Atrocity, Commerce and Accountability: Corporate Responsibility for International Crimes

James Graham Stewart

Submitted in partial fulfillment of the
requirements for the degree of
Doctor of the Science of Law
in the School of Law

COLUMBIA UNIVERSITY
2013

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ATROCITY, COMMERCE AND ACCOUNTABILITY: THREE ESSENTIAL FOUNDATIONS

This essay brings together three papers I have completed for the JSD degree at Columbia Law School, situating them within a wider project on corporate responsibility for international crimes. In recent decades, the prospect of holding corporations and their representatives responsible for international crimes has emerged as an important component of a number of interlinked fields. While these ideas have become widely acknowledged, the scope of the relationship between commerce and international criminal justice has remained poorly understood among theorists and seldom implemented in practice. In large part, both these phenomena result from a lack of familiarity with the diverse fields one must traverse in order to speak with any degree of confidence about the role of international criminal justice as a means of regulating globalized markets. In what follows, I introduce how my work for the JSD has explored three different but necessary areas of law that underpin these analyses. Specifically, this final essay provides a narrative of how this work emerged for me, the normative hypotheses that have informed my JSD, and the three core projects I have undertaken in international criminal law, the theory of complicity, and corporate criminal liability to move this agenda forward.

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I. INTRODUCTION

In April 2000, I arrived in Rwanda to work with a prosecution team at the International Criminal Tribunal for Rwanda (ICTR). Over the course of six months, I interviewed perpetrators of the Rwandan Genocide crammed into horrifically overcrowded prison cells, listened to the testimony of victims of mass rape who had seen their families massacred, and waded through mass graves where tens of thousands of bodies were preserved in lime for UN investigators. The experience in Rwanda was jarring, incongruous, filled with terrible ironies. After one mission, I stayed on with a set of Rwanda students at the Université de Butare in the South of Rwanda, to learn that students had murdered professors and professors students. Thumbing through texts in my friends' bookshelves, I discovered that the leading text on public international law in Rwanda was written by an accused in the case I had a hand in prosecuting.

Peculiarities such as these were overshadowed, however, by a more intense contradiction that stayed with me for much longer after leaving Rwanda. At the very same time that I was bearing witness to the aftermath of so much unspeakable violence, remarkably similar atrocities were going on unchecked just across in the Democratic Republic of Congo (DRC). It struck me that there were terrible continuities with the suffering I had witnessed in two important dimensions. First, the violence in the DRC was a physical continuation of the Rwanda genocide, just migrated across the neighboring border. As is well known now, Hutu extremists were displaced when the Rwanda Patriotic Front

militarily intervened to end the Rwandan genocide, but a "counter-genocide" occurred in the DRC in 1996,[1] and the hostilities that ensued thereafter are reported to have killed in excess of 4.3 million civilians, in what Madeline Albright once dubbed Africa's World War.[2]

Second, despite lofty rhetoric and heartfelt apologies after Rwanda, the West again largely left them to it. At the time, this incongruity was no small foible of international relations I could process in the abstract; it was a core challenge to everything I knew. So, in an attempt to exercise some agency over the experience, I resolved that the DRC would become a central component of my ongoing work. As a result of this new commitment, I came to appreciate a range of causal influences on atrocity that my discipline, international criminal justice, failed to meaningfully address—I learned how Joseph Konrad's spectacular novel had entrenched Western perceptions that peace and stability in the DRC were impossible in *the Heart of Darkness*,[3] how the legacies of a brutal Belgian colonial rule had set the stage for much of the bloodletting that presently reigns in the region,[4] about

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[1] No other term in international law is more abused than genocide, but in this instance, the label accurately reflects realities. For more details, see United Nations Office of the High Commissioner for Human Rights, *Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003*, August 2010.

[2] The comparison was meaningful in terms of numbers kill, and attempted to highlight the number of African nations with troops in the DRC. Conservative reports suggest that this totaled at least 11 national armies, all vying for resource allocations. For excellent later works that adopted the phrase, see GERARD PRUNIER, AFRICA'S WORLD WAR: CONGO, THE RWANDAN GENOCIDE, AND THE MAKING OF A CONTINENTAL CATASTROPHE (Reprint ed. 2011).

[3] KEVIN C. DUNN, IMAGINING THE CONGO: THE INTERNATIONAL RELATIONS OF IDENTITY (2003).

[4] ADAM HOCHSCHILD, KING LEOPOLD'S GHOST : A STORY OF GREED, TERROR, AND HEROISM IN COLONIAL AFRICA (1st Mariner Books ed. ed. 1998); For a valuable historical account, but one that replicates Konrad's

the West harvesting all uranium for the Manhattan Project from the nation, then assassinating its first democratically elected leader for unwelcome communist leanings.

Against this backdrop, I read with great interest reports written by a Panel of Experts created by the UN Security Council in 2000, charged with investigating the role of illegal exploitation of natural resources in the DRC, and its role is sustaining a war that had created a mortality rate in the region that was 56 times higher than anywhere else in sub-Saharan Africa. Over the course of three years worth of investigations, that culminated in 7 detailed reports, the Panel of Experts pointed to "win-win situations" for the many belligerents in the DRC, that created strong incentives to resist negotiated peace processes and sustained some of the most egregious human rights violation in modern history. And as things transpire, the DRC was only the most intense manifestation of a globalized phenomenon, whereby illegal exploitation of natural resources had substituted for superpower sponsorship as the predominant means of conflict financing. Blood diamonds, blood oil, blood timber, the list goes on.

Then, something in UN Panel's final report struck, while I was then working as an Appellate Counsel for the Prosecution at the International Criminal Tribunal for the former Yugoslavia (ICTY). Towards the end of the UN Panel's report, the group uses a triangular diagram to depict the interrelatedness of ongoing conflict (characterized by massive human rights violations) and forms of Western commerce. Ongoing atrocity sits at the apex of the

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ultimately unhelpful metaphor, see MICHELA WRONG, IN THE FOOTSTEPS OF MR. KURTZ: LIVING ON THE BRINK OF DISASTER IN MOBUTU'S CONGO (Reprint ed. 2002).

triangle, with illegal exploitation of natural resources in one periphery and illicit weapons flows in the other. Any aggrieved party (and there are many) can harvest natural resources by force, to acquire cash to purchase weapons, to wage war, and therefore, to precipitate more grievance, creating a downward spiral into darkness.

Something immediately struck me. We as prosecutors of international crimes focus too much on the apex of the triangle. We focus too much on prosecuting those actors who are "most responsible" for atrocities, once the carnage has run its course. Rape, torture, murder and displacement are *de rigeur* for prosecutors, many of whom struggle with doubts that all this legal theatre is far too little far too late. Better to intervene earlier in the trajectory of an atrocity, by focusing on the two peripheries of the triangle, reaching out to the enablers of mass violence before their influence is left to run its terrible course. At the end of the final report, the UN Panel named 84 Western companies as having engaged with the illegal exploitation of natural resources, from diamonds to gold, coltan and timber, so the immediate question was, why are we blind to the responsibility of these actors?

Like other jarring inconsistencies that troubled me, that question was all the more peculiar given the history of international criminal justice. At Nuremberg, a host of businesspeople were prosecuted for sustaining the Nazi apparatus, often in terms that that seemed intuitively analogous to someone who had a then superficial understanding of the Congolese cases. Weren't representatives from IG Farben, Flick and Krupp prosecuted for pillaging natural resources from occupied France, Poland and beyond, in ways that could shed some light on avenues for holding contemporary equivalents accountability for their

role in massive international violence?[5] Likewise, the vendors of the chemicals used at Auschwitz were prosecuted as accomplices, no?[6] If this is right, what ramifications for the global market in weaponry, and its causal impact on the killing fields in the DRC? As I will soon show, I have used this JSD to do the groundwork necessary to answer these questions.

By strange serendipity (or maybe fate), the International Committee of the Red Cross (ICRC) later asked me to write a brochure for public consumption detailing the obligations contained in the laws of war for businesses and their representatives.[7] While the final product touched on both the weapons and extractive sectors, it also introduced a third industry that had proved spectacularly difficult to regulate. In 2005, when I worked for the Legal Division of the ICRC, the privatization of military into Private Military Companies (PMCs) was a major preoccupation. The concern was that the commercialization of violence broke the chain of command, which had proved so essential in ensuring compliance with the laws of war. Indeed, a substantial study of behaviors during war that the ICRC itself had commissioned, suggested that the very best way of ensuring respect for the laws of war was "not to persuade that combatant to behave differently or abide by his

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[5] The distaste for comparisons with Nazi Germany has proved one of the factors that resist many ideas in this thesis. While I acknowledge the distinctiveness of the Nazi Holocaust, I do think the comparison with modern events in the DRC is meaningful, both as a matter of fact and law.

[6] See United Nations War Crimes Commission, Trial of Bruno Tesch and Two Others "The Zyklon B Case", *1 Law Reports of Trials of War Criminals* 93.

[7] The final version (alas, edited by higher-ups) is available online at International Committee of the Red Cross, BUSINESS AND INTERNATIONAL HUMANITARIAN LAW: AN INTRODUCTION TO THE RIGHTS AND OBLIGATIONS OF BUSINESS ENTERPRISES UNDER INTERNATIONAL HUMANITARIAN LAW, http://www.icrc.org/eng/resources/documents/misc/business-ihl-150806.htm (last visited Nov 25, 2010).

personal convictions, but to influence those who have ascendancy over him".[8] How could we do this within a PMC?

In international criminal law, superior responsibility usually performs this task. After the end of WWII, a US military court famously tried a Japanese General named Japanese General Tomoyuki Yamashita for failing to adequately prevent or punish subordinates' crimes carried out during the Rape of Nanking.[9] Having spent several years as a prosecutor arguing, sometimes successfully, that this same doctrine adequately captured the responsibility of Serb military leaders, Rwandan politicians and, in more than one case, acts of civilian leaders, it struck me that international criminal justice might have some role in ensuring accountability within modern PMCs. To return to one of my core themes, perhaps holding directors of PMCs and those who contract them responsible as superiors allows international courts to play a role in preventing atrocities by their underlings, prior to their realization. This, of course, paralleled my ambitions for international criminal law in other sectors.

Then, in 2008, a group of 17 states formally vindicated this thesis. Under the auspices of what has come to be known as the Montreux Document, these states agreed that "[s]uperiors of PMSC personnel, such as: (a) governmental officials, whether they are military commanders or civilian superiors, or (b) directors or managers of PMSCs, may be

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[8] ICRC, *The Roots of Behaviour in War: A Survey of the Literature* (2004), at 110. available online at http://www.icrc.org/eng/resources/documents/publication/p0854.htm

[9] In Re: Yamashita 327 U.S. 1, 15 (1946). For a detailed history of the case, see RICHARD L. LAEL, THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW (1982).

liable for crimes under international law committed by PMSC personnel under their effective authority and control, as a result of their failure to properly exercise control over them, in accordance with the rules of international law."[10] Abstract statements like this certainly lent helpful support to my claim, but they did little to substantiate how existing law governing superior responsibility would intersect with corporate practices, whether this novel application of the doctrine could be squared with liberal notions of punishment, or what the implications would be for established understandings of director liability around the world.

With this history in mind, I set out to explore the new intersections between commerce, corporate structures and international criminal justice, harboring all the while, an intuition that this new focus could have important implications for the prevention of atrocities and the role of international criminal justice in the modern era. In the remainder of this Essay, I divide the work I have done under the auspices of my JSD into two separated parts. In Part II, that immediately follows, I set out eight hypotheses that have animated my initial thinking about this issue, which form the centerpiece of my ongoing work in this area. In Part III, I provide an overview of the three papers I have authored for the JSD, showing how they are each essential in my ability to test the hypotheses set out in Part II. This process will reveal how my JSD work involves three very distinct fields, each of which is foundational to this project.

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[10] See *The Montreux Document on Private Military and Security Companies*, 17 September 2008, available online at:

http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/psechi.html (visited 3 January 2010).

II. Conceptual Hypotheses

At the beginning of my JSD, I explored the possible consequences of holding companies and their representatives responsible for international crimes. Through that initial process, I isolated a set of eight themes or working hypotheses that I could test while assessing the scope of liability in each of the sectors that interested me. In other words, I frontloaded research into each of these thematic areas, such that they could remain touchstones as my work on the broader project unfolded. While very few of these themes have featured explicitly in my JSD work, they form central points of reference in my ongoing exploration of the intersection between commerce, accountability and international criminal law. With my JSD behind me, and tenure decisions pending, I now intend to bring this material together in book form. In what follows, I provide a concise overview of these eight themes, in ways that shed light on the wider relevance of the work I have completed for this degree.

a. Criminal Liability of Corporate Actors for International Crimes

Initially, I hypothesized that the responsibility of corporations for international crimes would offer important insights to corporate criminal liability generally. At the point

I began this project, a range of policy-based organizations,[11] academics,[12] and the then ICC Prosecutor[13] had highlighted the possibility of international criminal responsibility of business representatives or their companies, but in negotiating the literature of corporate criminal theory, I discovered that it was far too conceptually limited to cope with the demands these actors sought to place on it.[14] All sides of the sometimes very polarized debate about the propriety of corporate criminal liability assumed that companies operate within a single perfect jurisdiction, ignoring the fact that some carry out business in foreign conflict zones. From the beginning then, I sensed that corporate responsibility for

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[11] For policy related research, see FAFO Institute and the International Peace Academy, *Business and International Crimes: Assessing the Liability of Business Entities for Grave Violations of International Law*, available online at http://www.fafo.no/liabilities/index.htm (visited 3 January 2010); International Commission of Jurists, *Report of the Expert Legal Panel on Corporate Complicity in International Crimes,* (2008) http://www.business-humanrights.org/Updates/Archive/ICJPaneloncomplicity (visited 3 January 2010).

[12] See A. Clapham, 'The Question of Jurisdiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference on a International Criminal Court', in M. Kamminga and S. Zia-Zarifi (eds), *Liability of Multinational Corporations Under International Law* (The Hague: Kluwer Law International, 2000); C. Chiomenti, 'Corporations and the International Criminal Court', in O. De Schutter (ed), *Transnational Corporations and Human Rights* 287 (Oxford: Hart Publishing, 2006); J. Kyriakakis, 'Corporations and the International Criminal Court: the Complementarity Objection Stripped Bare', 19(1) *Criminal Law Forum* (2008) 115-151.

[13] ICC Press Release, 'Communications Received By The Office Of The Prosecutor Of The ICC' (ICC-OTP-20030716-27) 16 July 2003, available online at http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2003/press%20conference%20of%20the%20prosecutor%20_%20press%20release (visited 3 January 2010). See also, Mr L. Moreno-Ocampo, 'Second Assembly of States Parties to the Rome Statute of the International Criminal Court, Report of the Prosecutor of the ICC', 8 September 2003, available online at http://www.icc-cpi.int/NR/rdonlyres/C073586C-7D46-4CBE-B901-0672908E8639/143656/LMO_20030908_En.pdf (visited 3 January 2010).

[14] For example, R. Posner, *Economic Analysis Of Law* (5th edn., New York: Little, Brown & Co., 1998), at 464; V. Khanna, 'Corporate Criminal Liability: What Purpose Does It Serve?', 109 *Harvard Law Review* (1996), 1477–1534; L. Friedman, 'In Defense of Corporate Criminal Liability', 23 *Harvard Journal of Law & Public Policy* (2000) 833-859. J. Coffee, '"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment', 79 *Michigan Law Review* (1981) 386-459 at 410; B. Fisse & J. Braithwaite, *Corporations, Crime And Accountability* (Cambridge: Cambridge University Press, 1993) at 36; C. Wells, *Corporations and Criminal Responsibility*, (2nd edn., Oxford: Oxford University Press, 2001) at 52.

international crimes also had something to offer perceptions of corporate crime generally. This intuition later formed the basis of my third article for the JSD degree.

b. Beyond Transitional Justice: International Criminal Liability as an Element of Global Governance

Exponents of "Transitional Justice" frequently view international criminal justice as merely one means of promoting reconciliation between previously warring factions after some political transition on the ground. [15] From an historical perspective, the description is understandable because the vast majority of international criminal prosecutions have taken place in societies attempting to address the impact and transcend the causes of recent violent histories.[16] But, by employing examples of the contemporary liability of corporate actors for international crimes, I hoped to illustrate how this conception of international justice is too restrictive—international criminal law is more than a simple tool for reconciling warring parties or precipitating societal change during a time of post-conflict transition; the discipline is part of an increasingly robust system of global governance that

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[15] See R. Teitel, *Transitional Justice* (New York: Oxford University Press, 2000); C. Stahn, 'The Geometry of Transitional Justice : Choices of Institutional Design*,'* , 18(3) *Leiden Journal of International Law* (2005), at 425-466; W. Schabas, 'Conjoined Twins of Transitional Justice?: the Sierra Leone Truth and Reconciliation Commission and the Special Court,' 2 *Journal of International Criminal Justice* (2004) 1082-1099.

[1616] G. Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton: Princeton University Press, 2000), at 8-20; G.J. Simpson et al (eds), *The Law of War Crimes: National and International Approaches* (The Hague: Kluwer Law International, 1997); M. Drumbl, *Atrocity, Punishment and International Law* (New York: Cambridge University Press, 2007).

applies to certain actors regardless of whether there is political transition on the ground. If there is a meaningful relationship between commerce and international criminal law, especially in the sectors that interest me, I hoped to show how this relationship revealed that Transitional Justice and International Criminal Justice come apart, with significant consequences for both.

b. International Criminal Justice as a Means of Affecting the Course of Ongoing Violence

Historically, international criminal trials had always followed the military defeat of one warring faction, perpetuating a perception that international criminal justice might still be synonymous with "victor's justice."[17] The new possibility posed by a permanent International Criminal Court, combined with increasingly engaged domestic courts,[18] is that international criminal justice (in the broad sense of also encapsulating domestic trials) can influence the course of continuing violence. As the once Prosecutor of the ICC acknowledged (in terms that are slightly oxymoronic), "[my] Office is part of a new system

[17] For two apt examples, see M. Koskenniemi, 'Between Impunity and Show Trials', in J.A. Frowein, R. Wolfrum (eds.) 6 *Max Planck UNYB* (The Hague: Kluwer Law International, 2002) 1-35; A. Garapon, *Des crimes qu'on ne peut ni punir ni pardoner* (Paris: Odile Jacob, 2002), chapitre 2.

[18] For a detailed review of the avalanche of cases national courts have suddenly brought forward after a long period of almost total stasis, see KATHRYN SIKKINK, THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS (1 ed. 2011).

dealing with a complex new reality: transitional justice during ongoing conflicts."[19] A working hypothesis of my JSD, derived from my early experience in the DRC, is that these cases against corporations could typify this new trend. Law enforcement agencies could prioritize the prosecution of corporate crimes that fuel armed violence in a bid to extinguish ongoing hostilities, as distinct from simply punishing acts of rape, torture and murder once the violence has burned out. The prior question, though, which my JSD needed to resolve, was whether these sorts of cases in the specific sectors that might make a difference, are doctrinally feasible and normatively defensible.

c. *A Critique of a Prosecutorial Policy that Focuses Exclusively on those "Who Bear the Greatest Responsibility"*

A large number of international criminal courts and tribunals expressly profess a commitment to only prosecuting those "who bear the greatest responsibility" for crimes within their jurisdiction.[20] As part of my ongoing research agenda, I wanted to use these specific illustrations of corporate liability for international crimes to criticize this commitment, since it seems to deprive international criminal courts of the ability to pursue

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[19] L. Moreno Ocampo, 'Transitional Justice in Ongoing Conflicts,' 1 *International Journal of Transitional Justice* 8-9 (2007); for similar views of another international prosecutor, see R. Goldstone, 'Bringing War Criminals to Justice During an Ongoing War', in *Hard Choices: Moral Dilemmas in Humanitarian Intervention*, J. Moore (ed) (Lanham, MD: Rowman and Littlefield, 1998).

[20] Art. 1(1) Statute of the Special Court for Sierra Leone; ICC Office of the Prosecutor, *Paper on some policy issues before the Office of the Prosecutor*, Sept 2003, at 7. Extraordinary Chambers in the Courts of Cambodia Internal Rules (Rev.4) as revised on 11 September 2009, Preamble, available online at http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3D& (visited 3 January 2010).

corporate actors during hostilities—corporate actors who fuel violence are seldom more responsible than the leaders who instigate atrocities. And yet, businesses have important causal influences on atrocities, are more easily apprehended and appear more likely to be deterred by the threat of criminal sanction than armed groups.[21] Consequently, if existing international criminal law could be applied to corporations in a principled fashion, this might furnish strong grounds for re-questioning a seemingly well-accepted position on prosecutorial discretion.[22] Once again, I needed to remain sensitive to this issue from the outset, as I pursued core questions about corporate responsibility.

d. Prosecuting Corporate Actors to Overcome Perceptions of Geographical Bias

The enforcement of international criminal justice is increasingly perceived as geographically biased. At the same time that I was embarking upon this JSD degree, African leaders began to voice this criticism very openly. At least one African president, for instance, publicly denounced the ICC as "a new form of imperialism created by the West to

[21] Although deterrence is empirically problematic, rebel groups cannot be deterred by the prospect of international criminal liability, since they are already perpetrating a range of criminal offences in domestic law by waging rebellion. In this light, evidence that corporate actors are deterred by the threat of criminal liability at all is significant. In this regard, see S. Simpson, *Corporate Crime, Law, and Social Control* (New York: Cambridge University Press, 2002), at 22–44; See also T. Makkai and J. Braithwaite, 'The Dialectics of Corporate Deterrence' 31 *Journal of Research in Crime and Delinquency* (1994) 347-373; D. Thornton et. al, 'General Deterrence and Corporate Environmental Behavior' 27 *Law & Policy* 262 (2005) 262-288; J. Gobert and M. Punch, *Rethinking Corporate Crime* (Bath: Butterworths, 2003), at 292-296.

[22] For instance, see A. Danner, 'Enhancing the legitimacy and accountability of prosecutorial discretion at the International Criminal Court,' 97(3) *American Journal of International Law* (2003) 510-552; L. Côté, 'Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law' 3 *Journal of International Criminal Justice* (2005) 162-186; M. Brubacher, 'The Development of Prosecutorial Discretion in International Criminal Courts,' in E. Hughes et al. (eds) *Atrocities and International Accountability : Beyond Transitional Justice* (Tokyo: United Nations University Press, 2007).

control the world's poorest countries."[23] Although I find claims of this sort obviously overstated, the accusations are not entirely without foundation—the ICC has indicted the sitting President of Sudan and the former Vice-President of the Democratic Republic of Congo for pillage, while numerous western business representatives alleged to have perpetrated the same offence (in the same conflicts, with much more serious repercussions) escape all scrutiny. There was, therefore, a pressing need to explore opportunities to progressively overcome these perceptions of bias. As Mirjan Damaška has rightly argued, "the task of international criminal courts is to make incremental headway to-ward a system unstained by the flaw of selectivity."[24] As I set about testing when and how corporations and their officers could be responsible for international crimes at all, I hypothesized that these cases could be a realistic example of achieving this incremental headway, thereby adding to international criminal law's legitimacy.

[23]See AFP, 'Rwanda's Kagame says ICC Targeting Poor, African Countries', Jul 31, 2008 available online at http://afp.google.com/article/ALeqM5ilwB_Zg00Jx3N9hSX-Wu8zEyQGig (visited 3 January 2010).

[24] M. Damaška, 'What is the Point of International Criminal Justice?,' 83 *Chicago-Kent Law Review* (2009) 329-365 at 362. But see, for skepticism about the possibility of international criminal law being anything other than highly selective, F. Mégret, 'The Creation of the International Criminal Court and State Sovereignty: the "Problem of an International Criminal Law" re-examined,' in J. Carey, W.Dunlap, R. Pritchard (eds) *International Humanitarian Law* (Ardsley, N.Y.: Transnational Publishers, 2006).

e. Corporate Prosecutions as a Potential Source of Finance for International Prosecutions

International criminal justice is very expensive. The two ad hoc UN international tribunals alone are estimated to have claimed roughly 15 percent of the United Nations annual budget, with a projected cost of around $25 million per case.[25] While others have suggested that these expenses may be in step with the costs of law enforcement domestically,[26] the reality is that international courts frequently operate under of cloud of severe uncertainty about future sources of funding, as states pull back from their massive initial investment in ad hoc tribunals. For but one example, staff at the Extraordinary Chambers for Cambodia recently had to protest over unpaid wages.[27] All this suggests that, at present, our ability to stage trials is heavily dependent on the beneficence of wealthy first world states, raising the specter of "donor's justice."[28]

And yet, seizing assets derived from crimes perpetrated on the financial side of atrocities may be able to undermine this dependence—international and domestic courts could use civil or criminal forfeiture laws to generate an income stream that finances

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[25] UN SC, The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies, Report of the Secretary-General, UN Doc. s/2004/616 (2004); Mark Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity* 99 NW. U. L. REV. 539 (2005) (calculating average cost of trials as $25 million per case).

[26] David Wippmann, *The Costs of International Justice*, 100 AM. J. INT'L L. 861–881 (2006).

[27] http://ilawyerblog.com/eccc-staff-protest-over-unpaid-wages/

[28] Sara Kendall, *Donors' Justice: Recasting International Criminal Accountability*, 24 LEIDEN J. INT. L. 585–606 (2011).

accountability.[29] To return to Cambodia, the illegal exploitation of timber bankrolled the Khmer Rouge towards the end of its rein of terror, and much detailed investigation has plotted the corporate actors involved.[30] So while at least one international court has begun the process of tracing then seizing assets of international criminals,[31] there is much unexplored scope for harnessing these procedures for corporate international crimes particularly. I respect, of course, that there may be conceptual limitations on the ways in which forfeited assets might be disbursed within a justice system, but I hypothesize that, within certain bounds, focusing more on corporate implication in the financial side of atrocities may create a system of international justice that is self-financing.

Once again, much of this hinges on the prior question of whether trials against commercial defendants are conceptually plausible.

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[29] For excellent comparative overviews of this law, see TREVOR MILLINGTON & MARK SUTHERLAND WILLIAMS, THE PROCEEDS OF CRIME (3d ed., 2010); JEAN-PIERRE BRUN ET AL., WORLD BANK, ASSET RECOVERY HANDBOOK: A GUIDE FOR PRACTITIONERS (2011); CIVIL FORFEITURE OF CRIMINAL PROPERTY: LEGAL MEASURES FOR TARGETING THE PROCEEDS OF CRIME (Simon N.M. Young ed., 2009).

[30] Phillippe Le Billon, *The Political Ecology of Transition in Cambodia 1989-1999: War, Peace and Forest Exploitation,* 31 DEVELOPMENT AND CHANGE 785 (2000); GLOBAL WITNESS & FAFO INSTITUTE, THE LOGS OF WAR, 17-22 (Mar. 1, 2002) available at http://www.globalwitness.org/media_library_detail.php/89/en/the_logs_of_war [hereafter *Logs of War*].

[31] Doreen Carvajal, *Hunting for Liberia's Missing Millions*, THE NEW YORK TIMES, May 30, 2010, http://www.nytimes.com/2010/05/31/world/africa/31taylor.html?pagewanted=3&ref=global-home (last visited Jun 1, 2010).

f. Corporate Prosecutions as Incentives for Greater Compliance by Armed Groups with the Laws of War

Another of my working hypotheses that developed during the initial phases of the JSD relates to theories of compliance with the laws of war, and the ways in which focusing on corporate actors could offer very new incentives for *military groups* to respect IHL. In general, there are three theoretical explanations for why military groups comply with IHL norms: the first points to the overlap between morality and the law of war;[32] the second supposes that only reciprocity could motivate armed groups to comply;[33] and the third, more recent, posits that the warring factions respect the laws of war in order to ensure internal discipline.[34] And yet, I hypothesize that my research raises a novel fourth way. Each of my case studies raises the possibility of creating strategic advantages for warring factions to comply with the laws of war, since failing to do so will deter the corporate enablers that they interact with in order to acquire necessary finances.

Take the accomplice liability of arms vendors, in conjunction with the widely acknowledged incidence of rape in the Democratic Republic of Congo (to return to a

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[32] MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 125–133 (2006); LARRY MAY, WAR CRIMES AND JUST WAR 2–8 (2007).

[33] See in particular, Eric A Posner, *A Theory of the Laws of War*, 70 U. CHI. L. REV. 297 (2003).

[34] EYAL BENVENISTI & AMICHAI COHEN, WAR IS GOVERNANCE: EXPLAINING THE LOGIC OF THE LAWS OF WAR FROM A PRINCIPAL-AGENT PERSPECTIVE (2013), http://papers.ssrn.com/abstract=2199016 (last visited Feb 15, 2013).

central influence). By prosecuting the arms suppliers for complicity in rape,[35] criminal courts and tribunals can signal that if rebel groups do not discontinue the widespread practice, it will be more difficult for them to acquire weaponry, and they will lose the war. So while there is much political concern for systematic rape in the DRC, a variety of suggestions for addressing the problem, and a considerable body of scholarly literature on the topic,[36] the complicity of arms vendors goes unnoticed in these debates. As such, I hypothesize that this project presents a new strategy for leveraging compliance with the laws of war, creating incentives for the discontinuation of ongoing atrocities in the DRC at an even deeper level than I first imagined.

g. "By Far the Most Consequential System of Law": International Criminal Law and Corporate Social Responsibility

In 1999, the then UN Secretary General Kofi Annan, declared that "[t]ransnational companies have been the first to benefit from globalization. They must take their share of responsibility for coping with its effects." While these sentiments have made Corporate

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[35] I accept that accomplice liability of arms vendor for rape will sometimes be practically difficult and normatively suspect, but it will also be appropriate under certain circumstances. For a practical illustration, see Charles Taylor's recent conviction for rape as a result of supplying weapons to the RUF in Sierra Leone.

[36] The problem is recognized widely. See, Clinton demands end to Congo rape, BBC, August 11, 2009, http://news.bbc.co.uk/2/hi/8194836.stm (last visited Feb 15, 2013); And yet, to my knowledge, there is a real paucity of projects that seek to deal with the problem. For more on the topic, see JANIE L. LEATHERMAN, SEXUAL VIOLENCE AND ARMED CONFLICT (1 ed. 2011); FIONNUALA NÍ AOLÁIN, DINA FRANCESCA HAYNES & NAOMI CAHN, ON THE FRONTLINES: GENDER, WAR, AND THE POST-CONFLICT PROCESS (2011).

Social Responsibility (CSR) a growth industry over the past decades,[37] many are still despondent that avenues for corporate accountability for violations of international law are either weak or illusory.[38] One of the core difficulties that inhibits this aspiration stems from limitations with the branch of international law CSR draws on to measure standards of good corporate citizenship globally. At least traditionally, international human rights norms only bind states. In the words of one leading author, "in international human rights law, the prime duty-bearer is the state. No human rights treaty imposes any direct obligations on any other entity."[39] As I have argued within my JSD, international criminal law overcomes this limitation, since these criminal norms automatically bind individual businesspeople (and, by coupling with domestic criminal statutes, their corporations). Unsurprisingly, this reality led John Ruggie, the United Nations Special Representative on to the Secretary General on Business and Human Rights, to conclude his mandate with the statement that corporate responsibility for international crimes was "[b]y far the most consequential legal

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[37] SARAH JOSEPH, CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION (2004); DAVID KINLEY, CIVILISING GLOBALISATION: HUMAN RIGHTS AND THE GLOBAL ECONOMY (1 ed. 2009); PHILIP ALSTON, NON-STATE ACTORS AND HUMAN RIGHTS (2005).

[38] See, for instance, *Joint Civil Society Statement on the draft Guiding Principles on Business and Human Rights – 2011*, January 2011, available online at http://www.escr-net.org/docs/i/1473602 (detailing criticisms of 125 NGOs).

[39] Sarah Joseph, *Taming the Leviathans: Multinational Enterprises and Human Rights*, 46 NETHERLANDS INTERNATIONAL LAW REVIEW 171–203, 175 (1999). And although a great deal of important work has undermined the state-centric focus of human rights obligations, Muchlinski is correct when he laments that "[d]espite the convincing arguments for extending responsibility for human rights violations to TNCs, the legal responsibly of TNCs for such violations remains uncertain."Peter T. Muchlinski, *The Development of Human Rights Responsibilities for Multinational Enterprises*, *in* CORPORATE SOCIAL RESPONSIBILITY: READINGS AND CASES IN A GLOBAL CONTEXT , 238 (Andrew Crane, Dirk Matten, & Laura Spence eds., 1 ed. 2007); For the contrary argument, see ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS (1 ed. 2006).

development."[40] Therefore, I anticipate that if viable as a matter of international criminal justice, the case studies that interest me would add much that is presently missing in CSR.

III. THE THREE FOUNDATIONAL ARTICLES COMPLETED

In what follows, I provide an overview of the three articles I wrote for the JSD, rehearse their significance, and explain why they were necessary to substantiate the hypotheses that inspired this research.

a. First Article – Corporate Pillage Revived

My first article for the JSD is entitled *Corporate Pillage Revived*. This article presents the first legal analysis of commercial liability for the war crime of pillage. Plotting this interrelationship was essential. True, a range of businesspeople were prosecuted for this war crime for illegally exploiting oil, coal, manganese and "cut and uncut stones", after WWII, but how would modern courts called to hear these charges address this law? This seemed significant, given that these cases would mark a new marriage between a wide

[40] John Gerard Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM. J. INT'L L. 819–840, 30 (2007).

range of legal fields, including criminal law, the laws of war, comparative mining law, public international law of recognition and corporate criminal liability. How could I test my hypotheses without first identifying the applicable law? This article undertook that initial work.

i. The Article's Significance

Although the DRC was my initial inspiration for this research, it soon emerged that the Congo was merely the worst example of a globalized phenomenon. Since the end of the Cold War, illegal exploitation of natural resources had substituted for superpower sponsorship as the predominant means of conflict financing in countries as diverse as Sierra Leone, Burma and Papua New Guinea.[41] The availability of artisanal resources, such as diamonds and gold, have allowed any aggrieved group to bankroll armed violence indefinitely. In places where rule of war is painfully absent, this possibility has dominated all other means of internal government, creating a vicious cycle between resource predation and human insecurity that has continued to reproduce much torment.

Prior to this work, legal confusion reined. When a UN Panel of Experts for the DRC denounced a large number of western companies for illegally exploiting natural resources

[41] PHILIPPE LE BILLON, WARS OF PLUNDER: CONFLICTS, PROFITS AND THE POLITICS OF RESOURCES (2012); MICHAEL KLARE, RESOURCE WARS : THE NEW LANDSCAPE OF GLOBAL CONFLICT (1st Owl Books ed. ed. 2002).

in the country, it grounded its allegations on the OECD Guidelines for Multinational Enterprises. This, despite the facts that: the UN reports themselves consistently used the words pillage and plunder; the Congolese government had already set up a "Commission des experts nationaux sur le pillage et l'exploitation illégale des ressources naturelles", and the term had penetrated the Congolese vernacular.[42] Subsequently, Parliamentary Commissions of Inquiry in Belgian, Uganda and the UK dismissed allegations against their corporations on the misinformed basis that there is no international law governing the illegal exploitation of natural resources in conflict zones. This Article has refuted that misnomer by providing a logical framework for understanding the legality of resource exploitation during war.

There are also important scholarly implications. First, the standard view among legal scholars and historians is that only a handful of "industrialists"[43] were tried after Nuremberg—Flick, IG Farben and Krupp particularly.[44] This Article has revealed a whole host of highly valuable cases outside of these well-known classics. For instance, the Nuremberg Tribunal convicted Walther Funk for pillaging oil through a commercial

[42] One popular Congolese rap song refers to western "pillage" of Congolese resources within the refrain. See *Baloji Congo*, available online at http://www.youtube.com/watch?v=wA5_mspsqbc.

[43] I do not care for this term. In my view, its archaic tone is one of the key devices used to distance this history from modern corporations.

[44] See, J. A Bush, *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said*, 109 COLUM. L. REV. 1094–2081 (2009); Allision Marston Danner, *The Nuremberg Industrialist Prosecutions and Aggressive War*, 46 VA. J. INT'L L. 651 (2005).

enterprise named the Continental Oil Company.[45] Likewise, Paul Pleiger, the manager of a company known by the acronym BHO, was found guilty of pillaging 50,000 tons of coal each year from mines located in Poland.[46] The many cases like these reveal a body of precedent that is far more extensive than most believed previously, which has important implications for the viability of prosecuting modern businesspeople for the illegal exploitation of natural resources in contemporary conflicts and the scholarly work around this area.

Second, this body of precedent indicates that subsequent purchasers can be guilty of pillage, without recourse to complicity. This arises because a host of these WWII cases treat receiving stolen property as equivalent to pillage, and modern courts are likely to embrace this position as an embodiment of customary international law.[47] The implications are broad. Complicity, or aiding and abetting, is by far and away the dominant point of focus in discussions about corporate responsibility for human rights violations and

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[45] International Military Tribunal (Nuremberg) Judgment (1946), 1 Trial of the Major War Criminals before the International Military Tribunal 171, 306 (1945) [hereafter *Nuremberg Judgment*]; Representatives of IG Farben were also charged with the pillage of oil as a consequence of their association with the Continental Oil Company, but the court found that the allegations were not proved. Whilst Farben made elaborate plans to plunder Russia, they were never completed and there was inadequate evidence to link Farben to plunder in the Russian theatre. United States v. Krauch et al (I.G. Farben), 8 Trials of War Criminals 1081, 1152 [hereafter *IG Farben*]. Likewise, Keppler, the deputy-chairman of the Continental Oil company, was tried for plundering Soviet oil, but the Court acquitted him stating that "from the evidence, we cannot draw the conclusion that he participated or directed the Continental Oil Company, in its spoliation activities or programs." *U.S.A. v. Von Weizsaecker et al. (Ministries Case)*, 14 Trials of War Criminals 314, 695 (1949) [hereafter *Ministries Case*].

[46] *Ministries Case, supra*, at 741.

[47] Corporate Pillage Revived, pp. 25-29.

international crime.[48] This research highlights the potential for serious criminal liability outside this framework, and questions usual thinking about the bases for corporate liability for international crimes. For instance, a number of prominent theorists have argued that "corporations might in theory commit war crimes or crimes against humanity, but as a practical matter, history does not suggest this is a prevalent practice."[49] A keener appreciation of pillage, however, reveals a very different picture.

Third, corporations can probably already be held responsible for war crimes in many national legal systems. In this Article, I show how states criminalize corporate wrongdoing through one of two techniques: (a) stipulating that corporations are to be treated as "people" within the general part of a comprehensive code that includes war crimes; and (b) passing separate legislation that mandates that every reference to a "person" in other legislation is to be read as including corporations. To some extent, this is a run-around the question presently before the US Supreme Court in Kiobel, where the issue is whether corporations can be held responsible for international crimes in customary international law. That particular issue is thorny, but the controversy does not affect the

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[48] John Ruggie dedicated a major portion of his work to the concept, the UN Global Compact adopts complicity as a (if not the) core idea for the institution, and a prominent Panel of Experts convened by the International Commission of Jurists to explore the liability of corporations for international crimes happily went under the name "The Complicity Panel." See International Commission of Jurists, CORPORATE COMPLICITY & LEGAL ACCOUNTABILITY, (2008) Vols I, II and III. Available online at: http://goo.gl/8Utbd

[49] Steven Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 495 (2001); See also William Schabas, *War Economies, Economic Acts, and International Criminal Law*, in PROFITING FROM PEACE: MANAGING THE RESOURCE DIMENSIONS OF CIVIL WAR 60 (Ballenstine et al. (eds), 2005) [hereafter *PROFITING FROM PEACE*] (arguing that "[g]enerally, though, the role of economic actors is more indirect. For example, while it is widely agreed that trade in diamonds helped to fuel conflict in places like Sierra Leone, unless it can be established that diamond traders were actually accomplices in the atrocities committed against civilians, there is little that existing law can contribute.")

ability of states to try corporations in accordance with the rules of domestic criminal legislation.

There is one principal reason why this is the case. A state is perfectly free to define its criminal law governing corporations in terms that extend customary international law, and states often adopt progressive codifications of this sort when implementing international crimes into domestic law.[50] Consequently, customary international law has no bearing on the legislation set out in the preceding paragraph. As the majority in the US Appeals Court in Kiobel rightly recognized, "[n]or does anything in this opinion limit or foreclose criminal, administrative, or civil actions against *any* corporation under a body of law *other than customary international law*—for example the domestic laws of any State."[51] Thus, corporate criminal responsibility is the obvious next avenue to pursue, if ATS is suddenly closed down.

Finally, this research helped isolate core normative problems, beyond the usual discussions of complicity that dominate scholarly debates in this realm. For instance, the Article highlights how recognition in public international law will have troublesome consequences in the peripheries of the international criminal law governing pillage. How

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[50] For instance, in implementing genocide into domestic criminal law, a number of states have passed legislation that adds protected groups capable of being victims to genocide. For a survey of this legislation, see WARD FERDINANDUSSE, DIRECT APPLICATION OF INTERNATIONAL CRIMINAL LAW IN NATIONAL COURTS, 23–29 (2006). In the context of war crimes, see the intentional extension of grave breaches to non-international armed conflicts in countries like Belgium, even though this goes beyond customary international law. Sonja Boelaert-Suominen, *"Grave Breaches, Universal Jurisdiction and Internal Armed Conflicts: Is Customary Law Moving Towards a Uniform Enforcement Mechanism for All Armed Conflicts?",* Journal of Conflict and Security Law 5 (2000), pp. 89–90.

[51] *Kiobel v. Royal Dutch Petroleum, No. 06-4800-CV, 06-4876-CV, 2010 WL 3611392 (2d Cir. September 17, 2010),* pp. 11–12.

are international courts to respond when faced with a situation of split recognition? Who, for instance, owns natural resources in Biafra when half the states of Africa recognize it as an independent state, whereas the other half insist that Nigeria retains sovereign authority? What of unilateral recognition, when Australia alone recognizes Indonesian sovereignty over East Timor in order to exploit oil within the Timor Gap? These points are vexed byproducts of the international order we live in, which create ambiguities in title of basic property. This Article uncovers these important problems.

ii. Intersection with Conceptual Hypotheses

This Article substantiated many and modified some of my working hypotheses. To start, this research very much corroborates John Ruggie's impression that international criminal justice is "by far the most consequential" legal framing in CSR. There are certainly a range of initiatives geared at dealing with conflict commodities, including the Dodd Franks Act, which requires companies to report their due diligence over conflict minerals in the DRC, Publish What You Pay that also seeks to promote transparency, and complaints before National Contact Points over violations of OECD Guidelines on Multinational Enterprises. But even if each of these initiatives is salutary,[52] none adequately

[52] I confess that I have moments where, inspired by David Kennedy, I wonder if these mechanisms might be part of the problem. See David Kennedy, *International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 101 (2002).

captures the moral responsibility of De Beers in Angola or offers such potent opportunities for accountability.

Moreover, prosecuting corporate actors or their officers for pillage might play a role in many ongoing resource wars. The fact that the crime is defined is such a way that receiving stolen conflict commodities is subsumed within the offense, means that a wide range of actors within resource wars are probably implicated. The difficulty of obtaining evidence during ongoing hostilities is one of the real challenges that limits this hypothesis, but the availability of actors within the supply chain outside warzones does provide new opportunities to safely pursue corporations as a means of affecting violence *in situ*. To this extent, transitional justice and international criminal law do come apart. Pillage, therefore, offers a prime example of how treating the two concepts as coterminous is analytically invalid; amalgamating the two overlooks real opportunities for the discipline to prevent atrocities.

Nonetheless, this hypothesis is qualified by the value of pillage cases as a mechanism for promoting justice well after the hostilities concerned. For example, one of the examples in the Article highlights how the clearly illegal exploitation of natural resources by all range of western companies during the apartheid occupation of Namibia (despite the fact that the UN Council for Namibia and the General Assembly both openly denounced a large number of western companies for the "plunder of Namibian natural

resources"),[53] could well constitute pillage. Given that none of these western companies were ever held accountable, primarily because the Council's attempts to initiate civil proceedings in domestic courts were utterly unsuccessful,[54] there may be real reasons why reconsidering these acts as pillage now enables important historical justice, even though there are no ongoing hostilities in the country. The non-applicability of statutes of limitations has finite implications for individuals, but not corporations—they can live forever. To the extent that cases like these that are brought as part of a transitional justice agenda deter companies in ongoing hostilities, ICL and transitional justice might still go hand in hand.

Finally, some suggest that this project may *undermine* incentives for rebel groups to comply with the laws of war, contrary to another of my initial hypotheses. To recall, I surmised that corporate prosecutions could generate greater incentives for armed groups to comply with the laws of war, by using military goals to leverage compliance with IHL norms. The law of pillage arguably runs counter to these aspirations by violating the principle that IHL should be neutral between the warring parties—rebel groups will never

[53] UN General Assembly, Fourth Committee Report, A/41/726, 17 October 1986, (recalling "that the exploitation and depletion of those resources, particular the uranium deposits, as a result of their *plunder* by South African and certain Western and other foreign economic interests…") (emphasis added); Report of the United Nations Council for Namibia, General Assembly, 41st Session, Supplement No. 24 (A/41/24), ¶ 348 ("Since 1920, CDM has been *plundering* Namibia's gem diamond deposits, which are the most extensive in the world.") (emphasis added).

[54] See *Implementation of Decree No. 1 for the Protection of the Natural Resources of Namibia: Study on the Possibility of Instituting Legal Proceedings in the Domestic Courts of States*, reproduced in 80 Am. J. Int'l L. 442 (1986) (surveying numerous states to determine whether a decree of the UN Council for Namibia was justiciable within national legal systems); See also Nico Schrijver, *The UN Council for Namibia vs. Urenco, UCN and the State of the Netherlands*, 1 LEIDEN J. INT'L L. 25-49 (1998) (discussing the one case that was brought in the Netherlands because it had "fully recognized the Council and its competence to enact the Decree")

be able to comply with the laws governing resource ownership promulgated by governments in capital cities (who may not enjoy better democratic credentials, human rights records, or popular support than the rebel groups they oppose). Although I am presently preparing a criticism of this view, it does give rise to a danger that rebel groups might view the laws of war as alien, rather than inculcating these principles into their quotidian operations. This is one of the many intriguing issues that arises from this work.

b. Second Article – The End of Modes of Liability for International Crimes

Commencing my JSD, I quickly realized that there were foundational issues in criminal theory that I had to understand if I was going to adequately deal with the problem of corporate responsibility for international crimes. Initially, this was slightly daunting—I had to teach myself an entirely different discipline. I had to move away from my background in international law in general, and international criminal and humanitarian law in particular, to familiarize myself with the intricacies of criminal theory and moral philosophy. This shift, however, was indispensible for this project, given that so much of this literature doubted the propriety of using complicity to regulate "normal" business relations.[55] Moreover, using the JSD to educate myself about criminal theory struck me as strategically prudent beyond this project—one of difficulties with the still very new

[55] R A Duff, *"Can I help you?" Accessorial Liability and the Intention to Assist*, 10 LEGAL STUDIES 165–181 (1990); Larry Alexander, *Insufficient Concern: A Unified Conception of Criminal Culpability*, 88 CALIFORNIA LAW REVIEW 931–954 (2000); ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 412 (6 ed. 2009).

discipline of ICL as a whole is that it brings together experts in international and criminal law, often without establishing a common language between the two. This Article marked my decision to span both disciplines.

i. The Article's Significance

In my first article on pillage, I showed how the small amount of literature in this area placed too much emphasis on complicity, ignoring international crimes like pillage that companies perpetrate directly. This said, complicity is undoubtedly enormously important, and is the primary basis upon which arms vendors can be held responsible for the sometimes massive harm their commerce enables. At the same time, it struck me that the very best attempts at articulating the scope of complicity for international crimes were undertaken by prominent experts in fields other than criminal law. These included human rights experts,[56] public international lawyers,[57] experts in the laws of war,[58] journalists,[59] and frequently, human rights organizations[60]—in short, everyone except those trained in

[56] Andrew Clapham & Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses*, 24 HASTINGS INT'L & COMP. L. REV. 339 (2000); Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 NW. UNIV. J. INT'L HUM. RTS. 304 (2007).

[57] HELMUT PHILIPP AUST, COMPLICITY AND THE LAW OF STATE RESPONSIBILITY (2011).

[58] Alexandra Boivin, *Complicity and Beyond: International Law and the Transfer of Small Arms and Light Weapons*, 87 INT. REV. OF THE RED CROSS (2005), http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-859-p467/$File/irrc_859_Boivin.pdf.

