and Watkins. Id. at 529, 526.
62 Id. at 521.
government of Swaziland, and of all persons therein.’” As such, the Court held, “[a]ny original native title had…been effectually extinguished.”

What is really peculiar about the Sobhuza case is that as individuals defending their occupation of Swazi territory in violation of the Concession of December 17th 1890, the respondents relied on little or nothing in their private capacity – as individuals or as the corporation that had entered into the Concession with the King of Swaziland. Rather than invoking private law claims or defenses in the law of contracts or property, (e.g. a claim of adverse possession), the respondents relied on public law norms regarding the authority of the Crown. Intuitively, one would have expected that private individuals defending their right to use territory that did not belong to them would have relied less on a claim of authority of the Crown than on a claim of title connected to them in their individual or corporate capacities. Instead, the respondents relied exclusively on the authority of the Crown and its claim of ownership over Swazi territory even though Swaziland was not formally a protectorate of the Crown.

Here then we see a continuity between a claim to territory made by individuals or corporations, on the one hand, and those made by the Crown on the other. In effect, valid title to territory by the Crown over Swazi territory was good enough to legitimize title to territory held by British settlers rather than by the British Crown. In effect, the Sobhuza Court concurred with the arguments of the respondents that what the Crown owned could be claimed by British settlers to be their own as well. It of course helped that the settlers

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63 Id. at 522.
64 Id. at 521 (the Court refers to respondents Thorburn and Watkins as ‘the respondent company.’).
could show they had a grant of the disputed land made to them by the Crown notwithstanding express limitations making the disputed land outside settler occupation, a stipulation to which the Crown itself had agreed to. What is more, defects in the title to land held by private individuals –because of the limitation in the December 17th 1890 concession making the disputed land for the sole and exclusive use of natives - could be cured by the overriding title to native territory held by the Crown. Thus since the December 17th 1890 concession did not authorize the respondents to use or occupy the land in question in the case, legislation conferring Swazi territory on the Crown that came into effect well after 1890 could be relied on to authorize private individuals –not the Crown – to defend their occupation and use of the land. Consequently, the fact that the 1890 concession had set aside the land for the exclusive and sole use of Swazi natives is rendered irrelevant and illusory.

Remarkably for our purposes in this paper, the authority of the Crown to hold title to the territory is justified not only on legislative grounds, but also on the basis of the Crown’s authority to acquire title to territory by conquest. Notably, the British victory over the Boers in the Anglo-Boer war of 1899 is argued to have conferred upon the Crown the territory the Boers held, including the Swazi territory in question in the Sobhuza case. Yet, this British victory over the Boers cannot be a stand in for victory over the Swazi’s 65 given that it was Swazi territory –rather than Boer territory - that was the subject of the Sobhuza case and was held to have been acquired by conquest. According to this

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65 The reasoning in Sobhuza is that even though the 1890 concession did not grant the respondents the territory in question, the Crown did so by a proclamation made by the “High Commissioner made on March 16, 1917” which had proclaimed lands including those in issue in the case to have been granted to the respondents. The Court argued that the Crown had acquired title to the territory in 1908, Id. at 527-8.
reasoning, Swazi agency or consent in ceding their territory to the British was rendered irrelevant. It seemed sufficient that since the British had conquered the Boers, they had effectively acquired Swazi territory. This justification for acquisition of native land had already been applied before in a similar context in an earlier case involving the authority of the Crown over South Africa. In that case, the House of Lords held, “[w]here the King of England conquers a country…by saving the lives of the people conquered…[he] gains a right and property in such people, in consequence of which he may impose upon them what law he pleases.” Similarly, the Sobhuza court concluded that the authority of the Crown to acquire the disputed land and to give it to the respondents was validly exercised “either under the Foreign Jurisdiction Act, or as an act of State which cannot be questioned in a Court of law,” and further that the Crown “could not excepting by statute, deprive itself of freedom to make Orders in Council, even when these were inconsistent with previous orders.”

This doctrinal strategy of legitimizing private claims to non-European territory using the power of the Crown is not peculiar to the Sobhuza case. The Ole Njogo case determined by the East Africa Court of Appeal in 1913 raised exactly the same issues in question in the Sobhuza case. In Ole Njogo, the Maasai alleged that the British government had acted inconsistently with a treaty entered into with them in 1904 by opening up land set aside for the sole and exclusive use by the maasai for European occupation. The East

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66 W. Rand Central Gold Mining Co. Ltd. V. The King, 2 K.B. 391, 406 (1905).
67 Id. at 527-8.
68 For an extended analysis of the maasai case, see James Gathii, Imperialism, Colonialism and International Law, 54 BUFF. L. REV. 1013 (2006).
African Court of Appeal used reasoning very similar to that of the Sobhuza court and found against the Maasai.

