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The Law of Pillage, Conflict Resources, and Jus Post Bellum

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6.1 Introduction

The link between conflict and natural resources has been firmly established in recent decades. At least eighteen violent conflicts have been fuelled by natural resource exploitation since 1990,1 and according to one study, between 1970 and 2008 from 29 per cent to 57 per cent of non-international armed conflicts (‘NIAC’) were related to high-value natural resources.2 In addition to the number of resource-fuelled conflicts being on the rise, both the nature of conflicts and the source of financing have undergone transformation since the end of the Cold War: there are now substantially more NIACs than international wars, and the source of financing has shifted from support from Cold War powers for proxy wars to natural resource revenues in many conflict-affected situations.3 As the President of the UN Security Council noted in 2007: ‘in specific armed conflict situations, the exploitation, trafficking, and illicit trade of natural resources

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have played a role in areas where they have contributed to the outbreak, escalation, or continuation of armed conflict.\(^4\)

Furthermore, conflicts with the presence of lootable natural resources tend to be more prolonged and more destructive;\(^5\) and the longer that a conflict persists, the weaker the rule of law becomes, reducing the opportunities to establish durable peace.\(^6\) Accordingly, there are three principal pathways in which natural resources play a role in conflict: by contributing to the outbreak of conflict, by financing and thereby sustaining conflict, and by undermining peacemaking.\(^7\)

Natural resources are also central to post-conflict peacebuilding.

The causation between natural resources and armed conflict is rarely clear or straightforward. Since Paul Collier and Anke Hoeffler identified greed and grievance as the primary motivations of NIACs,\(^8\) scholarship has developed a more nuanced conceptualization that recognizes the complex forces shaping the onset and sustenance of conflict.\(^9\) Nevertheless, it is worth noting that the plunder and pillage of natural resources is probably as old as conflict itself, no matter the intricacies of this linkage. As one commentator notes: "Traditionally, armies live off the land. Where there is nothing left to plunder, they wither and die, as Napoleon discovered at the gates of Moscow."\(^10\)

The pillage of natural resources—witnessed in conflicts in the Democratic Republic of the Congo (‘DRC’), Colombia, Cambodia, and elsewhere—can act not only as a means for financing the conflict,\(^11\) but also put an enormous strain on the environment as a result of predatory exploitation practices, often leading to severe damage and the eventual depletion of resources.\(^12\) This, in turn, can undermine long-term livelihoods, trigger further violence, and lock communities in a vicious cycle of destruction.

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\(^6\) Emily E. Harwell, ‘Building Momentum and Constituencies for Peace: The Role of Natural Resources in Transitional Justice and Peacebuilding’ in Bruch, Muffett, and Nichols (n 3).

\(^7\) UNEP, From Conflict to Peacebuilding (UNEP, 2009), 8, at <http://postconflict.unep.ch/publications/pcdmb_policy_01.pdf> accessed 5 June 2017.


\(^9\) See UNEP, Conflict to Peacebuilding: The Role of Natural Resources and the Environment, Consultation Draft, at 5, 6, 7, 8, 15, 10 (September 2008), noting that the relationship between natural resources, the environment, and conflict is multidimensional and complex, with three principle pathways: natural resources contributing to the outbreak of conflict; financing and sustaining conflict; and undermining peacemaking. Lujala and Rustad note three main avenues leading from natural resources to conflict: resource capture, resource-related grievances, and adverse effects on the economy and institutions. See also van den Herik and Dam-de Jong (n 3) 242; Päivi Lujala and Siri Aas Rustad, ‘High-Value Natural Resources: A Blessing or a Curse for Peace’ in Päivi Lujala and Siri Aas Rustad (eds.), High-Value Natural Resources and Post-Conflict Peacebuilding (New York: Routledge, 2012), 7.

\(^10\) See Schabas (n 3).

\(^11\) For a list of recent civil wars and the specific types of natural resources that fuelled them, see UNEP (n 7) 11.

\(^12\) Dam-de Jong (n 3) at 156; James G. Stewart, ‘Corporate War Crimes: Prosecuting the Pillage of Natural Resources’ (2011) Open Society Justice Initiative 9.
has been taking place in Afghanistan, where the pressure of warfare, combined with the destruction of livelihoods, has resulted in mass displacement of rural people and to this day contributes to brewing tensions.13

Reigning in predatory natural resource exploitation both in conflict and in the immediate aftermath of conflict can be critical to maintaining stability and preventing a relapse to conflict. Furthermore, predatory natural resource exploitation often continues well after the signing of peace agreements; unbalanced resource contracts—negotiated during conflict or as a result of what Michael Ross calls ‘booty futures’14—can lead to the continuation of exploitative practices in the post-conflict period as well, rendering a long-lasting vision of peace illusory.

At the same time, while it is imperative to recognize the role of natural resources—particularly high-value natural resources—in fuelling and financing conflict, they also have a role in promoting peace.15 Revenue from natural resources often represents the backbone of the national economy of conflict-affected countries, and in the aftermath of conflict these revenues can be instrumental in financing reconstruction and development—if they are managed soundly.16

Recent years have seen a revival of usage for the ancient crime of pillage as a potential avenue to address conflict-related illegal natural resource exploitation. Yet, despite this revival in the sphere of international criminal law, pillage has so far not been used by any international criminal courts to prosecute illegal natural resource exploitation. Indeed, to date, the International Court of Justice has been the sole international tribunal that applied pillage directly to the exploitation of natural resources, in the DRC v. Uganda case.17 In addition to the dearth of pillage prosecutions, there is the concern about the potential scope of pillage prosecutions: corporate actors have had a well-documented role in the illegal exploitation of natural resources in a number of conflicts, yet the criminal liability of corporations remains contested in international criminal law. War crime trials—including pillage prosecutions—are essential for the jus post bellum legal framework and could be an important bridge towards lasting peace.

While the pillage of natural resources is in many ways an environmentally based crime—due to the predatory exploitation of natural resources and its effects on the environment—it may be best, as Michael Lundberg notes, to avoid prosecuting resource exploitation as an environmental crime, say under the International Criminal Court’s environmental war crime provision.18 While the environmental costs of such crimes

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13 UNEP (n 7) 17.
14 Ross (n 5) 3, defining ‘booty futures’ as future exploitation rights to natural resources owned by governments that rebel groups are aiming to overthrow. Rebel groups sell these rights to outsiders, thereby raising money to fund their cause. See also van den Herik and Dam-de Jong’s argument that booty futures are covered by law prohibiting plunder: in the IG Farben judgment, the Nuremberg Tribunal found that ‘property’ covers all sorts of objects, including physical and intangible ones, thereby also covering rights attached to resources, see van den Herik and Dam-de Jong (n 3) 252.
16 Lujala and Rustad (n 15) 3.
17 van den Herik and Dam-de Jong (n 3) 269.
Pillage, Conflict Resources, and Jus Post Bellum

can be significant, there is doubt as to whether the threshold of ‘widespread, long-term and severe damage’ would be reached, and its potential scope is further restricted by military necessity. Furthermore, while resource plunder can often have serious environmental ramifications, it is a ‘fundamentally economic and property-based crime’, where the aim is not environmental destruction per se, but resource capture.

This chapter argues that the primary focus of pillage as a war crime must necessarily be on the economic damage and loss it causes to a country and communities, while recognizing that part of this damage is the harm caused to the environment by predatory exploitation practices. This chapter explores natural resource pillage as a fundamentally economic crime, and places it in the larger panoply of economic crimes committed during conflict. In addition to examining the war crime of pillage and its relation to illegal natural resource exploitation in conflict, the chapter assesses the relevance and potential utility of the law of pillage to jus post bellum. The goal is not only to address the potential that prosecutions for pillage may have for curbing the role of natural resources in enabling and financing conflict; it is necessary to take a broader view of pillage in the context of jus post bellum to consider the role that prosecution of the crime of pillage may fulfil in post-conflict peacebuilding and restoration of natural resources, together with other avenues addressing illegal natural resource exploitation.