[59] Kathi Austin, *Illicit Arms Brokers: Aiding and Abetting Atrocities*, 9 BROWN J. WORLD AFF. 203–216 (2002).

criminal law, from whence the doctrine comes. I therefore set out to produce an article that was more rigorous in its appreciation of international criminal doctrine and criminal theory.

The Article sought to articulate a defensible definition of complicity. It ended as a radical critique of all standards of blame presently applicable within international courts and tribunals, and a criticism of the national standards within most Western criminal systems upon which these international positions are based. Through this process, I discovered that the more complicity becomes conceptually defensible, the more it tends to disappear into a more capacious concept of perpetration. Similarly, all other modes of attribution, such as instigation, superior responsibility and joint criminal liability should also collapse into a unified theory of responsibility. This left me arguing for what Germans call a unitary theory of perpetration (initially applied at Nuremberg, and presently in force in Italy, Austria, Denmark and Brazil), according to which, the sole requirements for liability are a causal contribution to a crime and the requisite mental element to be blame for that particular offense.

The project was essential for my wider interests, and key for my ability to assess the validity of several of the hypotheses I began with. If I were to advocate for the responsibility of arms vendors (or anyone else) based on this notion of complicity, I had to have a firm understanding of the normative strengths and weakness of the doctrine ahead of time. It was essential, in other words, that my work on the accomplice liability of arms

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[60] CORPORATE COMPLICITY & LEGAL ACCOUNTABILITY, *supra* note 48; FAFO Institute, COMMERCE, CRIME AND CONFLICT: A SURVEY OF SIXTEEN JURISDICTIONS (Fafo AIS, 2006).

vendors was informed by an in-depth understanding of the core concept, if I were going to defend these allegations against scholarly critiques (or courtroom arguments) once the concept was set loose within the arms industry. Two weeks ago, I travel to San Diego for a roundtable on complicity with twelve of the United States' very finest criminal theorists, which I take as an indicator that this piece served its purpose to some extent.

Beyond just complicity, this Article is important for blame attribution generally in international criminal law. Since its modern resurrection, "modes of liability" have featured as one of the most debated topics within scholarly and judicial writings about international criminal justice. What standards do we use to pin this atrocity on that actor? The question is all the more difficult given the ambiguities of customary international law, the imprecisions of treaty making, radical heterogeneity of national exemplars and the risk that these reflect illiberal domestic agendas, usually as part and parcel of criminological policies bent on social control.[61] While this Article ended by sparking some considerable debate about these issues in international criminal law,[62] its primary purpose was to act as a conceptual precursor to the hypotheses identified above. What does complicity mean? When can arms vendors be held liable as accomplices?

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[61] For more on the use of criminal justice in the US and UK as a mechanism for social control, see DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (2002).

[62] For criticisms and responses to this Article on the blog Opinion Juris, see Professor Thomas Weigend (Cologne), and My Response to Weigend; Professor Darryl Robinson (Queens), and My Response to Robinson; Professor Jens Ohlin (Cornell), and My Response to Ohlin.

ii. Important Conclusions

There are several significant conclusions that arise from this Article. First, understandings of complicity that have animated much ATCA litigation and scholarship within the US are not reflective of the true application of complicity in customary international law. That debate has focused exclusively on whether knowledge or purpose is the requisite mental element for complicity in customary international law,[63] but my Article reveals that the true standard most frequently applied is neither—international criminal tribunals generally treat recklessness as sufficient for complicity, although this is frequently subsumed in rhetoric that claims knowledge.[64] This revelation should have broad ramifications in theory and practice.

Second, none of the alternative standards for complicity presently on offer (recklessness, knowledge, purpose) is conceptually defensible. This arises because each is static, and therefore fails to reconcile with the mental elements in international crimes, which change from one crime to the next. If the mental element for complicity is recklessness (alas, it varies depending on jurisdiction), then a match between this mental element and the requirements of the crime is entirely haphazard (some crimes allow recklessness, others do not). To make things concrete, recklessness as a mental element for

[63] Chimene I Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61 (2008); Cassel, *supra* note 56.

[64] James G. Stewart, *The End of "Modes of Liability" for International Crimes*, 25 LEIDEN JOURNAL OF INTERNATIONAL LAW 165–219, 192–194 (2012).

complicity clashes with the special purpose required to prove genocide, giving rise to objectionable outcomes—a defendant can be convicted of genocide when they are only reckless about the eventuality, but this scenario miscommunicates what it means to be responsible for genocide. Thus, doctrinal understandings are misguided and first principles point to a different solution altogether.

Third, there is no single answer to the question "what is complicity." This, because standards defining the concept vary at both international and domestic levels. As the Article shows, complicity means something different in US jurisdictions, England and Germany, and to compound matters, international criminal courts and tribunals take different sides in this doctrinal inconsistency, such that the question of accomplice liability produces fragmented responses across a globalized system of law that lacks terribly much harmony. In response, this Article also calls for a process of harmonization, whereby a unitary theory of perpetration would apply immediately in all trials involving international crimes, wherever these prosecutions take place. The argument is not just that "modes of liability" should be abandoned internationally; it is also that they should be discontinued domestically for trials involving international crimes. Only this will preclude corporate races to the regulatory bottom globally, which are already prevalent with the global arms industry.

Fourth and finally, the understanding of complicity for which I advocate (presently applicable in a small minority of states), is broader and narrower than previous understandings. It is broader than standards applicable in most US jurisdictions and before

the ICC, since it allows mental elements significantly lower than purpose *when the crime with which the accomplice will be convicted makes these lower standards sufficient for responsibility.* Conversely, recklessness and knowledge will not be adequate for international crimes like genocide that require a specific purpose. This does not mean that cases against arms vendors are not possible in jurisdictions that embrace different concepts of complicity; it just means that prosecutors will have to charge crimes carefully in order to avoid harsh results.

iii. Intersection with Conceptual Hypotheses

This Article has a range of important consequences for my larger project. First, John Ruggie may well be correct that international criminal law is "by far the most consequential" legal framework dealing with corporate responsibility globally, but that does not mean that international criminal law is immediately normatively defensible. In other words, if and when courts (international or domestic) beginning prosecuting corporations and their officers for international crimes, it will be essential that these institutions are guided by principled conceptual constraints, that ensure that international criminal justice's "consequentialism" is also justifiable. This article has shown when that will be the case in complicity prosecutions, providing audiences with better answers to the inevitable criticisms these cases will face.

Second, the sheer heterogeneity of complicity standards undermines the doctrine's ability to play a constant regulatory role in transnational corporate regulation. Recall that one of my primary hypotheses was that international criminal law exists outside transitional justice; that the two concepts overlap but remain distinct. In other words, international criminal law can play a significant role as an element of global governance, regardless of whether there is a political transition of any sort on the ground and irrespective of the role one might assign legal institutions in generating reconciliation between previously warring factions. An analysis of complicity, however, reveals that this role is unlikely to be consistent. Even if political (dis)appetite for prosecutions is held constant, the various *different* understandings of complicity globally mean that, at least here, international criminal justice's existence outside transitional justice is in flux.

Third, because complicity is understood differently from one jurisdiction to the next, its ability to satisfy my hypotheses is contingent. The accomplice liability of arms vendors can play an important role in affecting the trajectory of ongoing conflicts, but this is dependent on jurisdictions with understandings of complicity that can accommodate these types of cases. Not all can. Similarly, complicity's ability to produce new incentives for compliance with the laws of war is patchy, depending on the contacts weapons vendors have with jurisdictions where complicity is understood in adequately broad (but not excessive) terms. In part, these conclusions motivate my call for unified standards of blame attribution *for international crimes,* that would operate in all domestic and international trials where these crimes are charged.

Finally, there is still much scholarly work required to map the relationship between the theory of complicity and human rights. For one reason, there is very little interaction between exponents of the two disciplines. For instance, in one of the classic papers discussing the scope of corporate complicity in human rights violations, Beth Stephens argues that "[m]orally defensible or not, business as usual or not, if corporations are complicit in human rights violations, the victims of the abuses have a legal right to compensation from those corporations."[65] And yet, the leading *criminal* theorists, from George Fletcher to Alan Duff, reach the diametrically opposite conclusion.[66] As things transpire, I believe the human rights camp has this issue mostly correct, but there is much work in criminal theory required to establish why. Undoubtedly, both disciplines have much to gain from a new dialogue this Article begins.

c. Third Article – A Pragmatic Critique of Corporate Criminal Theory

The third Article for my JSD addresses corporate criminal liability. In so doing, it addresses a third foundational pillar that is crucial in testing my various hypotheses. In particular, this article attempts to assess international criminal law's relationship with

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[65] Stephens, Beth, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY JOURNAL OF INTERNATIONAL LAW 45–90, 46 (2002).

[66] Duff, *supra* note 55, at 178–180 (setting out the argument how complicity functions like an omission in this context); ASHWORTH, *supra* note 55, at 412 ("The problem is that both acts are 'normal': the shopkeeper is simply selling goods in the normal course of business... If the law were to regard [this] as 'aiding' it would be requiring the defendants to do something abnormal in the circumstances, and-in effect-punishing them for the omission to do the abnormal thing."); GEORGE FLETCHER, RETHINKING CRIMINAL LAW 640–641 (1978) ("He must deviate from the ordinary course of commercial life in order to him that his customers criminal plan.").

commerce by considering three core questions: first, whether there is a basic conceptual justification for using a system of criminal justice constructed for individuals against inanimate entities like corporations; second, what value corporate criminal liability could have given co-existent possibilities of civil redress against them; and third, whether corporate criminal liability has any added value over and above individual criminal responsibility of corporate officers. I find this literature wanting, precisely because it fails to account for the realities ICL faces in this domain. As I argue in the article, the shortcomings of extant scholarship include: a tendency to presuppose that corporate crimes take place in a *perfect single jurisdiction* (thus overlooking globalization); the blind projection of local theories of corporate criminal responsibility onto global corporate practices; and a perspective that sometimes seems insensitive to the corporate crimes carried out in the developing world. To account for these shortcomings, I conclude that we need to embrace a pragmatic theory of corporate criminal liability that takes into account the great many contingencies that cannot be easily ascertained ahead of time. It is, however, a key factor that international criminal justice (enforced nationally and internationally) might offer opportunities for accountability when no other alternatives are either legally or politically feasible.

i. General Significance

The Article was important for several reasons. First, it allowed me to develop responses to the following recurrent objections: (a) "prosecuting corporations for international crimes like genocide or war crimes is a tremendously brunt instrument. It brands corporations with labels associated with Nazism, in ways that are harsh for the company and counterproductive for the citizens of developing nations, who are dependent on foreign investment to lift them out of poverty"; (b) "prosecuting corporations is fundamentally unfair; it just forces employees and shareholders to bare the brunt of the trial, when the vast majority of them are entirely innocent of wrongdoing;" (c) "sure we could pursue corporate officers as individuals, but this will almost always be inadequate when individuals are fungible one for the other within a corporation, cannot easily be identified as being responsible for international crimes that are carried out through businesses and are far more difficult to apprehend than their behemoth companies." This Article sought to respond to these questions.

Second, the Article opened up new points of dialogue between divergent fields. If there was a lack of dialogue between criminal theorists and human rights advocates on issues of complicity, this missing interface proved even more pronounced between those who write about corporate criminal theory and the many important international scholars

who call for the inclusion of corporate criminal liability within the ICC Statute.[67] This article was important insofar as it allowed me to bridge these discourses, informing myself about core issues that will remain central to this research for some time to come.

Third, the article was an attempt to incite corporate theorists to think more creativity about problems of global corporate crime. To some extent, I suspect that the absence of terribly much accountability in this realm (and a fixation on the ATCA as the sole means of delivering it), stems from a scholarly failure to imagine the problem of corporate malfeasance in its full breadth. The audience for this final article is therefore more the corporate criminal theorist than the international criminal lawyer, the human rights advocate or the expert in complicity. I view these new discussions as a key element in generating a more complete sense of when corporate accountability will be possible, and under what conditions it will be conceptually justifiable. Both factors go to the heart of my various working hypotheses.

Fourth, the literature on philosophical and legal pragmatism had a major effect on my academic life. The literature resonated powerfully, offering me a conceptual way of merging my love of philosophy with dark, real-world experiences I have had in Rwanda, The Hague and Geneva. For the longest time, I have harbored the sense that there is a very wide chasm between the theory and practice of international criminal law, and

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[67] Andrew Clapham, *The Question of Jurisdiction Under International Criminal Law Over Legal Persons*, *in* LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000); Clapham, Andrew, *Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Groups*, 6 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 899–926 (2008); J. Kyriakakis, *Corporate Criminal Liability and the ICC Statute: The Comparative Law Challenge*, 56 NETHERLANDS INTERNATIONAL LAW REVIEW 333–366 (2009).

philosophical pragmatism brought forth a methodological path I could tread in order to play a role in developing a better symbiotic relationship between the two. My future work will embrace the very practical and the highly abstract, so that the two can better shape one another.

Fifth, I also hope the article offers some contribution to legal pragmatism. For instance, Brian Tamanaha is highly critical of pragmatism as a socio-legal theory, in large part because it fails to get beyond the values that ultimately drive the law in competing directions.[68] Nonetheless, part of my argument here is that pragmatism is made necessary by the fact that all the variables for holding corporations responsible for international crimes cannot be known ahead of time. As a consequence, any categorical abstractions are unsafe insofar as they cannot guarantee their ability to speak to every context they might encounter. As such, this illustration highlights how pragmatism has particular value here, quite apart from issues of competing values that Tamanaha cites against it. To that extent, this is also a modest contribution to pragmatism and its salience in confronting massive social problems that span the globe.

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[68] BRIAN Z. TAMANAHA, REALISTIC SOCIO-LEGAL THEORY: PRAGMATISM AND A SOCIAL THEORY OF LAW Chap. 2 (1999).

ii. Important Conclusions

My primary conclusion arising out of this Article is that it is not possible to provide categorical responses to the questions I set out to answer here; there is no perfect division of labor between different forms of accountability for corporate atrocities. To return to the frequent objections I set out in the earlier section, there will be circumstances where individual criminal responsibility, corporate criminal responsibility and civil liability are all preferable as against one another, but the complexity of corporate practices globally resists reaching inflexible positions about these relationships in the abstract. This does not undermine the significance of this literature in providing guidance in formulating responses to the usual criticisms my research elicits, but it does caution against absolute solutions and alert us to the need for sensitivity to context.

For example, the comparison with businesses during WWII is not too blunt in some contexts. When a South African man allegedly sells 50,000 machetes to the leader of the extremist Hutu group the Interahawme at the zenith of the Rwandan genocide,[69] the parallel with the Holocaust is meaningful. Beyond this, the argument that corporate criminal liability merely punishes shareholders and employees is specious in this context, because the vendor operated a closely held company. And, even if the company were a multinational, replete with many employees and shareholders, it is an unconvincing double standard to immediately preclude corporate criminal liability on these bases—capitalism

[69] Austin, *supra* note 59.

presumes that forcing 80,000 people onto the streets to find new work is justifiable—nay, desirable—when market forces dictate that their employer is no longer economically competitive, but the same effects that flow from market reactions to their employer's engagement with genocide are denounced as an aberration. This is an important double-standard.

Finally, the article points out that not all arguments for corporate criminal liability can be automatically applied internationally. For instance, the inability to trace corporate crimes to specific individuals within corporations is arguably the strongest motivation for the maintenance of corporate criminal liability across the globe. As John Coffee suggests, corporate criminal theory is necessary because "we cannot identify the real [individual] decision-maker."[70] And yet, I show how this reality is not necessarily true internationally. Because businesses have enjoyed an almost unbroken impunity for the longest period, many have become complacent, publicly revealing evidence of individual responsibility that may be actionable.

These insights help identify a possible role for international criminal justice in this realm. As I argue, all modern attempts at regulating the might of corporate actors globally

[70]Coffee, John C., Jr, *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 BOSTON UNIVERSITY LAW REVIEW 193–246, 229 (1991); Developments in the Law—Corporate Crime: Regulating Corporate Behavior through Criminal Sanctions, 92 HARVARD LAW REVIEW 1227–1375, 1371 (1979) (Where it is difficult or impossible to determine which individuals are responsible for illegal activity, liability can only be imposed on the corporation."). Council of Europe, Recommendation no. R (88) 18 of the Committee of Ministers to Member States Concerning Liability of Enterprises Having Legal Personality for Offences Committed in the Exercise of Their Activities (adopted by the Committee of Ministers on 20 October 1988 at the 420th meeting of the Ministers' Deputies), at 1 ("the difficulty, due to the often complex management structure in an enterprise, of identifying the individuals responsible for the commission of an offence.")

have stemmed from pragmatic experimentation. In the United States alone, the very phenomenon of corporate criminal liability proves this *par excellence*—but everything from litigation under the rubric of the Alien Tort Statute to the advent of the Foreign Corrupt Practices Act conforms with this account. So if even corporate criminal liability had to be "discovered,"[71] reimagining international criminal law as having an important role in restraining corporate greed in war zones seems like the logical next step in an ongoing process of pragmatic experimentation. This paper has shown that international criminal law stands to play a significant role in this evolving process.

Finally, the Article concludes by calling for greater energies directed towards exposing the many hidden variables that are relevant in deciding how best to respond to global corporate malfeasance. Understanding the applicable legal terrain as best possible is a key factor in this process. Thus, instead of claiming to have distilled the absolute truth about corporate criminal theory in a world as legally heterogeneous and morally flawed as that we inhabit, our attentions should be directed at comparative analyses to unearth the types of regulatory opportunities that already exist. To some extent, there are promising initiatives in place that seek to respond to this challenge,[72] but this Article suggests that the comparative methodology must be amplified and maintained in perpetuity. A deeper

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[71] CELIA WELLS, CORPORATIONS AND CRIMINAL RESPONSIBILITY, 25 (Oxford, 2nd ed., 2001).

[72] See International Law Association, International Civil Litigation for Human Rights Violations, Final Report, 2012 available online at http://goo.gl/RGERS; See also the survey of the law of complicity applicable in 43 national systems, presently underway at the Max Plank Institute in Germany. Max Plank Institute, General Legal Principles of International Criminal Law on the Criminal Liability of Leaders of Criminal Groups and Networks, forthcoming, available online at http://goo.gl/kFGdG.

understanding of these legal variations will improve theories of how best to hold corporations accountable, and help in articulating a principled role for international criminal justice.

iii. Intersection with Conceptual Hypotheses

While this Article does not directly address the core hypotheses that I set out in Part II of this essay, it does lay the groundwork for that assessment in essential ways. The most significant factor to emerge from this Article is that opportunities for using international criminal law to curb illegal commerce and its contribution to atrocity are multifaceted: one could pursue the corporation for international crimes within national courts, prosecute corporate officers within international or domestic courts, and employ civil remedies that harness international criminal norms where possible. This multiplicity has important implications for a range of my hypotheses.

First, Professor Ruggie is undoubtedly correct that international criminal law is "by far the most consequential" legal framework on offer, but it is also more complex than many recognize. As this article shows, whether ICL is consequential depends on *where* you are looking to enforce it. In some instances, it will be effective, in others not. This said, the multifaceted capacities of ICL (focusing on individuals and corporations within civil and criminal frames) heightens opportunities for accountability where traditionally there has been none. Therefore, international criminal law's contribution to CSR might not be

perfectly uniform across the globe, but it is markedly more potent than other voluntary initiatives presently in vogue as means of using international law to regulate global corporate practices. International criminal justice already offers a system of law that is "beyond voluntarism".[73]

Second, the multifaceted possibilities mentioned above allow international criminal justice to exist outside the sphere of transitional justice in a number of ways. Perhaps the ICC could exercise jurisdiction over a rogue businessperson who was pillaging natural resources from a notoriously brutal rebel group in the DRC, or courts within Canada, Australia or the United States could prosecute a company alleged to have willingly provided important support to a Congolese massacre of local civilians.[74] Presumably, if the Alien Tort Statute survives Kiobel, civil litigation against corporations engaged in the conflict could also affect the dynamics of ongoing hostilities in a range of theatres. Nonetheless, both the feasibility and legitimacy of these actions are context specific, and cannot, therefore, be prescribed as absolute divisions of labour between these bodies of law.

Third, the heterogeneity of the law governing the relationship between commerce and international criminal law has important repercussions too. Take the notion that accomplice liability of arms vendors might change incentives for rebel groups to comply

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[73] "Beyond voluntarism" has been the war cry for civil society concerned about corporate accountability for human rights for many years. For instance, see International Council on Human Rights Policy, *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies* (2002), available online at http://goo.gl/7Ijnh.

[74] See Arij Riahi, *No Justice Anywhere: Supreme Court shuns survivors of Congo massacre linked to Canadian mining firm*. Feb 13, 2013 available online at: http://dominion.mediacoop.ca/story/no-justice-anywhere/15751

with the laws of war. For this deterrent argument to hold, the rebel group will have to rationally assess the likelihood of prosecution together with the consequences of its eventuality. Even leaving political factors aside, the heterogeneity of corporate criminal liability globally adds a new layer of complexity in determining the probability of prosecutions. This does not mean that international criminal responsibility of corporations can have no impact on incentives for their clients' compliance with IHL, it merely implies that the relationship is not linear. This Article has helped identify these and other factors that are foundational to my ongoing interest in this topic.

IV. CONCLUSION

I came to this JSD and the academy with a project that sought to respond to a set of egregious injustices I had witnessed first hand. Out of a sense that this project required academic leadership that merged doctrine and theory from within a variety of distinct fields, I embarked on an ambitious JSD that required me to move with fluidity within international criminal doctrine, criminal theory of blame attribution and corporate responsibility. The resulting Articles have provided me with a sound grounding in three disciplines that are essential for my ongoing work, substantiating a set of hypotheses about the role of ICL in regulating corporate misconduct. This relationship could have sweeping consequences, including for the discipline itself. I now feel well equipped to play the leadership role I sensed was required to move this agenda forward. My timing is also

good—over the course of this research, the idea of holding corporations and their representatives responsible for international crimes has shifted drastically, going from radical improbability to a mainstream concept within this discipline. My kind thanks to my supervisors and external readers for their intervention, patience, time and faith.

CORPORATE PILLAGE REVIVED

James G. Stewart

This Article presents the first legal analysis of corporate liability for the war crime of pillage. In particular, it explores the potential criminal liability of corporate entities and their representatives for the pillage of natural resources within modern conflict zones, thereby providing a missing blueprint for the prosecution of illegal trade in Sierra Leonean blood diamonds or the corporate plunder of Iraqi oil. In the wake of WWII, a number of business representatives were prosecuted and convicted for the pillage of natural resources including iron ore, manganese and oil from occupied Europe. But since then, strikingly similar corporate practices have largely escaped both judicial and academic scrutiny, in spite of the burgeoning corporate social responsibility movement, no shortage of allegations against otherwise reputable western companies by UN-sponsored investigations, and a prolific body of literature plotting the correlation between illicit resource extraction and the financing of armed violence. Since the end of the Cold War, corporate implication in the illicit trade in natural resources has substituted for superpower sponsorship as the predominant means of conflict financing.

Despite the ascendancy of the ICJ at both international and domestic levels over the same period, corporate liability for pillage has gone ignored in practice and theory. This

Article turns one post Cold-War trend on the other by reviving corporate liability for pillaging natural resources in the light of the modern international criminal law governing pillage. In so doing, the Article reveals a fragmented offence in need of a modern consensus, a discipline overly focused on complicity as a means of attributing blame to corporate actors for international offences, and serious misperceptions about the relationship between corporate actors and international criminality born of longstanding misunderstandings in corporate social responsibility. The ramifications of reviving corporate liability for pillage are significant. A network of domestic and international courts already enjoys criminal jurisdiction over corporate entities and their representatives for acts of pillage, and even a single prosecution in one of these jurisdictions will radically transform the trajectory of global armed violence by either starving armed groups of the means of financing war or deterring inter-state aggression for increasingly scarce resources.

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CORPORATE PILLAGE REVIVED

James G. Stewart[*]

I. INTRODUCTION

Pillage means theft during war. The term is often used interchangeably with other labels such as plunder, spoliation and looting, all of which denote the unlawful appropriation of property during armed conflict. The offense is not infrequently enforced. In the past decade alone, the International Criminal Tribunal for the former Yugoslavia (ICTY) as well as the Special Court for Sierra Leone (SCSL) have found several soldiers guilty of pillage.[75] The offense also extends to political leaders. At present, Liberia's former President Charles Taylor, the sitting President of Sudan Omar al-Bashir and onetime Congolese Vice-President Jean-Pierre Bemba are facing trial before international courts for

[*] Associate-in-Law, Columbia Law School. Principal Consultant, Open Society Institute, Pillage Project. Formerly Appeals Counsel, Office of the Prosecutor, International Criminal Tribunal for the former Yugoslavia. Chair, Editorial Committee, Journal of International Criminal Justice. Kind thanks to José Alvarez, Marc Barenberg, Sarah Cleveland, Roger Clark, Samuel Bray, Wade Wright and Nicole Barrett and Ittai-Bar-Simon-Tov for helpful contributions and comments. james.stewart@law.columbia.edu

[75] Prosecutor v. Simić, Case No. IT-95-9-T, Judgement, ¶ 873 (Oct. 17, 2003) ("Cars, money, and jewellery were plundered from civilians") Prosecutor v. Jelisic, Case No. IT-95-10-T, Judgment ¶ 48-49 (Dec. 14, 1999) ("the accused stole money, watches, jewellery and other valuables"); *Hadžihasanović Trial Judgment*, *supra* note 141, ¶ 1875 (finding that household appliances, furniture, and clothing were pillaged); *Fofana Case*, *supra* note 148, Prosecutor v. Brima et al. Case No. SCSL-04-16-T, Judgment, ¶ 754 (June 20, 2007) ; See also Prosecutor v. Fofana et al. Case No.SCSL-04-14-T, Judgement, § 5.1.1.1. (Aug. 2, 2007) (finding that armed groups pillaged medicines) [hereafter *Fofana Case*].

pillaging property of various descriptions during war.[76] Like soldiers and politicians, corporate representatives are also bound by the prohibition. In the aftermath of WWII, a host of businessmen were convicted of pillaging a range of property, including both natural resources and raw materials. A German businessman named Hermann Roechling, for instance, was found guilty of pillaging 100 million tons of iron ore from occupied France.[77] But somewhat inexplicably, these precedents have not been redeployed to sanction strikingly similar corporate practices in the modern era, in spite of a prolific body of literature plotting the correlation between illicit resource extraction and the financing of modern armed violence.[78] Since the end of the Cold War, corporate implication in the illicit trade of conflict commodities has substituted for superpower sponsorship as the

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[76] Prosecutor v. Charles Ghankay Taylor, Pre-Trial Brief, Case No. SCSL-03-01-PT, ¶ 6 (Apr. 4, 2007) (stipulating that "[p]riot to the commencement of the armed conflict in Sierra Leone, and through the armed conflict, the Accused participated in a common plan, design or purpose to gain and maintain political power and physical control over the territory of Sierra Leone, in particular the diamond mining areas, in order the exploit the natural resources of the country."); Situation in Central African Republic in the Case of Prosecutor v. Jean-Pierre Bemba Gombo, Warrant of Arrest for Jean-Pierre Bemba Gombo Replacing the Warrant of Arrest Issued on 23 May 2008, Case No.: ICC/01/05/01/08, ¶ 5 (vi) (June 10, 2008) (charging Bemba with pillage); In the Case of the Prosecutor v. Omar Hassan Ahmad al Bashir ("Omar al Bashir"), Warrant of Arrest for Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09 5 (Mar. 4, 2009) (indicting Bashir for pillage perpetrated by his troops); See Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges, ¶ 575 (Sept. 30, 2008) (confirming charges against both Katanga and Chui for pillage);

[77] France v. Roechling, 14 Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10 [hereinafter Trials of War Criminals], at B, at 1113 and 1124 (1949)

[78] THE POLITICAL ECONOMY OF THE GREAT LAKES REGION IN AFRICA (Stefaan Marysse and Filip Reyntjens eds., Palgrave, 2005) [hereafter *Marysse*]; RESOURCES, GOVERNANCE AND CIVIL CONFLICT (Magnes Öberg and Kaare Strøm eds., Routledge, 2008); NATURAL RESOURCES AND VIOLENT CONFLICT (Ian Bannon and Paul Collier eds. The World Bank, 2003) [hereafter *Natural Resources and Violent Conflict]*; GREED AND GREIVANCE: ECONOMIC AGENDAS IN CIVIL WARS (Mats Berdal and David M. Malone eds. Lynne Rienner Publishers, 2000); MICHAEL T. KLARE, RESOURCE WARS: THE NEW LANDSCAPE OF GLOBAL CONFLICT (Henry Holt, 2001); RETHINKING THE ECONOMICS OF WAR: THE INTERSECTION OF NEED, CREED AND GREED (Cynthia J. Arnson & I. William Zartman eds., 2005) [hereafter *Rethinking the Economics of War*]; THE POLITICAL ECONOMY OF ARMED CONFLICT: BEYOND GREED & GRIEVANCE (Karen Ballentine & Jake Sherman eds., 2003) [hereafter *Beyond Greed and Grievance*]

predominant means of conflict financing.[79] Corporate liability for pillaging natural resources, however, has largely gone ignored.

Legal amnesia appears the most compelling explanation for the failure to apply pillage to corporate actors operating in modern war zones. Attempts to quell the trade in blood diamonds serve as a prime example. In the 1990's, a Security Council-appointed Panel of Experts charged with investigating violations of a UN embargo on Angolan diamonds found that prominent western businesses had acquired large quantities of diamonds from the Angolan rebel group União Nacional para a Independência Total de Angola (UNITA), which illegally seized then sold the gems in order to finance conflict estimated to have killed more than half a million civilians.[80] Although at least one case derived from WWII had convicted an individual for pillaging "cut and uncut precious stones,"[81] both the UN Panel of Experts and the corporate actors it denounced appeared

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[79]Michael Ross, *The Natural Resource Curse: How Wealth Can Make You Poor* in *Natural Resources and Violent Conflict, supra* note 78, at 30; DAVID KEEN, THE ECONOMIC FUNCTIONS OF VIOLENCE IN CIVIL WARS (International Institute of Strategic Studies). Charles Cater, *The Political Economy of Conflict and the UN Intervention: Rethinking the Critical Cases of Africa*, in *Beyond Greed and Grievance, supra* note 78, at 1-2; Ian Bannon & Paul Collier, *Natural Resources and Conflict: What Can We Do?* in *Natural Resources and Violent Conflict, supra* note 78, at 4 (arguing that unless a rebel movement is bankrolled by another state or an extensive and willing diaspora "it must generate income by operating some business activity alongside its military operation.")

[80] See Final Report of the Panel of Experts Establishing by the Panel of Experts Pursuant to Resolution 1237 (1999), S/2000/203, paras. 75-114. See also Final Report of the Monitoring Mechanism on Angola Sanctions established by Resolution 1295 (2000), Dec 21, 2000, S/2000/1225, ¶ 153 ("De Beers central selling organization bought the majority of the diamonds…). The Mechanism also named David Zollmann, a junior partner in the Antwerp firm of Glasol and George Forrest, a major player in the economy of the Democratic Republic of the Congo, both of who allegedly assisted UNITA in exploiting diamonds during the war. _CHECK. See also TONY HODGES, ANGOLA: ANATOMY OF AN OIL STATE, 176-184 (Indiana University Press, 2004); Philippe Le Billon, *Angola's Political Economy of War: The Role of Oil and Diamonds 1975 – 2000*, AFRICAN AFFAIRS 75-75 (2001).

[81] *U.S.A. v. Von Weizsaecker et al. (Ministries Case)*, 14 Trials of War Criminals 314, 720 (1949) [hereafter *Ministries Case*] (finding Wilhelm Stuckart guilty of pillage for having signed a decree that provided for the

patently unaware of these precedents. One senior employee of the diamond cartel De Beers, for instance, was reported as openly admitting that the company purchased two-thirds of the diamonds supplied from Angola at a time when UNITA reputedly controlled approximately 90 percent of diamond exports from the country.[82] Even advocacy groups who decried the absence of judicial sanction against companies like De Beers named in the Panel's report merely argued that traders "dealing with UNITA should be penalized with confiscation of diamonds,… heavy fines and loss of tax concessions."[83] And yet the numerous convictions of individuals like Hans Kehrl for pillaging manganese, iron and other similar resources during WWII resulted in significantly more serious sentences.[84]

The legal amnesia characteristic of responses to illegal exploitation of diamonds over the past decades has also influenced initiatives geared at restricting the plunder of conflict timber. In Cambodia, foreign firms alleged to have traded timber with the Khmer Rouge during the 1990s were chastised in essentially moral terms, without reference to the similarity between these corporate transactions and conduct denounced as pillage in other

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expropriation of various Polish property including both "gold and silver," and "cut and uncut precious stones.")

[82] The De Beers' Annual Report of 1992 is said to read "That we should have been able to buy some two thirds of the increased supply from Angola is testimony not only to our financial strength but to the infrastructure and experienced personnel we have in place." Cited in Global Witness, *A Rough Trade: The Role of Companies and Governments in the Angola Conflict* 8 (1998) available at: http://www.globalwitness.org/media_library_detail.php/90/en/a_rough_trade .

[83] *Id.* at 3.

[84] *Ministries Case*, *supra* note 77, at 758. In finding Kehrl guilty of pillage, the Tribunal concluded that "through his active participation in the acquisition and control of the industries and enterprises hereinbefore specifically referred to, violated the Hague Convention with respect to belligerent occupancy." *Ministries Case*, *supra* note 77, at 763.

conflicts.[85] Although a large number of companies were reported as having financed the Khmer Rouge to the tune of between $ 10 and 20 million per month,[86] impunity prevailed. In a more recent example, Dutch prosecutors earlier this decade preferred to charge a Dutch businessman operating a timber company during the Liberian civil war with complicity in the war crime of willful killing for supplying weaponry to Charles Taylor's notoriously brutal regime.[87] The failure to simultaneously allege pillage was perplexing, especially given seemingly compelling evidence that "the company was harvesting at least twice the legal rate."[88] To this day, similar corporate conduct within the timber sector fuels bloodshed in Indonesia, Myanmar and the Democratic Republic of Congo,[89] despite the fact that these corporate practices constitute war crimes.

The same apparently inadvertent failure to assess illegal exploitation of natural resources during war as pillage is even more conspicuous in responses to the illicit trade in

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[85] Phillippe Le Billon, *The Political Ecology of Transition in Cambodia 1989-1999: War, Peace and Forest Exploitation,* 31 DEVELOPMENT AND CHANGE 785 (2000); GLOBAL WITNESS & FAFO INSTITUTE, THE LOGS OF WAR, 17-22 (Mar. 1, 2002) available at http://www.globalwitness.org/media_library_detail.php/89/en/the_logs_of_war [hereafter *Logs of War*].

[86] *Logs of War, supra* note 85, at 18.

[87] Prosecutor v. Kouwenhoven, Netherlands, LJN: AY5160, Rechtbank 's-Gravenhage , 09/750001-05 (July 28, 2006).

[88] In testimony to the Liberian Truth and Reconciliation Commission, representatives of the Liberian Forestry Development Authority and a former employee of the Dutch national's company suggested that the company was over-harvesting and cutting under-sized trees. This is consistent with analysis conducted by the UN Panel of Experts on Liberia in 2003, which found that the company was harvesting at least twice the legal rate. Similarly, a World Bank contractor, concluded that OTC B had not respected the legal cutting limits in any of the three years of operations . See Draft Truth and Reconciliation Report, at 12. See also S/2003/779; Table 3.

[89] *Logs of War, supra* note 85; GLOBAL WITNESS, A CHOICE FOR CHINA: ENDING THE DESTRUCTION OF BURMA'S NORTHERN FRONTIER FORESTS, 19 (Oct., 2005); available at: http://www.globalwitness.org/media_library_detail.php/492/en/a_choice_for_china_ending_the_destruction_of_burma

metals during modern armed violence. In the year 2000, a Panel of Experts appointed by the UN Security Council to investigate the link between illegal exploitation of natural resources and ongoing violence in the territory unearthed what it described as a "self-sustaining war economy" in which hostilities create "win-win situations for all belligerents."[90] But in denouncing 85 predominantly western companies and 54 individuals that had it its estimation illegally exploited gold, diamonds, coltan and other resources during the war,[91] the Panel resorted to OECD Guidelines on Multinational Enterprises as the guiding legal benchmark.[92] This less than orthodox choice of regulatory regime belied the conviction of a corporate manager named Paul Pleiger for pillaging coal from mines located in Poland only decades earlier.[93] In fact, the International Court of Justice also held Uganda responsible for "pillaging" Congolese natural resources on the strength of precisely these allegations.[94] And in recognition of the fact that the term "pillage" best describes these corporate actions, the Congolese government established an investigative body entitled the "Commission of National Experts on the Pillage and Illegal Exploitation of

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[90] UN Panel Report, S/2001/357, *supra* note 80, ¶ 218.

[91] *Id.* Annexes I-III.

[92] The OECD Guidelines for Multinational Enterprises area a set of voluntary principals and standards adopted by OECD governments, with which companies are expected to comply. In 2000 the guidelines were revamped to create National Contact Points capable of hearing cases, although these contact points have no investigative capacity, cannot sanction violations and only apply in a limit number of countries. OECD Watch, *Guide to the OECD Guidelines for Multinational Enterprises' Complaint Procedure: Lessons from Past NGO Complaints*, (Nov. 2006), http://oecdwatch.org/publications-en/Publication_1664/.; NICOLA JÄGERS, CORPORATE HUMAN RIGHTS OBLIGATIONS: IN SEARCH OF ACCOUNTABILITY, 101-109 (2002)

[93] *Ministries Case, supra* note 81 , at 741.

[94] Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, 2005 I.C.J, ¶ 239-240, 250 (December 19) [hereafter *DRC v. Uganda Case*].

Resources and Other Riches,"[95] but like its numerous international counterparts,[96] the UN Panel of Experts itself,[97] and the academic literature focused on resource wars,[98] the Congolese Commission's liberal use of the labels "pillage" and "plunder" neither acknowledged the terms' etymology nor made reference to the robust body of law applying the offense in practice.

The legal myopia that has seen corporate liability for pillage ignored in theory and practice is no less prevalent with respect to corporations implicated in inter-state violence waged for the control of strategic minerals such as oil, uranium and water. At the end of the Second World War, the Nuremberg Tribunal convicted Walther Funk for pillage achieved through his role in the management of a commercial enterprise named the Continental Oil

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[95] Rapport de la Commission des experts nationaux sur le pillage et l'exploitation illégale des ressources naturelles et autres richesses de la RDC, October 2001.

[96] Sénat belge, *Rapport de la Commission d'enquête parlementaire chargée d'enquêter sur l'exploitation et le commerce légaux et illégaux de richesses naturelles dans la région des Grands Lacs au vu de la situation conflictuelle actuelle et de l'implication de la Belgique*, Session 2002-2003, Document législatif n° 2-942/1 (20 February 2003). [hereafter *Belgian Parliamentary Commission*], § 1.1 ("La guerre, l'exploitation et le pillage des ressources de la République démocratique du Congo s'inscrivent sur fond de vide étatique et de récession économique profonde."), § 1.3.6. ("Criminalisation de l'économie par l'élite politico-militaire, commercialisme militaire par les armées étrangères et *pillage* des ressources de la République Démocratique du Congo") (emphasis added); See also The Republic of Uganda, Judicial Commission of Inquiry into Allegations into Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of Congo 2001, Final Report 30 (November 2002) ("the definition of illegality is quite as simple as the original Panel of Experts has set out in the report.") [hereafter *Porter Commission Report*].

[97] *UN Panel of Experts*, S/2002/1146, *supra* note 80, ¶ 1(b) (describing the Panel's role as to "help bring to an end the plundering of the natural"), ¶ 46 (stating that "[t]he State-owned Société minière de Bakwanga diamond company has been plundered by a management"); ¶ 153 ("[y]ears of lawlessness and a government incapable of protecting its citizens have allowed the armed groups to loot and plunder the country's resources with impunity."); UN Panel of Experts, S/2003/1027, *supra* note 80, ¶ ("[l]es travaux du Groupe de travail ont incité les gouvernements, les ONG et d'autres organisations ou associations à poursuivre leurs propres investigations sur le pillage des ressources.)

[98] Erik Kennes, *The Mining Sector in the Congo: The Victim or the Orphan of Globalization?* in *Marysse, supra* note 78, at 152 [hereafter *Kennes*] (indicating that these business practices would ultimately register as "no more than an intensified and particularly cruel (and systematic) episode in a longer history of plunder.")

Company, which exploited crude oil throughout occupied Europe.[99] Convictions of this sort were also prevalent within the Pacific theatre, where a British court ruled that the Japanese exploitation of oil reserves in Singapore that were owned by a Dutch conglomerate violated the prohibition against pillage.[100] But these precedents were lost during the apartheid occupation of Namibia, despite the fact that the UN Council for Namibia and the General Assembly both openly denounced a large number of western companies for the "plunder of Namibian natural resources."[101] None of these western companies were indicted, primarily because the Council's attempts to initiate proceedings in domestic courts were stymied by misconceived theories of responsibility.[102] On the same basis, the absence of a detailed

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[99] International Military Tribunal (Nuremberg) Judgment (1946), 1 Trial of the Major War Criminals before the International Military Tribunal 171, 306 (1945) [hereafter *Nuremberg Judgment*]; Representatives of IG Farben were also charged with the pillage of oil as a consequence of their association with the Continental Oil Company, but the court found that the allegations were not proved. Whilst Farben made elaborate plans to plunder Russia, they were never completed and there was inadequate evidence to link Farben to plunder in the Russian theatre. United States v. Krauch et al (I.G. Farben), 8 Trials of War Criminals 1081, 1152 [hereafter *IG Farben*]. Likewise, Keppler, the deputy-chairman of the Continental Oil company, was tried for plundering Soviet oil, but the Court acquitted him stating that "from the evidence, we cannot draw the conclusion that he participated or directed the Continental Oil Company, in its spoliation activities or programs." *Ministries Case*, *supra* note *81*, at 695.

[100] N. V. De Bataafsche Petroleum Maatschappij and Others v. The War Damage Commission, Singapore Law Reports 65, 81 (1956) [hereafter *Singapore Oil Stocks*] (declaring that "[t]he seizure of the oil resources of the Netherlands Indies was economic plunder.")

[101] UN General Assembly, Fourth Committee Report, A/41/726, 17 October 1986, (recalling "that the exploitation and depletion of those resources, particular the uranium deposits, as a result of their *plunder* by South African and certain Western and other foreign economic interests…") (emphasis added); Report of the United Nations Council for Namibia, General Assembly, 41st Session, Supplement No. 24 (A/41/24), ¶ 348 ("Since 1920, CDM has been *plundering* Namibia's gem diamond deposits, which are the most extensive in the world.") (emphasis added).

[102] *Implementation of Decree No. 1 for the Protection of the Natural Resources of Namibia: Study on the Possibility of Instituting Legal Proceedings in the Domestic Courts of States*, reproduced in 80 Am. J. Int'l L. 442 (1986) (surveying numerous states to determine whether a decree of the UN Council for Namibia was justiciable within national legal systems); See also Nico Schrijver, *The UN Council for Namibia vs. Urenco, UCN and the State of the Netherlands*, 1 LEIDEN J. INT'L L. 25-49 (1998) (discussing the one case that was brought in the Netherlands because it had "fully recognized the Council and its competence to enact the

criticism of corporate responsibility for the pillage of oil in Iraq is almost as strange given the widely-held view that the Coalition invasion of the country was a mere pretext for the exploitation of oil and the mounting evidence that this misgiving was not entirely unfounded.[103]

This Article revives corporate liability for the war crime of pillage as a means of curbing conflict motivated or fueled by the illegal exploitation of natural resources. In particular, it explores the potential criminal liability of corporate entities and their representatives for pillaging natural resources in light of modern international criminal law standards. The Article proceeds as follows. Part I advocates a new doctrinal consensus with respect to pillage by resolving a three-way split in contemporary jurisprudence governing the offense. Part II then proceeds to assess the application of elements of this definition to the intricacies of illegal exploitation of natural resources during warfare specifically. The process highlights both the value of the offense as a response to resource wars and a series of significant but almost entirely overlooked normative implications for contemporary understandings of international criminal justice more broadly. Part III explores criminal liability of corporate entities and their representatives for pillaging natural resources, unveiling pre-existing but equally unnoticed bases for criminally sanctioning corporate

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Decree"); See also NICO SCHRIJVER, SOVEREIGHTY OVER NATURAL RESOURCES, 149-152 (Cambridge Univ. Press, 1997)

[103] PLATFORM, CRUDE DESIGNS: THE RIP-OFF OF IRAQI OIL, 4 (2005) http://www.globalpolicy.org/security/oil/2005/crudedesigns.pdf (finding that Iraq stands to lose between $74 billion and $194 billion over the lifetime of the proposed contracts offered by US State Department to multinational companies from only the first 12 oilfields to be developed); Philip Shishkin, *Losing Fuel: Pipeline Thefts Cripple Iraqi Oil Production*, WALL STREET JOURNAL , (May 25, 2007)

implication in war crimes such as pillage. In this sense, the revival of corporate liability for pillaging resource wealth presents an old but forgotten solution to the acknowledged shortcomings of corporate social responsibility. And while Part IV of the Article foreshadows a series of inevitable challenges for the offense within an essentially horizontal system of global governance, it concludes that pillage promises to act as a serious deterrent against inter-state aggression for strategic resource wealth and a credible mechanism for starving warring factions of the means of financing bloodshed.

II. DEFINING PILLAGE

The revival of corporate liability for pillage is, at least in part, a call for a new doctrinal consensus. Pillage presently constitutes an offense in all international criminal statutes[104] and a raft of domestic systems of criminal law,[105] but modern definitions of the

[104] Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, entered into force July 1, 2002.,Arts. 8(2)(b)(xvi) and 8(2) (e)(v) (prohibiting "pillaging a town or place even when taken by assault."); Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993), Art. 3(e) (criminalizing "plunder of public or private property."); Charter of the International Military Tribunal (IMT), August 8, 1945, 58 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 280, Art. 6(b) (prohibiting "plunder of public or private property."); Statute of the International Tribunal for Rwanda, adopted by S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 3, U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598, 1600 (1994), Art. 4(f) (prohibiting "pillage"); Statute for the Special Court for Sierra Leone, (Jan. 16, 2002), Art. 3(f) (prohibiting "pillage")

[105] § 2441(c)(2) of the U.S. War Crimes Act defines war crimes as including any conduct "prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907." Article 28 of the Hague Regulation, to which the provision refers, states that "[t]he pillage of a town or place, even when taken by assault, is prohibited."; British and Canadian legislation incorporates pillage by invoking crimes defined in the ICC Statute. International Criminal Court Act, 2001, 17, § 50(1) (Eng.) ("'war crime' means a war crime as defined in article 8.2."); Crimes against

offense are split between three competing interpretations. First, the ICTY defines pillage as theft during war subject to five specific exceptions contained within the Hague Regulations of 1907, each of which is to be considered individually. Second, the Nuremberg trials also defined pillage as theft during war subject to exceptions in the Hague Regulations but amalgamated these exceptions into a single umbrella standard rather than assessing the exceptions one by one. Third, the ICC Elements of Crimes purport to dispense with the complexities of the Hague Regulations altogether by restricting pillage to misappropriation "for personal or private purposes." The first of these standards is more in keeping with the origins of and precedents governing pillage. In order to justify this preference and overcome a badly fragmented jurisprudence, this Part provides an overview of the development of pillage in the laws of war; a comprehensive exposition of a pervasive terminological confusion that has frequently ignored the fact that pillage, plunder, spoliation and looting are synonyms; and a careful criticism of the three conflicting standards.

Humanity and War Crimes Act, 2000 c. 24 (Can.) § 6(3) ("'war crime' means an act or omission committed during an armed conflict that, at the time and in the place of its commission, constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission."); In other jurisdictions, states codify explicit definitions of pillage. Entwurf eines Gesetzes zue Einführung des Völkerstrafgesetzbuches [German Code of Crimes against International Law] 30 June 2002 BGBl 2002, I, at 2254, § 9 (F.R.G) ("Whoever in connection with an international armed conflict or with an armed conflict not of an international character pillages … shall be punished with imprisonment from one to ten years.") International Criminal Court (Consequential Amendments) Act 2002 No. 42, 2002, § 268.54 (Aus) (defining pillaging in identical terms as the ICC Elements of Crimes.)