What is particularly striking though is that the same doctrinal strategy used in the Ole Njogo and Sobhuza cases in the context of British colonial occupation of native territory had been used across the Atlantic in the United States Supreme Court about a century before. *Johnson v McIntosh*\(^{69}\) involved two corporations defending their ownership of land claimed by Indians. Hence, we have again a native (Indian) community claiming ownership of its territory against claims by private individuals. Like in the Sobhuza and Ole Njogo cases, the individuals do not defend their right to the disputed territory using private law defenses such as on contract or property law grounds, rather they rely on the authority of the U.S. government and its claim to ownership over all the land owned by the Indians.

However, in *Johnson v McIntosh* unlike in Sobhuza and Ole Njogo, Justice Marshall holds the basis for the ownership of the territory by the United States as a ‘civilized’ inhabitant was valid because “discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise.”\(^{70}\) In fact, the court in Johnson v McIntosh went further holding that “conquest gives a title which the Courts of the Conqueror cannot deny, *whatever the private and*

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\(^{69}\) Johnson v. McIntosh, 21 U.S. 543 (1823).

\(^{70}\) *Id.* at 587.
speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted.”

Resource Conflicts and Slippages of the Public/Private Distinction in International Law

The foregoing examples so far illustrate the continuities between private and public violence, on the one hand, the expansion of commerce particularly over claims over territory and trade monopolies, on the other. They undermine a telling of the relationship between war and commerce that presupposes the monopolization of violence by states. These examples also question assumptions about the safety of commerce from the vagaries of war and commerce.

Resource conflicts over valuable minerals like diamonds in war torn countries like Sierra Leone further blur the lines between public and private violence and the assumption that a liberal kind of peace would best guarantee freedom of commerce. Rather, today’s resource conflicts are characterized by “bandits, slave traders, religious-military orders, and nomadic raiders” who have long engaged in violent activities beyond the reach of the State. Most of these conflicts are concentrated in resource rich poor African countries.

71 Id. at 588.
72 THOMPSON, supra note 5, at 156 n.19.
73 Paul Collier, The Bottom Billion: Why the Poorest Countries Are Failing and What Can be Done About It, 2007 at page x (preface)
Stateless bandits, mercenaries and other non-State and State actors use labor often under slavish and cruel conditions to prospect for high value minerals like diamonds. These very easily portable minerals that can be hidden in any part of the human body are then sold to intermediary businesses in or around the prospecting areas before they find their way to brand name stores and other outlets in Europe, Asia, the United States and elsewhere.\textsuperscript{74} In resource conflicts therefore, there is a symbiosis between ruthlessly violent non-State bandits like the Revolutionary United Front (RUF)\textsuperscript{75} of Sierra Leone which chop off the limbs of innocent civilians in their terror campaigns, on the one hand, and privately owned multinational corporations which control global diamond trade, on the other.

Non-State actors unleash violence to maintain control over extraction of resources like diamonds, timber and gold because of the lucrative illegal trade in these resources. Their aim differs from the traditional war objective of defeating an enemy. Instead, non-State actors or bandits involved in resource extraction seem to have economic motivations to keep fighting as way of maintaining the profitability of resource extraction activities.

\textsuperscript{74} One of the best telling of trade in valuable minerals under these conditions is, Greg Campbell. \textit{See GREG CAMPBELL, BLOOD DIAMONDS: TRACING THE DEADLY PATH OF THE WORLD’S MOST PRECIOUS STONES} (2004).