6.2 Background

6.2.1 Key terms: overlap and ambiguity

‘Pillage’, ‘spoliation’, ‘plunder’, and ‘looting’ have been used interchangeably in most international humanitarian law instruments, as well as international jurisprudence and popular parlance. Black’s Law Dictionary defines ‘pillage’ as ‘the forcible taking of private property by an invading or conquering army from the enemy’s subjects’. The origins of the word ‘looting’ come from the Sanskrit ‘lunt’ or to rob and the Hindi ‘lut’. The terms ‘pillage’ and ‘plunder’ were used interchangeably by commentators, such as Hugo Grotius, across centuries. This interchangeability continued in the twentieth century: the English and French versions of the Statutes of the Nuremberg Tribunal used the terms ‘plunder’ and ‘pillage’ respectively, while referring to the same legal concept. The statute and the judgments of the International Criminal Tribunal for

20 Lundberg (n 18) 502.
21 See ICRC website, at <http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule52> accessed 5 June 2017. Pillage is not the same as ‘booty of war’, which is defined as a ‘State’s taking of public property by its organs and for its benefit, whereby title to public movable property taken from the enemy is granted to the state that captured it upon seizure, and the original owners are only entitled to compensation. Pillaged or plundered property is not meant to give title to the captor and concerns both private and public property. See Oxford Public International Law (OPIL), ‘Pillage’ Encyclopedia Entry, August 2009, at <http://opil.ouplaw.com> accessed 5 June 2017.
23 Stewart (n 12) 15.
24 ibid.
Yugoslavia (‘ICTY’) similarly conflate plunder and pillage, and the ICTY specifically acknowledged the interchangeability of the terms ‘pillage’, ‘plunder’, and ‘spoliation’ as applied to the unlawful appropriation of property in armed conflict.25 ‘Looting’ has emerged as yet another synonym,26 and has appeared in the US Uniform Code for Military Justice, as well as a number of ICTY judgments.27 In the course of post-Second World War Nuremberg prosecutions,28 ‘spoliation’ was used interchangeably with ‘plunder’ and was defined as ‘the widespread and systematised acts of dispossession and acquisition of property in violation of the rights of the owners which took place in territories under the belligerent occupation or control of Nazi Germany’.29

The International Court of Justice (‘ICJ’), in the *Armed Activities Case* between the DRC and Uganda, used the terms ‘plundering’, ‘looting’, and ‘exploitation’, when finding Uganda ‘internationally responsible for acts of looting, plundering and exploitation of the DRC’s natural resources committed by members of the UPDF in the territory of the DRC’.30 The Court also used the term ‘pillage’.31 The ICJ did not make a legal distinction among these four terms, leading to both ‘some doctrinal uncertainty about the precise scope and meaning of each’, but also maintaining consistency with ICTY jurisprudence.32 The decision on the ICJ’s part to refrain from establishing a legal distinction between the terms pillage, plunder, and looting, allowed it to ‘look more broadly at patterns of misappropriation’.33

6.2.2 Evolution of norms against pillage

Historically, pillage was a right of the victors in the context of war and the immediate aftermath of war.34 From antiquity into the Middle Ages, while regarded by many as criminal, pillage bore the imprimatur of legitimacy as spoils of war, applicable during conflict but not for instance in the case of civil disasters.35 Pillage fulfilled a double function in medieval times: it served as a weapon against the enemy—by way of
destroying the enemy’s property—and it provided for the maintenance of the army on foreign land through provisioning and in lieu of payment to soldiers, while reinforcing its control over the countryside. In the seventeenth century, Grotius’s writings largely consider pillage and plunder of enemy property as acceptable under the laws of war, calling it ‘equivalent for a debt’ or ‘for reasonable punishment’ but only for an enemy and not for third parties.

A slow change began occurring, starting from the seventeenth century, when philosophers such as John Locke began to challenge the right of victors to spoils of war. The definitive shift, however, came in the nineteenth century, when the 1863 Lieber Code prohibited pillage: ‘all pillage or sacking, even after taking a place by main force . . . are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense’. The Hague Regulations of 1899 and 1907 also prohibit pillage, as do the Hague Conventions IX and X.

The devastations and systematic plundering of property of the Second World War reinforced the need to reaffirm the prohibition against pillage in international law. Thus, prohibitions against pillage appear in the Charter of the International Military Tribunal (Nuremberg), the Fourth Geneva Convention, and Additional Protocol II to the Geneva Conventions (under Fundamental Guarantees). As of 2015, similar prohibitions appear in forty-eight national military manuals, the national legislation of ninety-two countries, and the case law of twelve countries. Furthermore, the prohibition against pillage is now accepted as a rule of customary international law.

36 Tuba Inal, Looting and Rape in Wartime: Law and Change in International Relations (Philadelphia: University of Pennsylvania Press, 2013), 28. Regarding the connection between pillage and rape in wartime, while women were considered ‘booty’ for soldiers much along the lines of property, rape in war was rejected and found unacceptable much sooner than pillage. In modern times, the occurrence of rape and pillage is still often synchronous. See Holly Dranginis, ‘Interrupting the Silence: Addressing Congo’s Sexual Violence Crisis within the Great Lakes Regional Peace Process’ The Enough Project (20 March 2014), 8, 10, at <http://www.enoughproject.org/files/InterruptingtheSilence_AddressingCongosSexualViolenceCrisiswithinthegreatLakesRegionalPeaceProcess.pdf>. accessed 5 June 2017.

37 Inal (n 36) 28–9.


39 Lieber Code (1863), Art. 44. This shift in the nineteenth century from pillage being accepted to being a prohibited act is also manifest in several arbitral awards from that era. See OPIL (n 21).

40 Hague Regulations (1899), Arts. 28, 47; Hague Regulations (1907), Arts. 28, 47. In addition to prohibiting pillage, Art. 21 of Hague Convention X (1907) provides that parties ‘undertake to enact or to propose to their legislatures . . . the measures necessary for checking in time of war individual acts of pillage’. See <http://www.icrc.org/custumary-ihl/eng/docs/v2_rul_rule52> accessed 6 June 2017.

41 OPIL (n 21).

42 Art. 6(b) of the 1945 IMT Charter (Nuremberg) includes ‘plunder of public or private property’ in its list of war crimes, for which there must be individual responsibility.

43 Geneva Convention IV (1949), Art. 33.

44 Additional Protocol II to the Geneva Conventions (1977), Art. 4(2)(g).

45 For the full list of military manuals and countries, see <http://www.icrc.org/custumary-ihl/eng/docs/v2_rul_rule52> and <http://www.icrc.org/custumary-ihl/eng/docs/v1_rul_rule52#refFn_82_9> accessed 5 June 2017.

46 Stewart (n 12) 14.
Yet another revival of the crime of pillage came with the establishment of the International Criminal Court (‘ICC’), as well as special courts, such as the Special Court for Sierra Leone (‘SCSL’), the Iraqi Special Court, the International Criminal Tribunal for Rwanda (‘ICTR’), and the ICTY. Codification of the crime of pillage is of particular significance in the context of the SCSL and ICTR statutes, as both tribunals’ statutes apply to non-international armed conflict. It does not come as a surprise then that pillage as a war crime is prohibited under these special tribunals’ statutes, since all of these conflicts witnessed widespread pillaging and exploitation of private and public property.

The Rome Statute establishing the ICC prohibits ‘pillaging a town or place, even when taken by assault’ under Article 8(2)(b)(xvi) and (e)(v), thereby making pillage a war crime in both international and non-international armed conflict. The Rome Statute contains three other important war crime provisions relevant to the protection of property in wartime. These are Article 8(2)(a)(iv) on the extensive destruction and appropriation of property, and Article 8(2)(b)(xiii) and (e)(xii) on the destruction and seizure of enemy property. All three of these provisions criminalize different forms of unjust takings of property.

### 6.2.3 Towards a standard definition of pillage

Despite the progressive development in the criminalization of pillage in international law, a firm definition of the crime did not, and many would argue still does not, exist until the late twentieth century, when the ICC Elements of Crime specified the required elements for the war crime of pillage—at least for purposes of prosecution under the ICC Statute. Until that time, pillage was mostly defined as appropriation of property without the consent of the owner, usually subject to the exceptions contained in the Hague Regulations. Traditionally the prohibition against pillage covered the taking of both private and public property; and with respect to natural resources, the prohibitions protected both extracted natural resources as well as the rights to such resources, such as concessions.