A. Origins of the Offense

Defining the modern offense of pillage is inextricably linked to the historical development of the prohibition since a series of tensions that date to the earliest inceptions of the offense continue to plague the three competing interpretations. The offense is of relatively recent origin. As late as the seventeenth century, wars were legally sustained upon the pillage of enemy property.[106] The legality of these practices was gradually eroded, partly out of a growing sense of 'humanity,' but predominantly because the right of open pillage undermined military discipline.[107] The practice was incrementally prohibited, first by proscribing pillage unless the resistance of a town necessitated siege,[108] then by forbidding the offense categorically subject to a more limited series of substitutes sanctioned by law. The latter of these processes witnessed the development of a custom of

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[106] SAKUYE TAKAHASHI, CASES ON INTERNATIONAL LAW DURING THE CHINO-JAPANESE WAR 155-156 (Cambridge University Press, 1899) [hereafter *Takahashi*]. For a detailed narration of the history of the offense, albeit focused exclusively on art, see WAYNE SANDHOLTZ, PROHIBITING PLUNDER: HOW NORMS CHANGE 71-100 (Oxford University Press, 2007) [hereafter *Sandholtz*]

[107] Even Napoleon is quoted as stating that "But nothing is more calculated to disorganize and completely ruin an army. From the moment he is allowed to pillage, a soldier's discipline is gone." THE GERMAN WAR BOOK: BEING THE USAGES OF WAR ON LAND ISSUED BY THE GREAT GENERAL STAFF OF THE GERMAN ARMY, 132 (J. H. Morgan trans., 1915) HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 468 (Stevens & Sons, 1889) (stating that "[i]t, however, unfortunately often happens that military discipline is relaxed after an assault, and the general is unable to restrain his soldiers from plundering private houses.") Even the modern British Military Manual bears out the impact on pillage on military discipline, where it states that "[n]othing is more subversive of military discipline than plundering or looting." UK MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT 300 (Oxford, 2005) [hereafter *UK Military Manual*]; JAMES BROWN SCOTT, THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES: THE CONFERENCE OF 1907, 789 – 790 (Vol III, 1921) (disputing that military discipline alone explains the prohibition against pillage).

[108] NORMAN BENTWORTH, THE LAW OF PRIVATE PROPERTY IN WAR, 8 (SWEET & MAXWELL, 1907) ("the old custom of pillage, however, was still retained where a besieged town was taken after having been stormed ; but this was by way of penalty for obstinacy.")

purchasing immunity from pillage by paying a sum of money agreed between the local population and the invader, and by furnishing the invading forces with specified quantities of articles required for the use of their army.[109] These practices, known as contributions and requisitions, were subsequently retained in more circumscribed form within codifications of the laws of war. By the time the Hague Regulations were signed in 1907, the treaty stipulated that "pillage is formally forbidden,"[110] but also afforded warring factions a series of powers to requisition property, seize war booty and exact contributions subject to certain restrictions.[111]

Initially, pillage was viewed as distinct from the abuse of these limited powers over property. After the close of WWI, the Commission of Responsibilities' convened to identify enemy war crimes listed pillage as one of several offenses against property that attracted criminal sanction without making a discernable effort to elaborate on the content of pillage or its relationship to what it deemed other property-related crimes.[112] In particular, the Commission's final report cited a series of incidents under the headings "confiscation of property" and "exaction of illegitimate or of exorbitant contributions and requisitions," without explaining the distinction between the various offenses and pillage

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[109] *Takahashi*, *supra* note 106, at 155-156.

[110] Hague Regulations 1907, Article 47; *Id.* Article 28 ("the pillage of a town or place, even when taken by assault, is prohibited,"

[111] *Hague Regulations, supra* note 110, Articles 46-55 (affording armies the right to requisition civilian property "for the needs of the army of occupation," take moveable state property "of a nature to serve operations of war," seize all munitions of war and administer state property according to the doctrine of usufruct, demand contributions). For more on the law governing these exceptions, see infra Part I.H.

[112] COMMISSION ON THE RESPONSIBILITY OF THE AUTHORS OF THE WAR AND ON ENFORCEMENT OF PENALTIES, Report Presented to the Preliminary Peace Conference, March 29, 1919, Annex A, at 40.

proper.[113] Overlap was patent. One entry under the rubric of "illegitimate requisitions" described how "an institution known as the Kriegsrohfitoffstelle drained the country systematically and completely of all raw materials…"[114] The reluctance to treat these types of acts as synonymous with pillage was artificial, since even at the time commentators accepted that contributions and requisitions of this sort "did not differ from pillage except in name."[115]

In light of these criticisms, courts convened after the end of WWII abandoned the unnecessarily overlapping offences by criminalizing all types of misappropriation of property during war as pillage. The provisions of the Hague Regulations governing requisitions and the like were thus treated as exceptions to a single offence. The IG Farben judgment, for instance, defined pillage by declaring that "[w]here private individuals, including juristic persons, proceed to exploit the military occupancy by acquiring private property against the will and consent of the former owner, such action, not being expressly justified by any applicable provision of the Hague Regulations, is in violation of international law."[116] Excessive or illegal requisitions were thus treated as pillage. A US Military Tribunal, for example, found that "[t]he materials thus taken were not for the needs of the army of occupation, and the carrying of them away was nothing more than pillage

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[113] *Id.*, Annex A, at 41-43.

[114] *Id.*, Annex A, at 42.

[115] JAMES WILFORD GARNER, INTERNATIONAL LAW AND THE WORLD WAR, 107 (Longmans, 1920).

[116] I.*G. Farben Case*, *supra* note 99, at 1133.

and spoliation under the disguise of requisitions."[117] As a result of this broader conception of pillage, courts prosecuted the misappropriation of oil, the forcible acquisition of shareholdings and patent infringements on the premise that pillage encapsulates all violations of property rights during war.[118]

This unified theory of property-related offenses during war was short-lived. Soon after the Second World War, provisions of the Geneva Conventions of 1949 reaffirmed that "pillage is prohibited,"[119] but the Conventions also promulgated a new overlapping and highly confusing war crime. Within the section of the Geneva Conventions dedicated to grave breaches, the Conventions proscribed "extensive destruction and *appropriation* of

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[117] U.S. v. Krupp, 9 Trials of War Criminals, 1327, 1344 [hereafter *Krupp Case*] (finding that "[t]he materials thus taken were not for the needs of the army of occupation, and the carrying of them away was nothing more than pillage and spoliation under the disguise of requisitions."); See also Case of Phillipe Rust, Permanent Military Tribunal at Metz, Mar. 5, 1948, 9 United Nations War Crimes Commission Law Reports of Trials of War Criminals [hereafter *Law Reports of Trials of War Criminals*] 71, 72 (explicitly regarding "abusive and illegal requisitioning" of property as a case of pillage.) Trial of Ulrich Greifelt and Others, 13 *Law Reports of Trials of War Criminals* 1, 26 (finding Lorenz guilty of pillage on the basis that "confiscations were carried out by Lorenz under the guise of requisitions.")

[118] I.*G. Farben Case*, *supra* note *99*, at 1146 (finding that "French shareholders were deprived of their majority interest in Norsk-Hydro under compulsion resulting from the ever-present threat of seizure of the physical properties of Norsk-Hydro in occupied Norway and that their participation in Nordisk-Lettmetall was not voluntary."); See also *Ministries Case*, *supra* note *81*, at 777 (finding Rasche, the chairman of the Dresdner Bank, guilty of pillaging the Rothschild-Gutmann share in the Vitkovice steel plants in then Czeckoslovakia); *Roechling Case*, *supra* note *77*, at 1118 (Roechling was charged with plundering patents concerning the steel production methods of a rival, but the court held that he only threatened to do so.); See also *id.*, at 1116 and 1120 (where Roechling was found guilty of plunder of credit for having induced the French government to credit a German company with 180 million francs, which were used to reduce Roechlings debts while selling material at less than cost to the German government.); *Ministries Case*, *supra* note *81*, at 720 (convicting Stuckart, a civil servant active in the German agency charged with spoliation of Polish property for having signed a decree that provided for the expropriation of various property in Poland, including "stocks and other securities of all kinds; bills of exchange and checks; mortgages and land charge deeds.")

[119] Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, *entered into force* Oct. 21, 1950. Art. 33, second paragraph [hereafter *Geneva Convention IV*]

property *not justified by military necessity* and carried out unlawfully and wantonly."[120] In spite of the fact that the "appropriation" aspect of this new offense is technically more limited in scope than pillage,[121] its reference to military necessary created a conceptual clash with the terms of the Hague Regulations. At Nuremberg, only provisions of the Hague Regulations were viewed as exceptions to pillage in keeping with the origins of the offence, but suddenly military necessity also purported to limit property rights during warfare or occupation. As will become apparent, the resulting tension between military necessity and the terms of the Hague Regulations has proved a primary basis for disagreement that continues to underpin doctrinal divergence today.

The final development of special importance in the growth of pillage involved the extension of the offense from its essentially inter-state origins to so-called non-international armed conflicts. As part of an increasingly willingness to retreat from staunch conceptions of state sovereignty that zealously protected against the role of international law in the domestic sphere, provisions of the Additional Protocol to the Geneva Conventions signed in 1977 listed pillage within a catalog of protections applicable during conflicts "not of an international character."[122] With the rapid assimilation of laws of war governing international and non-international armed conflict, a great deal of state practice confirms

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[120] *Id.* Art. 147 (emphasis added).

[121] KNUT DÖRMANN, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: SOURCES AND COMMENTARY 89-96 (Cambridge University Press, 2002)

[122] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609, entered into force Dec. 7, 1978, Article 4(g).

that pillage amounts to a norm of customary international law applicable in both international and non-international armed conflicts.[123] Increasingly, the exceptions contained within the Hague Regulations were also used within civil wars, even though the origins of these exceptions clearly contemplated inter-state warfare. Pillage might thus be universally proscribed during all types of modern armed conflict, but the different historical origins of the offence create doctrinal ambiguities that remain unresolved within the three competing definitions of the offense.

B. Terminological Duplication: Pillage, Plunder, Spoliation and Looting

The underlying substantive tensions within the development of pillage are compounded by an unnecessary terminological ambiguity amongst labels used to describe the offense. The terms plunder, spoliation and looting are frequently used as substitutes for pillage within statutory definitions of the offence, judicial reasoning and academic commentary. The proliferation of these colloquial alternatives for one and the same offense has spawned highly confused understandings of pillage, even among leading authorities.[124]

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[123] JEAN-MARIE HENKAERTS AND LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, Vol. I, 182-185 (Cambridge Univ. Press, 2005) [hereafter *Customary International Humanitarian Law Study*].

[124] *DRC v. Uganda Case*, *supra* note *94*,. ¶ 250 (assessing the illegal exploitation of Congolese gold and diamonds by referencing the prohibition against "pillage," but then concluding that Uganda was responsible for "all acts of looting, plundering and exploitation of natural resources in the occupied territory."); For confusion within the ICTY, see infra note 64; Robert Dufresne, *Reflections and Extrapolation on the ICJ's Approach to Illegal Resource Exploitation in the Armed Activities Case*, 40 N.Y.U. J. Int'l L. & Pol 185 (2008) [hereafter *Reflections and Extrapolation*] (surmising that the concepts of pillage, plunder, spoliation and looting are autonomous elements of illegal exploitation more broadly.)

A full explanation of these equivalent but misunderstood terms is thus indispensable in defining the scope of the offense. In fact, dispelling these terminological misunderstandings is especially important for present purposes given that the remainder of this Article uses corporate convictions for "plunder" or "spoliation" of natural resources as precedents for the interpretation of "pillage" in modern criminal statutes. As this section shows, pillage is synonymous with plunder, spoliation and looting, and encapsulates all forms of illegal exploitation of both public and private property during war.

With respect to the first of these terminological correlations then, pillage and plunder are undoubtedly legal synonyms. As early as the 17th century, Grotius used the two terms inter-changeably, sparking a practice that became widespread among subsequent commentators of that vintage.[125] At Nuremberg, the terms pillage and plunder were used in a similar fashion. Although Article 6(b) of the Charter of the Nuremberg Tribunal adopted the term "plunder of public or private property,"[126] the French equivalent referred instead to "le pillage des biens publics ou privés."[127] This linguistic equivalence also permeated the

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[125] WILLIAM WHEWELL (trans.), GROTIUS ON THE RIGHTS OF WAR AND PEACE 345 (Cambridge, 1953) ("They who condemn this practice nay, that greedy hands, active in pillage, are so forward as to snatch the prizes which ought to fall to the share of the bravest; for it commonly happens that they who are slowest in fight are quickest in plunder."); JOHN WESTLAKE, INTERNATIONAL LAW, PART 2 WAR 92-93 (2 ed., 1907) (describing pillage as "indiscriminate plundering," amounting to "the unauthorized taking away of property, public or private."); ERNST H. FEILCHENFELD, THE INTERNATIONAL ECONOMIC LAW OF BELLIGERENT OCCUPATION 30 (Carnegie, 1942) (using terms pillage and plunder interchangeably) [hereafter *Feilchenfeld*]

[126] Charter of the International Military Tribunal (IMT), August 8, 1945, 58 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 280.

[127] Accord concernant la poursuite et le châtiment des grands criminels de guerre des Puissances européennes de l'Axe et statut du tribunal international militaire. Londres, 8 août 1945, Article 6(b) ("Les Crimes de Guerre: c'est-à-dire les violations des lois et coutumes de la guerre. Ces violations comprennent, sans y être limitées[…] le pillage des biens publics ou privés).

substance of the Tribunal's opinion. Within the body of the Nuremberg judgment, the Tribunal addressed the widespread incidents of property violations during the war under a heading entitled "pillage of public and private property" and appeared to use the two terms as analogues throughout the course of its reasoning.[128] On occasion, pillage and plunder were even used interchangeably when addressing the illegal exploitation of natural resources. In the wake of the Japanese seizure of oil in Singapore during WWII, a British court ruled that "[t]he seizure of the oil resources of the Netherlands Indies was economic *plunder* […] the Japanese acted in contravention of the Hague Regulations, and committed an act of *pillage* against the claimants' properties, which rendered them liable to be condemned for a violation of the laws and customs of war." The conjoint use of these labels in no way implied normatively distinct connotations.

The ICTY's Statutes not only replicated their predecessor's linguistic differences; the Tribunal's verdicts also reflected the essentially interchangeable nature of the two labels. In more than one case, an accused was convicted of pillage in the original version of the judgment but of plunder in the English translation.[129] Despite these clear linguistic parallels, the Tribunal shied away from drawing the obvious conclusion that the two terms were interchangeable by reasoning that "it may be noted that the concept of pillage in the traditional sense implied an element of violence not necessarily present in the offense of

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[128] *Nuremberg Judgment*, *supra* note *99*, at 228 (finding that "[p]ublic and private property was systematically plundered and pillaged in order to enlarge the resources of Germany at the expense of the rest of Europe.")

[129] See for instance Kubura's conviction for "pillage" in the original French, but for plunder in the English translation. Prosecutor v. Hadžihasanović et al. Case No. IT-01-47-T, Judgement, (Mar. 15 , 2006), disposition [hereafter Hadžihasanović Trial Judgment]

plunder."[130] Instead, the same court ruled that the term plunder "should be understood to embrace all forms of unlawful appropriation of property in armed conflict for which individual criminal responsibility attaches under international law, including those acts traditionally described as "pillage."[131] Aside from creating the linguistic absurdity whereby the official French translation of the passage presented the truism that pillage includes pillage,[132] the reasoning ignored an extensive jurisprudence indicating that the offense need not involve overt physical violence.[133] There was, therefore, little basis for the decision to sidestep an extensive body of literature and practice indicating that pillage and plunder were linguistic alternatives for a common legal concept.

Somewhat confusingly, spoliation simultaneously emerged as a further label for pillage. Like plunder, the term spoliation does not feature in international treaties or

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[130] Prosecutor v. Delalić et al., Case No. IT-96-21-T, Judgement, ¶ 591 (Nov. 16, 1998) [hereafter *Delalić Trial Judgment*].

[131] *Id*.

[132] The authoritative French translation of the passage reads as follows "il convient de relever que le crime d'appropriation illégale de biens publics ou privés au courts d'un conflit armé a été qualifié tantôt de "pillage" (*pillage*), tantôt de "pillage" (*plunder)* et tantôt de "spoliation." Par consequent, tandis que l'article 47 du Règlement de La Haye et l'article 33 ed la IVe Convention de Genève interdisent de par leur libellé l'acte de "pillage" (pillage), le Statute de Nuremberg la Loi No 10 du Conseil de contrôle et le Statut du Tribunal international font tous reference au crime de guerre de "pillage (plunder) de biens publics ou privés." Si l'on peut faire observer que la notion de pillage (pillage au sens trantionnel du terme implique un element de violence, qui n'est pas forcément present dans le crime de pillage (plunder), il n'est pas nécessaire en l'espèce de determiner si, en vertu du droit international actual, ces deuc termes sont entièrement synonymes") *Delalić Trial Judgment*, *supra* note *130*, ¶ 591

[133] In discussing the conviction of two female teenagers for pillage as a result of having illegally procured Jewish property, the UN War Crimes Commission stated that "[t]he French law and jurisprudence are now evidence that to pillage in the traditional sense, that is as misappropriation committed with the use of violence, is added ordinary theft or fraudulent removal of property, where there is, or need be, no violence." See also WCC, Vol X, Notes on the Case, 164 (the United Nations War Crimes Commission concluded that "[p]roperty offenses recognized by modern international law are not limited to offenses against physical tangible possessions or to open robbery in the old sense of pillage.")

codified lists of international crimes, but in the wake of WWII prosecutors preferred to charge pillage as spoliation, apparently as a matter of expediency. When the Directors of IG Farben were charged with spoliation for acts that amounted to pillage, the use of a term that did not feature within the enabling statute prompted the court to clarify that "the term 'spoliation,' which has been admittedly adopted as a term of convenience by the prosecution, applies to the widespread and systematized 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 during World War II."[134]

The preference for the term spoliation was, of course, of dubious convenience when it merely substituted a colloquialism for a pre-existing legal concept already prone to unnecessary terminological duplication. As the same case concluded, "spoliation is synonymous with the word 'plunder' as employed in Control Council Law No. 10, and that it embraces offenses against property in violation of the laws and customs of war of the general type charged in the indictment."[135] Certainly, the argument that spoliation might be distinguished from pillage or plunder on the basis of scale or policy has little meaningful support.[136] As Lawrence had observed almost a century earlier, "[p]illage is still pillage,

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[134] *IG Farben Case, supra* note *99*, at 1133.

[135] *Id.*

[136] *Reflections and Extrapolation*, *supra* note 124, at 193 (arguing that among other factors "spoliation often involves a 'normalization' which gives the misappropriation a veneer of ordinary economic acitivity,")

even though it be reduced to system and carried on by rule and measure."[137] By extrapolation then, spoliation, plunder and pillage share a common legal meaning, even if only one of these terms features explicitly in international conventions.

By fully laying this longstanding terminological misunderstanding to rest, a comprehensive picture of what constitutes a precedent for pillage emerges, which in turn allows us to confront and resolve the three competing definitions of the offense.

C. Towards a Modern Doctrinal Consensus

The first and preferable definition of pillage views the offence as akin to theft subject to specific exceptions defined in the Hague Regulations, which are assessed individually. The ICTY habitually adopts this approach in determining charges of pillage. The initial decisions of the ICTY governing the offense posited that pillage "is committed when private or public property is appropriated intentionally and unlawfully."[138] But in

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[137] LAWRENCE, THE PRINCIPLES OF INTERNATIONAL LAW 377 (D. C. Heath & Co., 1899). See also Prosecutor v. Martinović, Case No. IT-98-34-T, Judgement, ¶ 612 [hereafter *Martinović Trial Judgment*] (stating that pillage "is general in scope, comprising not only large-scale seizures of property within the framework of systematic economic exploitations of occupied territory, but also acts of appropriation committed by individual soldiers for their private gain. In fact, under international law, plunder does not require the appropriation to be extensive or to involve a large economic value.") (footnotes omitted). See also Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-T, Judgement, ¶ 352 (Feb. 26, 2001) (pillage extends to ''both widespread and systematised acts of dispossession and acquisition of property in violation of the rights of the owners and isolated acts of theft or plunder by individuals for their private gain.'') Prosecutor v. Hadžihasanović et al. Case No. IT-01-47-T, Judgement, ¶ 49 (Mar. 15 , 2006) [hereafter *Hadžihasanović Trial Judgment*]

[138] Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-A, Judgement, ¶ 82. (Dec. 17, 2004) [hereafter *Kordić Appeal Judgment*]

deference to the complexity of the exceptions in the Hague Regulations that color the legality of forced property acquisitions during war, the Tribunal tentatively confessed that "[i]t is not possible, absent a complete analysis of the existing legal framework for the protection of public and private property under international humanitarian law, to here set out a more comprehensive description of the circumstances under which such criminal responsibility arises."[139]

Later authorities from within the same institution proved more willing to at least superficially identify these exceptions. In one instance, a Trial Chamber hearing allegations of pillage concluded an appraisal of the offense by surmising that "[a]ccording to the Hague Regulations forcible contribution of money, requisition for the needs of the army of occupation, and seizure of material obviously related to the conduct of military operations, though restricted, are lawful in principle."[140] Other judgments followed this lead, not only endorsing the Hague Regulations as exceptions to the prohibition against pillage but also by assessing each of the exceptions on an individual basis.[141] As previous sections show, this

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[139] Within the first judgments of the Tribunal, the failure to articulate specific exceptions to the prohibition against pillage was unproblematic, since allegations generally involved incidents such as the seizure of jewelry and money from detainees within prison camps or the looting of civilian homes after military operations, which did not give rise to arguments that could square with the exceptions contained in the Hague Regulations. See Delalić Trial Judgement, *supra* note 130, ¶ 1147 and *Kordić Appeal Judgment, supra* note *138*, ¶ 548.

[140] *Martinović Trial Judgment*, *supra* note 137, ¶ 616

[141] *Hadžihasanović Trial Judgment, supra* note *137,* ¶ 51 ("In the context of international armed conflicts, the taking of war booty and the requisition of property for military use may constitute limitations to that principle."); Prosecutor v. Martić, Case No. IT-95-11-T, Judgement, ¶ 102 (June 10, 2007) [hereafter *Martić Trial Judgment*] ("[a] party to the conflict is also allowed to seise enemy military equipment captured or found on the battlefield as war booty, with the exception that the personal belongings of the prisoners of war may not be taken away. According to the Hague Regulations, forcible contribution of money, requisition for

approach aligns with the historical development of the offence as a unified criminal concept covering all violations of property-rights subject to longstanding customary exceptions now codified in the laws of war.

The second less compelling definition of pillage is largely consistent with this methodology except that it condenses the five exceptions contained within the Hague Regulations into a single umbrella standard that bears little resemblance to the terms of the exceptions themselves. As we witnessed in the earlier sections, the *IG Farben* judgment also considered that pillage involves acquiring property without the consent of the owner "not being expressly justified by any applicable provision of the Hague Regulations."[142] The definition was enlightened insofar as it recalled the relevance of consent and exceptions created within the Hague Regulations, but the exceptions promised were seldom appraised with any degree of rigor. Instead of addressing each and every exception contained within the Hague Regulations, the Nuremberg Judgment condensed these limitations into a single overarching test that crudely surmised that "[t]hese articles [of the Hague Regulations] make it clear that under the rules of war, the economy of an occupied country can only be required to bear the expense of the occupation, and these should not be greater than the economy of the country can reasonably be expected to bear."[143]

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the needs of the occupying army, and seizure of material obviously related to the conduct of military operations, though restricted, are lawful in principle.")

[142] I.*G. Farben Case*, *supra* note 99, at 1133.

[143] *Nuremberg Judgment*, *supra* note 99, at 238-239.

The amalgamation was problematic. For one reason, the sweeping generalization privileges efficiency over coherence, since the umbrella standard bears little resemblance to the wording of the exceptions. Even though it purports to ensure an occupier's obligations to maintain a local population, the reconstituted test condones violations of private property rights provided the proceeds from the theft are spent on the upkeep of the military occupation. The provisions in question support no such proposition. The amalgamation also creates an unworkable standard in practice, whereby the legality of transactions with warring factions over property forcibly seized during war would turn on the subsequent application of the proceeds to the "expenses of the occupation." As a consequence, the legality of the transaction could not be determined at the time of sale, creating a commercially unworkable regime. By contrast, the orthodox approach adopted by the ICTY assesses the legality of acts alleged to constitute pillage in light of the each and every exception contained within the Hague Regulations, allowing a clearer determination of title at the time the transaction takes place.

The third variant of pillage purports to transcend the exceptions contained in The Hague Regulations altogether, although this quest for simplicity also harbors serious legal shortcomings. According to the definition of "pillaging" adopted by the ICC Elements of Crimes, the offense includes the following key components:[144]

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[144] International Criminal Court, Elements of Crimes, ICC-ASP/1/3, at 138-139 and 150 [hereafter *ICC Elements of Crimes*].

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 or non-international armed conflict; and
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

[*] As indicated by the use of the term 'private or personal use', appropriations justified by military necessity cannot constitute the crime of pillaging.

The definition certainly provides a helpful explanation of most of the requisite elements of the offence, but one aspect undermines the value of the definition. By restricting pillage to appropriation "for personal or private purposes," the ICC's definition departs from the vast majority of WWII cases that condemned acts of plunder perpetrated in furtherance of the Nazi war machine. For instance, assuming that pillage and plunder are synonyms, the ICC's doctrinal reconfiguration of pillage would absolve Hermann Goering and other senior Nazi officials of liability for pillaging raw materials, scrap metals, machines, food, crude oil, art, furniture and textiles to the extent that their motive was military not personal.[145] In an equally questionable departure from historical understandings of the offence, the finding that the Japanese had plundered oil stocks from Singapore could not stand within the ICC's revised definition of the offense, even though

[145] *Nuremberg Judgment*, *supra* note 99, at 238, 281, 295, 329, 346 (finding Goering, Rosenberg, Seyss-Inquart and Schacht guilty of pillage for the systematic exploitation of raw materials, scrap metals, machines, food, crude oil, art, furniture and textiles.);

these acts were rightly deemed to have violated property rights enshrined in the laws of war.[146] The ICC's reformulated definition also runs counter to modern war crimes jurisprudence, which has aptly reaffirmed that the laws of war "do not allow arbitrary and unjustified pillage for army purposes or for the individual use of army members."[147] In response to these concerns, the Special Court for Sierra Leone appears justified in having declared that "the requirement of 'private or personal use' is unduly restrictive and ought not to be an element of the crime of pillage."[148]

In addition, the ICC's definition confuses the exceptions contained within the Hague Regulations with military necessity. To recall, an asterisked footnote in the ICC definition of pillage stipulates that 'private or personal use' implies "appropriations justified by military necessity cannot constitute the crime of pillaging." This, of course, conflates the terms of the newer grave breach within the Geneva Conventions that speaks of appropriation not justified by military necessity with the older offence of pillage, exceptions to which were explicitly codified within the Hague Regulations. This confusion is normatively significant since Military necessity cannot limit pillage. The longstanding principle of international humanitarian law insists that military necessity can only act as an exception to the laws of war when the concept is explicitly referenced within the relevant

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[146] N. V. De Bataafsche Petroleum Maatschappij and Others v. The War Damage Commission, Singapore Law Reports (1956) p. 65 [hereafter *Singapore Oil Stocks*]

[147] *Hadžihasanović Trial Judgment*, *supra* note *137*, ¶ 52.

[148] *Brima Trial Judgment*, *supra* note *75*, ¶ 754 (June 20, 2007); Fofana Trial Judgment, supra note 75, ¶ 160.

provision.[149] The right of relief personal to unrestricted access during war, for instance, can be curtailed by military necessity since the Geneva Conventions state that "[o]nly in case of imperative military necessity may the activities of the relief personnel be limited to their movements temporarily restricted."[150] And yet in the case of pillage, both the Hague Regulations and Geneva Conventions state quite simply that and "pillage is prohibited."

The deduction that military necessity does not curtail pillage also conforms with the intentions of states. During the negotiation of the Hague Regulations an attempt to make private property dependent on military necessity was defeated, precisely because exceptions to the offense were already set out within provisions of the Hague Regulations governing property rights.[151] All of this confirms that the creative use of both the 'person and private purposes' requirement as well as military necessity within the corresponding footnote to the ICC's definition of the offense cannot override the origins of pillage or the

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[149] *Instructions for the Government of Armies of the United States in the Field* (Lieber Code). 24 April 1863, Art. 14 ("Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.");*UK Military Manual*, *supra* note *107*, ¶ 2.2 (defining military necessity as "that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of conflict…"); See generally, Robert Kolb, *La necessité militaire dans le droit des conflits armés – essai de clarification conceptuelle*, 151-186 in LA NÉCESSITÉ EN DROIT INTERNATIONAL (Societé Française pour le droit international, 2007).

[150] Additional Protocol I, Art 71(3).

[151] See DORIS GRABER, THE DEVELOPMENT OF THE LAW OF BELLIGERENT OCCUPATION A HISTORICAL SURVEY 198 (Oxford Univ. Press, 1949) [hereafter *A Historical Survey*] (claiming that the Italian Delegate at the Brussels meeting in 1874 that codified the exceptions that were later adopted in the Hague Regulations proposed "that the protection of private property should be made dependent on military necessity, as in the Russian draft, was defeated on the ground that the principle expressed in the article is a general one, and that exceptions to it are discussed in the articles dealing with requisitions and contributions.")

categorical language in the Hague Regulations and Geneva Conventions themselves.[152] The third fragmented test for pillage might bring greater clarity, but it departs from history and violates the laws of war. The preferable definition thus borrows the remaining elements identified within the ICC's definition, substituting the exceptions to the Hague Regulations for the requirement of private or personal use.

III. THE PILLAGE OF NATURAL RESOURCES

The next logical point of interrogation in plotting the role of pillage in curbing resource wars is to ascertain how the elements of this generic offense interrelate with illegal exploitation of natural resources in particular. This Part considers four of the elements of the offense gleaned from the ICC Elements of Crimes together with the exceptions contained in the Hague Regulations in light of the intricacies of the illegal exploitation of natural resources during modern warfare. The elements of pillage considered include: appropriation; ownership; consent; *mens rea*, and exceptions within the Hague Regulations. As we will see, pillage emerges not only as a means of punishing corporate actors responsible for collaborating with military in these illicit commercial ventures; but also as a

[152] As the U.S. Military Tribunal concisely stated in the *Hostages Case*, "The Hague Regulations are mandatory provisions of international law. The prohibitions therein contained, control, and are superior to military necessities of the most urgent nature except where the Regulations themselves specifically provide the contrary." United States of America against Wilhelm List, et al. ("Hostages Case") 11 Trials of War Criminals 1296 (1949).

tool capable of protecting valid corporate interests in resource wealth against warring factions and corrupt government élite.

D. Appropriation of Natural Resources

An individual accused of pillaging natural resources must "appropriate" property. At first glance, the requirement may seem more than slightly banal, but a closer inspection reveals much about the scope of the offence and overly restrictive views of corporate responsibility for violations of international law. A robust body of jurisprudence indicates that pillage encompasses both theft and the receiving of stolen property, thereby encapsulating the entire supply chain within the spectrum of actors who "appropriate" conflict resources. Appropriation, in other words, encompasses the acquisition of natural resources directly from the owner by way of extraction, harvesting or mining; but also indirect appropriation via an intermediary by way of purchase or trade. The scope of the term "appropriation" therefore envelopes an entire supply chain in conflict commodities as potentially direct perpetrators of pillage without recourse to notions of complicity that dominate perceptions of corporate liability for international crimes.

The first meaning of the term appropriation is largely unremarkable. In many instances extractive industries operating in conflicts zones achieve this "appropriation" *directly* from the owners of natural resources, either by entering into joint ventures with military groups as extractive partners or by relying on the putative authorization of an armed group that has no capacity to confer title. In one instance of direct appropriation

through collaboration with a warring army noted at the outset, the Nuremberg Tribunal convicted Walther Funk for his management of the Continental Oil Company and the crude oil it pillaged throughout Europe at the German behest.[153] The Nuremberg Tribunal unanimously considered that this constituted pillage, finding Funk personally culpable for his role in these practices.[154] In the same way, corporate actors that collaborate with rebel groups or foreign governments in the extraction, mining or harvesting of natural resources in conflict zones "appropriate" these resources from the true owners.

One specific manifestation of this direct appropriation is especially common—companies frequently exploit natural resources directly from the owner by relying on the authorization of a warring party to exploit mineral wealth even though the warring faction has no capacity to confer this authority. For instance, Paul Pleiger, the manager of a company known by the acronym BHO, was found guilty of pillaging coal from mines located in Poland,[155] even though the Reich government issued a so-called trusteeship to Pleiger's company. Given that the Reich government had no authority to seize these properties, Pleiger became personally culpable for pillaging in excess of 50,000 tons of coal acquired from the region each year of the war.[156] These facts are broadly comparable with allegations leveled against a British and a South African company, who reputedly undertook a joint venture with a Rwandan affiliate to exploit Congolese gold, even though

[153] *Nuremberg Judgment, supra* note *99*, at 306.

[154] *Id.* at 307.

[155] *Ministries Case, supra* note *81*, at 741.

[156] *Id.*

the concession purporting to permit the extraction emanated from a rebel group controlled by the Rwandan Government. These sorts of examples are not, however, especially interesting reflections of the term "appropriation" – extracting minerals directly from mines of quarries or harvesting timber directly from forests clearly constitutes "appropriating" property.

Appropriation through purchase, on the other hand, gives rise to significantly more striking normative implications. A series of pillage cases endorse the notion that receiving stolen property can constitute pillage.[157] A particularly useful illustration of this principle stems from a case involving Karl Mummenthey, a manager of the German Earth and Stone Works known as DEST, who was found guilty of pillage for harboring the proceeds of an especially sinister campaign of plunder known as Action Reinhardt.[158] On appeal from conviction, Mummenthey protested that he took no part in the infamous Action Reinhardt through which dental gold from deceased prisoners was seized. In finding Mummenthey guilty of pillage, the Tribunal retorted that "it is not correct to say, as defense counsel says, that because a crime has been completed no further crime may follow from it. Receiving stolen goods is a crime in every civilized jurisdiction and yet the larceny, which forms its

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[157] Judgment of the Permanent Military Tribunal at Metz, (June 10, 1947) in 9 *Law Reports of Trials of War Criminals*, at 65 (finding a German gendarme named August Bauer guilty of pillage for removing and using furniture that his predecessor in the gendarmerie had stolen from a French inhabitant). Judgment of the Permanent Military Tribunal at Metz, (April 6, 1948) in 9 *Law Reports of Trials of War Criminals*, at 65 (finding a German settler in France named Elisabeth Neber guilty of pillage for receiving crockery stolen by her nephew from a French woman, which Neber took with her when returning to Germany towards the end of the war.)

[158] U.S. v. Pohl et al., 5 *Trials of War Criminals*, 958, 1051 and 1055 (Nov. 3, 1947) [hereafter *Pohl Case*].

basis, has already been completed."[159] In other words, receiving natural resources from an intermediary constitutes "appropriation" for the purposes of pillage, even though the appropriation is not achieved directly from the rightful owner.

The adequacy of this type of indirect appropriation is further reflected in jurisprudence highlighting culpability for pillage by purchasing stolen merchandise during war. One example is especially apposite. A court convened in France found a German couple named Bommer and their daughters guilty of pillage for purchasing furniture and other property from a German custodian in charge of an abandoned French farm.[160] When reflecting upon the daughters' convictions, the UN War Crimes Commission reasoned that "[t]he case against the daughters of the Bommer couple is an illustration of how receiving stolen goods may, under the same principles, equally constitute a war crime."[161] Other cases found a variety of defendants guilty of pillage through purchase in strikingly similar circumstances.[162] The extrapolation of principles gleaned from these cases to contemporary resource wars is revealing. If German civilians who purchased stolen property from a custodian during armed occupation were held responsible for pillage, corporate

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[159] *Pohl Case*, *supra* note 158, at 1244.

[160] Trial of Alois and Anna Bommer and their Daughters, Permanent Military Tribunal At Metz, 9 *Law Report of Trials of War Criminals*, (February 19, 1947), at 64 [hereafter *Bommer Case*].

[161] *Id.*

[162] Judgment of the Permanent Military Tribunal at Metz, 2nd December, 1947, in 9 *Law Reports of Trials of War Criminals*, at 65 (finding an individual named Willi Buch guilty of pillage for purchasing at auction property as banal as silverware, which the German Kommandantur at Saint-Die had illegally requisitioned in occupied France.) Likewise, a German settler in France named Elisabeth Neber was found guilty of receiving crockery stolen by her nephew from a French woman, which she took with her when returning to Germany towards the end of the war. *Id.*

representatives who purchase natural resources from the rebel or foreign military forces during contemporary resource would appear to warrant comparable treatment.

A range of cases addressing the liability of corporate representatives for trade in conflict commodities confirm this proposition. A Tribunal of Military Government for the French Zone of Occupation in Germany tried and convicted representatives of the Roechling firm for pillage arising out of the commerce in illegally seized scrap metal from the German Raw Materials Trading Company, known (appropriately enough) by the acronym ROGES.[163] In December 1940, the German Army High Command founded ROGES as a collaborative enterprise with other Nazi authorities, then tasked the entity with acquiring property from German military agencies and on-selling these acquisitions to German industries.[164] Herman Roechling, the director of the firm, was convicted of pillage for purchasing illegally seized property euphemistically known as "Booty Goods." In delivering the verdict, the Tribunal rejected the contention that Roechling's seizures were vindicated by the Reich annexing French territory, since "[k]nowingly to accept a stolen object from the thief constitutes the crime of receiving stolen goods."[165] Like other German industrialists in the same circumstances, Hermann Roechling was deemed "a receiver of

[163] *Roechling Case*, *supra* note 77, at 1117-1118.

[164] *Id.,* See also *Krupp Case*, *supra* note 117, at 1361-1362.

[165] *Id.*, at 1113.

looted property."[166] A number of other cases involving the purchase of stolen property were treated as pillage in keeping with this position.[167]

The willingness of these precedents to consider receiving stolen property as an element of pillage is vindicated by analogies to theft in domestic criminal law. Several jurisdictions subsume receiving stolen property within a single definition of theft on the basis that the original thief and the receiver both appropriate property with the intent to deprive the rightful owner.[168] As the commentary to the U.S. Model Penal Code itself argues, "analytically, the receiver does precisely what is forbidden by [the prohibition against theft] – namely, he exercises unlawful control over property of another with a purpose to deprive."[169] In jurisdictions that disaggregate theft and receiving as separate

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[166] *Id.*, at 1118.

[167] *I.G. Farben Case*, *supra* note 99, at 1143 (representatives were convicted of pillage for purchasing purchased "land, buildings, machinery, equipment" from the Boruta factory, which the Reich Ministry of Economics had seized); *Id.*, at 1146-1147 (convicting Farben executives of pillage for purchasing the Mulhausen Plant from the German Reich"); (convicting Farben for purchasing the oxygen and acetylene plants, referred to as Strassbourg-Schiltigheim, under similar circumstances); *Krupp Case*, *supra* note 117, at 1351 (convicting members of the firm Krupp for purchasing an office in Paris "not from the rightful owners of the premises but from the provisional administrator of the Societe Bacri Frères by virtue of a decision of a commissariat for Jewish questions.") *Id.* at 1353 (convicting members of the firm Krupp for purchasing machinery from a German appointed administrator, who had seized the machinery from a Jewish owner. Krupp paid "a ridiculously low price" for the machinery and the court found six representatives guilty of plundering the property "by purchasing and removing the machinery.")

[168] The Model Code stipulates that "a person is guilty of *theft* if he purposely receives, retains, or disposes of moveable property of another knowing that is has been stolen, or believing that it has probably been stolen…" AMERICAN LAW INSTITUTE, MODEL PENAL CODE AND COMMENTARIES, Part II, §223.6 (The American Law Institute, 1980) (emphasis added) [hereafter *Model Penal Code*]

[169] *Model Penal Code*, *supra* note *168*, at 232. See also SMITH & HOGAN, CRIMINAL LAW 848 (David Ormerod ed., Oxford Univ. Press 2005) (observing that "[a]lmost every handling is also a second theft – the handler dishonestly appropriates property belonging to another with the intention permanently to deprive the other of it."). See also Ian Elliott, *Theft and Related Problems – England, Australia and the U.S.A Compared,* 26 INT'L & COMP. L. Q. 110, 140 (1977) (arguing that "[t]he Model Penal Code, with its seven modes of the one offence of theft, achieves a measure of coherence by conflating the offence of receiving with theft."); J.C. SMITH, THE LAW OF THEFT, 24 (Butterworths, 4th ed., 1979) ("[t]he wide definition of theft means that almost

offenses, the rationale for the distinction flows from historical misgivings about treating receiving stolen property as complicity in the original theft rather than any philosophical difficulty with viewing receiving as a separate and distinct act of theft.[170] In light of these histories, one is forced to acknowledge that the amalgamation advocated by the Model Penal Code and adopted in international criminal precedents merely treats the receiver's conduct as a new and separate instance of pillage. There is thus good reason to affirm the United Nations War Crimes Commission's conclusion that "[i]f wrongful interference with property rights has been shown, it is not necessary to prove that the alleged wrongdoer was involved in the original wrongful appropriation."[171]

The implications of these conclusions for the trade in conflict commodities are hard to overstate. Subsequent purchasers of illegally seized conflict resources fall within the ambit of pillage, irrespective of whether they were implicated in the initial extraction of the resources. An entire supply chain from extraction to end-user is thus enmeshed in the *actus reus* of the offense. As a result, the French company that purchased large quantities of

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every person who would have been a received of stolen goods under the old law and almost everyone who is a 'handler' under the new law will be guilty of theft.")

[170] In most legal traditions a separate offense of receiving stolen property emerged in response to misgivings born of treating receiving as a type of complicity in the original theft. In English common law, receiving stolen property initially rendered the receiver culpable of theft as an accessory after the fact, but the injustice of absolving receivers of responsibility where the principal perpetrator could not be convicted coupled with a growing recognition of the impropriety of holding a receiver complicit in an original theft to which he or she made no causal contribution soon lead parliament to elevate receiving to the status of a distinct crime in its own right. WAYNE R. LAFAVE, CRIMINAL LAW, 985 (Thomson West, 4th ed. 2003); See also JEROME HALL, THEFT, LAW AND SOCIETY, 52-62 (1952) (discussing the history of receiving stolen property, especially as it related to complicity in theft); See also MICHELE-LAURE RASSAT, DROIT PENAL SPECIAL: INFRACTIONS DES ET CONTRE LES PARTICULIERS ¶ 187 (Dalloz, 3rd ed., 2001) [hereafter *Rassat*] (identifying a strikingly similar history within continental legal systems).

[171] 10 Law Reports of Trials of War Criminals 166 1949.

illegally harvested timber from Charles Taylor at a time when he operated as a Liberian warlord fermenting wars in several West African states was potentially responsible for war crimes,[172] to make no mention of the numerous allegations leveled against companies responsible for purchasing conflict commodities in war zones from Myanmar to Sierra Leone.

On a broader level, this reading of the term "appropriation" also has significant implications for the tendency to fixate almost exclusively on complicity as a means of attributing responsibility to corporate actors for international offenses. Even though complicity has emerged the new champion of attempts to hold businesses responsible for transgressing supranational norms,[173] the breadth of the term 'appropriation' in pillage allows all actors within a supply chain to be convicted of the offence as direct perpetrators, thereby dispensing with complicity entirely. This not only highlights the importance of a more rigorous contemplation of the substantive elements of international offenses rather than just modes of liability like complicity, it also tends to refute the supposition that

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[172] In March 1991, the French newspaper Le Figaro reported that a company owned by the French state named Sollac bought 70,000 tonnes or ore from the NPFL, paying approximately $80,000 per shipment. Figaro, January 8, 1992 in WILLIAM RENO, WARLORD POLITICS AND AFRICAN STATES 100-101 (1999)

[173] International Commission of Jurists, *Report of the Expert Legal Panel on Corporate Complicity in International Crimes*, (2008); JENNIFER ZERK, MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY: LIMITATIONS AND OPPORTUNITIES IN INTERNATIONAL LAW 93 (2006) ("criminal theories such as 'functional liability,' 'complicity' or 'conspiracy' are potentially useful as bases for attributing legal responsibility within complex corporate groups."); Andrew Clapham and Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses*, 24 HASTINGS INT'L & COMP. L. REV 339 (discussing three categories of corporate complicity in human rights abuses); Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, A/HRC/8/5, ¶¶ 73-81 (April 7, 2008) (discussing complicity); Jonathan Clough, *Not-So-Innocents Abroad: Corporate Criminal Liability for Human Rights,* 11 AUST. JOURN. HUM. R. 1, 14-16 (2005) (detailing aspects of accessorial liability).

companies rarely perpetrate war crimes.[174] On the contrary, the scope of the term appropriation combined with the detailed allegations of corporate impropriety in war zones suggests that corporate pillage of natural resources is endemic.

E. Ownership of Natural Resources

One of the quintessential elements of pillage requires proof that "appropriation was without the consent of the owner"[175] A determination of resource ownership is thus indispensable in prosecuting pillage. With respect to natural resources, the task of ascertaining ownership potentially involves the intersection of three legal regimes of both an international and domestic character. From a purely domestic perspective, national law applies different models of resource ownership through three models of resource ownership, known as the claims, accession and regalian models. On an international plane, however, customary title of indigenous peoples is increasingly gaining recognition as giving rise to independent property rights capable of trumping title conferred through domestic mining legislation or constitutional principles. Also at an international level, a

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[174] Steven Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 495 (2001) (arguing that "corporations might in theory commit war crimes or crimes against humanity, but as a practical matter, history does not suggest this is a prevalent practice.") See also William Schabas, *War Economies, Economic Acts, and International Criminal Law*, in PROFITING FROM PEACE: MANAGING THE RESOURCE DIMENSIONS OF CIVIL WAR 60 (Ballenstine et al. (eds), 2005) [hereafter *PROFITING FROM PEACE*] (arguing that "[g]enerally, though, the role of economic actors is more indirect. For example, while it is widely agreed that trade in diamonds helped to fuel conflict in places like Sierra Leone, unless it can be established that diamond traders were actually accomplices in the atrocities committed against civilians, there is little that existing law can contribute.")

[175] *ICC Elements of Crimes, supra* note 144, at 138-139, ¶ 3.

growing body of literature argues that the public international law doctrine of permanent sovereignty over natural resources vests ownership of natural law in peoples. In this section, we see that the revival of corporate liability for the pillage of natural resources demands a new synthesis of these overlapping legal principles.

1. Ownership of Natural Resources in Domestic Law

In prior pillage cases involving the corporate pillage of natural resources, courts defined ownership of the natural resources in question by consulting property rights in domestic law. In adjudicating charges of pillage leveled against representatives of the firm Krupp with respect to the wartime exploitation of a tungsten mine in northern France, a judge at the United States Military Tribunal (USMT) defined ownership in tungsten ore by finding that "[u]nder French law all mineral rights are owned by the State but the extracted ores become the property of the individual to whom the government grants a lease or concession for the purpose of exploiting a mine."[176] A similar deference to domestic definitions of resource ownership will require modern courts adjudicating pillage to familiarize themselves with notions of resource ownership within domestic law, which often vary by resource type and means of extraction. A global understanding of the possible permutations of this domestic regulation necessitates a comparative overview of competing

[176] Dissenting Opinion of Judge Wilkins, *U.S. v. Krupp, 9 Trials of War Criminals,* p. 1461. *[hereafter Krupp Case]*. The judgment was dissenting because the majority considered that the court had no jurisdiction over these particular events. Wilkins disagreed and wrote the judgment anyhow.

models of resource governance at a domestic level, which are usually based on a claims, accession or regalian model.[177]

In the first of these, known as the claims system, title in natural resources vests in the person who first discovers a mineral deposit subject only to certain formalities surrounding registration of the claim. The system probably derived from fourteenth Century Spain, when King Juan I bequeathed a right to citizens to "search for, examine and excavate" minerals of various descriptions "in all … places whatsoever, not prejudicing in their searches and excavations the rights of other persons."[178] Although claims systems of this breadth are less than popular in most modern jurisdictions, a number of states still retain a claims system as a means of stimulating resource exploration. In the United States for example, the claims system is still in force with respect to minerals such as gold, silver, tin and copper located on federal land.[179] As part of a similar commitment to maximizing exploitation of national resource wealth, Chile and Bolivia are also reported to maintain variants of a claims system with respect to a prescribed series of resources. The point is less

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[177] Eva Liedholm Johnson, *Rights to Minerals in Sweden: Current Situations from an Historical Perspective*, 19(3) ENERGY NAT. RESOURCES L. 278-286*,* p. 280 (2001) .