\textsuperscript{75} The RUF has been described as defying “all available typologies on guerilla movements. It is neither a separatist uprising rooted in a specific demand, as in the case of Eritrea, nor a reformist movement with a radical agenda superior to the regime it sought to overthrow. Nor does it possess the kind of leadership that would be necessary to designate it as [a] warlord insurgency. The RUG has made history; it is a peculiar guerilla movement without any significant national following or ethnic support. Perhaps because of its lumpen social base and its lack of an emancipatory programme to garner support from other social groups, it has remained a bandit organization solely driven by the survivalist needs of its predominantly uneducated and alienated battle front and battle group commanders. Neither the peasantry, the natural ally of most revolutionary movements, nor the students, amongst whose ranks the RUF-to-be originated, lent any support to the organization during the [first] six years of fighting.” Ibrahim Abdallah and Patrick Muana, \textit{The Revolutionary United Front of Sierra Leone: A Revolt of the Lumpenproletariat, in AFRICAN GUERILLAS} (Christopher Clapham ed., 1998), \textit{cited in} CAMPBELL, \textit{supra} note 62, at 72-2.
From this perspective valuable resources are perhaps thought of much better as sustaining and aggravating factors rather than causes of conflict. The intensification of the scramble for these resources in the international economy in large and growing economies like India and China is unsurprisingly strongly correlated with the wars in some resource rich areas further pointing to the transnational connections these wars have with global commerce.76 In many cases resource wars span across entire regions sometimes crossing national boundaries. As Richard Reno, a leading researcher on this type of warfare argues, these wars do:

“not mark a turn toward more rigid distinctions between spheres of state authority and private enterprise...Intensified transnational market transactions in the context of the shadow state relationships of internal authority and markets can lay the groundwork for further integration of markets and political control.”77

In this section, I will continue demonstrating the continuities between public and private violence illustrating not only that the monopolization of violence by States is not only a ‘distinctively modern’78 phenomenon but one that has little relevance with respect to

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76 Michael T. Klare, Resource Wars: The New Landscape of Global Conflict, 2001 (arguing that conflict over valuable resources has become an increasingly prominent feature of the global landscape). See also Celine Moyroud and John Katunga, “Coltan Exploration in Eastern Democratic Republic of the Congo (DRC),” in Jeremy Lind and Kathryn Sturman, Scarcity and Surfeit: The Ecology of Africa’s Conflict, 174, 2002.arguing that “In the absence of strong state apparatus and legitimate government, coupled with the strong need for high-technology development materials on international markets, multinational corporations and local entrepreneurs have allied themselves with specific African countries to access these minerals in the DRC.”


78 THOMPSON, supra note 5, at 11.
mineral rich non-Western States where there seems to have been little movement of violence from non-state actors to being monopolized by the State.  

Scholars studying resource wars fall into two main groups. In the first group are those that show the strong correlation between resource abundance and large pools of unemployed youth, on the one hand, with the high likelihood of resource wars or conflicts on the other. In the second group, are scholars who argue that the coincidence of large pools of unemployed youth and resource abundance is insufficient to precipitate a conflict without a grievance.

Both approaches to resource conflicts acknowledge the centrality of resources like diamonds and other precious minerals in sparking or fueling the continuation of conflict. In addition to the lootability of minerals, the high demand of minerals like Coltan which is used in the defense industry and is a major import of the United States from the war torn Democratic Republic of Congo (DRC) is a factor in conflicts. The weaknesses of States in such countries as the DRC has meant that mercenaries and all sorts of bandits and non-state actors have taken the lead in exploiting these resources and finding markets for them particularly in industrialized countries.

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79 Weak States can however exercise power indirectly by sponsoring irregular groups to control resources that in turn generate revenues clandestinely for the State, William Reno, “Shadow States and the Political Economy of Civil Wars,” in Mats Berdal and David M. Malone, Greed and Grievance: Economic Agendas in Civil Wars, 2000 at 44-45
Two of the most significant international responses to conflicts over resources are the Kimberley Process Certification Scheme and a variety of United Nations Security Resolutions that have had little or no impact on reducing trade in diamonds mined from conflict areas.\(^{82}\) The Kimberley Process was forged on the initiative of non-governmental organizations, and the diamond industry which did not want its brand name linked to conflict diamonds as well as three of the largest diamond producers, South Africa, Botswana and Namibia and the largest consumers, the U.S., Belgium and the U.K.\(^{83}\) Non-governmental organizations like Global Witness and Partnership Africa Canada played a central role in negotiating and configuring the set up of the Certification Scheme.\(^{84}\) The Kimberley Process resulted in the creation of the World Diamond Council in 2003 to oversee a newly created diamond tracking system. An annual meeting between the participating countries and non-governmental organizations who seat as observers is held once a year to monitor the implementation of the certification process.