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47 Statute of the Special Court for Sierra Leone (2002), Art. 3(f).
49 Statute of the International Criminal Tribunal for Rwanda, Art. 4(f).
50 Statute of the International Criminal Tribunal for Yugoslavia, Art. 3(e).
51 Stewart (n 12) 13.
52 The language of this provision is closely aligned with Art. 28 of the Hague Regulations, see Rome Statute Art. 8(2)(b)(xvi) and 8(2)(e)(v). The language referring to ‘a town or place, even when taken by assault’ holds no legal relevance in modern international criminal law, and is not present in the SCSL Statute or the ICTR Statute. See Stewart (n 12) 13. The ICC Pre-Trial Chamber held in the Bemba case that the reference to a town or place may be understood to imply a certain scale requirement. See van den Herik and Dam-de Jong (n 3) 261.
53 ICC Statute, Arts. 8(2)(b)(xvi) and 8(2)(e)(v).
54 ICC Statute, Arts. 8(2)(a)(iv), 8(2)(b)(xiii), and 8(2)(e)(xii).
55 For a fuller discussion of Arts. 8(2)(a)(iv), 8(2)(b)(xiii), and 8(2)(e)(xii), see van den Herik and Dam-de Jong (n 3) 257–61.
56 The ICC Elements of Crimes—according to Art. 9(1) of the ICC Statute—are non-binding definitions adopted by consensus vote to assist the Court in its interpretation and application of Arts. 6, 7, and 8. ICC, Elements of Crimes, UN Doc. PCNICC/2000/1/Add.2, 2 November 2000; Stewart (n 12) 19.
57 Stewart (n 12) 21.
58 Dam-de Jong (n 3) 164.
The ICC Elements of Crime finally gave firmer contours to the crime of pillage. They also unnecessarily restricted the application of the crime, as discussed below. According to the ICC Elements of Crimes, the elements of pillage are:

1. The perpetrator appropriated certain property.
2. The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use.
3. The appropriation was without the consent of the owner.
4. The conduct took place in the context of and was associated with an international armed conflict or an armed conflict not of an international character.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.\(^59\)

The legal construct advanced by the ICC Elements of Crime covers a range of actors (combatants and civilians) and types of property (private and public).\(^60\) Regarding the first element of appropriation of property, even acquiring control legally may be prohibited.\(^61\) Examples from post-Second World War cases include instances where the accused purchased illegally requisitioned property at an auction and where representatives of a firm were convicted for pillage arising out of the commerce in illegally seized scrap metal.\(^62\) James Stewart identifies at least twenty-six pillage cases involved the legal appropriation of stolen property during the Second World War.\(^63\) Importantly, pillage under this construct covers both organized, systemic pillage and individual acts of pillage committed without consent of military authorities.\(^64\) These aspects provide for an adequately general scope for the provision, while other aspects in the Elements are more restrictive.

One particularly problematic aspect of the Elements is the overly restrictive requirement that the taking of property be for private or personal use (the last clause of the second element). This condition can lead to a restrictive application of the prohibition, especially on occasions when it is challenging to disentangle the symbiotic relationship that often exists between exploitation activities that are done in furtherance of an armed conflict—either by government or rebel groups—or for strictly personal gain.

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\(^{60}\) van den Herik and Dam-de Jong (n 3) 262.

\(^{61}\) Michael A. McGregor, ‘Ending Corporate Impunity: How to Really Curb the Pillaging of Natural Resources’ (2009) 42 Case Western Reserve Journal of International Law 469, 478, citing to the I.G. Farben Trial, in which defendants were found guilty of spoliation of Polish companies even though they purchased the stocks to the companies legally since the action took place in the context of conflict and the purchases were done under duress, thus without consent (The I.G. Farben Trial, Trial of Carl Krauch and Twenty-two Others, US Military Tribunal, Nuremberg, 14 August 1947–29 July 1948, Law Reports of the Trials of War Criminals, Vol. X, 1–68) (‘I.G. Farben Trial’).

\(^{62}\) I.G. Farben Trial 35. The element of consent is important: in the industrialist trials after the Second World War, the US Military Tribunal found that despite the seemingly legal acquisitions of Polish factories, these acts constituted pillage as the owners had no choice but to sell their property under duress.

\(^{63}\) ibid. 36. 

\(^{64}\) van den Herik and Dam-de Jong (n 3) 262.
and enrichment.\textsuperscript{65} The wording is a departure from both Second World War judgments as well as the approach of present day international criminal courts.\textsuperscript{66} The SCSL in fact declared in the \textit{Brima} case that this 'requirement of “private or personal use” is unduly restrictive and ought not to be an element of the crime of pillage'.\textsuperscript{67} Applying this requirement of private or personal use to the instances of pillage and plunder of natural resources, in some cases could still mean a successful pillage prosecution before the ICC. For instance in the DRC–Uganda conflict, since members of the Ugandan army—as well as Ugandan third parties—were exploiting the DRC’s natural resources for their own personal benefit, the 'personal use' criterion would still be applicable.\textsuperscript{68} However, in many other situations of natural resource exploitation, particularly when revenue from the exploitation is used to finance armed activities—that is, exploiting a conflict resource—this restrictive interpretation of pillage could mean that illegal resource exploitation would go unaddressed, at least by the ICC if it could not be shown that the exploitation is for personal gain.\textsuperscript{69} Such failure to address conflict resources could have serious implications for the continuing conflict.

International criminal tribunals have yet to apply the war crime of pillage to the illegal exploitation of natural resources.\textsuperscript{70} Instead of addressing systemic natural resource plunder, most pillage prosecutions to date by international criminal tribunals have been confined to the appropriation of the personal property of civilians, mostly perpetrated in the course of raids on villages.\textsuperscript{71} Thus, none of these tribunals have adjudicated pillage as it applies to natural resource exploitation to fund conflict. Based on the ICC Elements of Crime’s limitation regarding personal or private gain, it seems that natural resource exploitation to finance rebellions would not fall under the purview of Article 8(2)(b)(xvi), while illegal natural resource exploitation for the purposes of personal enrichment could.\textsuperscript{72} This means that one of the most important nexuses between conflict and natural resources—the financing of conflict through illegal or illicit natural resource exploitation—would be unaddressed by the war crime of pillage in the ICC.\textsuperscript{73}

### 6.3 The Law of Pillage and \textit{Jus Post Bellum}

How does the law of pillage fit into the \textit{jus post bellum} framework? The classical, binary distinction between war and peace that has been prevalent historically is disappearing.\textsuperscript{74}
Just as there is often no clear line between the cessation of hostilities and the post-conflict period, historic concepts of peacetime and wartime law—divided further into *jus ad bellum* and *jus in bello*—share an inability to provide an adequate framework for all stages of conflict, particularly for the transitory, legally grey period between hot conflict and stable peace that is prevalent.

It is posited that the *jus ad bellum/jus in bello* division reflects the traditional—and now less and less relevant—distinction between war and peace, by suggesting that ‘each of these two bodies of law contains its own specific and exclusive system of rules which comes into play in circumstances when the traditional rules of the “law of peace” cease to be of adequate guidance’. However, just as the traditional view that the presence of a state of war means that peacetime rules cease to apply is no longer tenable in its absolutist form, so is the *jus ad bellum/jus in bello* division similarly inadequate to capture all stages of conflict, particularly the transition from conflict to peace.

Regarding the consequences of this inadequacy of the current framework, Brian Orend observed: ‘the lack of rules regulating postwar conduct on the part of states creates serious problems of legal vacuum, political insecurity and profound injustice’. It is this lacuna of the legal landscape that *jus post bellum* intends to address.

This section explores four aspects of the role of pillage in the emerging body of *jus post bellum*: temporal considerations, relationship to the law of occupation, scope of actors to whom pillage would apply, and legal and practical implications of approaching pillage as an economic war crime.

### 6.3.1 Temporal considerations: when is pillage a war crime?

One gap in the traditional framework is the temporal scope of application of the norms of international humanitarian law: how far do these norms extend in time? In the context of pillage as a war crime, the question arises: when does pillage have to be perpetrated in order to fall within the scope of international humanitarian law and international criminal law? Are there temporal boundaries to the war crime of pillage? In many instances, the answer would be clear: while the armed conflict lasts, and perhaps to a limited extent following the end of hostilities as long as military operations continue. There must be a nexus between the crime and the armed conflict; for

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75 Stahn, ‘Rethinking the Conception of the Law of Armed Force’ (n 74) 926.
76 ibid. 927.
77 ibid. 924.
78 ILC, Draft Articles on the Effects of Armed Conflicts on Treaties, with Commentaries (2011).
79 Stahn, ‘Rethinking the Conception of the Law of Armed Force’ (n 74) 926.
82 ibid. 928. For a discussion the legal requirements for a finding of an international armed conflict based on Art. 2 of the Geneva Conventions of 1949 and for a non-international armed conflict based on Common Art. 3 of the Geneva Conventions of 1949 and Art. 1 of Additional Protocol II, please see the ICRC, Opinion
pillage, this is expressly provided for by the ICC Elements of Crimes, which requires that 'the conduct took place in the context and was associated with an international armed conflict or an armed conflict not of an international character'.

Moreover, the ICTY Appeals Chamber has identified a number of factors indicative of the nexus: the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of military campaign; and the fact that the crime is committed as part of, or in the context of, the perpetrator's official duties.

However, the nature of conflicts has changed: too often, a ceasefire or peace agreement is not an end to hostilities, and there is no clear dividing line where armed conflict turns into peace. John P. Quinn, writing of the operations of the US naval forces, notes that these operations 'can be said to operate at all times at some point along a continuum that ranges from peace through MOOTW (military operations other than war) to war'. The question is where along this continuum from conflict to peace is pillage still a war crime. This becomes all the more challenging to answer as the nature of modern conflicts becomes more complex and varied.