[178] Decree of King Juan I. Promulgated in the Year 1387 at Birbisca, cited in THEO VAN WAGENEN, INTERNATIONAL MINING LAW, 25 (1918) ("all persons whomsoever of these our said kingdoms, may search for, examine, any may excavate their said lands and estates, and remover from them said minerals of gold, silver, quicksilver, tin and other matals, and that they may search for minerals in all other places whatsoever, not prejudicing in their searches and excavations the rights of other persons").According to Walmesley, under the Spanish law of 1825 "mines were considered as res nullius, which any one without distinction of nationality could search for (on making compensation for damages to the soil), and acquire the right to work.). See OSWALD WALMESLEY, MINING LAWS OF THE WORLD, 130 (1894) Sweet and Maxwell).

[179]The Mining Act 1897 famously stipulates that mineral deposits "in land belonging to the Unites States … shall be free and open to exploration and purchase." 30 U.S.C.A. § 22. JAN G. LAITOS AND JOSEPH P. TOMAIN, ENERGY AND NATURAL RESOURCES LAW (West Publishing, 1992).

that the these types of claims systems are representative of a dominant trend in the domestic regulation of resource ownership, but more that a purely state-centric focus akin to that applied in Krupp will miss the nuance of variations in natural resource ownership across resource type and jurisdiction.

The second model of resource ownership, known as the accession system, reveals a further example of a system of domestic ownership that vests title in private entities rather than state structures. The accession model is premised on a precept of Roman law encapsulated in the maxim *cuisi est solum eius usque ad coelum et ad inferos*—ownership of land entails proprietary interests that extend below the surface to the center of the earth and above as far as the sky.[180] The rule still informs resource ownership in much of the developed world. In the United States, most minerals located beneath private land belong to the surface owner, subject only to exceptions created within legislation for specific minerals. Likewise, most minerals in the United Kingdom are considered property of the owner of the surface over them, subject to a series of limited exceptions enshrined in legislation.[181] In other words, the French state might have owned the tungsten Krupp representatives pillaged from occupied France, but the illegal exploitation of the same

[180] EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND, L. 1. C.1. Sect. 1, Fee simple (Clarke, 1832); For a description of the functioning of the principle in Australia, see Adrian J. Bradbrook, *The Relevance of the Cujus Est Solum Doctrine to the Surface Landowner's Claims to Natural Resources Located Above and Beneath the Land,* 11 ADEL. L. R. 462 (1988).

[181] Peter C. Morgan, *An Overview of the Legal Regime for Mineral Development in the United Kingdom*, 1081-1094, INTERNATIONAL AND COMPARATIVE MINERAL LAW AND POLICY: TRENDS AND PROSPECTS (Elizabeth Bastida et al. eds., Kluwer, 2005).

metal from a host of other nations would have violated property rights of private land owners rather than those of the state.

The third model reflects a state-centric understanding of resource ownership. Unlike either the claims or accession models, the so-called concession or regalian system vests ownership in the 'regent' or its contemporary equivalent, who then 'concedes' portions of title by contract. As the appellations would suggest, the regalian system dates to feudalism but one of the more important historical exemplars of these system was enshrined in the Napoleonic Code of 1810.[182] In modern terms, a regalian system of resource ownership is structured such that national law vests ownership of natural resources in the state, then confers a particular state organ or judicial body the authority to grant rights to search for, extract, process and market state property to prospective corporate interests. The vast majority of developing nations have passed legislation specific to mining indicating that the state owns minerals within the national territory, except when these resources are allocated to a private party through a concession.[183] Likewise, state ownership of natural resource

[182] See, for example, B. G. Taverne, *The Concession Groningen: A Lawyer's View,* 80 NETHERLANDS JOURNAL OF GEOSCIENCES 113 (2001) (discussing the relevance of the Napoleonic Code to a major development of natural gas in the Netherlands in the 1960s).

[183] In Ecuador, for example, the Ecuador Mining Law of 1991 states that "[a]ll the mineral substances existing in the territory….belong to the inalienable and imprescriptible domain of the State…" Likewise, Article 14(1) of the Sierra Leonean Mines and Minerals Decree of 1994 states that "[a]ll rights or ownership in, of searching for, mining and disposing of minerals in, under or upon any land in Sierra Leone and its minerals continental shelf are vested in the Republic of Sierra Leone."Section 2 of the Philippines Mining Act (1995) states that "[a]ll mineral resources in public and private lands within the territory and exclusive economic zone of the Republic of the Philippines are owned by the State."

wealth often features within national constitutions,[184] thereby entrenching the regalian system of resource governance with respect to all national resource wealth. Like the position in the Krupp judgment, natural resources will be owned by the state in the vast number of states that have adopted variations on a regalian model.

To the extent that the revival of corporate liability for pillage requires a determination of ownership, adjudication of the offense will suddenly be faced with the need for a careful reading of these differences in ownership structure. A sensitivity to the variations is especially important given that a large number of states adopt different models to regulate specific resources. In the United States, for instance, federal land is governed by the claims system, but federal legislation vests certain resources in the state, at the same time that the accession system governs the remainder of mineral wealth located within private property. Or in France, the U.S. Military Tribunal at Nuremberg's conclusion that representatives of the company Krupp violated state property by pillaging tungsten would not apply if the misappropriated property were iron ore, since the French domestic law that inspired the decision adopted a stratified system of resource ownership that treated tungsten as regalian but iron ore as accession.[185] As we will see, these nuances within domestic legal

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[184] Article 9 of the Constitution of the Democratic Republic of Congo states that "the State exercises a permanent sovereignty over Congolese soil, sub-soil, waters and forests as well as maritime and airspace. The modalities of the management of the States' domain mentioned in the preceding sentence are determined by law." (unofficial translation). See also P J Badenhorst, *Exodus of 'Mineral Rights' from South African Mineral Law*, 22 J. ENERGY NAT. RESOURCES L. 218 (2004)

[185] NORTHCUTT ELY, SUMMARY OF MINING AND PETROLEUM LAWS OF THE WORLD 74 (1961) ("The mining law of France has been molded about a central theoretical core of regalian ownership with important modifications. In general, the development of mines, and the exploitation of oil and gas require a concession contract from the French Government. Quarries for paving or building materials, open-pit mines for alluvial

systems have important consequences for the means of acquiring consent and shed new light on debates surrounding the regulation of property rights in international law. Most immediately though, the essentially continental origins of these forms of property act as an ideal prelude to an alternative series of ownership rights that derive from other traditions.

2. Indigenous Ownership of Natural Resources

In many parts of the world, ownership of natural resources is customary in nature. The rights of indigenous groups might also be relevant in determining ownership of natural resources within a conflict zone, especially since both international and domestic courts have shown an increasing willingness to countenance the proprietary interests of indigenous groups to natural resources in territories they traditionally occupied.[186] These ownership rights might enjoy priority over the terms of mining legislation, domestic constitutions or other elements of domestic law that explicitly treat ownership in accordance with one of the three continental models just discussed. The largely unexplored but entirely unavoidable inquiry is how the war crime of pillage interfaces with the burgeoning recognition of indigenous title to natural resources. So the new amalgamation

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iron ores, and outcropts of iron ore in lodes may be exploited and developed only by permission of the owner of the land.")

[186] S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW, 141-148 (Oxford, 2004); ALEXANDRA XANTHANKI, INDIGENOUS RIGHTS AND UNITED NATIONS STANDARDS 256-268 (Cambridge, 2007); E.I. Daes, *'Indigenous Peoples' Rights to Land and Natural Resources,* in MINORITIES, PEOPLES AND SELF-DETERMINATION 75-112 (Ghanea and Xanthanki (eds), 2005); *Indigenous Peoples' Permanent Sovereignty Over Natural Resources*, Final Report of the Special Rapporteur, Erica-Irene A. Daes, E/CN.4/Sub.2/2004/30/Add.1, (July 12, 2004).

of indigenous rights and international criminal justice suggests that the next round of struggles for indigenous recognition of title in natural resource wealth might soon implicate serious criminal responsibility of corporate actors as opposed to gentile settlements for historic injustices for international crimes.

A number of international Conventions and declarations support the notion of indigenous property rights in natural resources located within areas traditionally occupied by indigenous peoples. In the first of these, the International Labor Organization's Convention (N° 169) concerning Indigenous and Tribal Peoples affirmed "[t]he rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded.[187] This language successfully fudged issues of ownership over resource wealth by indicating that "these rights include the right of these peoples to participate in the use, management and conservation of these resources," then reserving state ownership of sub-surface resources.[188] More recently, the United Nations Declaration on the Rights of Indigenous Peoples was more categorical in confirming the rights of indigenous people to

[187] Article 15(1), ILO Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, states that "[t]he rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded." Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, adopted on 27 June 1989 by the General Conference of the International Labor Organization at its seventy-sixth session entry into force 5 September 1991. At present, the Convention is only ratified by twenty states, suggesting that it may be less than authoritative as a statement of customary international law. See http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C169

[188] Article 15(2) of the Convention states that "In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

"lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. [189] Although neither of these documents can claim to immediately reflect the content of universally binding international law, they are consistent with a growing willingness to recognize indigenous ownership in natural resources within judicial fora.

International courts have recognized indigenous ownership of natural resources by relying on the human right to property.[190] In the *Awas Tingni Community case*, the Inter-American Court of Human Rights found that Nicaragua had violated the human right to property enjoyed by the Awas Tingni indigenous community by issuing concessions over their traditional lands to companies interested to develop roads and exploit forestry from the territory.[191] According to the court, the property rights protected by the human rights conventions are not limited to those property interests already recognized by states or defined by domestic law—the right to property has an autonomous meaning in international human rights law. As such, property rights of indigenous peoples are not defined

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[189] United Nations Declaration on the Rights of Indigenous Peoples, Article 26(1), adopted by the General Assembly on September 13, 2007. 143 Member States voted in favour, 11 abstained and four – Australia, Canada, New Zealand and the United States – voted against the text. See http://www.un.org/apps/news/story.asp?NewsID=23794&Cr=indigenous&Cr1

[190] American Declaration on the Rights and Duties of Man, adopted May 2, 1948, Art 23 "[e]very person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and the home." American Convention on Human Rights, adopted Nov. 22, 1969, Article 21(1) "[e]veryone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.") African Charter on Human Rights and Peoples' Rights, Article 14 "[t]he right of property hsall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws."); THEO R.G. VAN BANNING, THE HUMAN RIGHT TO PROPERTY, (Intersentia, 2002).

[191] *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgment of August 31, 2001, Inter-Am. Ct. H.R., (Ser. C) No. 79 (2001).*

exclusively by a state's formal legal regime, but also include property that arises from indigenous custom and tradition.[192] By the same analytical process, the seizure of these natural resources during war or occupation would not only constitute a violation of human rights standards, it could potentially be actionable as a war crime.

These principles were further advanced by the Inter-American Commission on Human Rights in the *Maya Indigenous Communities Case*, where the Commission endorsed the notion that indigenous groups own natural resources by finding that the state authorities in Belize had violated an indigenous group's right to property by assigning companies concessions to exploit timber and oil from ancestral land.[193] Although the Commission agreed that a state could expropriate an indigenous group's entitlement to natural resources, it also emphasized that the expropriation would require fully informed consent, the absence of discrimination and fair compensation.[194] Where these conditions are not met, indigenous peoples arguably retain ownership of natural resources in areas they historically occupied with similar consequences.

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[192] The Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgment, (2001).

[193] *Maya Indigenous Community of the Toledo District v. Belize*, Case 12.053, Report No. 40/04, Inter-Am. C.H.R., OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 727 (2004). (finding that "the right to use and enjoy property may be impeded when the State itself, or third parties acting with the acquiescence or tolerance of the State, affect the existence, value, use or enjoyment of that property without due consideration of and informed consultations with those having rights in the property.") *Ibid*, ¶ 140.

[194] *Ibid*, ¶ 117. See also Mary and Carrie Dann, Case No. 11.140 (United States), Inter-Am. C.H.R Report No. 75/02 (Dec. 27, 2002), where the Inter-American Commission found that "the right of indigenous peoples to legal recognition of their varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property.") See Anaya, supra note 186, at 146-148.

The potentially sweeping effect of recognizing native title in natural resources in terms that transcend domestic models of ownership is also recognized within a number of national legal systems. In the landmark decision known as *Mabo*, the High Court of Australia declared that indigenous inhabitants of Australia have traditional land ownership rights that remain in force provided that the sovereign government has not acted to extinguish these rights,[195] ushering in severe complications for the allocation of natural resources within the country. Similarly, the Canadian Supreme Court in *Delgamuukw* recognized that indigenous peoples enjoy ongoing proprietary interests in land and resource wealth. According to the Supreme Court, "aboriginal title encompasses mineral rights and lands held pursuant to aboriginal title should be capable of exploitation."[196] The South African Constitutional Court has adopted a similar principle by finding that at least one indigenous community owned land prior to British colonial rule, and that this ownership still entitles the community "to use its water, to use its land for grazing and hunting and to exploit its natural resources, above and beneath the surface."[197]

In each of these contexts, the precise nature of the indigenous rights over natural resources varies, but the decisions highlight that international and domestic courts asked to adjudicate allegations of pillaging natural resources will be unable to duck the significance of indigenous title in determining natural resource ownership. There thus appears a real

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[195] *Mabo v. Queensland* (No. 2), (1992) 75 C.L.R. 1.

[196] *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010, December 11, 1997, ¶

[197] *Alexkor Limited & the Government of the Republic of South Africa v. The Richtersveld Community and Others*, Constitutional Court of South Africa, Case CCT 19/03, 14 October 2003, ¶ 64. available at http://www.saflii.org/za/cases/ZACC/2003/18.pdf

probability that companies intentionally violating indigenous rights over natural resources during war might be found guilty of pillage. Coupling the revival of liability for pillaging natural resources and the increasing recognition of indigenous ownership of resource wealth will thus promote pillage and not genocide as the preferable vehicle for seeking historical redress for colonial misappropriation. [198]

3. Permanent Sovereignty over Natural Resources Revisited

The doctrine of permanent sovereignty over natural resources represents a further basis for contesting the providence of domestic law as the sole determinant of natural resource ownership, although a central difficulty is that it has not reconciled with domestic or indigenous title in natural resources. The doctrine of permanent sovereignty developed during the decolonization process as a means of insisting that economic self-determination accompanied political emancipation.[199] The underlying motivations of the concept were

[198] One Australian judge has accepted that "[t]he history of the Aboriginal people of Australia since European settlement is that they have been the subject of unprovoked aggression, conquest, *pillage*, rape, brutalization, attempted genocide and systematic and unsystematic destruction of their culture." *Commonwealth v. Tasmania* (1983) Australian Law Journal & Reports 450, at 537. (per Murphy J)

[199] Karol Gess, *Permanent Sovereignty Over Natural Resources*, 13 INT'L & COMP. L. Q. 398-407 (1964) (discussing the original motivations of the doctrine); NDIVA KOFELE-KALE, THE INTERNATIONAL LAW OF RESPONSIBILITY FOR ECONOMIC CRIMES, 85 (Ashgate, 2006) (arguing that "permanent sovereignty was not intended to sanction abuses, nor to discourage foreign investment; it was intended to protect the economic and political independence of underdeveloped nations from exploitation by foreign investors."); DOMINIQUE ROSENBERG, LE PRINCIPE DE SOUVERAINETÉ DES ÉTATS SUR LEUR RESSOURCES NATURELLES, 94 116 (1983) (discussing the initial discussions of permanent sovereignty over natural resources during the process of decolonization); See also *Schrijver*, *supra* note *102*, Kalal Hossain and Subrata Roy Chomdhury, PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES IN NTERNATIONAL LAW, (St. Martin's Press, New York, 1984); GEORGE ELIAN, THE PRINCIPLE OF SOVEREIGNTY OVER NATURAL RESOURCES, (1979);

thus the reinforcement a newly-independent state's prerogative to annul resource concessions inherited from colonial masters and the facilitation of economic self-determination amongst peoples still struggling for liberation from colonial rule.[200] As a result of this dual purpose, initial articulations of the right to permanent sovereignty over natural resources variously vested sovereignty in natural resources in "peoples," "nations" and "states." In modern times, the doctrine of permanent sovereignty is most frequently deployed as a basis for justifying the nationalization of privatized resource ventures,[201] but a now significant body of literature harnesses the articulations of "peoples'" sovereignty of natural resources as a means of combating the kleptocratic embezzlement of national wealth by government officials—the people and not the corrupt members of state, argue the new advocates of permanent sovereignty, own national wealth.[202] Although this line of

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[200] Kamal Hossain, Introduction, in Kalal Hossain and Subrata Roy Chomdhury, PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES IN NTERNATIONAL LAW, ix (St. Martin's Press, New York, 1984) (arguing that "[f]or developing countries the principle of permanent sovereignty was important because it provided a basis on which they could claim to alter 'inequitable' legal arrangements under which foreign investors enjoyed rights to exploit natural resources found within the territories.") *Schrijver, supra* note *102*, at 33-76 (discussing the development of the doctrine); G. Fischer, *La Soveraineté sur les Ressources Naturelles*, 8 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL, 516-528 (1962); P O'Keefe, *The United Nations and Permanent Sovereignty Over Natural Resources*, J. WORLD TRADE L. 239.

[201] See Ayesha Diaz, *Permanent Sovereignty Over Natural Resources*, 24 ENV. POLICY & L. 157 (1994) (highlighting that "[s]ince its inception, PSNR reaffirmed the right of developing countries to repudiate, modify and renegotiate contractual arrangements for mineral development which were incompatible with PSNR."); Mohamed Bennouna, *Le Droit International relative aux matières Premières*, 177 RECEUIL DES COURS DE L'ACADEMIE DE DROIT INTERNATIONAL DE LA HAYE 103, 131 (1982); OSCAR SCHACTER, INTERNATIONAL LAW IN THEORY AND PRACTICE, 301-311 (1991) (discussing permanent sovereignty in light of internationalized contracts).

[202] Emeka Duruigbo, *Permanet Sovereignty and Peoples' Ownership of Natural Resources in International Law,* 38 GEO. WASH. INT'L L. REV. 43-51 (2006); KOFELE-KALE, *supra* note 199 , at 107-111; Robert Dufresne, *The Opacity of Oil: Oil Corporations, Internal Violence and International Law*, 36 N.Y.U. J. INT'L L. & POL. 331, 350-363; Robert Dufresne, *Reflections and Extrapolation on the ICJ's Approach to Illegal Resource Exploitation in the Armed Activities Case*, 40 N.Y.U. J. INT'L L. & POL. 171, 185 (2007-2008); With

argument creates a superficially attractive avenue for redress against endemic graft, the proposition appears significantly less compelling when viewed as a basis for defining ownership for the purposes of criminal liability for pillage.

As we have seen, domestic law frequently vests title in natural resource wealth in private land owners, parties able to stake first claim or indigenous groups who enjoyed traditional use of the resources. "People's sovereignty" cannot therefore mean that peoples somehow enjoy ownership of pre-assigned resource rights, otherwise the various UN General Assembly resolutions on permanent sovereignty unwittingly revolutionized property rights in a large number of developed nations—vesting ownership of natural resources in the people would require American land owners to cede title to natural resources beneath their land to 'the people' without formal legal procedure or compensation. Needless to say, this monumental shift in resource management can hardly be squared with the functions of permanent sovereignty.

Instead, the new advocates of permanent sovereignty appear to have overlooked an old but common error. During the negotiations of UN General Assembly resolutions addressing permanent sovereignty, a number of commentators pointed to "a failure to distinguish between the concepts of 'sovereignty' and 'ownership'."[203] The distinction has

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respect to indigenous spoliation generally, see also Michael Reisman, *Harnessing International Law to Restrain and Recapture Indigenous Spoliations*, 83 AM. J. INT'L L. 56-59 (1989);

[203] *Gess, supra* note *199*, at 416 ("[s]uch acceptance as this preambular paragraph won in the Assembly may partly be explained in terms of the emotional climate of the debate and partly in terms of failure to distinguish between the concepts of 'sovereignty' and 'ownership.' In the early part of the Second Committee debate, sovereignty over natural resources had been described, in an effort to clarify the relationship between the two ideas, as a political concept, unrelated to ownership. A country that permitted of foreign ownership of

appreciable implications. As O'Keefe argues, ownership is a derivative of sovereignty "depending for its content and its validity on the laws adopted by each State."[204] Sovereignty, in other words, does not automatically displace indigenous title or private ownership derived through the accession or claims models of ownership.

The notion of peoples' sovereignty is also unable to override state ownership of natural resources within a regalian model of resource ownership. Aside from concerns about the mismatch between sovereignty and ownership, a primary difficulty for proponents of the argument that permanent sovereignty vests ownership in peoples is that the underlying legal sources of permanent sovereignty just as frequently vest the privilege in states. In the most frequently cited source of the right to permanent sovereignty over natural resources, General Assembly Resolution 1803 refers to "[t]he right of *peoples and nations* to permanent sovereignty over their natural wealth and resources."[205] Conversely, the preamble to the same resolution speaks of "the inalienable right of all *States* freely to dispose of their natural wealth and resources."[206] This duality is replicated in provisions of the African Charter of Human and People's rights,[207] and although the two human rights

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resources lost none of its sovereignty, for the latter was exercised through national legislation which determined how foreign-owned resources could be used and whether natural resources should be transferred to the State.")

[204] *O'Keefe, supra* note *200*, at 244-245.

[205] General Assembly resolution 1803 (XVII) of 14 December 1962, Permanent Sovereignty over Natural Resources, Art 1.

[206] *Id.* Preamble.

[207] African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986, Art. 21(1) "[a]ll peoples shall freely dispose of their wealth and natural resources" but Art. 21(4) stipulates that "states parties … shall

covenants unambiguously vest the right to dispose of natural resource wealth in "peoples," this unanimity is offset by a raft of General Assembly resolutions that speak of "countries" or "states" as the repositories of permanent sovereignty over resources.[208] To compound matters, commentators too seem less than unanimous about the subordination of state sovereignty over resource wealth to that of peoples.[209] The diversity of opinion is such that irrespective of the authoritative position on the issue, ambiguity of this type is not likely to serve as a compelling basis for employing permanent sovereignty to effectively strike down

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individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity."

[208] GA Res 2158 (XXI), Permanent sovereignty over natural resources, 25 November 1966, ¶ 1 ("the inalienable right of all countries,"); GA Res 3201 (S-VI), Declaration on the Establishment of a New Economic Order, 1 May 1974, ¶ 4(e) (""full permanent sovereignty of every State over its natural resources"); GA Res 3016 (XXVII), Permanent sovereignty over natural resources of developing countries, 18 December 1972, ¶ 1 ("Reaffirms the right of States to permanent sovereignty over all their natural resources, on land within their international boundaries as well as those found in the sea-bed and the subsoil thereof within their national jurisdiction and in the superjacent waters"); GA Res 3171 (XXVIII), . Permanent sovereignty over natural resources, 17 December 1973, ¶ 1 ("Strongly reaffirms the inalienable rights of States to permanent sovereignty over their natural resources…"); GA Res 3281 (XXIX) Charter of Economic Rights and Duties of States, 12 December 1974, Article 2, ("Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities."); GA Res 34/201. Multilateral development assistance for the exploration of natural resources, 19 December 1979, preamble ("the permanent sovereignty of

States over their natural resources and all economic activities."); GA Res XX, 3517. Draft World Charter for Nature, 30 October I980, preamble ("Reaffirming the principle of the permanent sovereignty of States over their natural resources").

[209] Schrijver, for instance, openly advocates for a return to the roots of permanent sovereignty by favoring a people-centered interpretation of the concept, but later concedes that "a clear tendency can be discerned to confine the circle of direct permanent sovereignty subjects solely to States, that is all States." *Schrijver, supra* note 102, at 371 and 390 respectively. Kamal Hossain, Introduction, in Kalal Hossain and Subrata Roy Chomdhury, PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES IN INTERNATIONAL LAW xiii (St. Martin's Press, 1984) (pointing out that "[a]t the core of the concept of permanent sovereignty is the inherent and overriding right of a state to control and dispose of the natural wealth and resources in its territory for the benefit of its own people.") Ian Brownlie, Legal Status of Natural Resources in International Law (Some Aspects), at 270-271 ("permanent sovereignty is the assertion of the acquired rights of the host State which are not defeasible by contract or perhaps even by international agreement."); *O'Keefe*, *supra* note *200*, p. 245 (O'Keefe, finally, argues that "[y]et another reason for doubting the validity of the concept as a legal principle lies in the difficulty of ascertaining just who or what it relates to.")

established principles of domestic mining legislation or constitutional law that vest ownership in states.

Even absent these manifold shortcomings in permanent sovereignty as a theory of resource ownership, a large body of both judicial and academic opinion considers people's sovereignty over natural resources as limited to situations of unfulfilled political self-determination, further limiting claims that permanent sovereignty dictates ownership in the majority of modern conflict zones. Crawford, for example, accepts that permanent sovereignty vests in peoples, but then purports to limit this right to the decolonization process by confiding that "even if, as I suspect, the question of permanent sovereignty in relation to independent States is a right of States rather than peoples, in the context of colonial self-determination it seems clearly to be a peoples' right."[210] The International Court of Justice also appears to have tacitly endorsed this position by responded to pleadings that Uganda violated the principle of permanent sovereignty during inter-state warfare by exploiting diamonds and gold from the Congo by somewhat mysteriously finding that "[t]he Court does not believe that this principle is applicable to this type of situation." [211] Presumably, this arcane dismissal of permanent sovereignty implies that the unilateral exploitation of Nauruan phosphates at utterly unsustainable rates during the

[210] James Crawford, The Rights of Peoples : 'Peoples' or 'Governments', in THE RIGHTS OF PEOPLES 63 and 171 (Crawford (ed), 1992). This view is obliquely endorsed by the then UN Legal Advisor who suggests that the terms "peoples and nations" were originally intended to cover non-self-governing territories "which could not be covered by any concept of the sovereignty of States over natural resources." *See Gess, supra* note *199*, at 446.

[211] *DRC v. Uganda*, *supra* note *94*, ¶ 244.

Australian, New Zealand and British mandate over the territory might be relevant to allegations of pillage;[212] but the ownership of natural resources in modern day resource wars where issues of self-determination do not arise will either be defined by general notions of property in domestic law or customary title.

Quite apart from the myriad legal obstacles identified, pragmatism also favors this preference for domestic law. Most immediately, it remains unclear how peoples, who potentially incorporate multiple ethnic, indigenous and religious groups, could allocate their ownership of resource wealth. State ownership of natural resources is readily distributed by a governmental administration or judicial authority in accordance with an established regulatory framework. Private entities are also free to alienate their own property interests through contract, but peoples have no equivalent mechanism nor methodology for conferring consent to natural resource exploitation. The inherent vagaries of identifying approval within a collectivity are augmented by general disagreement on the precise definition of the term "peoples."[213] The purported elevation of peoples' rights over and above domestic or customary notions of resource ownership would thus replace sophisticated regulatory structures and private property with ambiguity in identifying the proprietors of natural resources and the approval necessary for extraction. The danger is not so much that the global system would atrophy. The inevitable consequence of vesting

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[212] See Certain Phosphate Lands in Naurau (Nauru v. Australia), 1992 I.C.J 240 (June 26 (Preliminary Objections, Judgment); Antony Anghie, *'The Heart of My Home': Colonialism, Environmental Damage, and the Nauru Case*, 34 HARV. INT'L. L. J. 445 (1993).

[213] *Fischer*, *supra* note *200*, at 519-520.

ownership of natural resources in peoples at the expense of preordained rules of property would, to again paraphrase O'Keefe, "open the way to chaos."[214]

And yet it is precisely this type of anarchy within modern resource sectors plagued by war that the criminal enforcement of pillage attempts to curtail. For all these reasons, ownership of natural resources is best defined in accordance with the terms of one particular UN General Assembly resolution on permanent sovereignty, which declared that "the exploitation of natural resources in each country shall always be conducted in accordance with its national laws and regulations."[215] We thus come full circle—back to the Krupp decision that rightly decided that ownership in tungsten pillaged by a German corporate entity in occupied France was to be determined with reference to applicable domestic notions of property rights. Customary indigenous title and not permanent sovereignty is the only possible caveat.

F. Consent

Consent differentiates pillage from commerce. In rejecting the argument that a military group is categorically prohibited from trading during conflict, the USMT declared that "[w]e deem it to be of the essence of the crime of plunder or spoliation that the owner

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[214] *O'Keefe, supra* note *200*, at 245.

[215] GA Res 2158 (XXI), Permanent sovereignty over natural resources, 25 November 1966, ¶ 4

be deprived of his property involuntarily and against his will." [216] This focus on the lack of consent as a constitutive element of pillage is reinforced by the less controversial aspects of the definition of the offense within the ICC Statute, which demands that "the appropriation was without the consent of the owner."[217] Consent must emanate from the rightful owner, creating a direct correlation between the various forms of ownership and the means of conferring consent. In this respect, the previous section of this Article concluded that while the state owns natural resources based on a regalian model of ownership in most countries that now suffer the woes of resource related violence, natural resources are often owned by private parties either through claims or accession-based systems, or where a state grants a private party a proprietary interest in resources by way of concession. The intricacies involved in granting consent in each of these scenarios vary according to the nature of the owner, the type of resource and the means of extraction. Although a comprehensive exploration of this new amalgamation of comparative resource management and international criminal justice is beyond this scope of this Article,[218] an overview shows that consent operates as a two-sided coin punishing corporate disregard for title in resource

[216] I.*G. Farben Case*, *supra* note 99, at 1135 ("We look in vain for any provision in the Hague Regulations which would justify the broad assertion that private citizens of the nation of the military occupant may not enter into agreements respecting property in occupied territories when consent of the owner is, in fact, freely given.")

[217] *ICC Elements of Crimes, supra* note 144, at 138-139, ¶ 3.

[218] For greater understanding of these issues, see JAMES OTTO & JOHN CORDES. THE REGULATION OF MINERAL ENTERPRISES: A GLOBAL PERSPECTIVE ON ECONOMICS, LAW AND POLICY, 4-1 to 4-42 (Rocky Mountain Mineral Law Foundation, 2002) [hereafter *The Regulation of Mineral Enterprises*]; *Basic Instruments and Concepts of Mineral Law, supra* note 218, at 2.6-2.11; Elizabeth Bastida et al. eds INTERNATIONAL AND COMPARATIVE MINERAL LAW AND POLICY: TRENDS AND PROSPECTS (Kluwer, 2005); DANIÈLE BARBERIS, NEGOTIATING MINING AGREEMENTS: PAST, PRESENT AND FUTURE TRENDS (Kluwer, 1998);

wealth but simultaneously protecting privately held rights in resource wealth during war, even against corrupt government officials.

Companies operating in resource wars frequently exploit mineral wealth without consent. In jurisdictions where ownership vests in the state, companies operating in conflict zones sometimes bypass the regulatory system promulgated altogether by relying on authorizations granted by rebel groups or foreign military forces. During South Africa's occupation of Nambia, for instance, the UN Council for Nambia reported that "the world's largest corporations and financial institutions from South Africa, Western Europe and North America [...] conduct their operations by means of licences issued by the illegal colonial South African régime."[219] If accurate, the allegations leveled against these companies differ little from incidents of natural resource exploitation that attracted criminal sanction elsewhere. Like the numerous well-known companies alleged to have operated in apartheid Namibia, Kehrl too purported to derive authority for exploitation from a foreign government, but the exploitation of large quantities of iron, crude steel and coal from the Vitkovice Works in then Czeckoslovakia that ensued was deemed to constitute pillage.[220] In fact, much of the Nazi plunder of occupied Europe was achieved through what the

[219] Report of the United Nations Council for Namibia, General Assembly, 41st Session, Supplement No. 24 (A/41/24), ¶ 337.

[220] *Ministries Case*, *supra* note 7, at 758. In finding Kehrl guilty of pillage, the Tribunal concluded that "through his active participation in the acquisition and control of the industries and enterprises hereinbefore specifically referred to, violated the Hague Convention with respect to belligerent occupancy." *Ministries Case*, *supra* note 7, at 763.

Nuremberg judgment described as "the colour of legality,"[221] whereby local Nazi administrators issued official decrees or regulations purporting to legitimize plunder. As Kehrl and others that relied on these proclamations later discovered first hand,[222] the illegitimacy of these decrees has serious legal ramifications. When there is no valid concession or binding mining convention emanating from the rightful owner, the offense of pillage penalizes the illicit trade in conflict commodities.

The offense serves the same function with respect to the exploitation of state owned artisanal resources, such as gold and diamonds, when corporate actors are unlicensed by the true owners. In contrast to the exclusive rights of exploitation conferred through a concession, mining regulations frequently express consent over artisanal resources through the designation of artisanal mining zones coupled with the licensing of eligible actors.[223] In the Congolese context, for example, the Code Minère allows the Minister of Mines to designate a specific zone from which licensed Congolese nationals can exploit artisanal

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[221] *Nuremberg Judgment*, *supra* note 99, at 329 ("[t]here was widespread pillage of public and private property which was given color of legality by Seyss-Inquart's regulations, and assisted by manipulations of the financial institutions of the Netherlands under his control."); See also *Ministries Case*, *supra* note 77, at 708.

[222] I.*G. Farben Case*, *supra* note 99, at 1147 (finding six directors of the firm IG Farben guilty of pillaging the Mulhausen chemical plant in Alsace-Lorraine on the basis that the German Civil Administration's decree confiscating the plants was "without any legal justification under international law." Consequently, the company's directors were criminally liable for having purchased the plant "without payment to or consent of the French owners.") In a more specific application of the same reasoning, the manager of Farben's Offenbach plant, Friedrich Jaehne, was found guilty of pillage on the basis of an employee's testimony to the effect that "[n]o negotiations were conducted with these former owners, nor were their interests considered by us. We rather negotiated with the sequestrators appointed by the German Reich.")

[223] See *Mining Code, supra* note 183, Arts. 5, 109 and 111.

resources,[224] provided they are then sold to registered middlemen (négotiants), who in turn trade the commodities to registered trading houses (comptoirs).[225] By implication, the trade in artisanal resources harvested from outside designated zones or by individuals who have no state-sanctioned authority to act in these capacities is devoid of consent and therefore illegal. This, of course, has direct implications for the British company denounced by the local National Contact Point for having failed to maintain a valid trading license in the territory during the war.[226]Arguably, the unlicensed trade roughly parallels Wilhelm Stuckart's conviction for pillaging "cut and uncut precious stones,"[227] since owners of the resources in both instances had not conferred the capacity to exploit the property.

The purchasers of pillaged natural resources also appropriate property without the owner's consent, albeit by acquiring the merchandise from an intermediary rather than the owner directly. To illustrate, the German businessman Hermann Roechling was found guilty of pillage for purchasing scrap steel from the German company ROGES, knowing that the merchandise had been illegally seized without the consent of the owners[228] As

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[224] *Mining Code, supra* note 183, Art. 5 (stating that "Any person of Congolese nationality is authorized to engage in artisanal exploitation of mineral substances in the National Territory, provided that he is the holder of an artisanal miner's card, issued or granted by the relevant government entity in accordance with the provisions of the present Code.)

[225] *Mining Code, supra* note 183, Art. 5 (stating that Any person is authorized to sell mineral substances in the National Territory provided that he is the holder of a trader's card or an authorization as a trading house issued or granted by the relevant government entity in accordance with the provisions of the present Code.") See also, *Mining Code, supra* note 183, Arts. 116-126.

[226] Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (Uk) Ltd, URN 08/1209, (Aug. 28, 2008) http://www.berr.gov.uk/files/file47555.doc

[227] *Ministries Case*, *supra* note 77, at 720.

[228] See *Krupp Case*, *supra* note 117, at 1361-1362.

previously seen, Roechling was convicted of pillage for purchasing from ROGES, since "Hermann Roechling, like all other German industrialists in the same circumstances, was a receiver of looted property."[229] The obvious implication of these and analogous decisions is that purchasers of pillaged resources also appropriate property without the owner's consent. On the strength of this reasoning, Chinese corporate actors who purchased in excess of 800,000 m^3 of conflict timber without either an exclusive concession or license from the Kachin Independence Army and other military factions operating in Northern Myanmar risk substantial criminal liability.[230] Moreover, the western businesses who subsequently purchased this timber from Chinese affiliates placed themselves in a legal position comparable to Hermann Roechling, since in both instances vendor and purchaser proceeded without the proprietor's consent.

In contrast to these instances where pillage penalizes businesses for the failure to respect ownership and consent, the offence also protects corporate title in resources during war. Pillage deters the illicit exploitation of privately owned resource wealth, which might vest in a company through a claims or accession system of ownership, or by dint of a valid resource agreement. In a war crimes trial convened in Poland soon after the end of WWII, Joseph Buhler was found guilty of pillage for "economic exploitation of the country's resources," in this instance through the issuance of decrees confiscating privately held

[229] Roechling Case, *supra* note 77, at 1117-1118.

[230] *A Choice for China*, supra note 89.

mining rights and mining shares.[231] A company that enjoys valid mining rights akin to those confiscated by Buhler is thus protected by the prohibition against pillage. Pillage, in other words, is both a sword and a shield to companies: sanctioning corporations engaged in the illegal exploitation of natural resources and promoting corporate interests in stability of valid resource concessions.

The prohibition against coercion furthers aspects of the offence that favor these corporate interests. Even where resource extraction is otherwise lawful, coercion is capable of vitiating consent. As the IG Farben case famously insisted, "[w]hen action by the owner is not voluntary because his consent is obtained by threats, intimidation, pressure, or by exploiting the position and power of the military occupant under circumstances indicating that the owner is being induced to part with his property against his will, it is clearly a violation of the Hague Regulations."[232] Unsurprisingly, private ownership of resource privileges during war is frequently misappropriated through highly coercive pressures, either when negotiations take place in the context of overt threats of physical violence or in instances where the surrounding military presence precludes even the semblance of a bargain. In these circumstances, companies are often victims of pillage.[233] When combined

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[231] *Trial of Dr. Joseph Buhler*, *Law Reports of Trials of War Criminals*, Vol. XIV, at 23 and 30.

[232] I.*G. Farben Case*, *supra* note 99, at 1134-1136.

[233] *Ministries Case*, *supra* note 77, at 758 (finding the Director of the Dresden Bank, Karl Rasche, guilty of pillaging the Rothschild-Gutmann share in the Vitkovice steel plants by negotiating the "sale" of shareholdings on behalf of the German authorities while one of the owners was held by the Gestapo in Vienna); I.*G. Farben Case*, *supra* note 99, at 1150 (finding the directors of IG Farben guilty of pillaging French chemical industries by compelling three of the then primary producers of dyestuffs to agree to participate in a venture named Francolor, in which Farben acquired a 51 percent shareholding to the severe economic detriment of the other participants. The transaction was deemed deficient since Farben had

with the ability of pillage to encapsulate subsequent purchasers, harnessing coercion as a means of establishing pillage heavily favors private commercial interests in natural resource wealth by impeding the sale of resources that are illegitimately acquired by government or rebel armed groups from corporate actors. Reviving liability for pillaging natural resources is therefore neither inimical to corporate interests nor hostile to commerce.

In a similar vein, the concern that pillage merely entrenches what are potentially highly repressive autocratic regimes by demonizing rebellion misreads the nature of resource consent. Consent is also absent where a governmental representative illegitimately assigns mining rights already allocated to other entities or in violation of binding regulations. In the Congolese wars, for instance, the Congolese President is alleged to have unilaterally purported to confer 45% of one of the nation's largest diamond concessions (then owned by a para-statal company named MIBA) to a Zimbabwean joint venture in exchange for Zimbabwean military deployment within the Congolese wars.[234] According to a UN Panel of Experts and various Congolese investigations, MIBA did not participate in

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leveraged the power resulting from the military occupation to acquire market dominance "in utter disregard of the rights and wishes of the owner." The Tribunal concluded that "[t]he essence of the offense is the use of the power resulting from the military occupation of France as the means of acquiring private property in utter disregard of the rights and wishes of the owner. We find the element of compulsion and coercion present in an aggravated degree in the Francolor transaction, and the violation of the Hague Regulations is clearly established."); For other incidents of coercion in trade, see the Nordisk-Lettmetal takeover, I.*G. Farben Case*, *supra* note 99, at 1146.

[234] The Commission established by the Congolese Ministry of Mines to review contracts signed during the war listed among the transaction's serious deficiencies "exclusion illegal de la MIBA lors de la signature de la convention initiale alors que les concessions concernées lui appartenaient." République Démocratique du Congo, *Ministère des Mines, Commission de revisitation de contrats miniers, Rapport des travaux*, (Nov. 2007) [hereafter *Congolese Contract Review Commission*]

the putative transfer of its proprietary interests, which resulted in the cession of diamonds valued at the princely sum of $1.63 billion. An official Congolese inquest found that the transaction had "amputated MIBA from its mining property and robbed the Congolese people of their natural resources,"[235] presumably because the rightful owners had no say in the transaction. On similar bases, legislation promulgated during the Liberian civil war purported to confer the then President Charles Taylor with unfettered power over all natural resources within the territory, except that the legislation defied the express terms of the national constitution.[236] In both of these scenarios, ruling élites transferred resource wealth during conflict without the consent of the rightful owners, thereby transgressing the terms of pillage. In addition to protecting valid corporate interests, the element of consent subsumed within the offense goes beyond merely penalizing extractive practices orchestrated by rebel movements or foreign governments.

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[235] République Démocratique du Congo, *Assemblée Nationale Commission Spéciale Chargée De L'examen de la validité des conventions à caractère economique et financier conclues pendant les guerres de 1996-1997 et de 1998*, Rapport des travaux, 47 [hereafter *Lutundula Report*].

[236] In February 2000, Liberia allegedly passed the Strategic Commodities Act (SCA), which effectively placed control over the distribution of natural resources in the sole hands of then President Charles Taylor. The Act stated that "the President of the Republic of Liberia is hereby granted the sole power to execute, negotiate and conclude all commercial contracts or agreements with any foreign or domestic investor for the exploitation of the strategic commodities of the Republic of Liberia. Such commercial agreement shall become effective and binding upon the Republic as would any treaty to which the Republic is a party, upon the sole signature and approval of the President of the Republic of Liberia." Article 7 of the Constitution of 1984, howeverm stated that "[he Republic shall, consistent with the principles of individual freedom and social justice enshrined in this Constitution, manage the national economy and the natural resources of Liberia in such manner as shall ensure the maximum feasible participation of Liberian citizens under conditions of equality as to advance the general welfare of the Liberian people and the economic development of Liberia." In addition, Article 34(f) of the Constitution entitled the legislature "to approve treaties, conventions and such other international agreements negotiated or signed on behalf of the Republic," which Taylor certainly violated by agreeing mining conventions in a personal capacity.

G. The Mental Element

Intent differentiates liability for the pillage of natural resources within a conflict zone from the unwitting participation in the trade of stolen conflict commodities. Defining the requisite mental elements of the offense inevitably entails recourse to general principles of criminal law and international precedent, since the Geneva Conventions themselves are unhelpfully vague in merely specifying that "pillage is prohibited."[237] This section shows that the requisite mental element for the offense within various jurisdictions involves two graduated degrees of intention applicable to pillage – direct and indirect intent.[238] The two terms, which permeate much of the modern jurisprudence emanating from international criminal courts, amalgamate divergent standards derived from domestic systems.

In all criminal jurisdictions, the direct intent to perpetrate pillage is culpable, meaning that the offense is perpetrated where corporate actors purposefully acquire natural resources knowing that the owner does not consent. Hermann Roechling's conviction for the pillage of iron ore from mines in Eastern France typifies resource extraction in violation of these standards. Roechling was the president of the board of a family company, which

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[237] *Geneva Convention IV*, *supra* note 119, Art. 33.

[238] *Martić Trial Judgment, supra* note 137, ¶ 104 (declaring that "with respect to the mens rea of this crime, the unlawful appropriation of the property must have been perpetrated with either direct or indirect intent."); See also *Hadžihasanović Trial Judgment*, *supra* note 141, ¶ 50 ("the mens rea element of the offense of plunder of public or private property is established when the perpetrator of the offense acts with the knowledge and intent to acquire property unlawfully, or when the consequences of his actions are foreseeable.")

owned three subsidiaries in the iron, steel and coal industries.[239] After the German invasion of France, Roechling seized steel plants at Moselle and Meurthe-et-Moselle that yielded 9 million tons of liquid steel per annum, initially appointing his own personnel to manage key mining installations at the same time as he seized important quantities of stockpiled iron "without furnishing to the real owners a proper inventory."[240] In convicting Roechling of pillage, the French Tribunal seized upon evidence that in March 1944 German authorities operating in the same region had celebrated the mining of 100 million tons of ore from pits located in eastern France alone.[241] Clearly, Reochling's purpose was to acquire natural resources while knowing that the property he acquired was illegally obtained. In the words of the Tribunal itself, "[t]he act committed by him constitutes, especially in this case, a robbery."[242]

Western businesses are alleged to have robbed resources from a number of contemporary conflict zones in strikingly similar circumstances. A series of Belgian companies controlled by two Lebanese families were reportedly allocated a monopoly on diamond trading within the eastern Congolese town of Kisangani for a period of the war, in terms vaguely reminiscent of Roechling's administrative control of the mining sector in Alsace. These transactions create what one leading criminal law academic and war crimes

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[239] *Roechling Case*, *supra* note 77, at 1113 and 1124.

[240] *Id.*, at 1080.

[241] *Id.*, at 1116.

[242] *Id.*, at 1113.

judge describes as "quasi-automatic" knowledge,[243] born of direct implication in exploiting resources without any form of even plausible consent. The direct intent standard nonetheless has serious limitations. For example, assuming hypothetically that De Beers representatives only purchased one diamond from Angola at a time when the rebel group UNITA illicitly exploited 90% of diamonds from the territory at war, the company could not be convicted of the offense since they did not know for certain that the diamond was stolen. At least potentially, there was a 10% chance the diamond came from legitimate Angolan sources. The jurisdictions that limit the *mens rea* of pillage to the strongest form of direct intent will therefore capture corporate actors implicated in the extractive phase but will less frequently reach the subsequent purchasers within a supply chain.

A marginally lower standard of direct intent, which also appears available in most jurisdictions, slightly dilutes this need for full knowledge. Many national criminal jurisdictions also incorporate an incrementally lower standard of direct intent, where the perpetrator does not want to acquire property unlawfully but is nonetheless aware that this is a *virtually certain* consequence under the prevailing circumstances.[244] Again, the

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[243] Albin Eser, *General Principles of International Criminal Law*, in THE ROME STATUTE IF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 889, 924 (Antonio Cassese et al. eds., Oxford Univ. Press 2002)

[244] In the United Kingdom for example, Courts have found that "[a] court or jury may also find that a result is intended, though it is not the actor's purpose to cause it, when (a) the result is a virtually certain consequence of the act, and (b) the actor knows that it is a virtually certain consequence." *Smith & Hogan, supra* note 169, at 94. These standards appear to approximate to what German criminal law considered dolus directus (2nd degree). See Albin Eser, *Mental Elements – Mistake of fact and Mistake of Law, in* THE ROME STATUTE IF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 889, 906 (Antonio Cassese et al. eds., Oxford Univ. Press 2002); See also E. VAN SLIEDREGT, THE CRIMINAL RESPONSIBILITY OF INDIVIDUALS FOR VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW 46 (T.M.C. Asser Press, 2003). The International Criminal Court has also acknowledged the relevance of this standard with respect to pillage for the purposes of its statute, where

commerce of the company ROGES best illustrates the functioning of this principle in relation to the corporate pillage of natural resources. In December 1940, ROGES was founded at the request of the German Army High Command as a collaborative enterprise with other Nazi authorities.[245] The company was tasked with acquiring property from German military and economic agencies, then on-selling the property to German industries. The Krupp firm purchased two categories of property from ROGES – illegally seized property known as "Booty Goods" and so-called "Purchased Goods" that the German economic agencies were begrudgingly compelled to purchase from vendors on the black market.[246] The Tribunal found that Krupp "received wares and goods of all kinds from ROGES," but was particularly interested in large quantities of scrap steel. In finding the Krupp directors guilty of pillage, the Tribunal seized upon discrepancies in accounting practices to indicate that they knew that the category of property euphemistically known as Booty Goods was in fact stolen.[247]

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it states that "The intent and knowledge requirement of article 30 of the Statute applies to the war crime of pillaging under article 8(2)(b)(xvi). This offense encompasses, first and foremost, cases of dolus directus of the first degree. It may also include dolus directus of the second degree." Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Public Redacted Version, Decision on the Confirmation of Charges, ICC-01/04-01/07, 30 September 2008, ¶ 331.