The purpose of this certification system was to eliminate the use of diamonds for illicit purposes such as in fueling conflict.\(^{85}\) Participating countries are required to establish laws establishing control systems that monitor the importation and exportation of rough diamonds, guaranteeing that each diamond would not be allowed in or out of their

\(^{82}\) For example, UN Security Council Resolutions 1127(1997); 1306(2000) and 1343(2001) with respect to diamonds from Angola, Sierra Leone and Liberia.


country without a Kimberley Process certificate. Thus only participating countries are allowed to trade in rough diamonds with each other. The exporting country, under this scheme, is expected to certify only diamonds mined from lawful sources.\textsuperscript{86} The aim of the Process was to create Conflict Free Trade Zones within which only non-conflict diamonds would be traded. By September, 2007 there were 48 countries who were members of the Kimberley Process.\textsuperscript{87}

The effectiveness of the Kimberley Process has been undermined by reports that significant volumes of diamonds from rebel areas such as Cote d’Ivoire have found their way into the international diamond market through Ghana where they had been certified. Similarly the continuing maze of conflicts in the Democratic Republic of Congo and weaknesses in the implementation of the Kimberley Process certification process there have not prevented conflict diamonds from finding their way into international markets.

Some of problems facing the Kimberley Process include failure to maintain adequate export and import controls that document the origin of the diamonds from the mines they originate, to their point of sale. As such the benefits intended to be accrued by the certification process and the licensing of mines where the diamonds originate are lost. Further, weak States do not provide sufficient oversight of the diamond industry through on-site monitoring and verification as well as border controls. The Process is financed

\textsuperscript{86} In 2003, the WTO issued a waiver allowing countries participating in the Kimberley Process to restrict trade in conflict diamonds without violating WTO Rules, see Agreement Reached on WTO Waiver for ‘Conflict Diamonds,’ 26\textsuperscript{th} February, 2003 available at http://www.wto.org/english/news_e/news03_e/goods_council_26fev03_e.htm (last visited September 26, 2008)

\textsuperscript{87} Since the EU counts as an individual participant, there are indeed 78 Member States in the Process.
and monitored by volunteers which in turn limits its potential to be an effective monitoring mechanism. In addition, the Kimberley Process was not designed to deal with alluvial diamonds which is a major economic activity often accompanied by conflict.\(^88\) In these areas, governments have little or no data on mining making it hard to track the origin of diamonds.\(^89\)

In addition to the weakness of the States charged with implementing the Kimberley Process, one of the most significant reasons accounting for the existence of non-binding and standards resource extraction is the conspicuous absence of a binding legal regime over the activities violent extraction of mineral resources to which all actors in the trade are committed.\(^90\) By contrast, public international law establishes an elaborate legal framework for inter-state wars providing for rules on the permissibility of the use of force as well as on the rules governing the use of force. Resource wars, unlike inter-state wars sometimes involve non-state actors especially irregular forces operating independently or with direct or indirect support of States, politicians and other non-state actors including local and multinational companies.\(^91\)

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\(^88\) There is a Working Group on Artisanal and Alluvial Producers in the Kimberley Process.

\(^89\) An excellent exploration of this is Greg Campbell, Blood Diamonds: Tracing the Deadly Path of the World’s Most Precious Stones, 2004. Campbell suggests the Kimberley Process is an evasive solution to the wars caused by the diamond trade, id. at 133. Further Campbell argues, “for smugglers and criminals, UN resolutions mean little,” id. at 185.

\(^90\) This is not to suggest that international law for example does not address mercenarism. The specific claim is in relation to resource conflicts and generally to the inconspicuousness and mostly non-binding nature of the little available rules outlawing mercenarism for example. Additional Protocol 1 to the Geneva Convention of 12 August 1949 defines a mercenary. A lot of focus on mercenarism has been in the context of anticolonial wars and the rules reflect the issues raised by the role in the era of self determination. See, e.g., The OAU Convention for the Elimination of Mercenarism in Africa, O.A.U. Doc. CM/433/Rev. L. Annex 1 (1972); The UN International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, G.A. Res., A/RES/44/34 (Dec. 4, 1989).

\(^91\) For these reasons, the Security Council and the UN General Assembly have continued to give support to the strengthening of the Kimberley Transparency Initiative, see UNGA, The Role of Diamonds in Fuelling Conflict: Breaking the Link Between the Illicit Transaction of Rough Diamonds and Armed Conflict as a
Thus a widely known phenomenon –the involvement of private capital, bandits and mercenaries directly or indirectly in resource wars– has been left with an inadequate legal framework. The Kimberley Process is a voluntary rather than a binding regime of legal rules. Yet, as we have seen, the transnational commercial connections of trade in resources like diamonds, has been central to the conflicts and wars in weak States. The only legally binding rules available are on the public law side involving complicity in war crimes, genocide and crimes against humanity. The role irregular forces play in fanning war directly or indirectly is therefore irremediable under international law unless these non-state actors have links with state action or unless the individual participants are prosecuted for violations of international humanitarian law.