With conflicts lasting longer or oscillating between peace and outbreaks of violence, combined with the involvement of numerous actors with diverse agendas and at times shifting loyalties and affiliations, it is often challenging to fix a point in time when the conflict terminates and the laws of war no longer apply. When hostilities have ceased in theory—as a result of a ceasefire or peace agreement—but acts of extreme violence and gravity persist, the question as to which legal framework applies may arise.

The Iraqi conflict is a case in point. Adam Roberts in his discussion of the Iraqi occupation post-June 2004 raised the question: 'When the occupation ends, and assuming that the violent opposition continues, will the Geneva Conventions and other rules of war still apply to the actions of coalition and Iraqi personnel?' His answer—specifically in the case of Iraq after 28 June 2004—is that the ongoing hostilities were 'of sufficient gravity as to make it implausible to suggest that the situation of armed conflict is definitely over', noting also that 'the situation does not conform exactly to recognized definitions of either international or civil war, or of military occupation'.

In conclusion, Roberts found that the laws of war should still apply to post-occupation
Iraq based on an examination of the factual scenario ‘it is the reality, not the label, that counts’.\(^91\)

In light of this, it is quite plausible that even following the conclusion of a peace agreement, acts of pillage may take place that would give rise to responsibility and liability under the laws of war and international criminal law. Whether this is the case would require an examination of the factual context of the violations to determine whether the laws of war were still to be applied or whether peacetime law should be applicable.

6.3.2 Natural resource exploitation and the law of occupation

Occupation is another point on the war-to-peace continuum that bears relevance for \textit{jus post bellum} and the law of pillage.\(^92\) While there has been some contention that the law of occupation has become obsolete, situations of formal occupations or situations akin to occupations have once again resurfaced.\(^93\) Many of the recent occupations involved resource-rich countries, such as Iraq or the Democratic Republic of the Congo. The question then arises: do occupying powers need to be concerned about being held responsible for pillage? Natural resource exploitation in occupied territories by the occupant is an issue that arises in the context of almost every occupation, particularly those of resource-rich countries or in situations of long-term occupations.

Regarding the exploitation of natural resources by a belligerent occupant,\(^94\) some of the most important questions are: Is a belligerent occupant allowed to exploit the natural resources of the occupied territory? Under what circumstances may a belligerent occupant use non-renewable natural resources? For what purposes can the yields of natural resource exploitation be used?

The Hague Regulations of 1907 are the principal governing body of law regarding belligerent occupation; since they are considered customary international law, they are binding even on nations that have not ratified the Regulations.\(^95\) While it has been

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\(^{91}\) ibid. 47.

\(^{92}\) See Quinn \textit{et al.} (n 86). According to the ICRC Handbook on International Rules Governing Military Operations, ‘occupied territory’ is territory that is actually placed under the authority of adverse foreign armed forces. The occupation extends only to the territory where such authority has been established and can be exercised. ICRC, Handbook on International Rules Governing Military Operations, 7 March 2014, 98, at <http://www.icrc.org/eng/resources/documents/publication/p0431.htm> accessed 5 June 2017.

\(^{93}\) Dufresne (n 29) 197.

\(^{94}\) It is worth noting that the general principle of law \textit{ex injuria jus non oritur}, according to which legal rights should not be able to arise from an illegal act, does not apply in the context of occupation law, and as Edward Cummings points out, this has been so since the Nuremberg Trials where in \textit{U.S. v. List} (The Hostages Trial), the US Military Tribunal held that ‘international law makes no distinction between a lawful and an unlawful occupant in dealing with the respective duties of occupant and population in occupied territory. … Whether the invasion was lawful or criminal is not an important factor in the consideration of this subject.’ See Edward R. Cummings, ‘Oil Resources in Occupied Arab Territories Under the Law of Belligerent Occupation’ (1974) 9 Journal of International Law and Economics 533, 550.

\(^{95}\) Brice M. Claggett and O. Thomas Johnson Jr., ‘May Israel As A Belligerent Occupant Lawfully Exploit Previously Unexploited Oil Resources of the Gulf of Suez’ (1978) 72 American Journal of International Law 558, 560. Additional protection is provided by Art. 147 of the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, as well as Arts. 46–56 of the Hague Regulations: Art. 53 prohibits the destruction of both private and public property for any reason other than military necessity, Art. 52 forbids the seizing of immovable property, Art. 46 forbids confiscation of private property, and Art. 47 forbids pillage.
contested in the past, notably in the Israeli occupation of The Gulf of Suez and Sinai, it is now firmly established that the Regulations remain relevant even after the conclusion of actual fighting over the occupied territory. During the Nuremberg Trials, the US Military Tribunal held in the *Krupp* case that: "The Articles of the Hague Regulations . . . are clear and unequivocal. Their essence is: if, as a result of war action, a belligerent occupies a territory of the adversary, he does not, thereby, acquire the right to dispose of property in that territory, except according to the strict rules laid down in the Regulations."  

Articles 53(1) and 55 of The Hague Regulations deal with occupied state property, distinguishing between movable and immovable property, while Article 46 regulates the occupant’s powers regarding private property. Article 53(1) is applicable to all movable property belonging to the state and allows for anything that may be used for military occupations to be possessed by the occupant, while Article 55 regulates the occupation of real estate, providing that ‘the occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country.’

The Hague Regulations apply to natural resources, and particularly to resources such as oil and gas, which are both non-renewable and high-value (and thus could be instrumental in financing conflict). Different regimes apply to already-extracted resources and to resources that are still in the ground: oil and gas, once extracted, become movable property, as confirmed by a leading Second World War case, and fall under Article 53(1); prior to extraction, however, they fall under Article 55’s purview. Article 55, however, only makes mention of real estate and forests, and remains silent on the use of other resources, such as gas, oils, or minerals. Article 55 itself sets up a system of usufruct, a concept originating in Roman law and defined in the Institutes of Justinian as ‘the right of using and enjoying the property of other people, without detriment to the substance of the property.’ This concept entails an obligation to preserve

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96 Claggett and Johnson (n 95) 561. For a different view, see Allan Gerson, who argues that new wells, and even exploration of new oil fields enhances the value of the real estate. Allan Gerson, ‘Off-Shore Oil Exploration by a Belligerent Occupant: The Gulf of Suez Dispute’ (1978) 71 American Journal of International Law 725.


98 ibid. 562. Art. 46 of the Hague Regulations: ‘Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated.’

99 Hague Regulations of 1907, Art. 53(1).

100 Hague Regulations of 1907, Art. 55.

101 *N.V. de Bataafsche Petroleum Maatschaap v. The War Damage Commission*, 23 ILR 810 (Court of Appeal, Singapore 1956), as referenced in Cummings (n 94) 557. The Court found that crude oil in the ground, even if the oil production commenced prior to occupation, was immovable property. Cummings notes that some civil law jurisdictions handle minerals to be extracted from mines (and presumably oil too) as movable property. Cummings (n 94) 573. Guano, coal, and minerals have been treated as movable property once extracted from rock, but not before. See Yutaka Arai-Takahashi, *The Law Of Occupation: Continuity And Change Of International Humanitarian Law, And Its Interaction With International Human Rights Law* (Leiden: Martin Nijhoff Publishers, 2009), 211.

102 Claggett and Johnson (n 95) 562–3.

103 ibid. 567–8. It is worth noting, as Claggett and Johnson do, that Romans had a fundamental misconception about the nature of minerals: they thought them to be inexhaustible, and thus the usufruct concept was modified to allow for opening of new mines, not only exploiting the ones opened by the original owners.
the capital of the property and to avoid deteriorating the position of the owner with regards to the capital, while allowing for the use and collection of the ‘fruits’ of the property by the occupant power.\footnote{ibid. 568; Dufresne (n 29) 200. For more on the regime of usufruct and its various interpretations, see Cummings (n 94) 559–66.} Could this usufruct regime be applicable to non-renewable resources, such as oil and gas, where exploitation necessarily consumes the capital?\footnote{Dufresne (n 29) 200.} Scholars argue that Article 55’s list of resources is non-exhaustive, and in fact does apply to non-renewable resources.\footnote{See, for example, Jean D’Aspremont, ‘Towards an International Law of Brigandage: Interpretative Engineering for the Regulation of Natural Resources Exploitation’ (2013) 3 Asian Journal Of International Law 1, 4–5.} It is also important to note that while under Article 53 of the Hague Regulations, certain movable property that would qualify as munitions of war may be seized, even if belonging to private individuals, crude oil has been considered not to be a form of war munitions and therefore arguably would not fall under this exception.\footnote{Arai-Takahashi (n 101) 213.}

The decision to expand the ambit of Article 55 to non-renewables poses some practical questions: Would an occupying power be allowed to open new oil wells or would it be restricted to use wells that had been in use prior to occupation? Would the occupant be allowed to grant new concessions? Would the occupied country be allowed to do so? If so, who in the occupied country would decide, and how?