[245] *Krupp Case*, *supra* note 117, at 1361-1362.

[246] *Id.*

[247] According to the Tribunal, property acquired as Purchased Goods was delivered to the Krupp firm with an attached invoice reflecting the price ROGES had paid for the property, whereas stolen Booty Goods were simply sent to Krupp without an invoice or other indication of price.[247] Whereas Krupp would immediately repay ROGES the amount indicated on the invoices for "Purchased Goods," the two companies would habitually negotiate a nominal price for "Booty Goods" some considerable time after Krupp received the property. From the disparity in these accounting procedures, the Tribunal deduced that "the Krupp firm knew the source of these goods purchased from ROGES and that certain of these items such as machines and materials were confiscated in the occupied territories and were so-called booty goods." *Id.*at 1363.

The lower variant of direct intent thus incorporates a broader range of corporate actors between extraction and end-user. Contemporary examples are also common. One UN Panel of Experts, for instance, found that stocks of Congolese coltan amassed in Rwanda were advertised and then sold to western businesses through the Rwandan National Army's so-called "Congo Desk." According to the Panel of Experts, "[s]ome of the letters sent to potential clients in Europe and the United States of America are signed Dan, who was the head of the Congo Desk."[248] Like ROGES's invoicing disparities, these communications from a Major within an Army that was deeply implicated in the illegal exploitation of Congolese resources might have alerted the foreign companies that accepting the invitation that doing so involved the virtual certainty of purchasing property acquired by force from a neighboring country. But whether it is meaningful to describe these incidents or the percentages in our De Beers hypothetical as constituting *virtual certainty*, this lower variant of direct intent certainly does not attribute culpability to the British company that "failed to ensure minerals it transported had not been sourced from the conflict zone."[249] The incrementally lower *mens rea* standard thus takes an appreciable step away from pure extraction, but still fails to encompass the majority of corporate conduct that facilities resource wars.

The indirect standard of *mens rea* associated with pillage arguably redresses these shortcomings. In a number of jurisdictions, corporate actors are also guilty of pillage based

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[248] *UN Panel of Experts*, S/2001/357, *supra* note 80, ¶ 129.

[249] News Release, UK Department for Business Enterprise and Regulatory Reform, 'Airline Broke Guidelines, Reference 2008/147, 21 July 2008.

on an indirect standard of intent, where they purchase minerals from theatres of war believing that the property is "probably stolen." In some of these domestic systems, a statutory provision stipulates that the absence of specific language (as is the case with pillage) defining intent should be interpreted as at least implying recklessness,[250] while in others, the application of *dolus eventualis* to war crimes is established through caselaw.[251] At an international level, the ad hoc international criminal tribunals too have defined indirect intent for the purposes of pillage and other international offenses as requiring proof of "knowledge that the offense was a *probable* consequence of the act or omission."[252] This

[250] In Australia, the Criminal Code Act states that "[t] f the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element." Criminal Code Act 1995, Act No.12 of 1995 as amended. In the United Kingdom, cl. 20 of the draft Criminal Code states that "[e]very offence requires a fault element of recklessness with respect to each of its elements other than fault elements, unless otherwise provided." For a more detailed discussion, see Smith & Hogan, *supra* note *169*, at 141-144. In the United States, the Model Penal Code insists that "when the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly with respect thereto." See *Model Penal Code*, *supra* note 168, §2.02(3).

[251] Jacques-Henri Robert, Droit Pénal Général 325 (Thémis, 2005) (describing dol eventuel); Van Sliedregt, supra note 244, at 43-47 (explaining *dolus eventualis* in civil law jurisdictions and comparing to recklessness).

[252] Prosecutor v. Kvočka et al., IT-98-30/1-A, Judgement, ¶ 261 (Feb. 28, 2005) ("the act or omission was committed with intent to kill, or in the knowledge that death was a probable consequence of the act or omission"); Prosecutor v. Boškoski, Case No. IT-04-82-T, Judgement, ¶358 (July 10, 2008) ("indirect intent may be expressed as requiring knowledge that destruction was a probable consequence of his acts."), ¶ 382 ("indirect intent, i.e. in the knowledge that cruel treatment was a probable consequence of his act or omission"); Prosecutor v. Strugar, Case No. IT-01-42-T, Judgement, ¶ 261 (Jan. 28, 2005) ("the Chamber holds that indirect intent, i.e. knowledge that cruel treatment was a probable consequence of the perpetrator's act or omission, may also fulfill the intent requirement for this crime."); ¶ 296 ("the mens rea requirement for a crime under Article 3(b) is met when the perpetrator acted with either direct or indirect intent, the latter requiring knowledge that devastation was a probable consequence of his acts."); *Martić Trial Judgment, supra* note 137, ¶ 65 ("The mens rea element of extermination requires that the act or omission was committed with the intent to kill persons on a large scale or in the knowledge that the deaths of a large number of people were a probable consequence of the act or omission"); ¶ 79 (reasoning that the term "likely" as a synonym for "probable"); The same jurisprudence appears to treat "an awareness of a substantial likelihood" as a synonym. Prosecutor v. Limaj et al., Case No. IT-03-66-T , Judgment, ¶ 509 (Nov. 20, 2005) ("The requisite mens rea is that the accused acted with an intent to commit the crime, or with an awareness of

reference to probable consequences aligns with definitions of intention attributed to theft in several national legal systems. The U.S. Model Penal Code, for instance, deems a person guilty of theft if he or she "purposely receives, retains, or disposes of moveable property of another knowing that it has been stolen, or *believing* that it has *probably* been stolen…"[253]

The utility of pillage as a vehicle for curbing the trade in conflict commodities is considerably extended by the availability of this indirect standard, since a great deal of evidence is capable of proving that subsequent purchasers were aware that their merchandise was "probably stolen." Several indicators are especially common. At Nuremberg, six representatives of the firm Krupp were convicted of pillage for purchasing machinery in occupied France for "a ridiculously low price."[254] The derisory price involved in the transaction coincides with comparable notions in domestic criminal law, which view the payment of a price well below market value as a key factor in establishing knowledge that property is probably stolen.[255] The clandestine nature of certain mineral transactions has also served as an indicator that property acquired during conflict was probably illicitly

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the probability, in the sense of the substantial likelihood, that the crime would occur as a consequence of his conduct.")

[253] *Model Penal Code*, *supra* note 168, § 223.6 (emphasis added).

[254] *Krupp Case*, *supra* note 117, at 1353.

[255] *LaFave, supra note* 96, at 989 ("[t]he circumstance that the buyer paid an inadequate price for the goods, that the seller was irresponsible, that the transaction between them was secret – these factors all point towards the buyer's guilty knowledge.") *Rassat*, p. 205 ("caractère bizarre de la négociation qui est à l'origine de la détention, liens du receleur et du voleur, absence de facture, prix dérisoire payé ou même absence de prix … "). See also J.C. SMITH, THE LAW OF THEFT, 211-215 (Butterworths, 4th ed., 1979); *Smith & Hogan*, p. 853-858.

acquired.[256] In this instance too, purchasing conflict commodities like diamonds from known arms traffickers or a warlord under a shroud of secrecy would suggest that the purchasers knew that the property was probably stolen. Similarly, a corporate actor that fails to heed warnings from reputable authorities that property they are trading stems from illegitimate sources can also evidence the requisite degree of knowledge.[257] This, of course, creates a new imperative for UN investigators, public authorities, NGOs or other credible sources to alert corporate actors that their merchandise is probably stolen and the potential ramifications of a failure to desist. After all, operating in a resource war almost automatically implies some probability that diamonds, gold and coltan exploited are illegally acquired provided these circumstances are plainly apparent to the purchaser. We could rehearse innumerable examples, but it is probably sufficient for present purposes to merely highlight that indirect intent satisfies the probabilities in our De Beers / UNITA

[256] A case from WWII highlights the application of these principles in practice. In the Ministries Case, the managing director and vice president of the Reich Bank, Emil Puhl, was found guilty of war crimes and crimes against humanity for the receipt of property taken by the SS from victims at concentration camps. The Tribunal rejected Puhl's claim that he had not realized the nefarious origins of the property housed within the bank, highlighting the extraordinary nature of the transactions through which the bank came upon the goods, the secrecy associated with the transactions, and dissent amongst colleagues employed within the bank.[256] According to the Tribunal, "that this was not looked upon as an ordinary transaction within the scope of its corporate purposes or official functions by the Reich Bank officials, including Puhl, is evidenced by the extreme secrecy with which the transaction was handled, the fact that the account was credited in the first instance to a fictitious name, Max Heiliger, and the contemporaneous misgivings expressed by officials and employees of the bank at the time." *Ministries Case*, p. 609-618.

[257] Between 1942 and Sept 1944, the German authorities seized products owned by Dutch municipal and private enterprises, which were delivered to various depots in Holland then shipped to Germany by Krupp's Shipping and Transport Company. Six members of the firm Krupp were convicted of pillage for their part in this process, presumably because they were well aware of the origins of their cargo. *Krupp Case*, *supra* note 117, at 1364-1365, 1373.

hypothetical—purchasing a diamond knowing that there is a 90% chance that it is illegally acquired is by definition reckless.

The reality remains that certain jurisdictions appear to limit *mens rea* to the two direct forms. In an initial hearing before the International Criminal Court, a Pre-Trial Chamber appeared to rule that pillage was limited to the two variants of direct intent,[258] which may also influence certain domestic criminal courts that have adopted the ICC's definitions of mental elements.[259] In sharp contrast, however, ad hoc international criminal tribunals and a host of other domestic systems clearly endorse indirect intent. This disparity reveals an ill-considered structural fragmentation of international criminal law that has important practical consequences for corporate pillage as well as the discipline as a whole. Nonetheless, absent a comprehensive understanding of the *mens rea* standards in the extensive array of potentially overlapping jurisdictions capable of trying corporate actors for pillage, businesses are likely to adhere to the lowest possible *mens rea* standard as a means of minimizing risk. As a result, pillage deters the trade in conflict diamonds, timber and oil that is probably stolen.

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[258] The International Criminal Court has also acknowledged the relevance of this standard with respect to pillage for the purposes of its statute, where it states that "The intent and knowledge requirement of article 30 of the Statute applies to the war crime of pillaging under article 8(2)(b)(xvi). This offense encompasses, first and foremost, cases of dolus directus of the first degree. It may also include dolus directus of the second degree." Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Public Redacted Version, Decision on the Confirmation of Charges, ICC-01/04-01/07, 30 September 2008, ¶ 331.

[259] In the United Kingdom's enabling legislation, for instance, a provision insists that "[i]n interpreting and applying the provisions of the articles referred to in subsection (1) [war crimes] the court shall take into account any relevant judgment or decision of the ICC." UK International Criminal Court Act 2001, § 50(5).

H. Exceptions in the Laws of War

As the previous portions of this Article have shown, the venerable practice of pillage was gradually prohibited in the laws of war, first by retaining the practice when a local population's obstinacy necessitated siege, then in absolute terms subject to a series of more permissive rules affording armed forces a limited right to acquire property for prescribed purposes. These exceptions, which were inspired by notions of military necessity, are now enshrined in the Hague Regulations. The first Part of this Article concluded that these provisions of the Hague Regulations and not military necessity writ large or the ICC's novel use of a limitation based on "personal or private purposes," act as limitations on or exceptions to the prohibition against pillage. While the provisions of the Hague Regulations in question are fairly criticized as "disfigured by the bad draftsmanship which is characteristic of The Hague Conventions,"[260] courts begrudgingly recognize the slightly opaque exceptions as justifications for the acquisition of property without consent.[261] In this section, I argue that exceptions created in the Hague Regulations allow

[260] H.A. Smith, *Booty of War*, 23 BRIT. Y.B. INT'L L. 227, 228 (1946); For similar sentiments concerning the poor darfting of the provisions, see Max Huber, *La Propriété Publique en Cas De Guerre Sur Terre,* 20 R.G.D.I.P. 657, 658 (1913) [hereafter *Huber*] ("Sa redaction est, de plus, au moins en partie, fort défectueuse.")

[261] *Martić Trial Judgment, supra* note 137, ¶ 102 (noting, not entirely accurately, that "[a] party to the conflict is also allowed to seise enemy military equipment captured or found on the battlefield as war booty, with the exception that the personal belongings of the prisoners of war may not be taken away. According to the Hague Regulations, forcible contribution of money, requisition for the needs of the occupying army, and seizure of material obviously related to the conduct of military operations, though restricted, are lawful in principle.") *Hadžihasanović Trial Judgment*, *supra* note 141, ¶ 51 ("In the context of international armed conflicts, the taking of war booty and the requisition of property for military use may constitute limitations to that principle. As early as 1863, the Lieber Code laid down the principle that war booty belongs to the party

for no exploitation of natural resource by military groups. The argument focuses exclusively on but two of these exceptions, munitions of war and usufruct, since they are most frequently used to contend that under certain circumstances armed forces might forcibly acquire title to resource wealth exploited during war.

1. Munitions-de-Guerre

The Hague Regulations recognize the ability of an army to seize munitions of war, irrespective of whether these munitions are owned by public or private entities.[262] The precise definition of the term munitions of war, together with its more frequently deployed translation "munitions-de-guerre," has primarily centered on the legality of seizing privately held crude oil stocks from occupied territories. In the leading case on point, colloquially known as *Singapore Oil Stocks*, a Singaporean court rejected the then British government's claim that the oil seized by Japanese military during WWII constituted munitions-de-guerre. In reaching the decision, the court drew on a passage contained in the then British Manual of Military Law, which rightly defined the term munitions-de-guerre as

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who seized it. According to national practices, war booty includes enemy property or military equipment captured on the battlefield. Personal effects belonging to prisoners of war are an exception. In the case of an occupation, the Hague Regulations leave open, in some cases, the possibility for the occupying power to requisition property "for the needs of the occupation army").

[262] Article 53(2) of the Hague Regulations reads "all appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms, and, generally, all kinds of munitions of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made."

"such things as are susceptible of direct military use."[263] On the strength of this definition, the court ruled that the need for sophisticated installations and considerable processing to extract and refine the oil meant that the crude oil failed to qualify as "arms or ammunition which could be used against the enemy in fighting."[264] Dissenting voices, nonetheless, have contested this definition of munitions-de-guerre, without considering the potential consequences for modern resource wars.

In the immediate aftermath of the decision in *Singapore Oil Stocks*, an indignant British government promptly amended the definition of munitions of war in its military manual in reactionary protest. Two years later, a revised manual emerged replacing the offending passage with the conspicuously unsubstantiated claim that a belligerent may "seize raw materials such as crude oil."[265] The capricious shift was maintained in subsequent editions of the same publication, without greater justification.[266] The British doctrinal about-face has had substantial influence—the revised definition was used to justify drilling of new oil wells within occupied territory in the Sinai and inspired argument that *Singapore Oil Stocks* was either inconsistent with state practice or wrongly decided.[267]

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[263] *Singapore Oil Stocks, supra* note 100, at 78.

[264] *Id.*.

[265] *UK Military Manual 1958, supra* note 107, ¶ 597 (arguing that "there is no justification for the view that 'war material' means materials which could be used immediately without being processed in any way for warlike purposes: for example crude oil could be included in the term 'war material."). For commentary that supports this criticism, see MYRES MCDOUGAL & FLORENTINO FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 812, 817 (Yale Univ. Press, 1961).

[266] *UK Military Manual*, *supra* note 107, at 301.

[267] See Evan J. Wallach, *The Use of Crude Oil by an Occupying Belligerent State as a Munition de Guerre*, 41 INT'L & COMP. L. Q. 287, 293-294 (1992) (arguing that state practice allows the seizure of oil as munition de

Even though these positions have failed to consider the wider implications for the financing of modern resource wars and the downstream humanitarian impact of a logical extension of their more permissive definition of munitions-de-guerre, a portion of academic and political though appears to consider that the term allows the unilateral seizure of resource wealth during war.

The weight of authority and principle suggests otherwise. The term munitions of war is almost unanimously interpreted as implying property susceptible of direct military use in keeping with the earlier British position, thereby precluding the capture of raw materials and crude oil.[268] This interpretation also comports with the purpose of the

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guerre in certain circumstances, although it is notable that much of this state practice would constitute pillage based on modern interpretations); *McDougal & Florentino, supra* note 265, at 812, 817 (Yale Univ. Press, 1961).

[268] A resolution adopted by the Institute of International Law in 1896 defined munitions-de-guerre as "articles which, to be used directly in war, need only be assembled or combined.." Institut de droit International, *Réglementation internationale de la contrebande de guerre*, §2 (1896) http://www.idi-iil.org/idiF/resolutionsF/1896_ven_05_fr.pdf. GEORG SCHWARZENBERGER, INTERNATIONAL LAW, VOL I, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS, 272 (Stevens & Sons, 1945), ("In the case, however, of private property susceptible to direct military use, only seizure is permitted, and, in accordance with Article 53, paragraph 2, it must be restored and compensation fixed when peace is declared."), ERIK CASTRÉNS, THE PRESENT LAW OF WAR AND NEUTRALITY, 236 (Helsinki, 1954), ("Raw materials and semi-manufactured products necessary for war production can hardly be regarded as munitions of war."); SPAIGHT, WAR RIGHTS ON LAND, 412 ("[w]arlike material, and all property which is directly adaptable to warlike purposes (railways and other means of communication, etc, may be seized by the occupant, whether belonging to the State or to individuals."); See also US Department of the Army's statement that "arms and munitions of war include all varieties of military equipment including that in the hands of manufacturers, component parts of or material suitable only for use in the foregoing, and in general all kinds of war materials. It will be noted that many items that could be extremely useful to a State at war are not included. Such items in occupied areas are heavy industry not yet converted to war production, crude oil and other petroleum products. Efforts to interpret broadly the term of the Hague Regulations "ammunition of war" have not been successful." DEP'T OF THE ARMY, INTERNATIONAL LAW, DA PAM 27-161-2, at 177; MORRIS GREENSPAN, THE MODERN LAW OF WAR, 296 (Univ. Calif. Press, 1959) [hereafter *Greenspan*].

provision.[269] The contrary view, that property capable of even indirect use for military operations could constitute munitions, would undermine the protection of civilian property enshrined in the Hague Regulations entirely.[270] As the increase in resource wars since the end of the Cold War shows, practically all property is susceptible of indirect military use, since resources of every description can be sold to finance conflict. If property is to be protected at all during conflict, the preferable definition of munitions of war is thus "everything susceptible to *direct* military use."[271]

Courts have also endorsed this interpretation in practice, although this jurisprudence does not seem to have percolated into debates surrounding the scope of munitions-de-guerre. In the addition to WWII jurisprudence that the seizure of property including gold could not be seized as munitions-de-guerre,[272] modern war crimes jurisprudence has also defined the concept in restrictive terms that would exclude the forcible acquisition of natural resources. The *Hadžihasanović Trial Judgment*, for instance, tacitly endorsed the test espoused in *Singapore Oil Stocks* when it declared that "weapons, ammunition, and any

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[269] Eliu Lauterpacht, *The Hague Regulations and the Seizure of Munitions-de-guerre* 32 BRIT. Y.B. INT'L L. 218, 226 (1955) (completing a meticulous appraisal of the negotiating history to the Hague Regulations, by stating that the conventions "did not include within the conception of munitions-de-guerre real property or raw materials which would require processing of a costly or lengthy character in order to make them suitable for use in war – despite the fact that when so processed they might be of the utmost value.")

[270] *A Historical Survey, supra* note 151, at 205 (arguing, in relation to the broader conception of munitions of war, that "[t]his of course is reasoning that might be extended to all articles suitable for export, and it therefore severely circumscribes the effectiveness of guarantees of protection of private property.")

[271] *US Field Manual, supra* note 304, § 410(a) (emphasis added).

[272] In re Esau, Holland, Special Criminal Court, 's-Hertogenbosch. 483-484 (Feb 21, 1949) in Annual Digest and Reports of Public International Law Cases (1949) (finding that "[n]either the text nor the history of Article 53 gave grounds for the thesis that the term 'munitions-de-guerre' should be extended to materials and apparatus such as boring machines, lathes, lamps, tubes, and gold, nor even to the other objects removed, however important they might be for technical or scientific research.")

other materials which have direct military applications, even if they are private property, may be seized as war booty."[273] Having clarified the parameters of the exception, the Chamber proceeded to reject contentions that household appliances, furniture and livestock could fall into the category of property having direct military use, and accordingly, convicted the perpetrators of the acts of pillage with which they were charged.[274] The seizure of natural resources, crude oil or otherwise, would arguably fair similarly.

And even if the definition of munitions of war were somehow stretched to encompass natural resources, the doctrinal debate has largely ignored that the commerce required to convert munitions-de-guerre into cash or weapons for war is again strictly prohibited. The explicit language of Article 53 of the Hague Regulations stipulates that property acquired pursuant to the article "must be restored and compensation fixed when peace is made." The often repeated consequence of this language is that "[t]hese objects can be used by, but do not become the property of the Occupant."[275] This limitation has consistently been interpreted as precluding the sale or exchange of property seized as munitions of war.[276] *Singapore Oil Stocks* itself found that "the belligerent occupant obtains

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[273] *Hadžihasanović Trial Judgment*, *supra* note 141, ¶ 52. Prosecutor v. Naletilić et al., Case No. IT-98-34-T, ¶ 616 (Mar. 31, 2003) (defining munitions de guerre as property that is "material obviously related to the conduct of military operations"); See also *Martić Trial Judgment, supra* note 137, ¶ 102.

[274] *Id.*, paras. 1875, 1895, 1914, 1941. It is notable, however, that the Chamber viewed automobiles and food as the object of pillage, the former of which is explicitly contemplated by Article 53 of the Hague Regulations, while the latter is perfectly capable of requisition. See paras. 1941, 1969 and 1976.

[275] *UK Military Manual 1958, supra* note 107, ¶ 597; *Westlake*, *supra* note 125, at 105.

[276] Mortier v. Laurent, France, Court of Appeal of Rouen, (May 17, 1947) reprinted in Annual Digest and Reports of Public International Law Cases, 274-275 (1947) (finding that a vehicle chassis commandeered by the German army in 1940 was recaptured by the French Administration des Domaines then sold to an independent purchaser. The French appellate court found that the original owner was entitled to recover the

only a provisional title to the seized property and must restore it to the original private owner if it is still in esse at the cessation of hostilities."[277] In keeping with this narrative, the revival of corporate pillage will require revisiting a wider range of exceptions to the protection of property during war in this same fashion, precisely in order to ensure that a single provision of one military manual enacted in spite and read out of context does not mistakenly legitimize the illicit trade in conflict commodities and justify the humanitarian consequences that follow.

2. Usufruct: Confronting the Anachronism

The second of the major normative debates a resurgence of corporate liability for the pillage of natural resources will reignite centers on the notion of usufruct. Article 55 of the Hague Regulations enables an occupying force to administer public immovable property such as public buildings, real estate, forests, and agricultural estates through recourse to the Roman law device known as usufruct.[278] Usufruct transliterates as "use of

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chassis, since "seizure by the enemy of means of transport belonging to private individuals, if authorized by the laws of war, does not deprive these individuals of ownership, but merely of the use of the seized property."); Andersen v. Christensen and the State Committee for Small Allotments. Denmark, Western Appellate Court. July 11, 1947, ILR (1947) Case No. 124, p 275, at 276 (that horses seized as war booty could not be on-sold since even if the animals were validly seized "it cannot be assumed that the appellant's right of ownership has thereby been lost.")

[277] *Singapore Oil Stocks, supra* note 100, at 80.

[278] Hague Regulations, Article 55 (stipulating that "[t]he 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. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.")

fruit." As the label suggests, the classic illustration of the doctrine posits that usufructuary privileges entitle an occupant to exploit and consume the fruit from an occupied orchid on the condition that the value of the trees and land is preserved. Prosecuting the pillage of natural resources, corporate or otherwise, will inevitably involve resolving a misnomer that has captivated the relationship between usufruct and natural resource exploitation for too long.

The initial extrapolation of usufruct to natural resource exploitation during war was premised on the perception that minerals are naturally replenishing. Roman legal scholars believed that resources within the ground automatically regenerated, a misplaced faith conspicuously revealed by provisions of Justinian's Institutes that speak of marble "growing" and resources such as clay, silver, gold and sand as "fruits."[279] These geological misconceptions infiltrated early interpretations of usufruct in the law of war, and endured even in the face of commonly accepted understandings to the contrary. Soon after the Brussels Declaration of 1874 adopted the doctrine of usufruct as a then novel means of limiting an occupying power's rights over immoveable state property,[280] one author argued that the principle entitled an occupying army to "lop forests and work the mines."[281] As a

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[279] Claggett and Johnson, *May Israel as Belligerent Occupant Lawfully Exploit Previously Unexploited Oil Resources of the Gulf of Suez?* 72 AM. J. INT'L L. 558, 568 (1978) [hereafter *Claggett & Johnson*]

[280] Previously, the Lieber Code of 1863 had stated simply that "A victorious army appropriates all public money, seizes all public movable property until further direction by its government, and sequesters for its own benefit or of that of its government all the revenues of real property belonging to the hostile government or nation. The title to such real property remains in abeyance during military occupation, and until the conquest is made complete." *Instructions for the Government of Armies of the United States in the Field* (Lieber Code). 24 April 1863, Art. 31.

[281] *Lawrence*, *supra* note 137, at 368.

result of unquestioning recitation of error, several contemporary military manuals and authorities still accept a belligerent's right "to work the mines" of publicly held property,[282] seemingly oblivious to the patent geological fallacy upon which the assertion rests. Minerals are not fruits.

The fallacy is not just a benign anachronism, it also creates an inescapable internal contradiction. Mining depletes discrete resources, whereas the central tenet of usufruct demands preservation of capital. As one of the earlier commentators queried: "[t]he products of mines and quarries are certainly not a fruit, but a part of the ground. It is therefore the substance of the thing which the exploiter successively depletes; how can the usufructuary have the right to exploit the mines and quarries when he must conserve the substance?"[283] Evidently, the US Department of State shared this misgiving many years later, since it famously chastised the Israeli government for drilling oil in occupied Sinai on precisely these grounds.[284] The criticisms were compelling, since the exploitation of non-renewable resources irredeemably contradicts the expressed wording of Article 55, which mandates that the occupying power "must safeguard the capital of these properties." One of the few cases to adjudicate allegations of an occupying power violating usufructuary

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[282] *US Field Manual, supra* note 304, § 402; *UK Military Manual*, *supra* note 107, at 303; New Zealand Military Manual, *supra* note 304, § 1341(2). *Feilchenfeld* , *supra* note 125, at 55.

[283] F. LAURENT, PRINCIPES DE DROIT CIVIL 563-564 (1887).

[284] In a memorandum addressing the legality of Israeli oil exploitation in occupied Sinai in light of usufruct, the State Department officials argued that "[r]esources such as oil deposits, which are irreplaceable and have value only as they are consumed, cannot be used without impairing the capital of the oil bearing land." *Department of State Memorandum of Law on Israel's Right to Develop New Oil Fields in Sinai and the Gulf of Suez*, 16 Int'l Legal Materials 733, 740 (1977) [hereafter *US Department of State Legal Memorandum*].

obligations confirms that the forcible extraction of property from state held land constitutes pillage.[285] The contrary conclusion, which is articulated in certain modern military manuals, deploys a legal fiction in order to confer usufructuary privileges that merely camouflage plunder.

One of the more perplexing aspects of the enduring anomaly is that commentators are conscious of the fiction but seemingly unwilling to denounce the incoherence. In an article broadly characteristic of an abundant literature,[286] Claggert and Johnson confide that usufruct "logically prohibits any exploitation of minerals,"[287] but go on to endorse a definition of usufruct in some civil law countries that incoherently permit a usufruct to continue exploitation at pre-occupation rates. As the authors themselves readily

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[285] French State v. Lemarchand, France, Court of Appeal of Rouen. Int'l.L.Rep, 597-598 (1948) (ruling that the dismantling of buildings owned by the French State in order to acquire materials for the construction of an army barracks elsewhere was inconsistent with the notion of usufruct.); Conversely, Gerson argues that "it has been widely held that the 'fruits' of public lands – crops timber, and minerals – may be exploited and sold providing their production neither depletes nor wantonly dissipates existing resources, but rather is consistent with sound ecological considerations.") The case Gerson cites to support this claim, however, relates to the exploitation of guano, a renewable resource. The conclusion that this justifies the exploitation of non-renewable minerals is therefore weak. See Allan Gerson, *Off-Shore Oil Exploration by a Belligerent Occupant: the Gulf of Suez Dispute*, 71 AM. J. INT'L. L. 730 (1977).

[286] Edward R. Cummings, *Oil Resources in Occupied Arab Territories under the Laws of Belligerent Occupation*, 9 J. INT'L L. & ECON. 533, 563 and 565 (1974) (acknowledging that appropriating property that would be consumed by use, "would not be permissible under the classical law on usufruct," but endorsing certain domestic interpretations that enable an occupying power to exploit mines "already open and in operation at the beginning of the usufruct."); Iain Scobbie, Natural Resources And Belligerent Occupation: Mutation Through Permanent Sovereignty, In S Bowen (Ed) HUMAN RIGHTS, SELF-DETERMINATION AND POLITICAL CHANGE IN THE OCCUPIED PALESTINIAN TERRITORIES 221, 250 (Kluwer, 1997) (conceding that "there is room to argue that an occupant, as usufruct, is not entitled even to continue the exploitation of resources in which the displaced sovereign was engaged on its own account," but later condoning a degree of continuing exploitation); *US Department of State Memorandum*, *supra* note 284, at 740 (conceding that the exploitation of non-renewable natural resources in accordance with the doctrine of usufruct constitutes "an illogical compromise," but latter accepting a degree of exploitation provided new mines are not opened.)

[287] *Claggett & Johnson, supra* note 279, at 574.

acknowledge, the interpretation that a usufruct is entitled to continue pre-occupation rates of extraction is "a not wholly logical compromise between the basic concept of usufruct and a misconceived application of that concept in the law of ancient Rome."[288] The compromise — unnecessary, illogical and premised on obsolete science — employs a legal fiction that places a state's natural resource wealth in the hands of any other nation willing to forcibly exercise the privilege, subject only to an arbitrary limitation inspired by pre-occupation rates of exploitation. Aside from creating perverse incentives for war, this interpretation is widely acknowledged as violating a state's permanent sovereignty over natural resources.[289] As the advent of resource wars now reveals, the fiction also permits the forcible acquisition of blood diamonds, gold, coltan and other conflict commodities that sustain bloodshed and prolong conflict.

An even greater irony is that the permissive but incoherent reading of usufruct has never won favor in pillage cases. To cite one of the more recent and authoritative examples, the International Court of Justice tacitly heard but rejected submissions based on usufruct in finding Uganda responsible for pillaging gold and diamonds during the occupation of the

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[288] *Claggett & Johnson, supra* note 279, at 570.

[289] United Nations Legal Report, A/38/265, E/1983/85, 21 June 1983, p. 39 ("[t]he principle of permanent sovereignty might give impetus to a new look at the rights of a usufructuary under article 55 of the Hague Regulations and might lead to an interpretation consistent with the requirement of that article that an occupying State 'must safeguard the capital' of properties subject to usufruct."); For commentary supporting this position, see *Schrijver*, *supra* note *102,* at 268-269 (Cambridge Univ. Press, 1997); *Scobbie*, *supra* note 287, at 247-253 (arguing that usufruct should be interpreted in terms that are consistent with permanent sovereignty over natural resources); Antonio Cassese, Powers and Duties of an Occupant in Relation to Land and Natural Resources in INTERNATIONAL LAW AND THE ADMINISTRATION OF THE OCCUPIED TERRITORIES 426-429 (Emma Playfair ed., 1992) (making the excellent point involving a comparison between munitions-de-guerre and usufruct by asking "would it make sense to claim that the same resource (oil) could in one case be sold or used only for the military operations of the occupation, while in the other case it could be sold for any purpose, including that of enriching the occupant's home economy?).

Congo.[290] The restrictive interpretation of usufruct is evident but overlooked in criminal trials. In the Ministries Judgment at Nuremberg, Pleiger was convicted of pillage for his role as chairman of the company BHO, which was responsible for the massive exploitation of state held mines in occupied Russia.[291] In response to submissions that the Hague Regulations allowed seizures of this nature, the Tribunal held that:

> it has been pointed out that the property seized in Russia, both movable and immovable, was, to a large extent, state-owned, and it has been urged that, as such, it is subject to seizure and utilization without regard to whether or not its use was necessary for military operations by the occupying army, and that under conditions of modern total warfare, all produce and material, raw or processed, including those of the soil, mines, forests, and oil fields, together with the plants which process them, are essential to military operations. This claim is far too broad.[292]

Pleiger's conviction for pillage was thus premised on the finding that the manganese, coal and iron his company exploited from these state-owned properties "were seized and used without regard to the rules of usufructuary."[293] Courts have therefore proved less willing to embrace the glaring anachronism openly tolerated within the literature. The resurgence of corporate liability for pillage will thus offer a new moral

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[290] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 2005 I.C.J, 19 December 2005, ¶ 249.

[291] *Ministries Case*, *supra* note 77, at 744 (finding that the company BHO "concentrated its efforts largely upon the manganese ore mines in Nikopol, the iron mines in Krivoi Rog, and the coal and ore mining in the Donetz Basin.").

[292] *Ministries Case*, *supra* note 77, at 746.

[293] *Id.*, at 747. The Tribunal rejected Pleiger's argument to have merely exercised the right of usufruct by reasoning that the entitlement "does not include the privilege to commit waste or strip off the property involved," presumably referencing the inherent diminution of capital value in land resulting from mining.

impetus for rethinking this and other exceptions to the prohibition against pillage that are enshrined in the Hague Regulations, since continuing to live with the logical nonsense not only means perpetuating an acknowledged fallacy rejected in practice, it also implies condoning atrocity.

IV. The Criminal Liability of Corporate Actors for Pillage

A wide variety of actors are susceptible to prosecution for pillaging natural resources, including military leaders, political élite and business managers. A focus on the corporate responsibility, however, is especially pertinent since it promises to deter the illicit trade in conflict commodities in ways that prosecuting warring factions or their leaders is unlikely to achieve. Rebel groups are already operating beyond the law in waging rebellion, meaning that the specter of criminal liability for pillaging natural resources adds little to the prospect of charges for treason, murder and destruction of property. Companies, however, are generally risk averse, and have significantly more to lose. In the context of inter-state aggression over resource wealth, companies are also more deterred by pillage—unlike their political sponsors, corporate representatives cannot claim diplomatic immunities as a means of deflecting criminal responsibility. In this spirit, this Part assesses the liability of corporate actors for pillaging natural resources along four principle themes.

I. Beyond Corporate Social Responsibility

The term corporate social responsibility has come to embrace a wide and at times contested range of moral and legal obligations incumbent upon corporate entities above and beyond the fundamental objective of maximizing profit.[294] Over the past two decades, proponents of corporate social responsibility have appealed to international human rights as a baseline set of standards for articulating grievances against corporations, especially where weak systems of domestic governance in developing nations allow foreign companies to prioritize profit over humanitarian consequences. These arguments are now prolific. [295] As one author described, the rise of corporate social responsibility over the past years has seen "an explosion of academic interest in the social and environmental problems posed by multinationals and prospects for legal reform."[296] The emphasis on legal reform that has

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[294] In many respects, corporate social responsibility is a direct response to Milton Friedman's claim that "there is only one social responsibility of business: to use its resources and engage in activities designed to increase its profits." See Milton Friedman, *The Social Responsibility of Business is to Increase its Profits,* N.Y. TIMES MAGAZINE, Sept. 13, 1970, at 124 _CHECK. See also Milton Friedman, *A Freidman Doctrine – The Social Responsibility of Business is to Increase its Profit*, in CORPORATE SOCIAL RESPONSIBILITY: READINGS AND CASES IN A GLOBAL CONTEXT 26-51 (Andre Crane et al. (eds), 2008) [hereafter *Readings And Cases*] For helpful articulation of competing definitions of the term corporate social responsibility, see *Zerk, supra* note *173*, at 29-32. See also, *Readings and Cases*, *supra* note *294*, at 54-106 (discussing concepts and theories of corporate social responsibility).

[295] Sarah Joseph, *Taming the Leviathans: Multinationals and Human Rights*, N.I.L.R. 175 (1999); Sarah Joseph, *An Overview of the Human Rights Accountability of Multinational Enterprises, in* LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 75-97 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000) [hereafter *An Overview of the Human Rights Accountability of Multinational Enterprises*]; SARAH JOSEPH, CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION, (2004); MICHAEL K. ADDO (ed.), HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS, (Kluwer, 1999); Josep M. Lozano & Maria Prandi, *Corporate Social Responsibility and Human Rights,* in CORPORATE SOCIAL RESPONSIBILITY: THE CORPORATE GOVERENCE OF THE 21ST CENTURY 183- 204 (Ramon Mullerat ed., 2005) [hereafter *Goverence Of The 21st Century*] (outlining CSR initiatives in relation to human rights); David Kinley, *Corporate Social Responsibility and Human Rights Law*, in *Goverence Of The 21st Century, supra* note *295*, at 205-214; EMEKA A. DURUIGBO, MULTINATIONAL CORPORATIONS AND INTERNATIONAL LAW: ACCOUNTABILITY AND COMPLIANCE ISSUES IN THE PETROLEUM INDUSTRY (Transnational, 2003) [hereafter *Accountability &Compliance*]; *Zerk, supra* note *173*,

[296] *Zerk*, *supra* note *173*, at 28.

characterized much of corporate social responsibility movement stems from conceptual limitations with human rights standards, which are at least traditionally understood as creating obligations between states and states alone.[297] In the words of one leading author, "in international human rights law, the prime duty-bearer is the state. No human rights treaty imposes any direct obligations on any other entity."[298]

In deference to this limitation, a large number of institutions and initiatives considered to fall within the rubric of corporate social responsibility rely on businesses to voluntarily pledge allegiance to human rights standards. The UN Global Compact invites multinational companies to voluntarily adhere to a series of standards inspired in part by human rights norms on the condition that businesses submit an annual report to the UN detailing concrete examples of progress made or lessons learned in implementing the principles.[299] Needless to say, the UN Global Compact's powers of investigation or sanction are highly underdeveloped, not to mention the fact that the vast majority of

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[297] For strong arguments that the received wisdom is outdated and that non-state actors like corporations are bound by human rights obligations, see ANDREW CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE, (Oxford, 1993)

[298] *Taming the Leviathans, supra* note *295,* at 175. And although a great deal of important work has undermined the state-centric focus of human rights obligations, Muchlinski is correct when he laments that "[d]espite the convincing arguments for extending responsibility for human rights violations to TNCs, the legal responsibly of TNCs for such violations remains uncertain." Muchlinski, p. 238. *Zerk*, *supra* note *173*, at 76-77 ("It is at least a theoretical possibility that international law could impose some human rights obligations directly on companies, although it is far less clear what these duties might entail."); *Zerk*, *supra* note *173*, at 83 ("The idea that multinationals may be subject to some 'direct' obligations under international human rights law is slowly gaining momentum.")

[299] See generally, Hans Corell, *The Global Compact,* in *Readings and Cases, supra* note *294*, at 235; *Jägers, supra* note *92*, at 128-130;

businesses elect to remain outside the scope of the mechanism.[300] The same perceived limitations of human rights norms has led to the proliferation of voluntary self-regulation mechanisms. The diamond industry's establishment of the Kimberley Process Certification Scheme in order to eliminate the trade in conflict diamonds serves as a prime example, since the mechanism arose as a market response to the precipitous decline of the fur industry on largely ethical grounds, not as the result of an emerging anxiety about liability for much discussed human rights violations. Unsurprisingly, when presented with the opportunity for self-regulation, "no consensus was reached at the various Kimberley meetings on how monitoring of compliance with the agreement was to be ensured."[301] In response to these regulatory deficiencies, a significant portion of corporate social responsibility is characterized by an almost pathological quest for a mandatory system of supranational law.[302]

This plight has largely ignored the one body of international law that provides the highly sought after binding regime.[303] In contrast to mainstream understandings of human rights norms, international humanitarian law is widely accepted as binding all actors

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[300] See *Accountability and Compliance*, *supra* note *295*, 150-153 (detailing these and other criticisms leveled against a weak UN Global Compact based on voluntary principles.)

[301] Ian Smillie, *What Lessons from the Kimberley Process Certification Scheme?* In *Profiting from Peace*, *supra* note *174*, at 60.

[302] *An Overview of the Human Rights Accountability of Multinational Enterprises*, *supra* note *295*, at 87-88 (arguing for an alternative reform based on "binding direct international regulation of MNEs")

[303] Karen Ballentine and Heiko Nitzchke, *Introduction*, 12 *Profiting From Peace*, [hereafter *Ballentine*] (arguing that "policy attention to the political economy of armed conflict has led to a growing convergence among corporate social responsibility, human rights, and conflict management agenda").

operating with a conflict zone including civilians and business.[304] The discrepancy is born of three major disparities. First, the advent of individual criminal liability in the post-war era transformed the laws of war from a system of mutually agreed inter-state obligations similar to modern day human rights into a structure more closely resembling a criminal code. This metamorphosis was most readily associated with the Nuremberg trials, which boldly announced that "[i]nternational law… binds every citizen just as does ordinary municipal law. Acts adjudged criminal when done by an officer of the Government are criminal also when done by a private individual."[305] Then, the codification of treaty obligations purporting to bind rebel groups within the Geneva Conventions and then in a separate Additional Protocol furthered this transition from a contractual to a criminal model by purporting to bind rebel groups who seldom participated in or endorsed the treaties.[306] And finally, the gradual disassociation of human rights and international humanitarian law at least with respect to commonly held views of scope of application, was reinforced by the increased recognition that international humanitarian law creates absolute and non-

[304] U.S. NAVY, *The Commander's Handbook On the Law Of Naval Operations*, NWP 1-14M, § 6.2.6 (July 2007) ("acts constituting war crimes may be committed by combatants, noncombatants, or civilians."); See also Department of the Army Washington, *The Law of Land Warfare*, Field Manual No. 27-10, § 499 (July 1956) ("The term "war crime" is the technical expression for a violation of the law of war by any person or persons, military or civilian.") [hereafter *US Field Manual*]; New Zealand Defence Force, *Interim Law of Armed Conflict Manual*, DM 112, § 1701(1) (1992) [hereafter New Zealand Military Manual] ("The term "war crime" is the generic expression for large and small violations of the laws of warfare, whether committed by members of the armed forces or by civilians.") Office of the Judge Advocate General (Canada), *The Law of Armed Conflict at the Operational and Tactical Level*, § 48; *UK Military Manual*, *supra* note 107, at § 16.30.1.

[305] Trial of Frederick Flick and Five Others (Flick), 6 *Trials of War Criminals*,, at 1192. See also *Krupp Case*, *supra* note 107, at 60 ("[t]he laws and customs of war are binding no less upon private individuals than upon government officials and military personnel.")

[306] *Geneva Convention IV, supra* note *119*, Common Article 3

derogable obligations that apply irrespective of reciprocity.[307] The difference between these standards and the state-centric model inspired by human rights law that has entirely dominated corporate social responsibility has tremendous implications for enforcement.

J. Individual Criminal Liability of Business Representatives

Business representatives responsible for the pillage of natural resources can be convicted of war crimes, regardless of whether the offense was perpetrated in the course of an employment relationship or under the guise of a corporate entity. This proposition has insufficiently influenced commentators, war crimes prosecutors and other experts, who too frequently repeat the misguided refrain that "[t]he existing mechanisms created for prosecuting violators of international criminal law currently offer no possibilities for the prosecution of corporations."[308] This seemingly all-pervasive perception has resulted from unduly fixating on the criminal liability of corporate entities, without regard for the significantly less controversial, markedly more orthodox and universally endorsed

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[307] Prosecutor v. Kupreškić et al., Case No. IT-95-16-T, Judgement, ¶ 511 (Jan. 14, 2000) [hereafter *Kupreškić Trial Judgment*].

[308] *Jägers, supra* note *92*, at 232; See also *Reflections and Extrapolation on the ICJ's Approach to Illegal Resource Exploitation, supra* note *124*, at 209-210 ("[T]here are of course other forms of responsibility that could contribute to curbing or remedying pendete bello resource exploitation. Individual criminal liability in international criminal law is an obvious alternative to state responsibility… [t]his form of liability is likely limited, however, as it is controversial whether it applies to corporations – a possibility not retained by the ICC."); *Developments in the Law-Corporate Liability for Violations of International Human Rights Law,* 114 HARV. L. REV. 2025, 2030-2031 (2001) (arguing that "international law views corporations as *possessing* certain human rights, but it generally does not recognize corporations as bearers of legal obligations under international criminal law.")

alternative for prosecuting corporate white collar crime. The misapprehension appears to stem from the negotiating history of the International Criminal Court, where delegations formally tabled a proposal that unsuccessfully advocated for the inclusion of corporate criminal liability within the ICC's statute.[309] Unfortunately, the proposal's demise appears to have obscured the more obvious alternative.

In contrast to the ability of the corporate structure to shield individual representatives from civil responsibility, criminal law universally dispenses with the corporate veil for the purposes of criminal proceedings against business representatives. This principle enjoys a long pedigree. As early as 1701, the Chief Justice of the Kings Bench dismissed the corporate veil as inapposite in criminal trials, declaring that "a corporation is not indictable, but its individual members are."[310] While certain other countries, such as Germany and Spain, continue to resist the notion of criminal liability of the corporate entity itself based essentially on misgivings about the anthropomorphism inherent in ascribing mental states to inanimate entities like companies, states universally dispense with the corporate structure where corporate representatives satisfy the elements

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[309] Assembly of States Parties, Press Release L/2769, STATUTE OF INTERNATIONAL COURT MUST NOT BE RETROACTIVE, SAY SPEAKERS IN PREPARATORY COMMITTEE, 3 (Mar. 29, 1996); PROCEEDINGS OF THE PREPARATORY COMMITTEE DURING THE PERIOD 25 March-12 April 1996, A/AC.249/CRP.3/Add.l, ¶ 6 (April 8, 1996); Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I (Proceedings of the Preparatory Committee during March-April and August 1996) General Assembly Official Records · Fifty-first Session Supplement No.22 (A/51/22), para 194(1996); United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, REPORT OF THE WORKING GROUP ON GENERAL PRINCIPLES OF CRIMINAL LAW, A/CONF.183/C.1/WGGP/L.4/Add.1, 1-2 (June 29, 1998).

[310] 88 Eng Rep 1518 (KB 1701).

of an offence.[311] Even the draft ICC Statute, which contemplated the ultimately unsuccessful notion of corporate criminal liability for war crimes, contained text mandating that "[t]he criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes."[312] And yet this less controversial means of sanctioning corporate criminality has seemingly escaped broad recognition. A great deal of literature has rightly protested the absence of corporate criminal liability within the ICC Statute,[313] but the basis upon which business representatives as opposed to corporate entities might be held responsible for

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[311] Ilias Bantekas, *The Legal Nature of Transnational Financial Crime*, in INTERNATIONAL AND EUROPEAN FINANCIAL CRIMINAL LAW 1, 12-14 (Ilias Bantekas ed., 2006) ("it would be absurd to employ the corporate veil in order to shield those responsible from criminal liability."); BRENT FISSE AND JOHN BRAITHWAITE, CORPORATIONS, CRIME AND ACCOUNTABILITY, 36 (Cambridge University Press, 1993), CELIA WELLS, CORPORATIONS AND CRIMINAL RESPONSIBILITY, 52 (Oxford, 2nd ed., 2001); See also *Recommendation, Council of Europe Committee of Ministers to Member States Concerning Liability of Enterprises Having Legal Personality for Offences Committed in Exercise of the Activities*, ¶ 5 ("[t]he imposition of liability on the enterprise should not exonerate from liability a natural person implicated in the offence."); For specific examples of criminal legislation reflecting this principle, see Austria, section 3(4) of Law on the Responsibility of Associations, which provides that both a natural person and the legal person may be held responsible for the same offense. Verbandsverantwortlichkeitsgesestz, § 3(4); In Switzerland, corporate criminal liability only arises where a crime or misdemeanor perpetrated during commercial activities cannot be imputed to a particular business representative. Article 102(1) of the Swiss Penal Code states that "[a] crime or a misdemeanor that is committed in a corporation in the exercise of commercial activities confirming to its objects is imputed to the corporation if it cannot be imputed to an identified physical person by reason of the lack of organization of the corporation…" Article 121-3, Code Pénal Francais (stating that the criminal responsibility of the corporate entity does not exclude that of natural persons who are perpetrators or accomplices to the same act."); Gérard Couturier, *Répartition des responsabilités entre personnes morales et personnes physiques*, 111 REVUE DES SOCIÉTÉS 307 (Dalloz, April 1993).