In light of the foregoing, we could say then that even outside the context of monopolizing violence, the theoretical construct of a State as a unitary category has been demonstrated to underestimate the reality of the enmeshment with non-state actors networks outside and beyond the State. Most importantly, resource conflicts demonstrate how assumptions such as those relating to States as monopolies of violence overstate the extent to which State power and sovereignty are ‘fixed principles of international order’

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Exceptions under national laws could include Canada’s Crimes against Humanity and War Crimes Act
Anne Marie Slaughter, A NEW WORLD ORDER (2004).
rather than social and political principles that have and continue to be ‘constituted and reconstituted’ in actual praxis rather than defined exclusively as abstract/theoretical principles.

Such abstractions are evidenced by permitting the use of force in self defense. For a State to liable for the use force by a non-State group, the State has to have “effective control of the military or paramilitary operations in the course of which the alleged violations were committed.” In any event, at minimum international law requires that the conduct of the non-State actor be attributable to a State. Yet resource wars are precisely possible because of weakness or complete collapse of the African State, and in particular its inability to monopolize violence. The inability of States to wield a monopoly of violence in places like the Democratic Republic of Congo has given rebel groups autonomy since the money they make in extracting and selling natural resources can buy them military equipment and other supplies. For a long time now, there has been a

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97 Nicar., 1986 I.C.J., at para. 195 (noting that the conduct of irregular forces attributable to a State could amount to an armed attack under Article 51).
98 See Tarcisio Gazzinii, The Changing Rules on Use of Force under International law, 139 ff 2005
99 But see Prosecutor v. Dusko Tadic, Case No. IT-94-1-A, I.C.T.Y. App. Ch., 15 July 1999, para.70 (where the Tribunal the recognized conflicts between non-state actors for the applicability of International Humanitarian Law and made no reference to the necessity of attribution of the armed conflict to a State unlike under Article 51. In addition, unlike in Nicaragua the Chamber applied a lower threshold of control, i.e. overall control by a State “not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity.”)
consensus that several African States do not have effective control over their territories, yet they continued to enjoy their internationally guaranteed juridical statehood. In these sham States, the bureaucratic separation of the private and public spheres presumed in the Weberian State is absent. Resource wars represent private uses of state resources outside the control of the State. Yet, rebel and irregular groups, though often autonomous in their operations are known to pay off poorly paid and trained military officers and governmental officials to ensure they extraction of natural resources enjoys little interference. For these irregular groups, this extraction of natural resources plays a ‘conflict sustaining role.’

Not surprisingly therefore, in his separate opinion in the 2005 International Court of Justice Case, Democratic Republic of Congo v Uganda, Judge Kooijmans expressed caution in evaluating the legality of ‘complex conflicts’ in which “regimes under constant threat from armed movements often operating from the territory of neighboring States, whose governments sometimes support such movements but often merely tolerate them since they do not have the means to control or repel them.” Judge Kooijmans observed this was possible because weak or collapsed States lack the power and authority to effectively exercise their territorial sovereignty. In such situations, irregular forces fill

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104 Separate opinion of Judge Kooijmans, para. 5 in Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) obtainable from <http://www.icj-cij.org> (December 23rd 2005)
105 Id.
the void and thrive by controlling the exploitation of natural resources. Feuding over
natural resources among such irregular groups results in complex conflicts that are in turn
funded by the monies made from exploiting natural resources. For these irregular groups,
continuing these conflicts becomes a logical extension of their desire to continue
profiting from natural resource exploitation. As a result, Judge Kooijman’s observed that
commitments such as those prohibiting the use of force “entered into by governments
unable to implement them are unworthy of reliance from the very start and hardly
contribute to the creation of more stability.”106

Conclusions
This paper has sought to show the artificiality of the distinction between public and
private violence in the context of the international legal regulation of commerce. Rather
than taking for granted the assumption that States monopolize violence, this paper
investigated how the boundary between public and private violence was blurred and
contested in the specific contexts of territorial acquisitions, mercantile corporations and
resource wars. What this paper shows therefore is that at least for more than a century,
the boundary between public and private violence in the context of commerce did not
simply reflect or produce the theoretical distinction between legitimate public and
illegitimate private violence. Rather, a more complex, fluid in fact I would say arbitrary
relationship between not only public and private violence, but also between national and
transnational/international commerce, as well as between the political and economic

106 Id.
emerges. This means that perhaps only in a very traditionalist sense is it tenable to maintain a doctrinal position that authoritatively defends the monopolization of violence exclusively by States. Such a pursuit of conceptual clarity and coherence is belied by incoherencies and inconsistencies on the relationship between violence and public and private actors addressed in this paper.