Regarding non-renewable resources, such as oil, arguments have been made that exploitation may be a way to preserve the possibility to exploit the resource after the end of occupation.\footnote{D’Aspremont (n 106) 5.} These arguments have largely been refuted.\footnote{ibid.} The consensus seems to be that under Article 55’s usufruct regime, the occupying power would not be allowed to open new wells in occupied territory.\footnote{Claggett and Johnson (n 95) 575.} This issue arose in the case of Israeli efforts to drill new wells in the occupied Sinai Peninsula and the Gulf of Suez in the 1970s.\footnote{Harold Dichter, ‘The Legal Status of Israel’s Water Policies in the Occupied Territories’ (1994) 35 Harvard International Law Journal 565, 590; Cummings (n 94) 533.} Commentators argued that such extraction would be an ‘impermissible taking of the capital of property protected by Article 55 whether or not the oil taken is newly discovered’.\footnote{Claggett and Johnson (n 95) 575; D’Aspremont (n 106) 5. For a more detailed discussion of the rates of exploitation, see R. Dobie Langenkamp and Rex J. Zedalis, ‘What Happens to the Iraqi Oil?: Thoughts on Some Significant, Unexamined International Legal Questions Regarding Occupation of Oil Fields’ (2003) 14 European Journal of International Law 417, 425–30; Arai-Takahashi (n 101) 210.} In addition, while old mines or wells may be used by an occupying power, there is a strong suggestion that such usage should not exceed the average levels of exploitation that took place prior to occupation and mines that were not in use prior to occupation should not be exploited at all.\footnote{ibid. 575; D’Aspremont (n 106) 5.} Along these lines, an occupying power would not be able to grant concessions to unexploited oil or gas reserves.\footnote{Arai-Takahashi (n 101) 214.} In the case of the Iraqi occupation, commentators have noted that an occupying power should not engage in granting oil concessions to private companies, thereby quasi-privatizing the resource, and should also avoid engaging in the state-owned oil production and distribution industry.\footnote{D’Aspremont (n 106) 5.} In summary, an occupying power would have limited authority
to utilize immovable resources of an occupied country under a usufruct regime, could not overexploit those resources, and would need to maintain their long-term value.\footnote{Claggett and Johnson (n 95) 577.}

An occupied country has the ability to grant natural resource concessions while the territory is being held by the occupant. The legality of such concessions arose in the case of the Amoco concessions granted by Egypt for oil in the Gulf of Suez.\footnote{ibid. 579.} Commentators noted that, ‘a displaced sovereign may take action affecting occupied territory as long as such action does not conflict with the right of the occupant’.\footnote{ibid. 579.} Since Israel was not allowed to open new wells in the Gulf of Suez under the usufruct regime, Article 55 prohibited Israel from exploiting the oil there, and therefore its rights as an occupying power would not be harmed by Egypt’s granting of concessions.

Another concern is what rights, if any, would rebel groups have to natural resources that are located in their territory. With respect to these groups’ exploitation of natural resources, including non-renewable resources, in territories under their control, it is arguable that the same principles should be applicable that are in place for occupying powers, despite the fact that only foreign armies who establish an occupation can apply the Hague Regulation exceptions.\footnote{Stewart (n 12) 61.}

International law limits the purposes for which an occupying power may use the natural resources of an occupied territory: 1) to meet the occupant’s own security needs in the occupied territory; 2) to defray the expenses involved in the belligerent occupation; and 3) to protect the interest and well-being of inhabitants.\footnote{Dufresne (n 29) 203.} Regarding expenses of the belligerent occupation, the Nuremberg judgments—both in the Major War Criminals Trial and later in the Flick Case—give some guidance on this: ‘an occupant may only take so much property, whether publicly or privately owned, as is necessary to meet the costs of the occupation’,\footnote{For analysis, see Claggett and Johnson (n 95) 580; Langenkamp and Zedalis (n 113) 430–1.} as the “economy of an occupied country can only be required to bear the expenses of the occupation’.\footnote{Claggett and Johnson (95) 580; Langenkamp and Zedalis (n 113) 430, both quoting the Trial of the Major War Criminals before the International Military Tribunal, vol. I, at 230, 6 Fed. Rules Dec. (1947) 69, at 120.} While it was not defined what constitutes costs or expenses in this regard, it was also clear that expenses could not include costs for the occupying power to wage war against the occupied: ‘Just as the inhabitants of the occupied territory must not be forced to help the enemy in waging the war against their own country or their own country’s allies, so must the economic assets of the occupied territory not be used in such a manner.’\footnote{Claggett & Johnson (n 95) 582.} In the N. V. de Bataafsche Petroleum Maatschappij v. The War Damage Commission case, the Singapore court ruled that the Japanese seizure of oil resources in the East Indies would be contrary to the law of occupation partly because the seizure was not aimed at meeting the requirements of the occupation army, but instead to supply the military and civilian needs of the occupying force, and as such it constituted plunder.\footnote{N. V. de Bataafsche Petroleum Maatschappij v. The War Damage Commission (n 101). For analysis, see Arai-Takahashi (n 101) 212.}
applied only to defraying the "expenses of the occupation", and that concept does not extend to the overall costs of the military operation.\textsuperscript{125} This seems to be reinforced by the fact that the Hague Regulations’ relevant provisions regarding the requisitioning of movable private property, for instance, also require a close tie to occupation activities.\textsuperscript{126} The notion that proceeds from the working of occupied state-owned immovable property should only be used to defray the costs of occupation was echoed in a 1943 resolution coming out of the London International Law Conference, which states that an occupant had no right to dispose of property—be it private or public—for any purpose other than the maintenance of public order and safety in the occupied territory.\textsuperscript{127} This understanding gains particular relevance for high-value natural resources, where revenue from such resources could then be used to maintain the preparedness of the military of the occupying power. Similarly, any revenue use for the occupant’s own personal enrichment would be unlawful.\textsuperscript{128}

Revenues from the operation of immovable state property, such as non-renewable resources, under the usufruct regime could be used only for the benefit of the population of the occupied territory, besides the expenses of the occupation itself.\textsuperscript{129} The ICJ’s judgment in the Armed Activities Case did not clarify whether exploitation carried out for the benefit of the local population would be lawful or not, but it did state that "Uganda’s argument that any exploitation of natural resources in the DRC was carried out for the benefit of the local population, as permitted under humanitarian law, is not supported by reliable evidence."\textsuperscript{130} The Court did hold that Uganda was under an obligation based on the duty of vigilance—which the Court specifically tied to Uganda’s status as an occupying power—to take adequate measures to prevent its nationals or groups under its control to engage in illegal natural resource exploitation on the occupied territories of the DRC.\textsuperscript{131} Thus, an occupying power is under a duty to prevent not only ‘official’ looting, but also private acts of looting.\textsuperscript{132} The ICJ’s Namibia Advisory Opinion also suggests that as long as the use is for the benefit of the local population, the exploitation is lawful, even despite the unlawfulness of the occupation itself.\textsuperscript{133} James Stewart also notes that cautiously allowing for the proceeds from the sale of non-renewable resources to be used for humanitarian needs of the population is necessary since in many conflict zones, large parts of the populace may be dependent for their survival on the sale of such proceeds.\textsuperscript{134}

In closing, it is also important to briefly refer to the principle of permanent sovereignty over natural resources and how that applies to natural resource exploitation in occupied territories: while the ICJ in the Armed Activities Case has found that the principle—while a part of customary international law—did not apply to the specific situation of looting, pillage, and the exploitation of certain natural resources committed

\textsuperscript{125} Langenkamp and Zedalis (n 113) 430.  
\textsuperscript{126} ibid. 430.  
\textsuperscript{127} ibid. 431.  
\textsuperscript{128} ibid. 434.  
\textsuperscript{129} D’Aspremont (n 106) 6.  
\textsuperscript{130} ibid., quoting the Armed Activities Case (n 30) para. 249.  
\textsuperscript{131} Dufresne (n 29) 196.  
\textsuperscript{132} ibid. 197.  
\textsuperscript{134} Stewart (n 12) 60.
by the occupying power.\textsuperscript{135} Nevertheless, some commentators still argue that permanent sovereignty may still be relevant.\textsuperscript{136}

6.3.3 Who?—corporate liability for pillage

Corporate accountability, both in terms of holding corporations themselves and holding corporate officers and managers criminally responsible before international criminal tribunals has been one of the most contested legal areas of recent years. As the role of corporate actors in some of the worst resource conflicts of the past decades has been revealed and documented, the issue has received heightened attention both in policy and academic circles.