[312] See Article 17(6) of the Draft Statute contained within Preparatory Committee on the Establishment of an International Criminal Court 16 March-3 April 1998, Report of the Inter-Sessional Meeting From 19 to 30 January 1998 in Zutphen, The Netherlands, A/AC.249/1998/L.13, 4 February 1998, p. 53.

[313] Cristina Chiomenti, *Corporations and the International Criminal Court*, in TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS 287 (Olivier De Schutter ed., 2006); Andrew Clapham, *The Question of Jurisdiction under International Criminal Law over Legal Persons : Lessons from the Rome Conference on a International Criminal Court,* in LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW (Menno T. Kamminga and Saman Zia-Zarifi eds., 2000) [hereafter *The Question of Jurisdiction*]; Joanna Kyriakakis, *Corporations and the International Criminal Court : the Complementarity Objection Stripped Bare,* 19(1) Crim. L. Forum; 115-151 (2008).

international crimes like pillage in accordance with universally-agreed criminal principles is hardly mentioned.

A host of international jurisprudence has ratified the domestic criminal theory that the corporate veil is inconsequential with respect to the liability of business representatives for war crimes. In particular, a range of precedent explicitly confirms that business representatives can be convicted of war crimes without reference to the corporate structure. In the wake of WWII, for instance, the Nuremberg Judgment's then revolutionary claim that crimes against international law "are committed by men, not by abstract entities,"[314] was rapidly extrapolated from governments to corporate defendants in order to defeat pleadings that the corporate veil might inhibit individual liability. The implications of this philosophy for corporate participation in international crimes where later explored in greater depth within the IG Farben Judgment, which announced that "responsibility does not automatically attach to an act proved to be criminal merely by virtue of a defendant's membership in the Vorstand [Board]. Conversely, one may not utilize the corporate structure to achieve an immunity from criminal responsibility for illegal acts which he directs, counsels, aids, orders, or abets."[315] In accordance with this emphasis on individual

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[314] *Nuremberg Judgment*, *supra* note *99*, at 41 (finding in relation to arguments based on state sovereignty that "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."

[315] I.*G. Farben Case*, *supra* note 99, at 1153. (stating that "[i]t is appropriate here to mention that the corporate defendant, Farben, is not before the bar of this Tribunal and cannot be subjected to criminal penalties in these proceedings. We have used the term Farben as descriptive of the instrumentality of cohesion in the name of which the enumerated acts of spoliation were committed. But corporations act through individuals and, under the conception of personal individual guilt to which previous reference has been made, the Prosecution, to discharge the burden imposed upon it in this case, must establish by competent proof

modes of liability rather than the corporate structure, a number of courts convened following the capitulation charged and convicted individual businessmen for a plethora of war crimes. Soon after the close of hostilities in WWII, two businessmen were convicted for murder as a result of commercial transactions involving the supply of the industrial chemical Zyklon B to the Reich, cognizant that the merchandise was destined to asphyxiate civilians in gas chambers.[316]

These principles have also enjoyed a modern application in contemporary courts. Over the past decade, Dutch courts have prosecuted at least two businessmen for war crimes allegedly perpetrated through commerce.[317] In one of these cases, a Dutch businessman potentially responsible for pillaging timber through a company registered in Liberia was acquitted of war crimes other than pillage. In the other case, a businessman named Frans Van Anraat was convicted of inhuman treatment as a war crime for commercial transactions that involved the sale of chemicals ultimately subjected upon Iraqi Kurds.[318] The court held Van Anraat personally responsible for transactions performed

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beyond a reasonable doubt that an individual defendant was either a participant in the illegal act or that, being aware thereof, he authorized or approved it.")

[316] Trial of Bruno Tesch and Two Others (The Zyklon B Case), British Military Court, Hamburg, 1 *Law Report of Trials of War Criminals*, 93 (March 8, 1946). In concluding its review of this case, the United Nations War Crimes Commission again described the affair as "a clear example of the application of the rule that the provisions of the laws and customs of war are addressed not only to combatants and to members of state and other public authorities, but to anybody who is in a position to assist in their violation." Id., at 103.

[317] Prosecutor v. Van Anraat, Netherlands, LJN: BA6734, Gerechtshof 's-Gravenhage , 2200050906-2, (May 9, 2007) [hereafter *Van Anraat*]; Prosecutor v. Kouwenhoven, Netherlands, LJN: AY5160, Rechtbank 's-Gravenhage , 09/750001-05 (July 28, 2006).

[318] *Van Anraat*, *supra* note 317, ¶ 11.5.

through intermediary firms in which he was a leading figure.[319] Modern international criminal courts have also convicted businesspeople for the most serious international crimes, including members of the commercial radio station Radio Station Milles Collines that incited genocide as part of the broadcasting company's official policy or the director of a commercial tea factory who instigated his employees to implement the same gruesome offense during the course of employment.[320] On the strength of these precedents, another heavily internationalized court operating under UN mandate in Kosovo surmised that "not only military personnel, members of government, party officials or administrators may be held liable for war crimes, but also industrialists and businessmen, judges and prosecutors."[321] In short, business representatives can be convicted of war crimes by simply assessing individual liability without regard to the corporate structure.

Commercial actors engaged in the pillage of natural resources are prone to criminal sanction on this same legal basis. As previously noted, the IG Farben judgment defined pillage as occurring "[w]here *private individuals*, including *juristic persons*, proceed to exploit the military occupancy by acquiring private property against the will and consent of

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[319] *Id.,* ¶ 11.5. These subsidiaries supplied a total of 1,400 metric tons of a vital chemical precursor to the then government of the Republic of Iraq in contemplation that the chemicals would be deployed as mustard gas during the ongoing hostilities against Iran. In sentencing Van Anraat to 17 years imprisonment for his complicity in the war crimes that ensued, the appellate court cautioned that "[p]eople or companies that conduct (international) trade, for example in weapons or raw materials used for their production, should be warned that – if they do not exercised increased vigilance – they can become involved in most serious criminal offenses." *Id.,* section 16 "Grounds for the punishment.".

[320] Prosecutor v. Barayagwiza et al., Case No. ICTR-99-52-T, Judgement and Sentence, (Dec. 3, 2003). Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgement, (Nov. 16, 2001). Musema was director of a public enterprise named the Gisovu Tea Factory at the time he directed his employees to engage in the killings.

[321] Prosecutor v. Kolasinac, District Court of Prizren , Case No. 226/200, (Jan. 31, 2003)

the former owner."[322] In a classic illustration of the application of these standards to corporate representatives, the Director of the Dresden Bank, Karl Rasche, was found guilty of pillage in a personal capacity for his role in the vast transfers of Jewish property to German interests, predominantly because the confiscations concerned were "carried out under the control of the Dresdner Bank, whose policies in these respects reflected the attitude and purposes of defendant Rasche."[323] The immediate consequences of applying this individualized focus on corporate representatives to the Australian businessman alleged to have purchased phosphate from Moroccan occupiers of modern day Western Sahara are potentially serious.[324] If Palmalat and Enron executives can face charges for other offenses like insider trading, tax evasion or obstruction of justice,[325] nothing conceptually prevents

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[322] I.*G. Farben Case*, *supra* note 99, at 1133 (emphasis added).

[323] *Ministries Case*, *supra* note 77, at 778. The focus on assessing the individual responsibility of business representatives evidenced in the Rasche trial also lead to the differentiated liability of company employees depending on their implication in specific transactions. In the IG Farben case, Georg Von Schitzler was convicted of plunder for his role in the company Farben's exploitive practices in France and Poland but discharged of responsibility for corporate practices that were no more scrupulous in Norway and Alsace-Lorraine. As justification for its partial acquittal of a self-confessed Nazi, the Tribunal recalled that "[r]esponsibility does not automatically attach to an act proved to be criminal merely by virtue of a defendant's membership in the Vorstand [Board]." I.*G. Farben Case*, *supra* note 99, at 1157. See also (dismissing charges against Gajewski on the basis that "[…] a defendant can be held guilty only if the evidence clearly establishes some positive conduct on his part which constitutes ordering, approving, authorizing, or joining in the execution of a policy or act which is criminal in character. It is essential, in keeping with the concept of personal and individual criminal responsibility, that, when seeking to attach criminality to acts not personally carried out, the action of a corporate officer in authorizing illegal action be done with adequate knowledge of those essential elements of the authorized act which give it its criminal character.") *Id.*,at 1157.

[324] The company stated that "it was satisfied it was not breaching international law by importing Western Sahara phosphate as it had been doing for 20 years… It is relevant to note that the Federal [national] Government has not prohibited importing resources from the Western Sahara." The Weekly Times, (June 21, 2006) available at http://www.wsrw.org/index.php?cat=115&art=523

[325] BBC, *Banks Charged over Parmalat Crash, (*reporting that a judge in the Italian city of Parma has ordered Parmalat's founder, Calisto Tanzi, and other former executives to face trial over its collapse in 2003); *Enron Jury Unswayed by 'I Didn't Know'* , NY TIMES, (May 26, 2006) (detailing the conviction of two Enron

the Australian businessman from standing trial for pillaging natural resources on the strength of the same willingness to dispense with the corporate structure within criminal proceedings. The transition then, is from an overlooked body of jurisprudence that corporate social responsibility assumes will be enforced through a single civil statute that enjoys a more limited history of success, to recognition that corporate pillage is already a subset of white collar crimes more broadly.

K. Corporate Criminal Liability

Corporate entities can also be prosecuted for war crimes in a range of domestic jurisdictions, thereby complimenting the potential criminal liability of business representatives. Once again, the demise of corporate criminal liability during the negotiations of the statute of the International Criminal Court spawned the unhelpful and shortsighted view that "international law […] generally does not recognize corporations as bearers of legal obligations under international criminal law."[326] If this view mistakenly discounts the notion of individual criminal liability of business representatives, it certainly ignores the possibility of corporate criminal liability for international crimes in domestic legal orders. And yet as a reflection of the increased willingness of states to embrace

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executives). Joseph F.C. DiMento & Gilbert Geis, *Corporate Criminal Liability in the United States,* in RESEARCH HANDBOOK ON CORPORATE LEGAL RESPONSIBILITY 159-176 (Stephen Tully (ed.), 2005) (discussing aspects of the both Enron and Palmalat cases).

[326] *Developments in the Law-Corporate Liability for Violations of International Human Rights Law,* 114 HARV. L. REV. 2025, 2030-2031 (2001) (emphasis added).

corporate liability for criminal offences, two recent surveys of a limited number of national jurisdictions reveal in excess of two dozen states in the Americas, Europe, Asia and Australasia that have promulgated law permitting the prosecution of corporate entities.[327] These jurisdictions bear testament to an ever-increasing recognition that corporations might not have "a soul to damn or a body to kick,"[328] but companies convicted of criminal offenses are still vulnerable to a panoply of comparable sanctions ranging from pecuniary fines to 'imprisonment' through orders mandating the suspension of trade. In certain circumstances, courts can even incapacitate a company permanently by issuing dissolution orders as a sort of corporate death penalty.[329]

The exact nature of the interface between the domestic law governing corporate criminal liability and international crimes will vary from jurisdiction to jurisdiction, but two major trends are evident. Among the jurisdictions that embrace corporate criminal liability, a large number have adopted an exhaustive criminal code that dedicates a specific provision

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[327] Anita Ramastray and Robert C. Thompson, *Commerce, Crime and Conflict, Legal Remedies for Private Sector Liability for Grave Breaches of International Law: A Survey of 16 Countries*, (2006) (finding that 11 of 16 jurisdictions surveyed contain legal provisions that allowed for the prosecution of corporate entities for international crimes. See also Megan Donaldson and Rupert Watters, *'Corporate Culture' as a Basis for the Criminal Liability of Corporations*, Prepared by Allens Arthur Robinson for the United Nations Special Representative of the Secretary-General on Human Rights and Business, (Feb. 2008) http://www.reports-and-materials.org/Allens-Arthur-Robinson-Corporate-Culture-paper-for-Ruggie-Feb-2008.pdf). See also RESEARCH HANDBOOK ON CORPORATE LEGAL RESPONSIBILITY (Stephen Tully ed., 2005); CRIMINAL RESPONSIBILITY OF LEGAL AND COLLECTIVE ENTITIES (Albin Eser et al. eds., 1999).

[328] Jack Coffee, *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 410 (1980-1981).

[329] *Wells, supra* note 311, 37. See generally Ilias Bantekas, *The Legal Nature of Transnational Financial Crime*, in INTERNATIONAL AND EUROPEAN FINANCIAL CRIMINAL LAW 1, 12-14 (Ilias Bantekas ed., 2006). *Fisse & Braithwaite, supra* note 311, at 36; *Wells, supra* note 311, at 52; *Tully, supra* note 325; *Eser, supra* note 243.

to corporate criminal liability before going on to prohibit war crimes in subsequent sections.[330] In Australia, for example, the Commonwealth Criminal Code of 1995 first states that "[t]his Code applies to bodies corporate in the same way as it applies to individuals," then explicitly lists the offense of pillage together with a codification of the elements of the crime. In a variation on this practice, a second category of jurisdictions have promulgated separate legislation mandating that the term "person" is to be read as including both natural and legal persons in all other legislative enactments. In Canada, section 35 of the Interpretation Act stipulates that "[i]n every enactment … person, or any word or expression descriptive of a person, includes a corporation."[331] In accordance with this definition, the provision of the Canadian Crimes Against Humanity and War Crimes Act that deems every "person" who commits a war crime guilty of an indictable offense must be read as encompassing corporations. By strikingly similar legislative processes, British and American firms are susceptible to corporate criminal liability for pillage within domestic courts.[332]

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[330] See §§ 12.1(1) and 268.54, Commonwealth Criminal Code Act 1995 respectively. Section 48 a, Norewegian General Civil Penal Code; Section 5, Code Pénal Belge reads « [t]oute personne morale est pénalement responsable des infractions qui sont intrinsèquement liées à la réalisation de son objet ou à la défense de ses intérêts, ou de celles dont les faits concrets démontrent qu'elles ont été commises pour son compte. ." Article 121 of the French Penal Code is translated as « Legal persons, with the exception of the State, are criminally liable for the offenses committed on their account by their organs or representatives…"

[331] Section 35, Interpretative Act, R.S. 1985, c. I-21,

[332] Section 51(2)(b). of the UK International Criminal Court Act 2001 confers British courts with jurisdiction over acts of pillage orchestrated "outside the United Kingdom by a United Kingdom national, a United Kingdom resident or a person subject to UK service jurisdiction." Article 67(2) states that "[i]n this Part a "United Kingdom resident" means a person who is resident in the United Kingdom." Finally, section 5 of the Interpretations Act 1978 states that "[i]n any Act, unless the contrary intention appears, words and expressions listed in Schedule 1 to this Act are to be construed according to that Schedule." The Schedule states that "'[p]erson' includes a body of persons corporate or unincorporate." The U.S. War Crime's Act

By harnessing these pre-existing criminal frameworks, corporate entities are liable for the pillage of natural resources depending on the theory of blame attribution adopted within the specific national jurisdiction capable of trying the offence. At least three standards predominate, namely the respondent superior model of vicarious liability, the identification theory and corporate culture model. The first, most readily exemplified by US federal law, holds companies vicariously liable for criminal offenses perpetrated by company employees "within the scope of his employment and with intent to benefit the corporation."[333] The prosecution of the American oil companies alleged to have purchased Namibian natural resources from an apartheid regime in the late 1970s,[334] might therefore proceed on the same footing as the Ford motor company's prosecution for manslaughter arising out of a defective vehicle.[335] In both instances, a jury simply needs to be satisfied that at least one company employee perpetrated the offense in order for that culpability to simultaneously extent to the overarching corporate structure.

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stipulates that "whoever" commits a war crime is subject to criminal punishment including fine, imprisonment and death. The Dictionary Act of 2000 states that "[i]n determining the meaning of any Act of Congress… the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." Dictionary Act, 1 U.S.C. § 1 (2000).

[333] New York Central & Hudson River Railroad Co, v. United States 212 U.S. 481, 29 S.Ct 304, 53 L.Ed. 613 (1909); For a assessment of the difficulties with locating corporate intent on this model, see Stacey Neumann Vu, Corporate Criminal Liability: Patchwork Verdicts and the Problem of Locating a Guilty Agent, 104 COLUM. L. R. 459 (2004); See generally RICHARD S. GRUNER, CORPORATE CRIMINAL LIABILITY AND PREVENTION (2007).

[334] See *Namibia Council Report*, *supra* note *219*, ¶¶ 343-344.

[335] State v. Ford Motor Company, No. 5324 (Ind. Super. Ct. Sept 3, 1978). For commentary on the Ford Pinto case, see Richard A. Epstein, *Is Pinto a Criminal?* 4 REGULATION 15 (1980). To take the analogy one step closer to the illegal exploitation of natural resources, if De Beers can plea guilty to charges of See United States of America v. De Beers Centenary AG, Case No. CR-2-94-019, Filed: 7/13/04, *Plea Agreement*, available at http://www.usdoj.gov/atr/cases/f204500/204594.htm

Other jurisdictions, such as the United Kingdom and Canada, adopt a rendition of corporate criminal responsibility premised on the individual responsibility of senior management. This so-called identification theory presupposes that senior management represent the corporation's "directing mind and will," such that a corporate conviction for pillaging natural resources would only be viable if at least one member of senior management was implicated.[336] And in a third more permissive category of blame attribution, a number of jurisdictions hold corporations criminally culpable based on a corporation's failure "to create and maintain a corporate culture that required compliance with the relevant provision."[337] While these variations create a less than level-playing field, they at least refute the perceived need for creative prescriptive alternatives to compensate for the lack of equivalent rules in human rights law.[338]

The exercise of corporate criminal liability for the pillage of natural resources in accordance with this pre-established rules of attribution could co-exist with and complement individual criminal liability of business representatives for the same offense. Outside the laws of war, commentators are adamant that corporate criminal liability and the

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[336] The overarching proviso, that the senior officer's conduct must by motivated "at least in part to benefit the organization," seems apt to describe the corporate pillage of natural resources during war, which is almost invariably characterized by a preference for corporate profit over the less lucrative social imperatives. For criticism of the identification and As Wells cogently surmised, "[v]icarious liability has been criticized for including too little (in demanding that liability flow through an individual, however great the fault of the corporation), and for including too much (in blaming the corporation whenever the individual employee is at fault, even in the absence of corporate fault).

[337] Section 12.3(2)(d) Commonwealth Criminal Code Act of 1995. Australia.

[338] *Ratner*, *supra* note *174*, 496-524 (advocating for a new series of rules for attributing human rights violations to corporations inspired by the public international law governing state responsibility)

individual criminal liability of business representatives should function in tandem,[339] and a number of criminal jurisdictions explicitly codify provisions to this effect.[340] The added value of this dualistic response applies with special force to the corporate liability for pillaging natural resources on an international plane. On the one hand, a range of factors militate in favor of corporate criminal liability for pillage: (1) the obvious concern that individual business representatives do not have deep pockets and may therefore unable to pay meaningful reparations, (2) the observation that corporate entities are better placed than state authorities to detect, prevent and sanction criminal commerce, and the provisions of attribution based on failures in corporate culture that do not require the identification of an individual perpetrator, and (3) the inapplicability of statutes of limitations to war crimes has longer-term implications for businesses than their representatives,[341] since the former is not limited to a finite lifetime. A commitment to hunting down war criminals until the end of

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[339] *Coffee, supra* note 254, at 410 (concluding that "a dual focus on the firm and the individual is necessary. Neither can be safely ignored."); Bernd Schünemann, *The Sarbanes-Oxley Act of 2002: A German Perspective* 8 BUFF. CRIM. L. REV. 35, 41 (2004) (arguing that "[i]t therefore appears necessary to combine the two concepts with one antoher in order to ensure the presence of an effective criminal control within the area of white collar crime."); Sara Sun Beale & Adam G. Safwat, *What Developments in Western Europe Tell Us About American Critiques of Corporate Criminal Liability*, 8 BUFF. CRIM. L. REV. 89, 136 (2004) (pointing out that "the new corporate criminal liability is intended to complement, not replace, the liability of individual actors."); Wells, supra note 311, at 161 ("there is no reason why there should not normally be prosecutions for both.").

[340] See above note 311.

[341] See Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 754 U.N.T.S. 73, 75 (entered into force Nov. 26, 1968); See also European Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes (Jan. 25, 1974) E.T.S. 82; JEAN-MARIE HENKAERTS AND LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, Vol. I, 614-618 (Cambridge Univ. Press, 2005), [hereafter *Customary International Humanitarian Law Study*] (concluding that, as a matter of customary international law, "statutes of limitations may not apply to war crimes.") See generally, RUTH A. KOK. STATUTORY LIMITATIONS IN INTERNATIONAL CRIMINAL LAW (T.M.C. Asser Press, 2007).

their days might thus have longer-lasting consequences for companies than their representatives.

In other circumstances, an ability to prosecute individual business representatives offers advantages over and above targeting the corporate entity itself. On a purely pragmatic basis, proprietors of smaller firms involved in trafficking conflict commodities frequently dissolve their corporate structures after each illicit transaction as a means of subterfuge. Individual criminal responsibility is therefore the sole avenue of criminal recourse possible when the corporate entity is already defunct. A wider body of literature also suggests that only individual criminal liability is likely to create a disincentive that transcends the pressures of corporate culture, which would seem an especially compelling rationale for individual liability within an extractive industry that has evidenced a strong cultural proclivity towards disregarding the niceties of ownership and consent during war. As the subsequent sections dedicated to jurisdiction show, a dual focus on individual liability of business representatives and corporate entities also creates a wider web of courts capable of exercising jurisdiction over acts of pillage, since the nationality of business representatives and their business' place of incorporation often diverge.

This analysis not only rebukes the widespread but misguided intuition that "multinationals are often said to 'fall through the cracks" of the international regulatory system,"[342] they also betray a misplaced focus on the International Criminal Court.

[342] *Zerk*, *supra* note *173*, at 104. See also Saman Zia-Zarifi, *Suing Multinational Corporations in the U.S. for Violating International Law*, 4 UCLA J. Int'l L. & For. Aff. 81, at 84 (1999) ("Even though the global

Corporate criminal liability might not be universally endorsed within national legal systems,[343] but it certainly provides a wider regulatory reach than the single civil statute cited in every text on corporate social responsibility that only regulates international offences perpetrated by companies in a single jurisdiction.

The Alien Tort Claims Act might have solved the Unocal litigation, but it is less well equipped to deal with the French company that allegedly purchased large quantities of timber from Charles Taylor's then rebel movement in Liberia, the Thai companies responsible for the illegal exploitation of timber at the Khmer Rouge's behest, or the German multinational alleged to have purchased natural resources from the Rwandan Army during its occupation of Eastern Congo. The point is not that ATCA is obsolete, but more than the resurgence of corporate liability for the pillage of natural resources allows a significantly broader array of avenues for corporate accountability in a globalized marketplace that transcends any one jurisdiction. The mere fact that corporate criminal liability for war crimes is largely unprecedented in practice should not deter. If Wells is correct to surmise that white collar crime had to be "discovered,"[344] the extension of the concept to corporations responsible for war crimes merely signals the inevitable next phase in an ongoing process of regulatory discovery.

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community is aware of the tremendous power of MNCs, private corporate entities bear almost no obligations under public international law.")

[343] *Jägers, supra* note *92*, at 213 ("the criminal prosecution of corporations at the national level may prove problematic as not every national system accepts the concept of criminal liability of legal persons.")

[344] *Wells, supra* note *311*, at 25.

L. Jurisdiction

The perennial criticism of attempts at regulating corporate behaviors within a globalized market is that piece-meal regulation within a single jurisdiction creates a competitive disadvantage vis-à-vis foreign companies. As a consequence, national regulation merely promotes capital flight to less onerous jurisdictions, which in turn produces the races to the regulatory bottom so typical of the modern society.[345] International law serves an indispensable role in correcting this regulatory trap, since synchronizing normative schemes across multiple jurisdictions is one of the key traditional functions of transnational law. Therefore, it seems only logical that international humanitarian law, which by definition regulates conduct during armed conflict, is the appropriate branch of international law to serve this harmonizing function.

1. Active Personality – Jurisdiction Based on Nationality

The first jurisdictional basis for adjudication of corporate pillage of natural resources relies on states to discipline their own nationals. The so-called "active personality principle" entitles states to assert criminal jurisdiction over offenses perpetrated by their

[345] Peter Muchlinski, *The Development of Human Rights Responsibilities for Multinational Enterprises*, in *Readings and Cases,* at 236 (arguing that "the more conscientious corporations that invest time and money into observing human rights and making themselves accountable for the ir record in this field, will be at a competitive disadvantage in relation to more unscrupulous corporations that do not undertake such responsibilities.")

nationals abroad.[346] In common law jurisdictions, active personality was initially developed to enable the prosecution of treasonous conspiracies originating outside a nation's territorial boundaries,[347] but after WWII nationality jurisdiction was incrementally extended to offenses such as child sex trafficking that offended elementary domestic values. Unsurprisingly, war crimes are widely recognized as ranking among the limited category of offenses that warrant extra-territorial application, even within jurisdictions that still maintain a marked skepticism for the extra-territorial application of criminal law. To illustrate, the United States has adopted active personality on a piece-meal basis with respect to only a limited set of criminal offenses, but the U.S. War Crimes Act of 1996 includes provisions that confer criminal jurisdiction on US federal courts over pillage perpetrated by "a national of the United States," regardless of whether the offense occurred "inside or outside the United States."[348] Although common law jurisdictions hand enforcement of these and other offences to the discretion of public officials, international humanitarian law simultaneously dictates a positive obligation to search for, investigate and punish war crimes. [349] Pillage thus provides a more compelling legal basis for scrutinizing

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[346] ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT, (Oxford, 1994) (considering the implications of active personality jurisdiction as "extraterritorial jurisdiction."); ILIAS BANTEKAS & SUSAN NASH, INTERNATIONAL CRIMINAL LAW 152 (Cavendish, 2nd e., 2003) [hereafter *Bantekas & Nash*]; See also Geoffrey R. Watson, *Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction* 17 YALE J. INT'L L. 41, 54 (1992); PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 111 (Routledge, 7th ed., 1997); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 303-304 (Oxford, 7th ed., 2008). *Cassese*, *supra* note 289, at 281-282.

[347] *Bantekas & Nash, supra* note 346, at 283.

[348] 18 U.S.C. 2441 (1996) § 2441.

[349] *Customary International Humanitarian Law Study, supra* note 341, at 607 (finding that, as a matter of customary international law, "States must investigate war crimes allegedly committed by their nationals or

corporate implication in the illegal exploitation of natural resources during war than any other form of corporate or criminal liability.

In countries inspired by the civil law tradition, extraterritorial criminal jurisdiction based on nationality has emerged as a general principle of criminal jurisdiction governing even minor criminal infractions. Thus in Spain, acts considered by Spanish criminal law to be crimes are susceptible to prosecution before local courts, "even if they are committed outside the national territory."[350] The jurisdictional principle has gained such a strong foothold within continental legal traditions that the Swedish Supreme Court has even upheld convictions for violations of the Swedish traffic code committed on foreign roads.[351] These principles have profound implications for the state-sanctioned investigation and adjudication of corporate pillage of natural resources during war. To cite but one example, active personality extends Danish jurisdiction over international crimes to acts of pillage allegedly perpetrated by a large multinational registered in Copenhagen, who reputedly traded in Liberian timber from illicit sources during the Liberian civil war.[352] Not only do a

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armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects.") The obligation stems from the equivalent obligation in the Geneva Conventions that mandates that "Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts." See *Geneva Convention IV*, *supra* note *119*, Art. 146.

[350] Article 23.2 Organic Law on Judicial Power cited in Ana Libertad Laiena and Olga Martin-Ortega *The Law in Spain*, in COMMERCE, CRIME AND CONFLICT: A SURVEY OF SIXTEEN JURISDICTIONS 12 (Fafo AIS, 2006) [hereafter *FAFO Survey*].

[351] Public Prosecutor v. Antoni, 32 Int'l L. Rep. (1960), at 140.

[352] See Greenpeace, Liberian Timber Trade Fuels Regional Insecurity, 8 (April, 2003) http://www.greenpeace.org/raw/content/international/press/reports/liberian-timber-trade-fuels-re-2.pdf

vast array of courts have jurisdiction and a positive international obligation to exercise this capacity,[353] the availability of *partie civile* in various civil law jurisdictions also allows private parties to initiate criminal proceedings directly, thus dispensing with prosecutorial discretion in prescribed circumstances.

Other states are also capable of investigating and charging companies and their representatives for pillage based on active personality jurisdiction. A recent survey of a representative proportion of criminal jurisdictions reveals that the vast majority of states surveyed extend domestic criminal jurisdiction to acts of nationals implemented abroad,[354] thereby providing a compelling grounds for jurisdiction over a large number of detailed allegations of corporate pillage. One Israeli businessman, who was granted an 11-month monopoly in the brokerage of diamonds by a Congolese rebel group during the zenith of the hostilities, was named by the UN Panel of Experts as having orchestrated a "reign of terror" that relieved the territory of large quantities of diamonds for the Rwandan Army.[355] The businessman risks criminal sanction within Israel, since Israeli penal law both criminalizes pillage and extends criminal jurisdiction to felonies and misdemeanors committed by an Israeli national or resident of Israel overseas.[356] In the case of these

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[353] See supra.

[354] *FAFO Survey*, *supra* note 350, at 16.

[355] UN Panel of Experts, S/2002/1146, *supra* note 80, ¶ 84.

[356] Penal Law of Israel (626/1996), § 15(a) ("Israeli penal law shall apply to a foreign offense of the category of felony or misdemeanor committed by a person while being - either at the time of or after committing the offense - an Israeli national or resident of Israel; once extradited from Israel for that offense to another state and tried there for it, Israeli penal law shall no longer apply for that offense.) http://wings.buffalo.edu/law/bclc/israeli.htm.

specific allegations, exercising this jurisdiction is not only obligatory according to the express terms of international humanitarian law, states are also bound by the strictures of UN Security Council Resolutions that called on member states to "conduct their own investigations, including as appropriate through judicial means."[357] Pillage provides the substantive framework that enables compliance with these binding obligations; active personality furnishes the jurisdictional capacity.

The same nationality-based jurisdiction exponentially expands the probability of criminal enforcement for acts of corporate pillage, since nationality of corporate entities and their agents potentially diverge. As regards individuals, nationality is generally understood as linking to citizenship, whereas the nationality of a corporation is determined by the place of incorporation.[358] Clearly these two jurisdictions need not overlap, such that active personality enables a much broader range of courts to criminally sanction one and the same corporate practices depending on whether the corporate entity or its representatives are charged. The two alternatives allow British courts to enforce the prohibition against pillaging natural resources against an English businessman, even though the mining company through which he funneled proceeds from the illegal exploitation of

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[357] S/RES/1457 (2003), 24 January 2003, ¶ 15. See also S/RES/1499 (2003), 13 August 2003, ¶ 3 (emphasizing that information should be provided to governments concerning corporate responsibility for the illegal exploitation of natural resources in the Congo to enable them to "take appropriate action according to their national laws and international obligations.")

[358] The American Law Institute, *Restatement of the Law, Foreign Relations Law of the United States*, § 213 ("For the purposes of international law, a corporate has the nationality of the state under the laws of which the corporation is organized"); See also *The Question of Jurisdiction*, above note _, 179-188 ("It is suggested that in most circumstances the rule is that nationality flows from the place of incorporation and the seat of management; this will be the obvious starting point.")

conflict commodities was registered within the Cayman Islands. The same authorities can also prosecute a company registered on the London Stock exchange and named in UN reports as having illegally exploited diamonds from a number of African war-zones, even though the founding director heralds from Oman. The confluence of active personality, individual liability of business representatives and corporate criminal liability thus distributes the obligation to investigate and prosecute across a broader range of constituents, further diluting the ability of particular political impediments to impede enforcement.

There are, in sum, established jurisdictional grounds that allow foreign domestic courts to adjudicate allegations of pillage leveled against their own when equivalents within war-torn societies are dilapidated or otherwise dysfunctional. This, of course, refutes the British Parliamentary Commission that professed that "there is little in the way of 'hard law' to regulate the activities of multinational companies operating in the developing world,"[359] before proposing to establishing a specialized UN court to address these issues. Domestic courts are perfectly capable. One anticipates therefore, that an appreciable portion of reviving corporate liability for pillage merely involves dispelling these and numerous related doctrinal misapprehensions. In keeping with the willingness of Dutch prosecutors to charge and try their own businessmen for war crimes perpetrated in Liberia and Iraq, a clearer understanding of active personality and the parameters of pillage might

[359] All Party Parliamentary Group on the Great Lakes Region, *The OECD Guidelines for Multinational Enterprises and the DRC,* 6 (February 2005), http://www.appggreatlakes.org/all-reports/the-oecd-guidelines-and-the-drc.html [hereafter *All Party Parliamentary Group on the Great Lakes Region*]

therefore reignite a body of WWII jurisprudence that has gathered dust despite a rapid rise in adjudication of international offenses over the same period.

2. Universal Jurisdiction---The Turn to Business

If a half a century of impunity in the face of widespread corporate offending is more than an inadvertent oversight, at least two further layers of criminal jurisdiction provide states with added incentives to honor supranational obligations. First, universal jurisdiction has emerged as a complementary jurisdictional basis capable of curing the impediments to prosecuting nationals for international crimes. [360] The doctrine posits that certain offenses are sufficiently grave that all states within an international community can assert criminal jurisdiction over the perpetrators regardless of where the offenses took place or the nationality of the respective participants.[361] War crimes clearly meet the requisite degree of

[360] Roger O'Keefe*, Universal Jurisdiction: Clarifying the Basic Concept*, 2 J. INT'L CRIM. JUST. 735 (2004); LUC REYDAMS, UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES (Oxford Univ. Press, 2003) (highlighting the availability of universal jurisdiction in a number of jurisdictions); UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW (Stephen Macedo ed., 2004)

[361] *Higgins*, supra note 346, at _ ("the nature of the act entitles as state to exercise its jurisdiction to apply its laws, even if the act has occurred outside its territory, even if it has been perpetrated by a non-national, and even if nationals have not been harmed by the acts.") For a similar definition, see G. de la Pradelle, *La competence universelle*, in DROIT INTERNATIONAL PENAL 905 (Pédone, 2000) ("La competence pénale d'une jurisdiction nationale est dite 'universelle' quand […] un tribunal que ne désgine aucun des critères ordinairement retenus – ni la nationalité d'une victime ou d'un auteur presume, ni la localization d'un element constitutive d'une infraction, ni l'atteinte portée aux interest foundamentaux de l'État – peut, cependant, connaître d'actes accomplish par des étrangers, à l'étranger ou dans un espace échappant à toute souvereineté.") (In Demjanyuk, a US court also found that "international law provides that certain offences may be punished by any state because the offenders are common enemies of all mankind and all nations have an equal interest in their apprehension and punishment." In matter of Demjanyuk, 603 F. Supp. 1468 (ND Ohio) aff'd 776 F. 2d 571 (6th Cir 1985) CHECK

gravity. As a Swiss Military Court found when exercising universal jurisdiction over a Rwandan mayor accused of war crimes, "given their qualification as war crimes, these infractions are intrinsically very serious."[362] War crimes are peremptory in character and thus enjoy of a higher rank in the international hierarchy of norms than treaty law or even ordinary customary rules.[363] On the strength of these rationale and a comprehensive synthesis of state practice on the subject, the ICRC has concluded that "[s]tates have the right to vest universal jurisdiction in their national courts over war crimes."[364] Quite how this jurisdiction impacts upon business remains unexplored, but pillage is a likely candidate to pioneer the uncharted territory.

The exercise of universal jurisdictional over companies will involve two distinct variants. One cluster of states has enacted a more restrained form of universality which demands the presence of the accused within the state's territory as a prerequisite to the assertion of jurisdiction. In Canada, for instance, the Crimes against Humanity and War Crimes Act provides that any person who has committed a war crime within or outside Canada may be prosecuted on the condition that the accused is present in Canada after the

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[362] Procureur c. Niyonteze, Tribunal Militaire d'Appel 1A, audience du 15 mai au 26 mai 2000, at 37 ("[q]ualifiées de crimes de guerre, ces infractions sont intrinsèquement très grave.")

[363] *Kupreškić Trial Judgment, supra* note 307, ¶ 520 ("The Kupreškić Judgment affirmed as much in declaring that "most norms of international humanitarian law, in particular those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms of international law or jus cogens, i.e. of a non-derogable and overriding character").

[364] See *Customary International Humanitarian Law Study, supra* note 123, at 604. The study defines war crimes as "serious violations of international humanitarian law." See Rule 156, Vol. I, p. 568.

offense was committed.[365] Multinational companies responsible for pillaging natural resources might thus face justice through the exercise of this jurisdictional capacity to the extent that they maintain operations within the Canadian jurisdiction. On the whole, one might anticipate a more prolific exercise of universal jurisdiction conditional upon the presence of the author in these types of situations, especially given the ever-increasing mobility of corporate representatives within a globalized market. Because of this mobility, *de facto* travel restrictions associated with universal jurisdiction will have more debilitating effects on multinational corporations than on political leaders or military officials, meaning that even an indictment will potentially involve serious economic loss for a company implicated in transnational markets.

These consequences apply *per force* with respect to states that have enacted an unconditional or pure rendition of universal jurisdiction. These unconditional manifestations of universal jurisdiction formally dispense with the requirement that the accused be present within the territory. The German Code of Crimes against International Law states that "[t]his Act shall apply to all criminal offenses against international law designated under this Act, to serious criminal offenses designated therein even when the offense was committed abroad and bears no relation to Germany."[366] In declining to exercise the jurisdiction conferred by this article over acts of torture allegedly committed by Donald Rumsfeld and others in Afghanistan, Cuba and Iraq, the German Prosecutor

[365] Crimes against Humanity and War Crimes Act, 2000 c. 24 (Can.) § 8(a)–(b).

[366] Entwurf eines Gesetzes zue Einführung des Völkerstrafgesetzbuches [German Code of Crimes against International Law] 30 June 2002 BGBl 2002, I, at 2254, § 1 (F.R.G).

General insisted that she retained a discretion not to proceed in cases committed abroad "if a perpetrator is neither present in the country nor can be expected to be present."[367] Presumably, allegations that are less politically fraught might meet with a different exercise of discretion in order to throw off the charge of political bias, particularly where foreign companies or their representatives seem likely to trade within German borders.

Spanish prosecutors appear more forthright. In February 2008, a Spanish judge confirmed the indictment of several high ranking Rwandan military officials for a range of international crimes that included the pillage of natural resources from the DRC.[368] According to credible evidence, one of the Rwandan military indictees habitually sold the minerals expropriated from the Congo to a series of companies jointly owned by a Swiss national.[369] As previously seen, there is little legal basis for distinguishing between the indicted Rwandan military leader who extracted the resources and the Swiss businessman who reportedly purchased the proceeds. And if universal jurisdiction is to amount to more than a discriminatory mechanism applied almost exclusively to Africans, as is its current perception within Africa, there is every reason why Spanish or other courts should create incentives for Swiss prosecutors to either fulfill their own international obligations or watch

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[367] The Prosecutor General at the Federal Supreme Court Karlsruhe, Re: Criminal Complaint against Donald Rumsfeld et, 3 ARP 156/06-2, April 5, 2007, p. 4. http://www.fidh.org/IMG/pdf/ProsecutorsDecisionApril2007ENGLISH.pdf.

[368] See Jean-Paul Puts (trans.), Tribunal Central d'Instruction No 4, Cour Nationale, Administration de la Justice Royaume d'Espagne, Résumé 3/ 2000 – D, at 23 www.veritasrwandaforum.org (« les actes de pillage ont servi, tantôt au financement de la guerre et des opérations militaires subséquentes, de mêmes que pour l'enrichissement personnel des hauts commandants militaires de 'A.P.R/F.P.R. »).

[369] *Belgian Parliamentary Commission, supra* note 96, § 3.3.1.

their neighbors prove that lofty conceptions of universal justice are not racially biased. Corporations (and not political leaders or military personnel) serve as a perfect vehicle for this process of moral balancing. How, after all, can Belgian authorities maintain the legitimacy of suing Senegal at the International Court of Justice for failing to honor international obligations to prosecute a Chadian dictator on the basis of universal jurisdiction,[370] when Belgian and other western corporate entities responsible for pillaging natural resources from all range of war zones have gone unpunished for decades? Universal jurisdiction's turn to business thus promises to transform the jurisdictional basis from one that substitutes for dilapidated judicial systems in war-torn territories, to a means of coercing perfectly functional courts to overcome political hypocrisy.

3. International Criminal Courts and Tribunals: Warning Shots

The final repository of criminal jurisdiction over corporate pillage is supranational. The past decades have seen a tremendous proliferation of international bodies charged with prosecuting international offenses within circumscribed temporal and geographic spheres. In many of the conflicts that inspired the creation of the institutions, the illicit exploitation

[370] Press Release, International Court of Justice, Belgium institutes proceedings against Senegal and requests the Court to indicate provisional measures, No. 2009/13 (Feb 19, 2009) ("Belgium instituted proceedings late this afternoon before the International Court of Justice (ICJ) against Senegal, on the grounds that a dispute exists "between the Kingdom of Belgium and the Republic of Senegal regarding Senegal's compliance with its obligation to prosecute" the former President of Chad, Hissène Habré, "or to extradite him to Belgium for the purposes of criminal proceedings.")

of resource wealth directly sustained the often harrowing violations of basic rights. In the wake of the Sierra Leone conflict, for instance, the international community together with the Sierra Leonean government established a internationalized court responsible for prosecuting those most responsible for the hostilities. Although the Tribunal has found several accused guilty of war crimes on the basis that they "significantly contributed to a joint criminal enterprise with former Liberian President Charles Taylor to control the diamond fields of Sierra Leone to finance their warfare,"[371] the inferential step towards holding the corporate actors that participating in the illicit trade was well known—investigations unearthed compelling evidence of western businesses trading in diamonds with indicted rebel leaders. Similarly, the Extraordinary Chambers for Cambodia has jurisdiction over business representatives responsible for pillaging natural resources during the Khmer Rouge's final years. Even if budgetary restrictions mean that these institutions do not charge culpable business representatives in these contexts, the very existence of these ad hoc international criminal institutions implies risks that corporations exploiting natural resources in conflict zones might have the legality of their transactions scrutinized based on established international norms by criminal courts created after the fact.

The International Criminal Court, however, is the more likely supranational venue for prosecution of corporate implication in the pillage of natural resources. As previously highlighted, the Court does not have jurisdiction over corporate entities as such, but is perfectly capable of prosecuting business representatives for pillaging natural resources

[371] http://news.bbc.co.uk/2/hi/africa/7910841.stm.

during the course of both international and non-international armed conflicts. Unlike its various ad hoc counterparts, the International Criminal Court can commence proceedings in a large number of states, either against nationals of states parties to the Court's statute or in relation to citizens of non-states parties who have perpetrated international crimes within the territory of a member state. As a result of this jurisdictional breadth, the International Criminal Court has jurisdiction over Belgian and British nationals who perpetrate pillage in Iraq, but also over American or Chinese business representatives responsible for pillaging natural resources within countries that fall within the Court's territorial jurisdiction.[372] By no small coincidence, a large number of situations that now fall within the jurisdictional ambit of the Court are fueled by the pillage of natural resources.[373] A revival of stagnant WWII precedents along the lines detailed here, will therefore allow the ICC and other courts to use pillage as a means of constraining the trajectory of these conflicts.

The ICC Prosecutor appears live to these realities. In a press release dated 16 July 2003, his office publicly acknowledged the work of the UN Panel of Experts for the DRC and observed that "various reports have pointed to links between the activities of some

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[372] Statute of the International Criminal Court, Art. 12(2) (stating that "the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3: (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft; (b) The State of which the person accused of the crime is a national.) See also Dapo Akande, *The Jurisdiction of the International Criminal Court over Nationals of Non-State Parties: Legal Basis and Limits* 1 J.INT'L CRIM. JUST. 618-650 (2003) (affirming the Courts ability to seize jurisdiction over nationals of non-state parties who perpetrate international crimes in states party to the convention.).

[373] At present, the ICC has jurisdiction over offences perpetrated in Cote d'Ivoire, where the illegal exploitation of diamonds and cocoa finance warfare; the DRC where resource exploitation of a range of types has become entirely synonymous with violence and in Sudan where corporate implication in the exploitation of oil and ongoing war is well documents.

African, European and Middle Eastern companies and the atrocities taking place in the Democratic Republic of Congo... Their activities allegedly include gold mining, the illegal exploitation of oil, and the arms trade."[374] The statement then cautioned that "[t]he Office of the Prosecutor is establishing whether investigations and prosecutions on the financial side of the alleged atrocities are being carried out in the relevant countries."[375] The warning was subsequently reissued in equally striking terms.[376] Nothing suggests that the warning shots were empty threats. After all, for precisely the same reasons that we might predict that Spain will dispel allegations of bias by indicting western corporate actors rather than more senior western political and military leaders, we can also anticipate that the ICC might attempt to investigate business as means of countering a growing perception that the Court is focused purely on one continent—if the sitting President of Sudan and the former Vice-President of the DRC are standing trial for pillage, why is the court not doing more about the liability of western business representatives for the same offence in the same countries?

Unresolved questions of this sort not only identify the availability of a supranational jurisdiction capable of adjudicating acts of pillage perpetrated by business representatives

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[374] The Prosecutor, Press Release 16 July 2003, "Communications Received By The Office Of The Prosecutor Of The ICC," http://www.icc-cpi.int/library/newspoint/mediaalert/pids009_2003-en.pdf

[375] *Id.*

[376] Mr Luis Moreno-Ocampo, Second Assembly of States Parties to the Rome Statute of the International Criminal Court Report of the Prosecutor of the ICC (Sept. 8, 2003) ("[d]ifferent armed groups have taken advantage of the situation of generalised violence and have engaged in the illegal exploitation of key mineral resources such as cobalt, coltan, copper, diamonds and gold… Those who direct mining operations, sell diamonds or gold extracted in these conditions, launder the dirty money or provide weapons could also be authors of the crimes, even if they are based in other countries.")

within a wide variety of contexts, they also impart a further degree of pressure on national courts to exercise active personality over these offenses. The added degree of pressure derives from the principle of complementary that underpins the Court's jurisdictional structure, which renders the ICC's competence conditional upon a finding that national jurisdictions theoretically capable of exercising jurisdiction over these infractions are "unwilling or unable" to proceed.[377] In at least one recent instance, this regulatory structure has sparked British courts to try their own soldiers for war crimes allegedly perpetrated in Iraq,[378] when like most other nations, British courts have almost never deemed appropriate to brand their own with the label war crimes. Along with the prosecution of Dutch business representatives for war crimes within the Netherlands, the British trial signals a telling departure from the victor's justice model of international criminal adjudication that has historically characterized the discipline. This shift away from a partisan application of international criminal norms, coupled with the interweaving jurisdictional capacities identified, bodes well for the revival of corporate liability for the pillage of natural resources as a means of reconciling these various tensions. The system need not be perfect in order to be effective. Even a single case within one of these jurisdictions will radically

[377] ICC Statute, *supra* note *104*, Art. 17(1)(a) ("Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where: (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.").

[378] See for instance the trial of British soldiers for inhumane treatment perpetrated in Iraq. Steven Morris, British soldier admits war crime as court martial told of Iraqi civilian's brutal death, GUARDIAN, (Sept. 20 2006), http://www.guardian.co.uk/uk/2006/sep/20/iraq.military.

transform the trajectory of armed violence by either starving armed groups of the means of financing war or criminally deterring inter-state aggression for increasingly rare resources.

V. CONCLUSION

As a result of the decline in superpower patronage, many modern conflicts are now "self-financing," as revenues generated from natural resource predation and criminal economic activities supply both the means and motivation for violence.[379] The availability of lootable resources and willing corporate actors have also come to pose serious problems for peace-building, since a raft of "spoilers" often have more to gain economically from continued instability and violence.[380] Inevitably, these factors contribute to the famed resource curse, whereby the richest nations in terms of latent mineral wealth are in fact the poorest in terms of social development and most prone to violent upheaval. The humanitarian toll is massive. Just one resource war in the Great Lakes Region over the past decade has claimed what independent surveys estimates as in excess of 5.3 million lives.[381] Businesses have played an indispensable role in facilitating this record – the illegal exploitation of natural resources that finances the bulk of violence in contemporary society

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[379] *Ballentine*, supra note 78, at 3.