If this is the case, then international law’s assumptions about the measuring the legality of violence on the baseline of state monopolization of it is demonstrated to be greatly undermined. In effect, international law is therefore split at its root in continuing to be based on a theoretical construct that has no bearing on the ground particularly in places like the Democratic Republic of Congo and other resource rich non-western countries. It may be argued that the African State is no more than a legitimization or Africanization of inherited regimes of colonial governance without removing the predatory actors who typified colonial rule.

The demonstration in this paper that non-state violence over commerce is a persistent historical fact has affirmed an important theme pursued in this book namely that international law inaccurately portrays commerce as enjoying safe passage during war. Thus it may be an overstatement to argue that States (especially developing states) once monopolized control over war and now there is a transformation dispersing or

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marketizing war and therefore making it available to non-state actors. Instead, this paper through a series of examples including resource conflicts over precious minerals like diamonds shows that non-state involvement in war and commerce recur quite frequently in the history of international law. Indeed, resource wars demonstrate that rather than undermining commerce entirely, wars indeed support and enable commerce especially over the mineral resources over which conflict arises. In resource wars, we see the relationship between ‘private power, commerce and state institutions in weak states’ most acutely.

Yet, contemporary efforts to address the illegality and illegitimacy of the use of war and violence to support resource conflicts with regard to non-State actors have fallen short of being categorical in their prohibition of the use of violence in the same way international law prohibits use of force between States under Article 2(4) of the United Nations Charter. Thus while on the public side international law has a norm of especially higher normativity prohibiting the use of force between States, on the private side there is no equivalent norm prohibiting to the same extent the use of violence at the intersection of war and commerce. It is for these reasons that international law is split at its root between public and private consequences of the use of violence.

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111 My claim is limited to cases at the intersection of war and commerce where there is generalized state collapse or ineffective control by a State such as in the Democratic Republic of Congo. There are instances in which the conduct of irregular forces or non-State actors can be much more readily attributable to an effective State, see For the approaches that may be taken to create state responsibility for the conduct of irregulars, see, Proulx, Vincent-Joel, Babysitting Terrorists: Should States be Strictly Liable for Failing to Prevent Transborder Attacks?, 23 Berkeley J. Int’l L. 615 (2005); Jinks, Derek State Responsibility for the Acts of Private Armed Groups, 4 Chi. J. Int’l L. 83 (Spring 2003); See Ruys Tom et al., Attacks by Private Actors and the Right to Self Defense, 10 J. Conflict & Security L. 289 (2005).
It must also be noted in concluding this paper that unfortunately, the telling of the story of war has been dominated by what the leading military historian Jeremy Black has called Eurocentricism. The telling of the story of war has largely neglected war outside the West and has as such failed to provide categorizations that would make sense of the kind of wars not typified by the monopolization of violence by the State. In States without effective control over their territory, rather than being organized vertically, sovereignty is a ‘horizontally woven tapestry of partial sovereignties’ that are and have become the ‘endemic condition of the postcolony.’ By expanding the scope of what is defined as war to incorporate the experiences that constitute war in non-Western societies, international law could begin addressing its Eurocentric distinctions between the public and the private; the political and the economic as well as between the state and non-state. Rules such as those relating to the permissible use of force in the context of irregular forces have come into sharp focus in the recent past precisely because they were not designed to take into account the discontinuous, overlapping sovereignties and pluralities that now characterize violent resource rich post colonies.

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114 Remarkably, violence in the postcolony as described here has much in common with violence in medieval Europe prior to the emergence of strong States where “conflict was funded to a large extent through plundering civilians, which compensated for inadequate provisioning and for pay that was generally low, late, or non-existent.” David Keen, “Incentives and Disincentives for Violence,” in Mats Berdal and David M. Malone, (eds.) Greed and Grievance: Economic Agendas in Civil Wars, 28, 2000.