Historically, the liability of individual corporate officers is well established. Several corporate officers and managers were held liable in Second World War related cases. As James Stewart observes, aside from the more usual references to the industrialist cases—such as \textit{Flick}, \textit{Farben}, and \textit{Krupp}—there were a number of less well-known examples of individual corporate liability in the Nuremberg cases.\textsuperscript{137} Since the Nuremberg Trials, however, corporate actors became largely invisible in war crimes tribunals. Recently, however, the role that corporations play in some of the worst resource conflicts and particularly the way this role is being documented and publicized, the notion of 'commercial responsibility of pillaging' is gaining strength.\textsuperscript{138}

A. Corporate accountability before the ICC

While the ICC can prosecute heads of state, political and military leaders, and corporate officers and managers, corporations are not subject to liability before it. There were several arguments raised both for and against including corporations within the personal jurisdiction of the Court when drafting the Rome Statute.\textsuperscript{139} Some argued that including corporations under the Court’s jurisdiction would facilitate compensation for victims—a valid point, considering the meagre activity of the Victim’s Trust Fund to date.\textsuperscript{140} Others argued that since not all national systems recognize the criminal liability of corporations, their exclusion is warranted to ensure fairness.\textsuperscript{141} Evidentiary challenges in pursuing legal entities were also raised as an objection.\textsuperscript{142} In the end, only natural persons were included within the Court’s jurisdiction.\textsuperscript{143}

B. Liability of corporate officers and managers before the ICC

In both civil and common law systems, the individual criminal liability of representatives of the corporation is well established.\textsuperscript{144} Furthermore, corporate

\begin{footnotesize}
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\item \textsuperscript{135} \textit{Armed Activities Case} (n 30) para. 244.
\item \textsuperscript{136} Dufresne (n 29) 213–16.
\item \textsuperscript{138} ibid.
\item \textsuperscript{140} ibid. 23.
\item \textsuperscript{141} ibid.
\item \textsuperscript{142} ibid.
\item \textsuperscript{143} Rome Statute, Art. 25(1).
\item \textsuperscript{144} Stewart (n 12) 76.
\end{itemize}
\end{footnotesize}
representatives can be held liable for war crimes, including pillage, in the same way that civilians can be prosecuted for violations of the laws of war—a notion that has gained confirmation both through codification and practice. Corporate officers were held liable in a number of Nuremberg cases, such as the IG Farben, Flick, or Krupp cases. There are also more recent cases. In the 2000s, Dutch businessmen were found guilty of war crimes in Dutch courts. The ICTR has held accountable members of a commercial radio station for incitement to genocide and the owner of a tea factory of genocide for failing to prevent or punish acts of genocide perpetrated by his employees.

Individual corporate liability on the part of officers and managers of the company—in the absence of direct participation in the atrocities—is conceivable under two theories: command responsibility and accomplice liability.

i. Command responsibility

Under command responsibility, a person may be individually criminally responsible for failing to supervise properly and control the conduct of others who are acting under his or her effective authority and control. While command responsibility appeared in the statutes of both the ICTY and the ICTR, the Rome Statute is different in its treatment of the subject since—unlike the other two statutes—it distinguishes between military commanders and civilian superiors under Article 28. Article 28(a) governs military commanders and Article 28(b) governs civilian superiors. Corporate officers would fall under Article 28(b) as civilian superiors. Under Article 28(a), a military commander would face criminal liability if he or she knew or should have known of a subordinate’s crimes under his effective command and control and failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to competent authorities.

145 ibid. Trial of Alois and Anna Bommer and their Daughters, Permanent Military Tribunal, Metz, 19 February 1947, 9 Law Report of Trials of War Criminals 64. The Geneva Conventions of 1949 and Additional Protocol II acknowledge civilian liability for violating the laws of war, binding rebel groups. Prior to that, the Nuremberg Tribunal confirmed the binding power of international law over individuals. A number of cases in the wake of the Second World War held civilians accountable for war crimes, such as murder. See, for example, Trial of Erich Heyer and Six Others (Essen Lynching case), British Military Court for the Trial of War Criminals, Essen, 22 December 1945, 1 Law Reports of Trials of War Criminals 88–92. On pillage, see the Bommer case, in which members of a German family were found guilty of pillage for retaining illegally acquired property from a deported civilian’s farm, Trial of Alois and Anna Bommer and their Daughters, Permanent Military Tribunal, Metz, 19 February 1947, 9 Law Report of Trials of War Criminals. For analysis, see Stewart (n 12) 76–7.

146 For an analysis of these cases, see Stewart (n 12) 77.


149 ibid. (n 139) 25.

150 ibid. 25.

151 ibid.

152 Rome Statute, Art. 28(a), (b).
he either knew or consciously disregarded information which clearly indicated that
the subordinates were committing or were about to commit such crimes; the crimes
concerned activities that were within his or her effective responsibility and control;
and the superior failed to take all necessary and reasonable measures within his or
her power to prevent or repress their commission or to submit the matter to the com-
petent authorities.\textsuperscript{154} The \textit{mens rea} requirement under Article 28(b)—‘knew or con-
sciously disregarded’—is much more stringent than under Article 28(a).\textsuperscript{155} In addition,
a superior–subordinate relationship must also be established, based on either \textit{de jure} or
\textit{de facto} control.\textsuperscript{156} An example of a corporate officer being held liable for a war crime
under the theory of command responsibility is \textit{Prosecutor v. Musema}, where the ICTR
held liable the director of a tea factory for genocide and crimes against community
because he failed to prevent his employees from committing acts of genocide while
under his effective control.\textsuperscript{157}

\textbf{ii. Accomplice liability}

Under Article 25(3) of the Rome Statute, an individual can be held liable for a crime
under the Court’s jurisdiction if he or she:

(a) commits such a crime, whether as an individual, jointly with another or through
another person, regardless of whether that other person is criminally responsible;
(b) orders, solicits or induces the commission of such a crime which in fact occurs
or is attempted; (c) for the purpose of facilitating the commission of such a crime,
cares, abets or otherwise assists in its commission or its attempted commission, includ-
ing providing the means for its commission; (d) in any other way contributes to the
commission or attempted commission of such a crime by a group of persons acting
with a common purpose ...

The contribution can be made either ‘with the aim of furthering the criminal activity
or criminal purpose of the group’ or in the knowledge of the intention of the group to
commit the crime.\textsuperscript{158}

Article 25 may provide a less stringent standard for individual corporate liability. Ex-
amples of such liability include for example the \textit{Zyklon B} case, in which a German
businessman and supplier of poison gas and equipment was convicted of a war crime as
an aider-and-abettor for selling the gas and equipment to Nazi concentration camps.\textsuperscript{160}
A more recent example would be Charles Taylor’s case before the SCSL, who was held
liable as an aider and abettor for eleven counts of war crimes, including pillage, for his
role in the Sierra Leone conflict.\textsuperscript{161}

\textsuperscript{154} Rome Statute, Art. 28(b).
\textsuperscript{155} Graff (n 139) 25.
\textsuperscript{156} ibid.
\textsuperscript{157} ibid. \textit{Prosecutor v. Musema}, Trial Chamber I, Judgment and Sentence (ICTR-96-13-A, Judgment, 16
November 2001).
\textsuperscript{158} Rome Statute, Art. 25(3).
\textsuperscript{159} Rome Statute, Art. 25(3)(d)(i)(ii).
\textsuperscript{160} \textit{International Criminal Court}, British Military Court, Hamburg, 8 March
1946, Law Report of Trials of War Criminals 93. For analysis, see Graff (n 139) 25.
\textsuperscript{161} \textit{Prosecutor v. Charles Ghankay Taylor} Judgment Summary (SCSL-03-1-T, Special Court for Sierra
Leone, 26 April 2012).
C. Liability of corporations for war crimes

Many argue that beyond holding corporate representatives individually liable for war crimes, the criminal liability of the legal entity itself is necessary, especially in the context of natural resource exploitation.\textsuperscript{162} While individual criminal responsibility is important to create disincentives, by pursuing the corporate entity itself, the possible measure of reparations is greater, since in case of a conviction, assets of the company itself could be forfeited.\textsuperscript{163} The Rome Statute does not grant the ICC jurisdiction over legal entities and many argue that corporate accountability for war crimes—for now, at least—is much more imaginable before domestic courts than in international forums. Efforts in that direction can be seen in domestic courts. In 2013, one of the leading gold refineries in the world, Argor-Heraeus, became the subject of a domestic criminal investigation in Switzerland for pillaging Congolese natural resources.\textsuperscript{164} While the prosecutor ultimately decided not to prosecute the company,\textsuperscript{165} it signals that in the absence of prosecution of corporate entities by international courts, domestic courts are increasingly willing to act. Importantly, this case focuses on the acquisition of pillaged gold rather than on the violation of embargoes, which has often been the case in regional and national prosecutions.\textsuperscript{166} Another case that merits attention is the lawsuit in France against Dalhoff, Larsen, and Horneman, a French timber company, for handling and profiting from goods obtained in an illegal manner, the company allegedly having continued to purchase Liberian timber despite evidence that the timber was harvested illegally and in an environmentally destructive manner and that the arms purchased from the proceeds from the timber violated UN embargoes.\textsuperscript{167}

6.3.4 The law of pillage and economic crimes

While the number of conflicts may arguably be declining, there is a growing number of recurrent and persistent conflicts—conflicts where lasting resolution seems elusive.\textsuperscript{168} Accordingly, a modern \textit{jus post bellum} must necessarily be ‘focused on the sustainability

\textsuperscript{162} Stewart (n 12) 82.