[380] *Id.*

[381] See International Rescue Committee, *Mortality in the Democratic Republic of Congo: An Ongoing Crisis* (2007) [hereafter *Mortality in the DRC*], http://www.theirc.org/resources/2007/2006-7_congomortalitysurvey.pdf. For earlier surveys, see the International Rescue Committee, *Mortality in the Democratic Republic of Congo: Results from a Nationwide Survey*, April 2003, at 4.

is entirely dependant on predominantly western businesses willing to trade with warring factions and foreign armies regardless of the downstream humanitarian consequences for local populations or the deficiencies in title to resource wealth acquired through the process. The revival of corporate liability for pillage delivers the missing normative framework through which to sanction these corporate practices, thereby curbing conflict-financing and acting as a bulwark against inter-state aggression for oil, water and other strategic resources.

There are nonetheless, a range of challenges involved in resuscitating the offense as a mechanism capable of regulating the illegal exploitation of natural resources on a global stage. The first of these is probably best labeled the "legality conundrum." The concern, reminiscent of the equivalent regarding the imposition of sanctions, is that prosecuting pillage unduly harms civilians who depend on the illicit trade in resources for subsistence.[382] In addition to the serious dangers of depriving a local citizenry of the means of subsistence, a formalistic legalism might also entrench autocratic and highly repressive regimes by precluding the only possible means of orchestrating political change. These concerns are indeed vitally important in certain resource conflicts, but proponents of the

[382] The dilemma was expressed well by a Congolese group, which argued that "calling regulations or relationships established by warring factions for the exploitation of resource wealth 'illegal' is meaningless in a country where the illegal informal economy has been the sole mechanism of survival for large parts of the population even during peacetime and where 'legality' has for decades been synonymous with state-organized theft.") Dominic Johnson & Aloys Tegera, DIGGING DEEPER: HOW THE DR CONGO'S MINING POLICY IS FAILING THE COUNTRY 16 (Pole Institute, 2005); See also Leiv Lunde & Mark Taylor, *Regulating Business in Conflict Zones: Challenges and Options* in PROFITING FROM PEACE, *supra* note *174*, at 332-333 (discussing the difficulties of designing targeted regulations that do not harm civilians); Phillippe Le Billon, *Getting it Done: Instruments of Enforcement*, in NATURAL RESOURCES AND VIOLENT CONFLICT*, supra* note *78*, at 268.

legality conundrum are too quick in discarding legality entirely. For one reason, the argument from humanitarian impact appears to prioritize one set of humanitarian concerns surrounding the need to finance subsistence over a series of others that flow from allowing the illicit trade in resource wealth to continue unchecked, namely massive loss of civilian life, systemic rape and a largely unprecedented rate of forcible displacement. One set of humanitarian concerns does not automatically trump the other. Moreover, the willingness to abandon legality would also render modern war zones free-for-alls, licensing any aggrieved party or foreign state to thieve unlimited resource wealth from the territory which would then create a self-financing enterprise that could continue indefinitely. This, of course, would approximate to colonialism.

The solution to the legality conundrum therefore is not to dispense with 'legality' as a concept, but more to accompany the enforcement of legal title in resource wealth with other complementary initiatives such as meaningful humanitarian assistance, robust institutional capacity building, electoral reform and a wider commitment to combating corruption among ruling élites. As for humanitarian concerns in particular, state officials are perfectly capable of regulating ownership of resources such that corporations do not risk liability for pillage for trading with needy local populations under rebel or foreign military rule should the officials feel that humanitarian interests within these territories outweigh the dangers of conflict financing. If vesting these powers in government appears overly formalistic and more than slightly dangerous, doing so is still preferable to embracing the façade that property rights in natural resources spontaneously disappear during war at the say-so of warring factions or self-interested multinationals. And in any

event, the legality conundrum is context specific—it does not arise when Dutch and American businesses collaborate with Rwandan military in the misappropriation of Congolese resources through the use of forced labor or where a prominent tire company signs a contract for the exploitation of rubber with a Liberian warlord who siphons all proceeds into personal coffers. In these and other similar instances, the humanitarian benefit to the local population is nil.

These reflections lead to a broader set of challenges associated with identifying the entity capable of exercising governmental privileges over natural resources. In several conflict zones, more than one entity will claim to represent the national government, provoking potentially serious practical difficulties for companies concerned with distinguish government representatives capable of wielding state prerogatives over resource wealth from rebel warlords whose actions constitute pillage.[383] In certain circumstances, doctrinal imprecision in the law governing recognition of governments has the potential to blur this distinction, creating indeterminacy in resource title. During one period of the Liberian Civil War, for instance, the Interim Government of Liberia ("IGL") and the National Patriotic Reconstruction Assembly Government ("NPRAG") both held themselves

[383] As Roth eloquently puts it, "where a putative government's acts are denied recognition as acts of state, forcible and other measures, not permitted to persons in a private capacity but licenses where authorized by sovereign authority to further 'public order', may become criminally punishable once the putative government is displaced. The recognition issue arises where the ground for such prosecution is not that the criminality of the acts was so manifest as to transcend positive law, but that the acts, having been predicated on statutes, decrees and orders issued by a legally non-existent government, lacked valid legal authorization. It is on this logic that captured insurgents are traitors and terrorists not prisoners of war, and their seizures of property robbery, not taxation or assertions of eminent domain…") BRAD R. ROTH, GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW 122-123 (Clarendon Press, 1999).

out as the one and only national government. The difficulty for companies who sought to delineate which entity had legal authority to confer title in state rubber, timber and gold was that foreign states responsible for according recognition on governments seldom openly announce their arguably capricious exercise of the governmental recognition one way or the other.[384] An absence of transparency in the means of expressing recognition arguably precipitates indeterminacy in title, which in turn may hinder attempts to retroactively prosecute companies through a criminal construct akin to theft. This, nonetheless, fails to absolve the French company prepared to trade timber exploited by a Liberian warlord during a period when no such conceptual doubt was mildly plausible.

Other aspects of governmental recognition act as a further limitation on the function of corporate liability for the pillage of natural resources that we appear powerless to curtail in an essentially horizontal system of international governance. In what Hersh Lauterpacht once condemned as a "grotesque spectacle,"[385] states have on occasion recognized competing entities as governments of one and the same state. At the outset of the Angolan Civil War, for example, countries aligned with the Soviet bloc recognized the MPLA

[384] Since the early 1980's, a large number of states have resolved to discontinue the practice of publicly announcing the recognition of new governments. The British Government, for instances, issued an announcement stating that "we have decided that we shall no longer accord recognition to Governments… [instead] we shall continue to decide the nature of our dealings with régimes which come to power unconstitutionally in light of our assessment of whether they are able of themselves to exercise effective control of the territory of the State concerned, and seem likely to continue to do so." See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 101 (7th ed., 2008) (describing the practical result of this change as "unfortunate.") For numerous other incidents of rival governments see STEFAN TALMON, RECOGNITION OF GOVERNMENTS IN INTERNATIONAL LAW: WITH PARTICULAR REFERENCE TO GOVERNMENTS IN EXILE (Clarendon Press, 1998); Hans Blix, *Contemporary Aspects of Recognition*, 130 R.C.A.D.I 591 (1970)

[385] HERSCH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW, 78 (Cambridge, 1947) ("the grotesque spectacle of a community being a State in relation to some but not other States is a grave reflection upon international law.")

Government ("the People's Republic of Angola") as the governing national body, while the United States, South Africa and others recognized the claims of the UNITA movement's Democratic People's Republic of Angola.[386] Although this divided state of affairs was later rectified as the MPLA gained ascendancy over the ensuing years of resource-driven bloodshed, the task of identifying the government capable of allocating state resources during this initial period was inescapably problematic—both armed groups had internationally vindicated claims to exercise state prerogatives over the nation's considerable resource endowment.

If the split recognition of Angola during the Cold War proved conceptually irksome, Australia's recognition of Indonesian sovereignty over East Timor when no other nation was prepared do similarly is even more conceptually thorny. [387] In the event that only a single country's recognition is necessary for a foreign government to legally relieve a nation of its oil wealth, the prohibition against pillaging natural resources is hardly a meaningful guarantor of sovereign ownership of natural resources. In the absence of

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[386] *Roth, supra* note *383*, at 154-155. For further information, see *Hodges, supra* note *80*, at 8-11; In the slight variant, consider the split recognition of Biafra during the Nigerian-Biafra war involving oil. According to Verhoeven, a number of states recognized Biafra's claims to independence. JOE VERHOEVEN, LA RECONNAISSANCE INTERNATIONALE DANS LA PRATIQUE CONTEMPORAINE: LES RELATIONS PUBLIQUES INTERNATIONALS (Pedone, 1975)

[387] Roger S. Clark, *Obligations of Third States in the Face of Illegality – Ruminations Inspired by the Weeramantry Dissent in the Case Concerning East Timor*, in LEGAL VISIONS OF THE 21ST CENTURY: ESSAYS IN HONOUR OF JUDGE CHRISTOPHER WEERAMANTRY 631-651 (Anthony Anghie et al. eds., 1998). William Martin & Dianne Pickersgill, *The Timor Gap Treaty - The Treaty Between Australia and the Republic of Indonesia on the Zone of Cooperation in the Area Between the Indonesia Province of East Timor and Northern Australia, Dec. 11, 1989, Australia-Indonesia, reprinted in 29 I.L.M. 469 (1990)*, 32 HARV. INT'L L. J. 566-582 (1991).

collectivized process of recognition within a more robust system of global governance,[388] the interrelationship between corporate liability for pillage and the complexities of split and unilateral recognition may stymie prosecutions. This said, the practice will not minimize the potential criminal liability of the Russian businessman who allegedly traded weapons for diamonds with Sierra Leonean rebels, to say nothing of the numerous western companies alleged to have illegally exploited Namibian Uranium from an apartheid occupier.

Admittedly, natural resources that are shared between more than one state may prove less amenable to pillage prosecution than diamonds or coltan. The over exploitation of jointly owned watercourses or transboundary aquifers is only now gaining careful consideration in international law.[389] Similarly, corporate criminal liability for pillaging resources seems no clearer where title in resources is genuinely contested, either as the result of disputed distributions of shared resources or classic border disputes. Although Nigeria, for instance, militarily occupied territory the International Court of Justice later determined belonged to Cameroon in order to maintain privileged access to a portion of Lake Chad,[390] it appears less that clear that criminal liability for the misappropriation of the

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[388] *Lauterpacht*, *supra* note *269*, at 78 (referring to split recognition as "the negation of the unity of international law as a system of law, may be unavoidable pending the collectivization of the process of recognition.")

[389] International Law Commission, *Fifth Report on Shared Natural Resources: Transboundary Aquifers*, Sixtieth session, Geneva, (Aug. 2008); The Convention on the Law of the Non-Navigational Uses of International Watercourses; EYAL BENVENISTI, SHARING TRANSBOUNDARY RESOURCES: INTERNATIONAL LAW AND OPTIMAL RESOURCE USE, (Camridge, 2002)

[390] CASE CONCERNING THE LAND AND MARITIME BOUNDARY BETWEEN CAMEROON AND NIGERIA (CAMEROON V. NIGERIA: EQUATORIAL GUINEA INTERVENING) JUGMENT OF 10 OCTOBER 2002, ¶¶ 48-70.

water would satisfy *mens rea* requirements of pillage given the attenuated dispute as to sovereignty over the lake that required the principal UN judicial organ several years to resolve. Neither of these scenarios, however, ever arose with respect to diamonds that the leading global broker reputedly acquired from the rebel group UNITA during a conflict that killed half a million civilians, or the corporate actors denounced by the UN Panel of Experts reports as having illegally exploited natural resources in the Democratic Republic of Congo during what Madeline Albright once dubbed "Africa's First World War."[391]

The opportunities for accountability are therefore significant, especially since statutes of limitations are widely understood as inapplicable to war crimes, a series of international obligations compel states to investigate and prosecute these offenses, and a number of institutions feel an acute pressure to dispel the myth that international criminal justice is geographically biased. Pillage provides the perfect vehicle through which to express the contrary. Given the inevitable collapse of law enforcement mechanisms within conflict zones, title in natural resources will either be enforced by foreign courts through use of a device akin to pillage, or nations that enjoy substantial resource endowments will continue to serve as a modern *terra nullius* for western corporate interests, thereby reproducing the tremendous violence witnessed is so many contemporary conflicts. Ironically then, combating the pillage of natural resources not only heralds a new era in corporate social responsibility and the rejuvenation of corporate liability for international

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[391] Richard Roth, *Albright Calls for End to 'Africa's First World War'*, CNN, 24 January 24, 2000, http://www.cnn.com/2000/WORLD/africa/01/24/un.congo.02/

crimes, it also sounds an important shift in international law more broadly. With the revival of corporate liability for pillage, Koskennimi's conception of the international legal order as "the gentle civilizer of nations,"[392] will require reassessment in light of the abrupt discipline international law imparts upon business. The metamorphosis is overdue. The English novelist Joseph Konrad once described the colonial conquest of one territory still prone to resource-related violence facilitated by western business as "the vilest scramble for loot to ever disfigure the history of human conscience."[393] Only the prospect of accountability has changed.

[392] MARTTI KOSKENNIEMI, THE GENTLE CIVILISER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960 (Cambridge Univ. Press, 2002).

[393] Joseph Konrad, *Geography and Some Explorers*, in LAST ESSAYS 17 (Richard Curle ed., 1926).

THE END OF "MODES OF LIABILITY" FOR INTERNATIONAL CRIMES

Modes of liability, such as ordering, instigation, superior responsibility and joint criminal liability, are arguably the most discussed topics in modern international criminal justice. In recent years, a wide range of scholars have rebuked some of these modes of liability for compromising basic concepts in liberal notions of blame attribution, thereby reducing international defendants to mere instruments for the promotion of wider socio-political objectives. Critics attribute this willingness to depart from orthodox concepts of criminal responsibility to international forces, be they interpretative styles typical of human rights or aspirations associated with transitional justice. Strangely, however, complicity has avoided these criticisms entirely, even though it too fails the tests international criminal lawyers use as benchmarks in the deconstruction of other modes. Moreover, the source of complicity's departures from basic principles is not international as previously suggested—it stems from international criminal law's emulation of objectionable domestic criminal doctrine. If, instead of inheriting the dark sides of domestic criminal law, we apply international scholars' criticisms across all modes of liability, complicity (and all other modes of liability) disintegrates into a broader notion of perpetration. A unitary theory could also attach to all prosecutions for international crimes, both international and domestic, transcending the long-endured fixation on modes of liability within the discipline.

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"I have the most profound conviction that I am being made to pay here for the glass that others have broken."

Adolf Eichmann[394]

I. INTRODUCTION

International criminal courts and tribunals use the term "modes of liability" to designate participants in a crime. Even though the label is conceptually misleading and of uncertain historical pedigree,[395] it has emerged as the preferred description of a whole series

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[394] Mark Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocities*, 105 GERMAN CRIMINAL LAW COLUM. L. REV. 1751, 1764 (2005) (quoting from GERMAN CRIMINAL LAW ENRIQUE GIMBERNAT ORDEIG, AUTOR Y COMPLICE EN DERECHO PENAL [PERPETRATOR AND ACCOMPLICE IN CRIMINAL LAW] COLUM. L. REV. trans., 1996)).

[395] Importantly, the phrase "modes of liability" is conceptually misleading and of uncertain historical pedigree. It is legally misleading because these doctrines only attribute unlawfulness rather than "liability". The better term is "modes of attribution," since whether a defendant is "liable" once a particular unlawful act is attributed to her requires a further assessment of justifications and excuses. Admittedly, this nomenclature is premised on a preference for the normative theory of guilt GEORGE FLETCHER, THE GRAMMAR OF CRIMINAL LAW : AMERICAN, COMPARATIVE, AND INTERNATIONAL 319, 329 (2007). In terms of origin, it is also unclear where international criminal justice acquired the term "modes of liability," and why it gained such ascendency in the discipline. Early international judgments used the more appropriate phrase "modes of participation": Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶ 227 (May 7, 1997) (referring to joint criminal enterprise as a "mode of participation"); Prosecutor v. Delić, Case No. IT-04-83-T, Judgment, ¶ 56 (Sep. 15, 2008) (referring to superior responsibility as a "mode of participation"); Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgment, ¶ 266 (Mar. 3, 2000) (discussing ordering, planning, instigating or otherwise aiding and abetting as "modes of participation"). This accords with the descriptor adopted in most domestic criminal systems. In German criminal law, the overarching concept is 'Beteiligung', which experts translate as 'Participation'. See MICHAEL BOHLANDER, PRINCIPLES OF GERMAN CRIMINAL LAW 154 (2008); French criminal theory also refers to criminal participation, see Christine Lazerges, *La participation criminelle*, *in* RÉFLEXIONS SUR LE NOUVEAU CODE PÉNAL, 11 (1995); for historical antecedents, see also B. GETZ, DE LA SOI-DISANT PARTICIPATION AU CRIME (1876); in many Anglo-American jurisdictions, the tendency is to describe modes of liability as those rules that determine parties to crime. See WAYNE R. LAFAVE, CRIMINAL

of doctrine, ranging from traditional notions of instigation to the more exotic concepts of superior responsibility and joint criminal enterprise. Understandably, the concepts attract tremendous judicial and scholarly treatment. After all, the contours of "modes of liability" determine whether Eichmann's punishment for the glass others broke is an illiberal instance of vicarious liability or justifiable blame for his contribution to atrocity. In what follows, I argue that complicity falls on the wrong side of these alternatives, and that consequently, it should collapse along with all other modes of liability into a single broad notion of perpetration. This, as we will soon see, promises to transcend a long-endured fixation on modes of liability within the discipline.

Since its modern revival, international criminal justice has devoted tremendous energy to the topic of modes of liability, precisely because international courts are committed to convicting Eichmann (and all the modern masterminds of atrocity like him) for the violence others have perpetrated.[396] To this end, international criminal courts have

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LAW, 5TH 701 (5th ed. 2010) (employing the term "Parties to Crime"); A. SIMESTER & G.R. SULLIVAN, CRIMINAL LAW : THEORY AND DOCTRINE 195-246 (3rd ed. 2007) (discussing modes of participation).

[396] A large number of international criminal courts expressly profess a commitment to only prosecuting those 'who bear the greatest responsibility' for crimes within their jurisdiction. See: Agreement between the United Nations and the Government of Sierra Leone on Establishing a Special Court for Sierra Leone (with Statute), art. 1.1, Sierra Leone-U.N., Jan. 16, 2002, 2178 U.N.T.S. 137 ("The Special Court shall, except as provided in subparagraph (2), have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone."); ICC Office of the Prosecutor, Paper on some policy issues before the Office of the Prosecutor, Sept. 2003, at 7 ("The global character of the ICC, its statutory provisions and logistical constraints support a preliminary recommendation that, as a general rule, the Office of the Prosecutor should focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or organisation allegedly responsible for those crimes."); Extraordinary Chambers in the Courts of Cambodia Internal Rules (Rev. 4) as revised on 11 September 2009, Preamble ("WHEREAS the Cambodian authorities have requested assistance from the United Nations in bringing to trial senior leaders of Democratic Kampuchea and those who were

crafted a series of "modes of liability" that treat principal architects of atrocity as perpetrators (even though masterminds seldom pull the trigger, deploy the asphyxiants, throw the electrical switch or, to borrow from Eichmann, break the glass). These new "modes of liability" (such as superior responsibility, joint criminal enterprise, indirect perpetration and perpetration through an organization) are necessary, we are told, to accurately capture the role of the principal architects of atrocity.

One especially evocative image drives the process. For many, the dilemma is that the application of everyday rules of criminal attribution lead to Hitler's conviction as an accomplice for the Holocaust. The proposition is simply insupportable since it would "get the moral valences entirely wrong—almost backwards, in fact."[397] To a large extent, this perception explains the motivation for adopting novel standards of blame attribution at the international level. But from the competing perspective, Eichmann's last words before the gallows leave a lingering concern modes of liability that make someone responsible for the acts of others might be fundamentally unfair. Thus, the development of modes of liability in international criminal justice reflects a persistent tension between these two competing

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most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979"); For scholarly opinion endorsing this view, see Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT'L L. 510 (2003); For a more critical assessment, see Jose E Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365 (1999).

[397] MARK OSIEL, MAKING SENSE OF MASS ATROCITY 85 (2009). The only caveat is that Osiel's comment assumes an objective theory of perpetration, whereby the perpetrator is the person who actually releases the gas into the concentration camps. As we will later see, the objective theory is theoretically discredited, but this does not undermine Osiel's point that rank and file perpetrators are generally viewed as less culpable than their superiors in international criminal justice.

extremes: functional attempts at ensuring accountability of senior masterminds of mass violence versus the very real threat of illiberal excess.

Initially, international courts looked domestically for solutions to their moral quandary, borrowing the most permissive "modes of liability" from domestic criminal systems. Yet in the ensuing years, these "modes of liability" have generated a flood of criticism. Many scholars have rebuked international doctrines such as superior responsibility and joint criminal enterprise as "display[ing] a measure of insensitivity to an actor's own personal culpability."[398] The criticism has become so extensive that it may be fair to say that a majority of scholars view the modes of liability deployed to solve the Hitler-as-accomplice dilemma as closer to substantiating Eichmann's appeal to unfairness than they are to offering a defensible account of criminal responsibility. This has led to a growing perception that international criminal courts of various descriptions "risk using the accused as an object in a didactic exercise rather than respecting autonomy and fairness."[399]

Strangely, however, complicity has escaped careful theoretical scrutiny in the scholarly revolt against international modes of liability.[400] This is peculiar since complicity,

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[398] Mirjan Damaška, *The Shadow Side of Command Responsibility*, 49 AM. J. COMP. L. LAW 455, 456 (2001). Aside from Damaška's excellent article, the critical literature is extensive. For some of the best exemplars, see in particular Héctor Olásolo, *Reflections on the International Criminal Court's Jurisdictional Reach*, 16 CRIM. L. FORUM 279 (2005); Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75 (2005); Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 LEIDEN J. INT'L L. 925 (2008); Jens David Ohlin, *Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise*, 5 J. INT'L CRIM. JUST. 69 (2007).

[399] Robinson, *supra* note 5, at 931.

[400] There is a considerable and important literature dealing with the doctrine and policy of complicity in international criminal justice, but to my knowledge, none of it explores the objectionable peripheries of the

or accessorial liability as it is otherwise known, is of central relevance to the Hitler-as-accessory dilemma; is increasingly prominent in international discourse; and most importantly, also harbors a glaring conceptual anomaly—the doctrine holds the accomplice liable for the same crime as the perpetrator, even though the accomplice by definition did not personally carry out the offense.[401] To illustrate, someone convicted of aiding genocide by supplying the weapons is herself guilty of genocide, even though she never killed a soul. As John Gardner aptly puts it, "[a]s far as the conviction goes, it is as if she had pulled the trigger herself."[402] Consequently, this fiction should raise the alarm that complicity too entails "a dramatic escalation of responsibility."[403]

As I will show, complicity too fails the tests scholars use as benchmarks in the deconstruction of other modes of liability. And yet these departures from defensible theory

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doctrine. See, for example, Andrew Clapham & Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses*, 24 HASTINGS INT'L & COMP. L. REV. 339 (2000) (explaining three categories of policy implication derived from the application of complicity); LEIV LUNDE, MARK TAYLOR & ANNE HUSER, COMMERCE OR CRIME? REGULATING ECONOMIES OF CONFLICT (2003) (providing a helpful synthesis of the law of complicity in sixteen different jurisdictions); Chimène I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61 (2008) (discussing ATCA cases that employ complicity); for a notable exception, see Markus D. Dubber, *Criminalizing Complicity: A Comparative Analysis*, 5 J. INT'L CRIM. JUST. 977 (2007) (discussing the need for international criminal justice to craft a law of complicity specific for its purposes).

[401] The French Criminal Law is a good example of this paradox. Article 121-6 of the French Criminal Codes stipulates that "[s]era puni comme auteur le complice de l'infraction". Simultaneously, leading experts define complicity as "un mode d'imputation dirigé contre une personne qui a aidé à la realization d'une situation infractionnelle sans pour autant accomplir elle-même aucun des actes visé par le texte d'incrimination." JACQUES-HENRI ROBERT, DROIT PÉNAL GÉNÉRAL 343 (6e éd. refondue. ed. 2005).

[402] John Gardner, *"Aid, Abet, Counsel, Procure": an English View of Complicity*, *in* EINZELVERANTWORTUNG UND MITVERANTWORTUNG IM STRAFRECHT, 228 (Albin Eser, Barbara Huber, & Karin Cornils eds., 1998). Lord Steyn, of the then British House of Lords, also put the point succinctly in the Pinochet litigation when he cited "an elementary principle of law, shared by all civilised legal systems, that there is no distinction between the man who strikes, and a man who orders another to strike." Lord Steyn in R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte, (1998) 3 W.L.R. 1456 (H.L) at 54.

[403] Damaška, *supra* note 5, at 464.

defy hypotheses authors have offered to explain the origins of harsh international doctrine. To date, critics have argued that these sorts of conceptual overreach are a byproduct of an uncomfortable amalgamation of the interpretative cultures that animate international criminal justice, namely interpretative styles typical of human rights and law of war; the effect of moral outrage on interpretative technique; or the broader political aspirations associated with transitional justice that are said to drive hermeneutics in international criminal adjudication.[404] An analysis of complicity, however, reveals that this explanation under-appreciates the role of domestic criminal justice in the development of objectionable international doctrine. In reality, complicity's most objectionable characteristics are inherited from domestic exemplars that national scholars denounce as a conceptual "disgrace."[405]

Let me qualify this criticism from the outset. I do not claim that domestic criminal law is of no value to international jurisdictions. International courts will inevitably take inspiration from domestic standards as practitioners with uniquely criminal law

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[404] Danner and Martinez, *supra* note 5, at 78 ("International human rights law, domestic criminal law, and transitional justice. Each one, to varying degrees, informs the purposes and principles of international prosecution, and their interaction creates conflicts within international criminal law itself."); Robinson, *supra* note 5, at 961 ("Interpretive, substantive, structural, and ideological assumptions of human rights and humanitarian law have been absorbed into ICL discourse, distorting methods of reasoning and undermining compliance with fundamental principles.") In fairness to Darryl Robinson, his excellent piece also mentions that this may only be part of the problem and that domestic systems depart from basic principles too. Robinson, *supra* note 5, at 927-930; Alexander K.A. Greenawalt, *The Pluralism of International Criminal Law*, 86 IND. L. J. 1111 (2011) (observing doubts about tribunals commitments to core principles of justice "that many domestic legal systems take for granted", and arguing that "[w]hile greater reliance on domestic law might not offer a complete solution, it may offer at least one positive step in ICL's rediscovery of a criminal law that better aspires to ICL's liberal aims.")

[405] Joshua Dressler, *Reforming Complicity Law: Trivial Assistance as a Lesser Offense?* 5 OHIO ST. J. CRIM. L. 427, 427 (2008).

backgrounds (who are, I suspect, a majority in international criminal justice) draw on domestic concepts in the day-to-day operation of modern international criminal courts. This process is entirely unavoidable and by and large positive—how else could practitioners come to terms with the novelty of supranational criminal law except through their pre-established experience of criminal justice? And international criminal justice certainly has much to learn from this experience. And yet, much of the excellent criticism of modes of liability has eagerly pointed out the dark sides of international doctrine as if domestic systems do not have equivalents, which has produced a skewed vision of the origins of objectionable international doctrine. As one prominent expert of domestic criminal law laments, departures from principle are so consistent in some national systems that criminal theory may well be "a lost cause."[406]

The shortcomings of complicity, however, lead to a wider set of reflections about modes of liability as a species. If accessorial liability fails the standards that scholars of international criminal justice erect to judge other international modes of liability, will there be any mode that survives the analytical deconstruction? Put differently, could it not be possible to put an end to the highly complicated, seriously inefficient and frequently harsh development of modes of liability in international criminal justice by adopting a unitary theory of perpetration that collapses all modes of liability into a single standard? On this account of blame attribution, only a causal contribution and the mental element required for

[406] Andrew Ashworth, *Is the Criminal Law a Lost Cause?*, 116 L. Q. REV. 225 (2000).

the offence would be necessary; all those who contribute to international crimes would be deemed perpetrators, dispensing with all other forms of legal classification.

The theory is not just conceptually coherent, it is also well suited to the realities of modern international criminal justice. On the theoretical plane, many scholars of criminal law are beginning to advocate for the abandonment of complicity,[407] often because they perceive that a proper conception of perpetration renders complicity "superfluous."[408] These scholarly arguments find practical support in at least five modern domestic criminal systems from Italy to Brazil, which operate unitary systems of perpetration that abandon the sorts of "modes of liability" that have plagued modern international criminal justice.[409] Moreover, the unitary theory also has international precedence—the Nuremberg and Tokyo

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[407] Michael S. Moore, *The Superfluity of Accomplice Liability*, *in* CAUSATION AND RESPONSIBILITY: AN ESSAY IN LAW, MORALS, AND METAPHYSICS 280 (2009); Bob Sullivan, *Principals and Accomplices-A Necessary and Useful Division?*, *in* FOUNDATIONAL ISSUES IN THE PHILOSOPHY OF CRIMINAL LAW, 651 (Anthony Duff & Christopher Wong eds., 2007); Sanford H. Kadish, *Reckless Complicity*, 87 J. CRIM. L. & CRIMINOLOGY 369 (1996) (although Kadish does not advocate for the abolition of complicity, his position is closest to that I advance here); LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW 7-10 (1 ed. 2009) (arguing that insufficient concern is the baseline for all forms of criminal responsibility); DIETHELM KIENAPFEL, DER EINHEITSTÄTER IM STRAFRECHT (1971); THOMAS ROTSCH, "EINHEITSTÄTERSCHAFT" STATT TATHERRSCHAFT: ZUR ABKEHR VON EINEM DIFFERENZIERENDEN BETEILIGUNGSFORMENSYSTEM IN EINER NORMATIV-FUNKTIONALEN STRAFTATLEHRE (2009).

[408] Michael S. Moore, *Causing, Aiding, and the Superfluity of Accomplice Liability*, 156 U. PA. L. REV. 395 (2007). The description of complicity as superfluous is overly forgiving of the violations of theoretical principles complicity presently entails, but in fairness to Michael Moore, his analysis does not consider the mental element of aiding and abetting where the most conspicuous violations of culpability occur. Moreover, his assessment of the physical element does not deal with standards adopted in international criminal justice, which deviate from basic principles elsewhere. Both these points are explored further below.

[409] The countries are Austria, Brazil, Denmark, Italy and Poland. For further information, see JEAN PRADEL, DROIT PÉNAL COMPARÉ 121, 133 (2e ed. 2002); Kai Ambos, *Development of a Common Substantive Criminal Law for Europe Possible? Some Preliminary Reflections*, 12 MAASTRICHT J. EUR. & COMP. 173, 182-185 (2005) (setting out examples from various unitary jurisdictions).

Tribunals initially dispensed with a distinction between direct perpetration and accomplice liability entirely.[410]

Surprisingly then, the unitary theory of perpetration has gone largely unnoticed in international criminal justice, even as scholars advocate for its adoption within a less mature system of European criminal law.[411] Putting aside the theoretical merits of the concept, an obvious pragmatic appeal lies in its ability to transcend the numerous inconsistencies between systems of blame attribution in each of the European systems it amalgamates. On this basis, one would imagine that the unitary theory should be all the more attractive internationally given the exponentially larger number of national systems globally, each of which contains disparate "modes of liability." Regrettably, the intensity of the debate around international modes of liability has obscured a potential solution hiding in plain sight.

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[410] Although the Nuremberg and Tokyo Charters adopted differentiated doctrines of complicity, the majority of cases merely considered whether an accused was "concerned in," "connected with", "inculpated in" or "implicated in" international crimes. For a overview of these cases, see The United Nations War Crimes Commission, Digest of the Laws and Cases, LAW REPORTS OF THE TRIALS OF WAR CRIMINALS, VOL XV at 49-58. Like Hector Olásolo, I conclude that this amounts to a unitary theory of perpetration insofar as it fails to distinguish modes of participation. See OLÁSOLO ET AL., THE CRIMINAL RESPONSIBILITY OF SENIOR POLITICAL AND MILITARY LEADERS AS PRINCIPALS TO INTERNATIONAL CRIMES 21 (2010).

[411] Johannes Keiler, *Towards a European Concept of Participation in Crime*, *in* SUBSTANTIVE CRIMINAL LAW OF THE EUROPEAN UNION (André Klip ed., 2011); BETTINA WEIßER, TÄTERSCHAFT IN EUROPA: EIN DISKUSSIONSVORSCHLAG FÜR EIN EUROPÄISCHES TÄTERMODELL AUF DER BASIS EINER RECHTSVERGLEICHENDEN UNTERSUCHUNG DER ... FRANKREICHS, ITALIENS UND ÖSTERREICHS (1. Auflage. ed. 2011); WOLFGANG SCHÖBERL, DIE EINHEITSTÄTERSCHAFT ALS EUROPÄISCHES MODELL: DIE STRAFRECHTLICHE BETEILIGUNGSREGELUNG IN ÖSTERREICH UND DEN NORDISCHEN LÄNDERN (1 ed. 2006); Ambos, supra note 17, at 182-185; for rare exceptions to the rule that scholars do not consider the unitary theory of perpetration for international crimes, see OLÁSOLO ET AL., *supra* note 19 at 14-20; E. VAN SLIEDREGT, THE CRIMINAL RESPONSIBILITY OF INDIVIDUALS FOR VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW 61–65 (1st Edition. ed. 2003).

This Article exposes the theory. To begin, Part I introduces criticisms of superior responsibility and joint criminal enterprise in order to flesh out the key theoretical objections raised against each of these modes of liability. Through this process, I isolate conceptual principles that are later helpful in revealing the objectionable peripheries of complicity. In Part II, I undertake this exercise by first exploring the identity of complicity in international criminal justice, then by assessing the mental and physical elements required for accessorial liability in light of the criticisms of other modes of liability in the field. I conclude that complicity too falls well short of the standards used to criticize other "modes of liability," but that this arises from the influence of objectionable domestic standards, not the undeniable pressures of international law or politics.

Having concluded that any defensible concept of complicity requires complicity and perpetration to share several common elements, Part III defends the unitary theory in abstract theoretical terms then assesses pragmatic arguments for applying the standard to international crimes particularly. I argue that whatever moral significance there might be between making a difference to a crime and "making a difference to the difference that principals make",[412] this discrepancy can be adequately accounted for at the sentencing stage of a criminal trial. The deconstruction of complicity shows that, at the very least, we must bring it much closer to perpetration, but my argument is that the characteristics of international criminal justice militate in favor of allowing complicity to disintegrate entirely into a unified notion of perpetration in all domestic and international jurisdictions capable

[412] John Gardner, *Complicity and Causality*, 1 CRIM. L. AND PHIL. 127, 128 (2007).

of prosecuting these offenses. What emerges then, is a preferable account of when we can hold Eichmann and his many analogues responsible for the glass others broke—without fallaciously escalating his guilt.

I. Fundamental Principles in the Criticism of Modes of Liability

It is instructive to briefly review the considerable literature criticizing other modes of liability in international criminal justice in order to isolate basic tenets of criminal responsibility. I here use the most objectionable elements of two modes of liability that are often admonished within international circles in order to identify a framework through which we might later interrogate complicity.

A. A Blameworthy Moral Choice: The Mental Element in JCE III

Joint criminal enterprise (JCE) holds all those who agree to a common plan involving the perpetration of a crime responsible for other foreseeable offences that take place during the execution of the plan.[413] I here use scholarly discussion of the so-called "third" or extended variant of JCE to introduce fundamental principles about blameworthy

[413] To find individual criminal responsibility pursuant to a joint criminal enterprise, the elements which must be established are: (i) a plurality of persons; (ii) the existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute; and (iii) the participation of the accused in the common plan involving the perpetration of one of the crimes provided for in the Statute. For a particularly recent affirmation, see Prosecutor v. Krajisnik, Judgment, Case No. IT-00-39-A, ICTY Appeals Chamber, ¶ 156–157 (Mar. 17, 2009).

moral choice in international criminal discourse, since so many scholars have openly deplored JCE III's tendency to "overpower the restraining force of the criminal law tradition."[414] While these criticisms appropriately expose basic principles applicable to mental elements in modes of liability, their idealized vision of the criminal tradition's predominantly restraining character understates the sometimes major gaps between theory and practice in domestic systems and their effect on the development of unjustifiable international doctrine.

JCE has three strands. The first "basic" form occurs where "co-defendants, acting pursuant to a common design, possess the same criminal purpose."[415] An example would be a plan formulated by three soldiers to torture a detainee, where each of the soldiers carries out a different role (holding the victim down, preventing others from entering the room and applying electrodes and controlling the current). This "basic" form of JCE holds each of the soldiers responsible for the war crime of torture, even though the men guarding the door and restraining the victim do not satisfy the elements of the crime—like Eichmann, they do not personally perform the crime. The second "systematic" form of joint criminal enterprise is a mere subset of the "basic" form, and therefore adds little of great salience for present

[414] Danner and Martinez, *supra* note 5, at 132.

[415] Prosecutor v. Tadić, *supra* note 2, at 196. Note that this language is not always consistent: see Prosecutor v. Vasiljević, Case No. IT-98-32-A, Judgment, ¶ 97 (Feb. 25, 2004) (finding that "[t]he first category is a 'basic' form of joint criminal enterprise. It is represented by cases where all co-perpetrators, acting pursuant to a common purposes, possess the same criminal intention.").

purposes,[416] mostly because it also requires that the participants in the enterprise harbor the necessary intent to torture.

The third variant, however, descends into darker territory. Under JCE III, all participants in a joint criminal enterprise are responsible for crimes committed beyond those agreed, provided they are "a natural and foreseeable consequence of the common purpose."[417] Thus, the soldier manning the door is also convicted of torturing the victim, even if he believed he was guarding the entry to prevent enemy soldiers entering and only foresaw that one of his confederates might commit torture while they were in the premises.[418] The great anomaly is not only that the lookout is punished for having perpetrated torture even though he did not personally hurt a fly; it is also that he is convicted based on mere foresight, a standard well below that defined in the offence for which he is punished. The key point is that JCE III tolerates a sharp cleavage between the definition of crimes and modes of liability used to convict defendants of them—the two categories overlap, but not perfectly.

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[416] In JCE II, the common plan in JCE I is merely replaced by "an organized criminal system," such as an extermination or concentration camp. There is, therefore, general consensus that this "systematic" category in JCE II is only a subset of the 'basic' form in JCE I. See for instance, Prosecutor v. Tadić, *supra* note 2, at 203 ("this category of cases... is really a variant of the first category"); Prosecutor v. Kvočka et al., Case No. IT-98-30/1-A, Judgment, ¶ 82 (Feb. 28, 2005) (describing JCE II as "a variant of the first form"); Kai Ambos, *Amicus Curiae Brief in the Matter of the Co-Prosecutors' Appeal of the Closing Order Against Kaing Guek Eav "Duch" Dated 8 August 2008*, 20 CRIM. L. FORUM 353, 374 (2009) (concluding that JCEII can be viewed as an element of JCE I if interpreted narrowly).

[417] Prosecutor v. Kvočka et al., *supra* note 20, at 83.

[418] In fact, there is good authority for the idea that the standard is actually objective foreseeability, lowering the mental element required for JCEIII even further. See Antonio Cassese, *The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise*, 5 J. INT'L CRIM. JUST. 109, 121 (2007) (arguing that most courts actually apply an objective standard of foreseeability for JCEIII).

From whence did the doctrine come? True, the famed *Tadić* Appeal Judgment declared JCE III part of customary international law, but this finding was a mere reiteration of national principles. To the extent that the court purported to draw on custom, it cited cases convened by British, Canadian, American Military Tribunals applying Control Council Law No. 10, as well as domestic courts within Italy, all of which originally applied national concepts of attribution.[419] And in any event, the ICTY explicitly affirmed that, "international criminal rules on common purpose [i.e. JCE] are substantially rooted in, and to a large extent reflect, a position taken by many States of the world in their national legal systems."[420] Therefore, to the extent that international criminal courts and tribunals are applying controversial standards of attribution like JCEIII, it is largely because they have imitated national equivalents.

The critics, however, have shown JCE III no mercy, largely on the grounds that the incongruity between the mental element for the mode and that required for the crime leads to a violation of the principle of *culpability*.[421] Traditionally the offshoot of retributivism,

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[419] Prosecutor v. Tadić, supra note 2, at 204. For discussion, see Verena Haan, *The Development of the Concept of Joint Criminal Enterprise at the International Criminal Tribunal for the Former Yugoslavia*, 5 INT'L CRIM. L. REV. 167, 177 (2005). For other arguments that JCE is an outgrowth of the US concept of Pinkerton liability, see George P. Fletcher, *New Court, Old Dogmatik*, 9 J. OF INT'L CRIM. JUST. 187 (2011),.

[420] Prosecutor v. Tadić, *supra* note 2, at 193. In support of this proposition, the Tribunal cited law from France, Italy, England and Wales, Canada, the United States, Australia and Zambia that also criminalize a version of JCE III, *id.* at 224.

[421] Kai Ambos, *Joint Criminal Enterprise and Command Responsibility*, 5 J. INT'L CRIM. JUST. 159, 174 (2007) (concluding that relative to other aspects of JCE, "the conflict of JCE III with the principle of culpability is more fundamental"); George P. Fletcher & Jens David Ohlin, *Reclaiming Fundamental Principles of Criminal Law in the Darfur Case*, 3 J. INT'L CRIM. JUST. 539, 548 (2005) (arguing that "the doctrine [JCE] itself is substantively overbroad and transgresses basic principles of legality that limit punishment to personal culpability."); Ohlin, *supra* note 5, at 85 (discussing the violation of culpability

culpability reflects a commitment to the idea that an individual's punishment must be calibrated to her personal desert.[422] The immediate retort (that I heard many times from Anglo-American lawyers in practice) is that this focus on culpability is overly academic when national systems depart from the principle as a matter of course. If JCE III solves the Hitler-as-accomplice dilemma and furthers the noble aspirations of the international justice project,[423] why should international courts moderate their use of the doctrine when so many major Western jurisdictions apply an identical concept?

In simple terms, guilt matters. An individual cannot be instrumentally punished to pursue even noble policy goals. Although this notion dates at least to Kant, in the English-speaking tradition, H.L.A Hart famously reconciled it with utilitarian theories of punishment by pointing out a disparity between the objectives of the criminal system as a whole and the principles to be employed in attributing blame in concrete cases.[424] He illustrates the distinction with a striking example—even if your rationale for punishment

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occasioned by punishing different degrees of contribution equally); Danner and Martinez, *supra* note 5, at 134 (arguing that JCE poses significant challenges to the culpability principle).

[422] In a sense, desert is synonymous with meritocracy. If an individual performs well in an exam, she deserves an excellent mark. If she kills her mother, she deserves punishment. For more on the positive and negative notions of desert, see JOEL FEINBERG, DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 55 (1974). See also PAUL H. ROBINSON, DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED, HOW MUCH? 135 (2008) (discussing vengeful, deontological and empirical concepts of desert).

[423] Mirjan Damaška, *What is the Point of International Criminal Justice?* 83 CHI.-KENT. L. REV. 329 (2008); Immi Tallgren, *The Sensibility and Sense of International Criminal Law*, 13 EUR. J. INT'L L. 561 (2002).

[424] According to Hart, "[w]hat is needed is the realization that different principles (each of which may in a sense be called a 'justification' [for punishment]) are relevant at different points in any morally acceptable account of punishment." Furthermore, "it is perfectly consistent to assert *both* that the General Justifying Aim of the practice of punishment is its beneficial consequences *and* that the pursuit of this General Aim should be qualified or restricted out of deference to principles of Distribution which require that punishment should be only of an offender for an offense." See H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 3, 9 (Rev. ed. 1984) (emphasis in original).

within the system generally is deterrence, it is clearly morally vulgar to punish family members of those who carried out criminal offenses, even if doing so has massive deterrent effects.[425] In a similar example of greater salience for international criminal justice, George Fletcher chillingly recalls that "[a]s the National Socialists well knew in controlling inmates in slave labour camps, occasionally hanging an innocent person effectively deters disobedience by other inmates."[426] Quite clearly, punishment without culpability is anathema to liberal notions of criminal law, even if it does promote deterrence or other desirable outcomes.

Therefore, culpability is central to any theoretically justifiable account of criminal responsibility, from retributivism to restorative justice.[427] True, advocates of restorative criminal justice may calculate guilt slightly differently,[428] but they are still committed to the

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[425] *Id.* at 5-6.

[426] GEORGE FLETCHER, RETHINKING CRIMINAL LAW 415 (1978).

[427] For a helpful overview of the different intensities of retribution and their intersection with utilitarian justifications for criminal law, see Alexander and Ferzan, *supra* note 15, at 7-10 (discussing weak, moderate and strong conceptions of retributivism); for a summary of similar thinking in German criminal theory, see VOLKER KREY, 1 DEUTSCHES STRAFRECHT : ALLGEMEINER TEIL 118 (2002) (discussing dominant theories of punishment in German criminal law, none of which advocate extending liability beyond an individual's desert).

[428] Since restorative fault emphasizes a defendant's responsibility for rectifying harm he has caused, John Braithwaite has argued that assessments of fault should be moved from their current point of assessment at the time the crime is perpetrated, "to fault based on how restoratively the offender acts after the crime." John Braithwaite, *Intention versus Reactive Fault*, *in* INTENTION IN LAW AND PHILOSOPHY 345 (Ngaire Naffine, Rosemary J. Owens, & John Matthew Williams eds., 2001). Few courts have adopted restorative theories of punishment in cases involving international crimes, such that Braithwaite's vision of culpability is less germane for present purposes. This leaves open the question whether, in preferencing some version of retributive punishment, international criminal lawyers may have "hitched themselves to a dead horse." GERRY SIMPSON, LAW, WAR AND CRIME: WAR CRIMES TRIALS AND THE REINVENTION OF INTERNATIONAL LAW 137 (2007).

notion that "only the guilty should be punished."[429] In fact, these philosophical commitments are so widely held that Mirjan Damaška plausibly claims that "if one were to catalog general principles of law so widely recognized by the community of nations that they constitute a subsidiary source of public international law, the culpability principle would be one of the most serious candidates for inclusion in the list."[430] And yet, while this is true at the level of principle, it overlooks states' sometimes prolific abdication from theoretical standards in practice and the genealogy of JCE in national law.

Unsurprisingly, international criminal courts mimic this schizophrenic relationship with culpability. When addressing the concept in abstract terms, they also adopt a formal rendition of the culpability principle, insisting that "the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some way participated".[431] The pledge is laudable but it also omits half the concept. An individual is culpable, not just because she participated in criminal acts or transactions, but also because

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[429] JOHN BRAITHWAITE & PHILIP PETTIT, NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE 168 (1993) ("We agree with the negative retributivists, for republican reasons, that indeed only the guilty ought to be punished.").

[430] Damaška, *supra* note 5, at 470.

[431] Prosecutor v. Tadić, *supra* note 2, at 186; Prosecutor v. Brima et al., Case No. SCSL 04-16-A, Judgment, ¶ 15 (Feb. 22, 2008); Prosecutor v. Vasiljević, *supra* note 22, at 29. Strikingly, the better formulation was at Nuremberg: the Tribunal claimed that its reasoning was "in accordance with well-settled legal principles, one of the most important of which is that criminal guilt is personal, and that mass punishments should be avoided." 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 499 (1947).

she made a blameworthy moral choice to do so.[432] So already the tremendous incidence of strict liability crimes within Anglo-American jurisdictions reveals a great distance between Damaška's understandable appeal to culpability and the practice of states that habitually disregard it.[433]

How then is culpability to be measured? To begin, note that the content of requisite blameworthy choice varies from one international crime to the next. Indeed, the availability of different mental elements allows states, treaty-makers and sometimes judges to define crimes in such a way that each prohibits distinct moral transgressions. For some crimes, recklessness or negligence will suffice, whereas others are markedly more demanding in order to signal the particular moral magnitude of the violation. In the context of genocide, for instance, the requisite choice is not simply to kill individuals; it also involves carrying out these acts with a corresponding intention to "destroy, in whole or in part, a racial,

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[432] MICHAEL MOORE, PLACING BLAME: A THEORY OF THE CRIMINAL LAW 403 (2010) (acknowledging the dual meanings of culpability, but emphasizing that responsibility entails a voluntary and unjustified act that proximately causes harm, coupled with the obligation that "one must have done so culpably"). Fletcher, *supra* note 27, at 461 (stipulating that the components of desert are wrongdoing and culpability). Note that culpability bears several meanings here. On the one hand, it is frequently used in a normative sense i.e. a person is culpable only if she is justifiably to blame for her conduct, as compared with the use of the term culpability in the US Model Penal Code to designate mental elements. For further discussion, see *id*., at 398.