\textsuperscript{163} ibid.


\textsuperscript{166} Anne-Cecile Vialle, Carl Bruch, Reinhold Gallmetzer, and Akiva Fishman, ‘Peace through Justice? International Tribunals and Accountability for Wartime Environmental Damage’ in Bruch, Muffett, and Nichols, \textit{Governance, Natural Resources, and Post-Conflict Peacebuilding} (n 3).


of peace, rather than on simply brokering an end to violence. There is now a recognized obligation not only to focus on the termination of violence, but also on peace-making and rebuilding. A comprehensive framework for peacebuilding must make a credible attempt to address the root causes of conflict, and must look beyond the objective of merely ending violence by applying a more holistic and comprehensive approach to peacebuilding.

However, economic crimes—and in fact, violations of economic, social, and cultural rights in general—have been largely marginalized in the context of peacebuilding, despite well-recognized connections between violations of economic, social, and cultural rights and violations of civil and political rights. International criminal law is still far from addressing these violations in an integrated and interdependent manner. This is unfortunate, particularly considering the very real risk that without scrutinizing and responding to the economic, social, and cultural rights violations that often lie at the root causes of conflict, there can be no lasting, sustainable, and just peace. This is just as true of war crimes violating economic, social, and cultural rights as of crimes of violence against a person. In addition, by failing to acknowledge the reality of economic crimes and address them, the justice system fails to acknowledge the mutually reinforcing relationship between economic crimes and violations of civil and political rights, as well as the way economic crimes and human rights violations can mutually reinforce impunity as proceeds of previous or ongoing economic crimes are used to

169 Stahn, 'Jus Post Bellum' (n 74) 335.
170 Stahn, 'Rethinking the Conception of the Law of Armed Force' (n 74) 930, making reference to the International Commission on Intervention and State Sovereignty's report, 'The Responsibility to Protect'.
171 Stahn, 'Jus Post Bellum' (n 74) 335. Wendy Lambourne, 'Transitional Justice and Peacebuilding after Mass Violence' (2009) 3 International Journal Of Transitional Justice 28, 34. Louise Arbour has called for a more holistic understanding of transitional justice: 'Transitional justice must have the ambition to assist the transformation of oppressed societies into free ones by addressing the injustices of the past through measures that will procure an equitable future. It must reach to—but also beyond—the crimes and abuses committed during the conflict that led to the transition, and it must address the human rights violations that pre-dated the conflict and caused or contributed to it. With these aims so broadly defined, transitional justice practitioners will very likely expose a great number of discriminatory practices and violations of economic, social, and cultural rights. Louise Arbour, 'Economic and Social Justice for Societies in Transition' (2007), 40 N.Y.U. Journal of International Law and Politics 1, 2.
172 Harwell and Le Billon (n 15); Lisa Hecht and Sabine Michalowski, 'The Economic and Social Dimensions of Transitional Justice', ETJN Concept Paper, available at <http://www.essex.ac.uk/tjn/documents/TheeconomicandsocialdimensionsofTJ.pdf> accessed 7 June 2017. As Louise Arbour noted, the reality of this marginalization is also reflected in the conception of justice itself, as expressed for instance in the UN Secretary General's report on The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: 'For the United Nations, “justice is an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishments of wrongs. Justice implies regard for the rights of the accused, for the interests of victims and for the well-being of society at large.” The first sentence, “fairness in the vindication of rights,” liberally construed, may imply the need to guarantee economic, social, and cultural rights. However, the language of “the victim” and “the accused” in the second sentence appears to circumscribe the concept of justice within a more traditional dispute resolution framework that primarily focuses on violations of civil and political rights. To the extent that this characterization is accurate, it reflects a narrow approach to justice.’ (Arbour (n 171) 4). As Arbour goes on to note, this may be ‘symptomatic of a deep ambivalence within justice systems about social justice.’ (Arbour (n 171) 5). What this results in is an incomplete concept of justice, and translated into the realm of transitional justice mechanisms, such as international criminal prosecutions and truth commissions, this results in an equally incomplete narrative of the conflict as well as impunity for some. Arbour (n 171) 4–5.
173 DiMeglio (n 80) 153 ('Failure to pursue justice against morally culpable individuals after war may result in a peace that lacks a sense of closure.'
Pillage, Conflict Resources, and Jus Post Bellum

derailed transition. Philippe Le Billon and Emily Harwell warn that ‘persistent impunity for widespread economic crimes with broad societal effects sends the message that there is still no rule of law’. Indeed, Harwell observes elsewhere that: ‘

the pattern of control and criminality in authoritarian regimes and among violent belligerents is intimately tied to the financial rewards of crimes in natural resource sectors. Therefore, as both a conceptual and practical matter, efforts to pursue accountability for civil and political abuses are rendered less effective by the neglect of economic crimes that facilitate and motivate those abuses.

In light of this and the now well-established recognition of the links between armed conflict and natural resource exploitation, resolving issues of the illegal exploitation of natural resources must necessarily be made one of the objectives of a nascent jus post bellum. As noted in the beginning of this chapter, illegal natural resource exploitation is at its core an economic crime, but as with other economic crimes, it has been largely absent from war crimes prosecutions.

The lack of provisions under which such crimes may be prosecuted in international criminal law is one example of how economic crimes have been marginalized in post-conflict contexts. Kristen Boon aptly observes: ‘The laws of war are notoriously silent on matters relating to the economy.’ Aside from the provisions regarding pillage, which is almost universally present in the statutes of war crimes tribunals, there are no provisions with regard to related economic crimes, such as money laundering or illicit arms trade.

This leaves the crime of pillage as one of the main, if not only, potential avenues for addressing the illegal exploitation of natural resources in conflict and post-conflict situations. As already noted, the war crime of pillage has been underutilized by international criminal tribunals when it comes to natural resource exploitation. In fact, other than the industrialist trials in the wake of the Second World War, this type of crime has been absent from the practice of these courts despite the growing recognition that economic crimes are often just as much at the heart of the conflict as crimes against persons. This recognition has not translated into actual prosecutions for illegal natural resource exploitation.

In addition to a lack of prosecutions of such crimes—and an absence of provisions that would be able to fully capture all aspects of illegal natural resource exploitation—the

175 Harwell and Le Billon (n 15).
176 Harwell (n 6).
177 Kyriakakis (n 3) 117.
179 See Kyriakakis (n 3) 116; Schabas (n 3) 2–4.
180 Schabas (n 3) 3.
182 Schabas (n 3) 2.
marginalization of the economic side of conflict is also manifest in the limited pool of actors who are prosecuted for such crimes. Some of the most important actors in the illegal exploitation of natural resources in conflict worldwide are transnational corporations; despite their prominent role, though, these actors have largely managed to remain under a cloak of invisibility when it comes to criminal prosecutions for their role in the pillage of natural resources. Moreover, certain features of international criminal law influence national criminal tribunals’ practice and approach. The lack of attention to the economic dimension of conflict and specifically the lack of prosecutions for illegal natural resource exploitation may lead to a decreased focus on these issues in domestic criminal law and can negatively affect accountability in general. In addition, these trends have a tendency to solidify, and the absence of accountability for economic war crimes may become ingrained.

Even when pillage prosecutions take place with regards to acts perpetrated in the context of resource conflicts, these prosecutions have been mostly in relation to the pillage of personal property, such as goods, chattel, money, and not for the systemic plunder of property that was in fact used to finance and thus perpetuate the conflict. Prosecutions for pillaging of relatively small personal property were the norm in the Yugoslav conflict and also with respect to the conflict in Sierra Leone, where a number of pillage prosecutions were in relation to livestock theft and money. The ICC found Germain Katanga guilty of pillage for extensive destruction of property—such as houses, roofing sheets, furniture, and various other effects, such as food, livestock, and animals—in Bogoro, DRC. In many of these cases, the stolen goods were not considered to be the principal reason for the fighting or the fighting was not considered to be impossible to sustain without the revenue produced by the theft. Curiously, the illegal natural resource exploitation underlying and sustaining the Congolese conflict has gone largely unaddressed by the ICC.

The marginalization of the economic aspects of conflicts has also been true for truth and reconciliation commissions. Of more than thirty truth commissions established between 1974 and 2004, only three expressly engaged with economic crimes—those for Chad, Liberia, and Sierra Leone. The Sierra Leone Truth and Reconciliation Commission report touched on the link between armed conflict and extractive industries, identifying specific diamond mining companies that had links to the armed groups in Sierra Leone, and making the connection between human rights violations, corruption, and bad governance. The Kenyan Truth, Justice and Reconciliation Commission report touched on the link between armed conflict and extractive industries, identifying specific diamond mining companies that had links to the armed groups in Sierra Leone, and making the connection between human rights violations, corruption, and bad governance.

183 ibid.; see also Kyriakakis (n 3) 117. 184 Schabas (n 3); Kyriakakis (n 3) 117.
185 Kyriakakis (n 3) 118. 186 ibid. 119.
188 ibid. 534–5.
189 Keenan (n 187) 537. 190 Harwell (n 6).
192 ibid. 320; Carranza Interview (n 174); Schabas (n 3) 14–15.
Commission included within its mandate the examination of economic crimes, such as grand corruption, irregular land acquisitions, and exploitation of natural resources.\(^{194}\) In addition, the role of business is rarely scrutinized by these commissions.\(^{195}\) Without transitional justice mechanisms addressing the economic aspects of conflict, they too forego the possibility to establish a more complete narrative.\(^{196}\)

It is therefore not surprising that there have been calls to establish so-called economic truth commissions.\(^{197}\) Whether separate economic truth commissions will receive traction has yet to be seen. It is also uncertain whether scrutinizing economic wrongdoings in separate commissions (as opposed to being part of truth and reconciliation more broadly) will ultimately help mainstream accountability for economic crimes. It is possible that separate economic truth commissions may solidify the narrative of economic crimes—and the associated violations of economic, social, and cultural rights—as secondary to the violations of political and civil rights.\(^{198}\) Another option, aside from separate economic truth commissions, could be a single truth commission with separate chambers for violations of civil and political rights and for economic crimes.\(^{199}\) One benefit of separate commissions would be that these could potentially address one of the most important aspects of economic crimes: asset recovery.\(^{200}\) While asset recovery should not be the primary focus of these commissions, they may be able to take steps towards this objective through establishing a narrative for the atrocities that have taken place, adequately accounting for economic misdeeds.\(^{201}\)

The International Commission against Impunity (‘CICIG’) in Guatemala is an interesting hybrid body. Established at the behest of Guatemalan authorities and operating through the national courts, it is an international body investigating ‘corruption as an instrumentality of organized crime and human rights violations’ cases in Guatemala, with a specific focus on security forces.\(^{202}\) Such a hybrid body, perhaps with a specific focus on economic crimes, including those related to natural resource exploitation, represents an option for states to take steps towards prosecuting those who have committed the worst of the atrocities, while also building the foundation for strong asset recovery cases.

To the extent that truth commissions take on economic crimes, attention will need to be paid to ensuring the commission has the necessary expertise. Most truth

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\(^{195}\) Carranza, ‘Pain and Plunder: Should Transitional Justice Engage with Corruption and Economic Crimes?’ (n 174) 320; Kyriakakis (n 3) 117.

\(^{196}\) Schabas (n 3) 3, 14; Carranza Interview (n 174); Carranza, ‘Pain and Plunder: Should Transitional Justice Engage with Corruption and Economic Crimes?’ (n 174) 319–20.

\(^{197}\) Harwell (n 6). Arguing for separate economic truth commissions, Professor Carranza asserts that such a commission ‘can link human rights violations involving physical integrity—torture, killing, disappearances, sexual violence and displacement—with the motivation of gaining financial advantage or preserving impunity for corrupt or repressive regimes’, thereby examining their mutually reinforcing relationship. Carranza Interview (n 174).

\(^{198}\) Harwell (n 6). ibid. ibid. ibid.

commissions lack the kind of expertise that is needed for efficient recovery and repatriation of looted assets.\textsuperscript{203}

6.4 Conclusion: Alternative Avenues for Accountability and Prevention

War crimes trials, including prosecutions for pillage, as well as alternative mechanisms of accountability, such as truth commissions, are integral to the \textit{jus post bellum} legal landscape. Their role is to provide justice and accountability; and where there is a particular risk of conflict recurrence, they play an essential role in building a lasting peace. The normative necessity for war crime trials has been reaffirmed by a number of theorists.\textsuperscript{204} According to Richard DiMeglio, war crimes trials are necessary to provide a remedy for violations of \textit{jus ad bellum} and \textit{jus in bello} as well as to serve as deterrent.\textsuperscript{205} War crimes trials are also important in terms of establishing closure and addressing grievances, and thus forging the path towards lasting peace.\textsuperscript{206}

Yet, as critics note, it is problematic to equate these trials with justice, especially considering that the narrative that they provide is often far from being complete.\textsuperscript{207} While such trials may be an important tool in providing accountability, just by reason of their limited resources and thus necessarily incomplete focus, paired with their marginalization of the economic dimensions of conflict, it must be recognized that they cannot in and of themselves provide the kind of justice and closure that is sought in post-conflict societies. The kind of selectivity in terms of prosecution seen to date, and not solely in terms of the crimes that are pursued, but also in terms of the actors that are put on trial, is indicative of the inability—in their current form and with the current focus—of international criminal law to address all of the key issues of justice in the aftermath of conflict. This lacuna is illustrated by the clear absence of any form of corporate accountability in international criminal tribunals. Moreover, the selectivity of international criminal tribunals in terms of the countries of origin of persons having been or being prosecuted has also generated criticisms, mostly from the global South.\textsuperscript{208}

The selective focus of international criminal law is all the more problematic when we consider that achieving durable, sustainable peace must necessarily be one of the goals of any \textit{jus post bellum} framework. If economic crimes—and in particular economic crimes relating to the illegal exploitation of natural resources—indeed lie at the root of many of our most current and recent violent conflicts, the lack of a comprehensive effort to address and disrupt these toxic processes results in impunity for many of the worst offenders and will result in continued conflicts over resources and continued


\textsuperscript{204} See, for example, Kellogg (n 81); Gary J. Bass, ‘Jus Post Bellum’ (2004) 32 Philosophy and Public Affairs 384; DiMeglio (n 80); See also Larry May, After War Ends: A Philosophical Perspective (New York: Cambridge University Press, 2012), 67–70.

\textsuperscript{205} DiMeglio (n 80) 154.

\textsuperscript{206} ibid. 153.

\textsuperscript{207} Kyriakakis (n 3) 128–9.

\textsuperscript{208} ibid. 137.
international trade in conflict resources. Moreover, the perception of justice is just as important as justice itself. Much like corruption is measured by perception, the same can be said to apply to justice. Without fair, equitable, and equal justice for all, there can be no long-term resolution to conflict. As Brian Orend notes, a just ending to a conflict must necessarily encompass: (1) rolling back aggression and reestablishing the integrity of the victim of aggression as a rights-bearing political community; (2) punishing the aggressor; and (3) in some sense deterring future aggression, notably with regard to the actual aggressor but perhaps also, to some extent, other would-be aggressors.\(^{209}\)

In addition, prosecutions can present an important step towards the recovery of assets squandered and plundered away. These assets, once recovered, could be instrumental in rebuilding and recovery efforts. The repatriation of assets could also help these societies to provide much needed funding for transitional justice mechanisms, without the need to rely solely on international assistance.\(^{210}\)

The regime of international criminal law, while often effective, is unable and at times unwilling to reach every aspect of a conflict, nor should it be expected to be a panacea of sorts. However, the economic dynamics that so often motivate, enable, and sustain armed conflict (and its associated war crimes and crimes against humanity) are glaring and serious omissions. This omission means that the necessary resolution and closure is unmet, as are expectations of fulfilling the requirements of justice and accountability. It is necessary therefore to reach beyond the possibilities of international criminal law as it currently stands. One option is to complement international criminal law with other avenues in an effort to terminate the link between natural resource exploitation and conflict. The more effective use of human rights mechanisms in the post-conflict period, as well as the application of the collective security regime—such as targeted UN sanctions—may be necessary, depending on the particular context, to curb the pillage of natural resources. Pillage of natural resources cuts across sectors and by its nature impacts human rights, can cause environmental degradation, and results in the depletion of natural resources, depriving societies of critical assets for reconstruction and development through corruption, the use of illicit financial flows and money laundering, thereby undermining the economic health of entire nations.

The law of pillage presents an as-yet underutilized tool for addressing conflict resources. To improve its application as part of *jus post bellum*, it is necessary to address temporal considerations, the relationship to the law of occupation, the scope of actors to whom pillage would apply, and the legal and practical implications of approaching pillage as an economic war crime.

\(^{209}\) Orend, as quoted in DiMeglio (n 80) 140.