[433] It is difficult to reconcile the extent of strict liability in many Anglo-American national systems with the view frequently expressed in international criminal scholarship that national departures from culpability are highly exceptional. In a survey of 165 new offenses created within England and Wales in 2005, Andrew Ashworth shows that strict liability was sufficient in 40%, plus an additional 26% were strict liability but watered down slightly by a proviso that the offense must be carried out "without reasonable excuse." Andrew Ashworth, *Criminal Law, Human Rights and Preventative Justice*, *in* REGULATING DEVIANCE: THE REDIRECTION OF CRIMINALISATION AND THE FUTURES OF CRIMINAL LAW (Bernadette McSherry, Alan Norrie, & Simon Bronitt eds., 2008). Strict liability is just the tip of the iceberg. For a wide range of violations of culpability in the United States, see Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609, 617–618 (1983) (discussing Pinkerton liability, the felony-murder rule, vicarious liability of officials of organizations, RICO and others).

ethnic, or religious group."[434] For many, this added psychological disposition is the quintessence of the crime—it is the element that distinguishes garden-variety murder from what Raphael Lemkin described as "barbarous practices reminiscent of the darkest pages of history."[435]

One would think then that convicting someone of genocide without this special intent emasculates the crime. And yet, international courts have found that a member of a JCE could be found to have committed genocide, even though he merely foresaw that his colleagues might carry out the crime.[436] For many scholars, this is theoretical heresy. David Nersessian, for example, describes JCE III as a form of "constructive liability",[437] a term he uses in contrast to direct forms of liability, because "theories of constructive liability… allow conviction for the same offense even though the requisite conduct and mental state are absent."[438] In articulating what makes these mechanisms objectionable, Nersessian

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[434] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, S. EXEC. DOC. O 81-1 (1949) ,78 U.N.T.S. 277, in Article II.

[435] RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED EUROPE 90 (2008).

[436] Prosecutor v. Brđanin, Case No. IT-99-36-A, Decision on Interlocutory Appeal, ¶ 6 (Mar. 19, 2004) (holding that even when the crime charged is genocide, "the Prosecution will be required to establish that it was reasonably foreseeable to the accused that an act specified in Article 4(2) would be committed and that it would be committed with genocidal intent".). For similar conclusions relating to other special intent crimes, see Prosecutor v. Milutinović et al., Case No. IT-05-87-T, Judgment, ¶ 471 (Feb. 26, 2009) (convicting Šainović of persecution for the murder of Kosovo Albanians "even though falling outside of the object of the JCE, [the murders carried act to persecute were] reasonably forseeable to Šainović.").

[437] David L. Nersessian, *Whoops, I Committed Genocide - The Anomaly of Constructive Liability for Serious International Crimes*, 30 FLETCHER F. WORLD AFF. 81, 82 (2006).

[438] *Id.* at 82. What this thoughtful criticism does not reveal is how aiding and abetting is also constructive, and that this point was instrumental in leading international courts to define JCE III similarly. Prosecutor v. Brđanin, *supra* note 43, at 5, 8 ("As a mode of liability, the third category of joint criminal enterprise is no different from other forms of criminal liability which do not require proof of intent to commit a crime on the

draws on the principle of fair labeling.[439] The concept was originally developed by Andrew Ashworth to describe the need for specificity in the label of a particular offense, rather than lumping together vastly different categories of offending.[440] Even though this original purpose is less germane here, the underlying idea was that "[f]airness demands that offenders be labeled and punished in proportion to their wrongdoing."[441] Otherwise, an accused is stigmatized by preconceptions associated with an offence that do not match his personal responsibility.

While I doubt that fair labeling (in the sense critics of international criminal justice use it) deserves an existence separate from culpability, it does alert us to an important insight—the label of a crime is a key element of punishment that must match an accused's guilt, *regardless of the number of years in prison an accused is to serve.*[442] This reading reinforces the idea that conviction for a particular crime requires fidelity to its identity,

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part of an accused before criminal liability can attach. Aiding and abetting, which requires knowledge on the part of the accused and substantial contribution with that knowledge, is but one example.").

[439] *Id.* at 96-98.

[440] Andrew Ashworth, *The Elasticity of Mens Rea*, *in* CRIME, PROOF AND PUNISHMENT: ESSAYS IN MEMORY OF SIR RUPERT CROSS, 53-56 (Colin Tapper ed.,) (referring to "representing labelling" as "the belief that the label applied to an offence ought fairly to represent the offender's wrongdoing." Ashworth's prototypical illustration was the impropriety of merging the hitherto separate crimes of theft and obtaining by deception, which were thought to convey separate moral wrongs.); For further discussion, see also Glanville Williams, *Convictions and Fair Labelling*, 42 CAMBRIDGE L..J. 85 (1983); James Chalmers & Fiona Leverick, *Fair Labelling in Criminal Law*, 71 MODERN L. REV. 217 (2008). To my mind, this principle does not enjoy a separate existence from culpability. This, because the label of a criminal conviction is a key component of a defendant's punishment, and therefore must be reconciled with desert.

[441] Ashworth, *supra* note 47, at 53-56 (Referring to "representing labeling" as "the belief that the label applied to an offence ought fairly to represent the offender's wrongdoing.").

[442] James Chalmers and Fiona Leverick make this point well in describing the preferences of rape victims to have their assailants prosecuted for rape, even if this leads to lesser jail-terms. See Chalmers & Leverick, *supra* note 47, at 217.

which predictably, is contained in the crime's definition. The physical and mental elements in the paradigm of the offence thus define what it means to be responsible for violating that prescription. Accordingly, convicting an individual of genocide for merely foreseeing the crime over-punishes. It misapplies the criminal label genocide, which is reserved for more blameworthy conduct, then mis-conveys a degree of responsibility that is not paired to the defendant's desert.

As Darryl Robinson convincingly argues, this is an aberration: "the [defendant] still faces the stigma of a conviction for committing genocide, while having satisfied neither the actus reus nor the hitherto indispensable mens rea for genocide".[443] The approach transgresses principles of culpability and fair labeling "by lumping together radically different levels of blameworthiness under one label."[444] While I am less convinced that international influences explain this position (as distinct from a combination of the Hitler-as-accomplice dilemma and readily available domestic tools like JCE), we are likely to share deep misgivings about the national justifications for the doctrine—calculating culpability as "a package deal"[445] still escalates responsibility on policy grounds.

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[443] Robinson, *supra* note 5, at 941.

[444] *Id.*, at 941.

[445] Andrew Simester offers arguably the most famous defense of joint criminal liability at the national level. See A.P. Simester, *The Mental Element in Complicity*, 122 L.Q. REV. 578, 599 (2006) ("[b]y forming a joint enterprise, S signs up to its goal. In so doing, she accepts responsibility for the wrongs perpetrated in realising that goal, even though they be done by someone else. Her joining with P in a common purpose means that she is no longer fully in command of how the purpose is achieved. Given that P is an autonomous agent, S cannot control the precise manner in which P acts. Yet her commitment to the common purpose implies an acceptance of the choices and actions that are taken by P in the course of realizing that purpose. Her responsibility for incidental offences is not unlimited: S cannot be said to accept the risk of wrongs by P that she does not foresee, or which depart radically from their shared enterprise, and joint enterprise liability

Jenny Martinez and Allison Marsten Danner also propose that "certain forms of joint criminal enterprise… that tolerate a reduced mens rea should not be used in cases involving specific intent crimes such as genocide and persecution."[446] Here too, there is a concern that the distinctive features of these serious crimes are "weakened by the lowering of the mental state to recklessness or negligence, as would occur in a Category Three JCE".[447] Although Martinez and Danner recommend closer attention to the principle of culpability in international criminal justice in order to bolster a fragile legitimacy, promote human rights and achieve transitional justice goals,[448] their critique also underscores more deontological concerns for fairness to the accused—using JCE III to circumvent special intent inappropriately amplifies moral responsibility beyond the contours of the crime.

A final set of scholars reach the same conclusion, albeit on slightly different grounds. Antonio Cassese, for instance, argues that JCEIII may not be employed in conjunction with special intent crimes for two very compelling reasons.[449] First, to do so

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rightly does not extend to such cases. Within these limitations, however, the execution of the common purpose-including its foreseen attendant risks-is a package deal. Just as risks attend the pursuit of the common purpose, an assumption of those risks flows from S's subscription to that purpose."); See also, George Fletcher's helpful outline of the common justification for felony-murder. GEORGE FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 193 (1998) ("The state justifiably threatens robbers who cause death with an additional punishment in order to make them, as it were, "careful" robbers-they should do everything possible to minimize the risk of death. Imposing this additional burden on them is not considered unjust, for they, as robbers, have embarked on a forbidden course of endangering human life.").

[446] Danner and Martinez, *supra* note 5, at 79.

[447] *Id.,* at 151.

[448] *Id.* at 146.

[449] Cassese, *supra* note 25, at 121.

would connote a "logical impossibility",[450] since one may not be held responsible for committing a crime that requires special intent unless that individual is proved to have the requisite special intent.[451] Second, he convincingly argues that the "distance" between the subjective dispositions of the primary and secondary offenders must not be dramatic if they are both to be convicted of the same offense, otherwise personal culpability "would be torn to shreds."[452]

Thus, to preserve analytical consistency, all modes of liability must require subjective standards that are the same as those announced in the definition of each particular crime. Otherwise, modes of liability warp responsibility as distinct form merely attributing wrongdoing in line with the moral weight of the crime in question.

B. The Fundamentals of Action: Failures to Punish in Superior Responsibility

At the turn of the seventeenth century, the famed internationalist Hugo Grotius wrote, "we must accept the principle that he who knows of a crime, and is able and bound

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[450] *Id.* at 121.

[451] *Id.* at 121.

[452] *Id.* at 121; Elies van Sliedregt also explains this difference based on a distinction between perpetration and participation. The former forbids escalation whereas the later tolerates this. Elies van Sliedregt, *Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide*, 5 J. INT'L CRIM. JUST. 184 -207, 201 (2007). I later argue that if such a distinction makes little sense, since it is still inappropriate to convict someone of a crime they do not deserve, even if you have reduced the time they will spend in prison. See infra section IV.A.

to prevent it but fails to do so, himself commits a crime."[453] The statement represented the beginnings of the modern doctrine of superior responsibility, but again it was not until domestic courts prosecuted the Japanese General Yamashita after WWII,[454] that the doctrine began its meteoric rise to prominence within international criminal justice. The doctrine's modern popularity has stemmed, in large part, from its promise as a solution to the Hitler-as-accessory dilemma. To this end, superior responsibility must function as a mechanism through which the superior is deemed liable "for the crimes of his subordinates."[455] Accordingly, superior responsibility emerged as a "mode of liability" with domestic backing that promised to overcome the insurmountable deficiencies of complicity and accurately capture the true moral responsibility of the puppet masters in atrocity.

Once again, the origins of the concept were largely domestic. To conclude a meticulous study of WWII jurisprudence governing superior responsibility (which in turn served as a foundation for modern iterations), Kevin Heller observes that "[n]one of the [WWII] tribunals, however, identified the precise 'law of war'—conventional or customary—that justified imposing criminal liability on a military commander who failed to properly supervise his subordinates, much less on a civilian superior. Instead, they

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[453] HUGO GROTIUS ET AL., HUGONIS GROTII DE JURE BELLI AC PACIS LIBRI TRES: IN QUIBUS JUS NATURAE & GENTIUM, ITEM JURIS PUBLICI PRÆCIPUA EXPLICANTUR 523 (1925).

[454] In Re: Yamashita 327 U.S. 1, 15 (1946). For a detailed history of the case, see RICHARD L. LAEL, THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW (1982).

[455] Prosecutor v. Halilović, Case No. IT-01-48-T, Judgment, ¶ 53 (Nov. 16, 2005); Amy J. Sepinwall, *Failures to Punish: Command Responsibility in Domestic and International Law*, 30 MICH. J. INT'L L. 251, 267 (2008) (completing a survey of previous practice by concluding that "there is overwhelming support for the mode of liability view.").

simply cited *Yamashita*, decided by the U.S. Supreme Court in 1949, for the existence of the mode of participation."[456] Much has transpired since, but this history undermines a thesis that broad modes of liability are necessarily hatched internationally. Quite the contrary, international courts enthusiastically embrace far-reaching doctrine once prominent domestic systems grant them their imprimatur.

Confusingly, there are several definitions of superior responsibility within international criminal law, but crudely speaking, a subordinate's wrongdoing is attributed to the superior where she has effective control over the perpetrators of crimes and knew or had reason to know of their offenses, but failed to prevent or punish the perpetrators.[457] Only a decade ago, however, Mirjan Damaška alerted us that aspects of the old concept are inconsistent with first principles—convicting a superior of the same offence as his subordinate for merely *failing to punish* that subordinate violates the principle of culpability too,[458] in this instance, because "the opprobrium attaches to [the superior] for heinous conduct to which he has in no way contributed".[459] Underlying Damaška's

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[456] KEVIN JON HELLER, THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW 262–263 (2011).

[457] For instance, Article 7(2) of the ICTY Statute states: "The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof." (Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, Article 7(2), Sept. 2008).

[458] Damaška, *supra* note 5, at 468.

[459] *Id.* at 468.

complaint lies the supposition that culpability presupposes personal participation *in the wrongful conduct required for the crime of which the accused is convicted*.[460]

Let us embark on a brief exegesis to explore the significance of this idea. Wrongful action requires that a defendant's actions "must reflect on him in a way that makes the kind of criticism communicated by the imposition of criminal responsibility appropriate."[461] Murder requires actions that lead to death, rape requires insertion of a penis in a vagina, theft demands appropriation, and so forth. There can be no mix and match—an appropriation cannot be a murder and a killing cannot be theft. Thus, it is not acceptable that someone convicted of a crime did something morally reprehensible, if that action has no bearing on the content of the offense with which she is charged. These principles reflect basic liberal aspirations—in order to guard against the prospect of thought-crimes, guilt by association or punishment based on status, a *wrongful act* calibrated to the definition of the crime is widely regarded as "a primary candidate for a universal principle of criminal liability."[462]

In traditional understandings, *wrongful acts* tend to divide into two camps. For one category of offences such as rape and fraud, conduct alone is sufficient since the action

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[460] *Id.* at 469.

[461] Victor Tadros, for instance, points out that it is not sufficient that the defendant has acted wrongly in some way; as a minimum his actions "must reflect on him *in a way that makes the kind of criticism communicated by the imposition of criminal responsibility* appropriate." VICTOR TADROS, CRIMINAL RESPONSIBILITY 49 (2007) (emphasis in original).

[462] Fletcher, *supra* note 26, at 420.

itself constitutes the criminal harm.[463] To extrapolate into the international sphere, the war crime declaring that no quarter will be given merely requires the order not to take prisoners—it matters not whether injured or surrendering enemy soldiers are subsequently massacred in Lawrence of Arabia style, since the announcement itself suffices to commit the crime. In the second category of crimes, however, proof of harmful consequences is required. And for these harm-type crimes, "a causal connexion between some action of the accused and the specified harm must be shown in order to establish the *existence* of liability."[464]

Two contrasting theories question this traditional thinking from opposing extremes, both of which are useful for understanding international criminal law's philosophical stance on these issues. From one side, there are those who deny the conduct/harm division outright, arguing that causation is a quintessential element of responsibility across all criminal offences.[465] Rape is not restricted to the conduct of inserting one's penis into a

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[463] See Fletcher, *supra* note 26, at 61-62 (describing a basic cleavage in the criminal law, between crimes of harmful consequences and crimes of harmful actions). Fletcher's taxonomy elsewhere refers to patterns of manifest criminality, harmful consequences and subjective criminality (Fletcher, *supra* note 26, at 388-390). The last of these labels describes inchoate offenses, and therefore is not directly relevant here; This tripartite taxonomy emulates German criminal theory (Krey, *supra* note 34, at 151-153, discussing Erfolgsdelikte (result-oriented crimes), schlichte Tätigkeitsdelikte (non-result oriented crimes); and Verletzungsdelikte/Gefährdungsdelikte (crimes constituted by violation of legal interests/mere endangerment of legal interests). The same distinction is true in both French and Spanish criminal law. See ALBIN ESER, INDIVIDUAL CRIMINAL RESPONSIBILITY 105 (2002) (describing a distinction between "delito de mera actividad" and "delito de resultado" in the former, and "infraction formelle" and "infraction materielle" in the latter.).

[464] H. L. A. HART & TONY HONORÉ, CAUSATION IN THE LAW 79 (2nd ed. 1985) (emphasis in original).

[465] The criticism of the traditionalist division between conduct and harm type offenses is best made in MICHAEL S. MOORE, CAUSATION AND RESPONSIBILITY: AN ESSAY IN LAW, MORALS, AND METAPHYSICS 101 (2009) ("The thesis is that all complex descriptions of actions share with `killing' a built-in, second causal element: the bodily movement (that is caused by a volition) must itself cause some further, independent event

woman's vagina without consent, but denotes "causing sexual penetration of the female."[466] By analogy, the war crime of declaring no quarter is actually *causing bodily movements* in the throat, mouth and lips, which subsequently cause an announcement to one's troops that no prisoners will be taken in battle. On this account of the philosophy of action, one can never escape causal analyses, even for what are commonly known as conduct-type crimes. The distinction between conduct and harm therefore disintegrates, leaving causation as a universal ingredient in blame attribution.

Others reach the diametrically opposite conclusion by denying causation any legitimate role in determining responsibility. These arguments rely heavily on thinking about moral luck—if we are committed to punishing people for what they deserve, surely they should not benefit from their luck.[467] Why, after all, should a would-be murderer who shoots at her enemy be punished less, merely because the victim by chance dies of a heart

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to occur, like a death in the case of `killing'.); But see John Gardner, *Moore on Complicity and Causation*, 156 U. PA L. REV. PENNUMBRA 432 (2008) (disagreeing that rape requires causation, because the offence demands "no result... other than the action in question having been performed"). My own sympathies lie with Moore. Consider this hypothetical: if a patient is given an anesthetic in her arm before an operation, and a doctor asks her to raise her arm, she tries but fails because the arm is anesthetized. If the doctor asks her to raise her anesthetized arm a second time, but this time the doctor physically raises the patient's arm at precisely the same time she makes her second attempt, we are still not able to say that the patient lifted her arm, even though she intended to raise it at precisely the same time that it did. Volition must cause action, therefore causation is common to all forms of responsibility. For helpful discussion, including arguments that would disagree with my hypothetical, see R. A. Duff, *Acting, Trying, and Criminal Liability*, *in* ACTION AND VALUE IN CRIMINAL LAW 75-106, 83-85 (Stephen Shute, John Gardner, & Jeremy Horder eds., New ed. 1995).

[466] MICHAEL S. MOORE, CAUSATION AND RESPONSIBILITY: AN ESSAY IN LAW, MORALS, AND METAPHYSICS 16 (2009).

[467] For the classic discussion of this in English-speaking literature, see Thomas Nagel, *Moral Luck*, Supp 50 PROCEEDINGS OF THE ARISTOTELEAN SOCIETY (1976); For more recent discussion, see Andrew Ashworth, *Taking the Consequences*, *in* ACTION AND VALUE IN CRIMINAL LAW 107 (Stephen Shute, John Gardner, & Jeremy Horder eds., 1995); Alexander and Ferzan, *supra* note 15, at 171-175.

attack seconds before the bullet hits?[468] If we are serious about culpability as the metric upon which to judge responsibility, we must eliminate these types of fortuitous scenarios from our calculus. To do this requires nothing short of abolishing harm as a touchstone for criminal responsibility, and as a result, eliminating causation from the criminal lexicon. In its place, criminal offenses would always be inchoate in structure, making attempt the paradigm for criminal responsibility.

As a reflection of the inherent deference to domestic orthodoxy, international courts and tribunals reject both extremes. To illustrate, in determining the liability of leaders within the infamous Radio télévision libre des mille collines (RTLM) for instigating genocide, the Rwanda Tribunal distinguished instigation as a "mode of liability" from direct and public incitement to commit genocide, which operates as a separate inchoate crime. Like the conduct-type war crime of declaring no quarter, the crime of direct and public incitement to commit genocide "is completed as soon as the discourse in question is uttered or published".[469] Whereas a showing of causation would be required to convict the radio owners for instigating genocide, for this inchoate crime a "causal relationship is not requisite to a finding of incitement."[470] So in contrast to the theory that causation represents

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[468] For an excellent overview of these arguments, see Alexander and Ferzan, *supra* note 15 at 171-196 (arguing that only culpability, not resulting harm, affects desert"). For a response to these claims, which asserts the orthodox position that harm matters, see Moore, *supra* note 73, at 30 (arguing that we feel very differently about a drunk driver's responsibility for swerving and only missing a child crossing the street by an inch, than we do if the drunk driver actually hits and kills the child.).

[469] Prosecutor v. Nahimana et al., Case No. ICTR-99-52-A, Judgment, ¶ 723 (Nov. 28, 2007).

[470] Prosecutor v. Nahimana et al., Case No. ICTR-99-52-T, Judgment, ¶ 1015 (Dec. 3, 2003); this aspect of the Trial Chamber's reasoning was affirmed on appeal. See Prosecutor v. Nahimana et al., *supra* note 76, at 678; for a concise articulation of the difference between instigation as mode of liability and incitement as

the hidden structure of all criminal responsibility, international courts side with domestic example.

Likewise, arguments from moral luck have no real currency internationally—harm indisputably matters in international criminal justice. All range of international crimes, from deportation as a war crime to extermination as a crime against humanity, are defined in ways that make the actual occurrence of harm necessary for guilt. For the former, civilians must be expelled across a border; for the latter, members of a civilian population must perish.[471] In some instances, international courts explicitly reinforce the normative significance of harm by explicitly stating that international crimes are *not* inchoate and that liability is contingent upon proof that the intended harm materialized.[472] In sum, international criminal justice is highly deferential to domestic tradition, both in its practice of distinguishing harm-type and conduct-type offences along traditional lines and in considering harm a theoretical center-piece of criminal responsibility.

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inchoate offence, see Prosecutor v. Kalimanzira, Case No. ICTR-05-88-T, Judgment, ¶ 512 (June 20, 2009) ("Instigation under Article 6 (1) is a mode of liability; an accused will incur criminal responsibility only if the instigation in fact substantially contributed to the commission of one of the crimes under Articles 2 to 4 of the Statute. By contrast, direct and public incitement is itself a crime, requiring no demonstration that it in fact contributed in any way to the commission of acts of genocide.").

[471] "(1) The perpetrator killed one or more persons, including by inflicting conditions of life calculated to bring about the destruction of part of a population; (2) The conduct constituted, or took place as part of a mass killing of members of a civilian population." Elements of Crimes, *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002* [hereinafter ICC Elements of Crimes], at 6; "The perpetrator deported or transferred one or more persons to another State or to another location." *Id*., at 17.

[472] Prosecutor v. Milutinović et al., *supra* note 43, at 92 ("liability for aiding and abetting under the Statute cannot be inchoate: the accused cannot be held responsible under Article 7(1) for aiding and abetting if a crime or underlying offence is never actually carried out with his assistance, encouragement, or moral support."); Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgment, ¶ 378 (May 15, 2003) ("Article 6(1) does not criminalize inchoate offences".).

But why the mimicry? If we are truly committed to culpability as the guiding feature of blame attribution in international criminal justice, should we not have boldly dispensed with harm as the essence of international criminal responsibility, in favor of a system that better accounts for the problem of moral luck? Less ambitiously, is it not more coherent to dispense with the traditional distinction between harm-type and conduct-type offences, to acknowledge that causation is common to both? That international criminal justice adopts neither of these positions again reflects the pull of domestic influence, not some nefarious utilitarian agenda derived from its international political status. The absence of any domestic practice adopting these theories has obviated the need for international criminal jurisdictions to choose between competing models, leaving them to contentedly follow established domestic doctrine regardless of whether it accords with principle.

This leads us back to superior responsibility, where international criminal justice's traditionalism plays out most keenly. To begin, we must acknowledge that one might dispute whether superior responsibility is the ideal illustration of these philosophical principles in action insofar as it involves liability for an omission. There is broad dispute in criminal theory whether omissions *cause* anything. On the on hand, there are those who consider that an omission is "nothing at all,"[473] which gives rise to the conclusion that omissions cannot cause anything—"nothing comes of nothing, and nothing ever could."[474]

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[473] Moore, *supra* note 73, at 55.

[474] Id., See also, I; HANS-HEINRICH JESCHECK & THOMAS WEIGEND, LEHRBUCH DES STRAFRECHTS. ALLGEMEINER TEIL. 618 (1996) (also doubting that omissions are causal insofar as they lack "a real source of energy.")

Conversely, social theories of causation posit that we ordinarily explain omissions as having causal power.[475] We have no problem, for instance, saying that "a lack of rain causes crops to fail."[476] The debate need not delay us here though, since both judicial and scholarly discussions of superior responsibility assume a causal structure, and perhaps more pertinently, the question is largely peripheral to our central focus on accessorial liability.

How then do these foundational principles play own within superior responsibility? Intriguingly, misgivings about causation have prompted international courts to offer two corrections to the law governing failures to punish. The first is largely cosmetic—in response to the complaint that failures to punish convicted defendants of harm-type offenses without establishing causation, international criminal courts began adding language to the pertinent sections of their judgments professing that "an accused is not charged with the crimes of his subordinates but with his failure to carry out his duty as a superior to exercise control."[477] This language, however, has proved more of a smokescreen to ward off conceptual criticisms than a marked normative change,[478] but the important

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[475] GEORGE FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 64 (1998).

[476] VICTOR TADROS, *supra* note 68, at 171-172 (2007).

[477] Prosecutor v. Krnojelac, Case No. IT-97-25-A, Judgment, ¶ 171 (Sept. 17, 2003).

[478] I view this language as largely cosmetic because it conceals the long history of holding the superior responsible "for the crimes of his subordinates," and more significantly, belies the ongoing practice of using superior responsibility to convict military and civilian commanders of "rape," "pillage" and "genocide" carried out by underlings. For instance, "The Accused Ljubomir Borovčanin is found GUILTY pursuant to Article 7(3) of the Statute, of the following counts: Count 4: Murder, as a crime against humanity."; Prosecutor v. Popović et. al., Case No. IT-05-88-T, Judgment, ¶ 835, (June 10, 2010). Thus, it seem clear that the superior is still convicted of the crime his subordinates perpetrated. For a more detailed confirmation of this reasoning, see Robinson, *supra* note 5, at 951-952.

point is that the rhetoric became important to quell theoretical unease with the doctrine's overreach, and that causation was the grounds for the discomfort.

In contrast, the second judicial correction was more radical. Several Trial Chambers convicted military commanders of a separate offence of "failing to take the necessary and reasonable measures to punish",[479] then proceeded to hand down drastically reduced sentences commensurate with the commanders' failure to act (as distinct from the harm associated with a crime such as torture, extermination or genocide).[480] This transformation of superior responsibility from a mode of liability to a separate lesser conduct-type crime was born of major theoretical misgivings—there is no logically plausible means of reconciling failures to punish with causation.[481] How, after all, can a commander *cause* a crime that is already complete by the time she is impelled to act? The solution then was to dispense with causation by transforming failures to punish into a form closer to attempt.

For the same reasons, the vast majority of academics agree that failures to punish must constitute a separate conduct-type offense, given the impossibility of the commander's failure causing the subordinate's crime.[482] With respect to a crime

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[479] Prosecutor v. Hadžihasanović and Kubura, Case No. IT-01-47-T, Judgment, ¶ 620-628 (Mar. 15, 2006) (finding Amir Kubura, for instance, "GUILTY of failing to take the necessary and reasonable measures to punish the murder of Mladen Havranek at the Slavonija Furniture Salon in Bugojno on 5 August 1993." The judgment's entire disposition followed this approach).

[480] *Id.* at 625, 627.(sentencing Enver Hadzihasanovic to 5 years imprisonment and Amir Kubura to 2.5 years for failing to prevent or punish war crimes).

[481] Prosecutor v. Hadžihasanović and Kubura, Case No. IT-01-47-A, Judgment, ¶ 38 (Apr. 22, 2008); citing Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgment, ¶ 77 (Jul. 29, 2004); Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-A, Judgment, ¶ 832 (Dec. 17, 2004).

[482] Thomas Weigend, *Bemerkungen zur Vorgesetztenverantwortlichkeit im Völkerstrafrecht*, 116 BEMERKUNGEN ZUR VORGESETZTENVERANTWORTLICHKEIT IM VÖLKERSTRAFRECHT 999, 1021 (2004); Bing

subordinates have already committed, causality is "logically impossible" since later events cannot cause earlier ones.[483] And as far as future crimes go, giving failures to punish a separate existence where crimes have yet to occur would require an absurdity: "to initiate prosecution of a crime that has not yet been committed." [484] On this basis, the problem of causation within failures to punish "has not and arguably cannot be resolved."[485] In sum total, using failure to punish as a vehicle for convicting the superior of the same offence as the subordinate is "largely disproportionate." [486]

Admittedly, a minority of scholars in international criminal justice do reach the opposite view, but strikingly, their disagreement consistently attempts to reconcile failures to punish with causation rather than simply denying that the concept is necessary.[487] Otto

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Bing Jia, *The Doctrine of Command Responsibility Revisited*, 3 CHINESE J. INT'L L. 1 (2004), ("[b]ut it makes no sense to see failure to punish in the same light, which should be treated as an offence independent of subordinate crimes that raise the issue of command responsibility in the first place."); Robinson, *supra* note 5, at 951 ("[e]ven if we agree that failure to punish crimes is worthy of criminalization, it is simply inaccurate to label such a failure as 'genocide'."); Chantal Meloni, *Command Responsibility: Mode of Liability for the Crimes of Subordinates or Separate Offence of the Superior?*, 5 J. INT'L CRIM. JUST. 619, 636 (2007), ("with regard to the failure to punish, where no real causal link subsists between the subsequent failure to act of the superior and the crime previously committed, the conviction of the superior for the same crime committed by the subordinates is difficult to justify."); Elies van Sliedregt, *Article 28 of the ICC Statute: Mode of Liability and/or Separate Offense*, 12 NEW CRIM. L. REV. 420, 431-432 (2009) (arguing that superior responsibility has different structures in different jurisdictions, but recommending the "splitting solution" involving treating failures to punish as a separate crime.).

[483] Weigend, *supra* note 89, at 1021.

[484] *Id.* at 1021.

[485] *Id.*; See opinion to similar effect *supra* note 83.

[486] Weigend, *supra* note 89, at 1021.

[487] Otto Triffterer, *Causality, a Separate Element of the Doctrine of Superior Responsibility as Expressed in Article 28 Rome Statute?*, 15 LEIDEN J. INT'L L., 203 (2002) (arguing that causation is embedded in the structure of superior responsibility); GUÉNAËL METTRAUX, THE LAW OF COMMAND RESPONSIBILITY 42-43 (1st ed. 2009) (accepting that superior responsibility is a mode of liability, and rejecting the view that the doctrine of superior responsibility contains no requirement of causality).

Triffterer, for example, argues that failures to punish are based on a double causal connection to the offense: the first flows from the superior's initial omission to control the subordinates; the second derives from the failure to exercise a "second chance" to absolve himself by referring the matter to justice.[488] Many find this explanation unsatisfying,[489] but its attempt to justify the mode of liability view in causal terms surely highlights the significance causation plays in any robust theory of blame attribution, at least for harm-type offences.

Only one scholar begs to differ. In her excellent article, Amy Sepinwall makes the strongest case for treating the failure to punish as a mode of liability by pointing out how "failure to punish can be read as an expression of his support for his troops' act."[490] She argues that because the superior intends the failure, he aligns himself with the subordinate's atrocity.[491] In so doing, the commander compounds his subordinates' offense, such that "he ought to be held criminally liable for it."[492] Although I have some sympathy for this explanation,[493] it unjustifiably snubs the philosophical rationale that makes causation

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[488] Triffterer, *supra* note 94, at 203. Use of the word "absolve" in the text is my own. I use this in anticipation of a criticism that Triffterer's "second chance" is causally unnecessary if the failure to control is already adequate. With this modification, I believe his account is coherent causally, even if I harbor grave doubts whether the causal element could ever match the requisite subjective element of the subordinate's crime *at the time of perpetration*.

[489] Weigend, *supra* note 89, at 1021; Meloni, *supra* note 89, at 630.

[490] Sepinwall, *supra* note 63, at 289.

[491] *Id.* at 292.

[492] *Id.* at 295.

[493] Her argument is, for instance, a wonderful explanation of why failures to punish must be criminalized in the face of fears of over-criminalization more broadly. See DOUGLAS N. HUSAK, OVER CRIMINALIZATION

central to theories of criminal responsibility everywhere. Without it, we abandon the project of creating an objective connection between an accusers action and the harm to which international criminal justice assigns moral weight in calculating responsibility, leaving little principled protection against thought-crimes, guilt by association, punishment based on status or other innovative doctrine that allow policy to supersede desert.

Thus, if international criminal justice is to become coherent not harsh, causation is an indispensable element for the perpetration of all harm-type offences. There is, however, one final twist in this plot. For secondary parties, the harm/conduct distinction disappears because the derivative nature of the secondary party's liability creates a cause-like relationship.[494] The war crime of declaring no quarter is a conduct-type war crime (insofar as the consequences of the declaration are legally immaterial), but assessing whether a superior can be convicted of the crime for failing to punish a subordinate who made the announcement demands causation too. How else can we justify convicting the superior of this particular war crime, other than by showing that his actions made a difference to someone else committing the offense? Thus, if the vast majority of scholars in international criminal justice assume valid foundations in their criticisms of superior responsibility, causality must be an element of all "modes of liability" within the discipline.

(2008). Nonetheless, my own view is that a separate conduct-based crime remains the appropriate form of liability, since the superior makes no difference to a completed atrocity.

[494] Sanford H Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323, 337 (1985) ("the notion of derivativeness can be expressed as well in terms of the requirement of a result: just as causation doctrine requires that the prohibited result occur before there can be an issue of the actor having caused it, so in complicity doctrine there must be a violation of law by the principal before there can be an issue of the secondary party's liability for it.").

II. THE CONCEPTUAL SHORTCOMINGS OF COMPLICITY

The previous section identified two benchmarks for testing the theoretical merit of modes of liability that emerge from scholarship in international criminal justice. First, there is a conceptual need for congruence between the mental element in the crime and that required for the mode of liability; and second, an accused's acts must be causally connected to the harm contemplated in the crime of which she is ultimately convicted. Before we apply these same benchmarks to complicity, we must first interrogate the nature of accessorial liability in order to establish that a comparison across different modes of liability is methodologically defensible.

A. The Nature of Complicity – Two Defining Features

1. Complicity as "Mode of Liability"

In his memorable treatise on accomplice liability, K.J.M Smith eloquently forewarned that "[s]urveying complicity's hazy theoretical landscape can, depending on the commentator's nerve, temperament, and resilience, induce feelings running from hand-rubbing relish to hand-on-the-brow gloom."[495] My analysis sails much closer to the gloom

[495] K. J. M. SMITH, A MODERN TREATISE ON THE LAW OF CRIMINAL COMPLICITY 4 (1991).

than the relish, for there is much in the peripheries of complicity that is deeply unsatisfying. The question remains, however, to what extent complicity can be compared to other modes of liability, and if it is abandoned in favor of a unitary theory of perpetration, what features of complicity will a unitary theory have to accommodate? The first prerequisite is that complicity must act as a mode of liability too.

In domestic law, it traditionally does precisely this. In the Anglo-American tradition, for example, "the accomplice is guilty of the same offense as the principle."[496] The driver of the getaway car, in other words, is convicted of the same offense as her confederates who hold up the bank at gunpoint, even though the getaway driver does not personally steal a thing. Civil law countries follow this approach too, although the similarity is sometime overlooked in disparate approaches to sentencing. In Germany, for instance, aiders and abettors are sentenced to a maximum of three quarters of the penalty for the offense they facilitate whereas the sentence for instigators is taken from the same sentence range as principals.[497] If one wonders how the great diversity of complicitous acts could consistently square with such neat mathematical divisions,[498] the rule's apparent

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[496] Sullivan, *supra* note 15, at 154; Fletcher, *supra* note 34, at 649-650 ("Aiding another person to commit a crime renders one an accomplice, and being an accomplice is simply one way of 'being guilty of an offence.'").

[497] Strafgesetzbuch, § 26, 27 and 49. For a modern English translation, see MICHAEL BOHLANDER, THE GERMAN CRIMINAL CODE: A MODERN ENGLISH TRANSLATION 43, 50 (2008).

[498] Is it not possible that some rogue aider is five sixths as culpable as the perpetrator? As Michael Moore has argued, "[o]ne could say that, on average, accomplices are less-substantial causers than are the principals they aid, and this is true enough. Yet this is only a rule of thumb, something that is true in the general run of causes." Moore, *supra* note 17, at 423; And in fact, the intuition that the indirect nature of the accomplice's acts render her less culpable is "surprisingly difficult to justify". CHRISTOPHER KUTZ, COMPLICITY: ETHICS

rigidity should not cloud our vision of complicity's overarching structure—regardless of how the accomplice's sentence is to be calculated, these systems unequivocally hold the accessory liable for the rape, theft or murder that she assists in bringing to fruition.

Some national jurisdictions take the equivalence between perpetration and complicity one step further. In France and England, criminal legislation explicitly stipulates that the accomplice "shall be liable to be tried, indicted, and punished *as a principal offender*."[499] In other words, not only is the label "robbery" common to the sanction visited on the robber and her getaway driver, both offenders warrant potentially equivalent punishment. In light of these principles, one shares George Fletcher's bewilderment "why the French and Anglo-American systems ever recognized distinctions among perpetrators, joint perpetrators and accomplices."[500] I return to this question in due course, but for now it is sufficient to observe that domestic jurisdictions have traditionally (but not invariably) viewed complicity of a mode of liability through which one becomes responsible for the perpetrator's crime regardless of sentencing policy.

This history has notable modern exceptions. Contrary to earlier understandings that there is no crime of "being an accessory",[501] some domestic jurisdictions have since passed

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AND LAW FOR A COLLECTIVE AGE 147 (2000) (discussing whether complicit actors are less culpable than direct actors). For further discussion, see Fletcher, *supra* note 34, at 654-657 (addressing the rationale for categorically mitigating the accessory's punishment.).

[499] The Accessories and Abettors Act 1861 (24 & 25 Vict. c.98), s. 8 (emphasis added).

[500] Fletcher, *supra* note 33, at 651.

[501] *Id.* at 582 ("the actor is punished for a violation of the same prohibitory norm that covers standard cases of perpetration. There is no crime of … 'being an accessory'".).

an inchoate offense called *criminal facilitation*.[502] These new inchoate offenses, which generally co-exist alongside orthodox notions of complicity, are inspired by the view that accessorial liability need not function as a mode of liability.[503] Once again, moral luck provides one important rationale for the modern inchoate variations of complicity—why should the accomplice who sends a crowbar to assist a prison breakout be acquitted of the offence only because the inmate fortuitously manages to escape without it? In terms of desert, this is undoubtedly perplexing—"[w]hether the aid is actually rendered is fortuitous; the actor is equally culpable and his dangerousness is equally great if the perpetrator never receives the aid."[504] In addition, some doubt that an accomplice can ever *cause* a

[502] In England and Wales, sections 44, 45 and 46 of the Serious Crimes 2007 create three new inchoate crimes of intentionally encouraging or assisting an offence; Encouraging or Assisting an Offence believing it will be committed; and encouraging or assisting offences believing one or more will be committed. For commentary, see ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW, 458–461 (6 ed. 2009). In the United States, similar offenses are labeled criminal facilitation. For discussion, see Robert Weisberg, *Reappraising Complicity*, 4 BUFF. CRIM. L. REV. 217, 261-270 (2000).

[503] Christopher Kutz, *Causeless Complicity*, 1 CRIM. L. & PHIL. 239, 301 (2007) (arguing that causality should play no role in complicity, in part, in order to limit the role of moral luck in criminal law). For similar sorts of arguments, see Richard Buxton, *Complicity and the Law Commission*, CRIM. L. REV. 223 (1973) ("the way out of these and other difficulties would be to create a general offence of aiding or encouraging crime, committed by one who does acts which are known to be likely to be of assistance or encouragement to another in committing crime, whether or not that principal crime is in fact committed."); Daniel Yeager, *Helping, Doing, and the Grammar of Complicity*, 15 CRIM. JUST. ETHICS 25 (1996) ("harm principles should have little or nothing to do with the law of complicity."); Michael Moore summarizes these arguments succinctly by claiming that "(on this view) accomplice liability is just inchoate liability in the special cases when the evil sought to be prevented by the law has occurred (even though the accomplice did not cause it to occur)." Moore, *supra* note 13, at 401. Note, however, that several of these authors would eliminate this special requirement that the harm occurred, making complicity resemble attempt even more closely than Moore suggests.

[504] Fletcher, *supra* note 26, at 679.

perpetrator with capacity for autonomous choice to commit a crime,[505] offering a further basis for adding an inchoate version of complicity that excludes causal inquiries outright.

Where does complicity in international criminal justice stand on these competing visions of accessorial liability? As one might expect, it unquestioningly rejects the modern avant-garde in favor of tradition. Without doubt, international courts do not treat complicity as a separate inchoate offense. A range of international courts, both historical and contemporary, have convicted accessories of *the same offense as the perpetrator* and done so while openly referring to aiding and abetting as a "mode of liability."[506] As further and decisive evidence of this reality, the terms aiding and abetting, instigating, or any other of complicity's numerous synonyms never feature in the dispositions of international criminal judgments in the overwhelming majority of instances.[507] In expressing condemnation of an

[505] Yeager, *supra* note 110, at 31.

[506] Fletcher, *supra* note 26, at 637 (defining accessorial liability as ""all those who are held derivately liable for another's committing the offense.").

[507] The typical international trial alleging complicity concludes abruptly by declaring: "The Accused RADOSLAV BRDANIN is found not guilty under Article 7(3) of the Statute but GUILTY pursuant to Article 7(1) of the following counts: Count 3 – Persecutions..." Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgment, ¶ 1152 (Sep. 1, 2004); A comprehensive review of all convictions for aiding and abetting, instigation, planning and ordering reveals that international courts and tribunals follow this format in fifty-nine (59) other situations i.e. making no mention of the mode of liability within the disposition of the judgment. In only three (3) scenarios, international courts state something like: "The Chamber finds the Accused Haradin Bala GUILTY, pursuant to Article 7(1) of the Statute, of the following counts: Count 4 - Torture, a violation of the laws or customs of war, under Article 3 of the Statue, for having aided the torture of L12." Prosecutor v. Limaj et al., Case No. IT-03-66-T, Judgment, ¶ 41 (Nov. 30, 2005). Thus in over 95% of cases, international court's dispositions make no mention of complicity, even though it was the basis for conviction.

accessory's conduct, international courts merely report that the defendant is responsible for crime X; we are not told why.[508]

Indeed, there is much to commend this orthodox view of complicity. Under an inchoate version, the vendors of the chemical Zyklon B used as an asphyxiant in Auschwitz would be convicted of *criminal facilitation*—not murder, extermination or genocide.[509] This alternative may overcome evidential difficulties proving complicity, but it also gravely undervalues culpability to convict the vendors of the chemical used to gas in excess of four million people of *criminal facilitation*. Whatever one might think about the merit of creating a new inchoate version of complicity to complement the more traditional equivalent, when the crime (here genocide) does take place and the accomplice's actions make an unequivocal contribution to the criminal harm (here providing the means),[510] convicting the accomplice of an inchoate offense is at best like convicting an actual murderer of attempted murder.[511] If harm matters, mere facilitation is inadequate.

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[508] *Id*.

[509] See UNITED NATIONS WAR CRIMES COMMISSION, Trial of Bruno Tesch and Two Others "The Zyklon B Case", 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS 93.

[510] Assume for the sake of this argument that Bruno Tesch's company Tesch & Stabenow was the only available supplier of the means of exterminating such a large number of civilians, such that their contribution was an indispensible cause of the crime. In fact, as I detail below, this is not factually accurate, but my minor factual modification makes the normative point indisputable.

[511] Actually, convicting those who intentionally provide chemicals for a genocide that subsequently takes place is even more objectionable than convicting an actual murder of attempted murder, because the label attempted murder at least communicates the gravity of the offense involved. Criminal facilitation communicates nothing of the sort, and to the extent that the label of the crime is a key element in the punishment inflicted on an accused, this significantly under-represents desert.

So, for better or worst, international criminal justice understands complicity in traditionalist form. In fact, such is the comfort with the unquestioning international dependence on pre-established traditional notions of complicity that there are few arguments that the doctrine might take inchoate form in international criminal justice. So somewhat strangely, the highly charged judicial and academic debate over whether failures to punish in superior responsibility should constitute a separate inchoate offense finds no parallel in the international law governing complicity, even though the issues are broadly analogous. The essential consequence of all this is therefore that causation must be an element of accomplice liability in order to honor the philosophical commitments international criminal law has inherited from below.

2. The Derivative Nature of Accessorial Liability

One further feature of complicity requires introduction as background too. The second defining feature of accessorial liability both internationally and domestically is that it is commonly known as a form of "derivative liability."[512] Even the most nefarious accessory, who does everything in her power to facilitate someone else's crime, is not complicit in anything if a perpetrator does not act wrongfully. If X sends a crowbar to her friend Y in prison in order for Y to use it to break out of prison, there is no crime if,

[512] Fletcher, *supra* note 26, at 637 (defining accessorial liability as "all those who are held derivately liable for another's committing the offense.").

unbeknownst to X, Y has independently broken out a week before the crowbar arrives at its destination. True, this again raises the perennial problem of moral luck (why should X benefit from Y's fortuitous earlier breakout), but the long history of complicity has almost invariably defined complicity as contingent upon the wrongdoing of a perpetrator.

Historically, this dependence was so intense that the accomplice would escape prosecution if the principal perpetrator was never apprehended, prosecuted and convicted.[513] For instance, until the eighteenth century no accessory could be convicted if his principal had died, received pardon by clergy, or had not been convicted for any reason at all.[514] In England it was only in 1848 that it became possible to indict, try, convict and punish an accessory before the fact "in all respects as if he were a principal felon",[515] regardless of whether the perpetrator was first brought to trial and convicted. Around the same time, Continental systems made a similar shift, which reduced the principal's perpetration of the crime to a contested issue within the accessory's trial. While these changes meant that the formal reliance on derivative liability within complicity was less strict, it remained a central feature of the doctrine.

The derivative nature of accomplice liability was later further diluted but again leaving the basic concept intact. In most national jurisdictions, an accomplice can now be

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[513] Dubber, *supra* note 7, at 982 (showing how a putative accomplice would "[e]scape trial and punishment if the principal was never found, was never prosecuted, was acquitted, was convicted but had his conviction overturned or was pardoned.") .

[514] Francis Bowes Sayre, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689, 695 (1929); Smith, *supra* note 102, at 20-23.

[515] Sayre, *supra* note 121, at 695.

held responsible where the principal perpetrator's crime is excused, say when an accomplice assists someone insane to commit a crime. As a result, complicity is now viewed as entailing only a "limited or partially derivative character."[516] Although the moral basis for this dilution is obvious, it also gives rise to downstream complications. How do we determine the responsibility of someone who gives you a gun intending that you kill Mr. W, but fortuitously, Mr. W attacks you first and you kill him with the gun in self-defense?[517] While cases of this sort involving culpable intentions on the accomplice's part but justified actions on the perpetrator's are complex, the complexity does not eclipse the overraching principle—the vast majority of domestic criminal systems still maintain that the accessory's liability is contingent on the principle perpetrator's wrongdoing.

Once again, international criminal courts follow domestic influence, here explicitly. In a leading case on point, the ICTR embraced the derivative nature of complicity by again relying on domestic examples, this time in the form of the French criminal law. As a reflection of a trend that international criminal tribunals repeat consistently, the tribunal acknowledged that this notion implies that "[t]he accomplice has not committed an autonomous crime, but has merely facilitated the criminal enterprise committed by

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[516] Hans-Ludwig Schreiber, *Problems of Justification and Excuse in the Setting of Accessorial Conduct*, 1986 BYU L. REV. 611, 620 (highlighting how the notion of limitierte Akzessorietat was not developed in German criminal law until 1943).

[517] For even more complicated variants of my example, see Fletcher, *supra* note 27, at 667-669 (discussing inconsistent American case law on the issue of whether a confederate of a criminal who is justifiably shot by police while fleeing the crime-scene can be an accomplice in the death of his confederate.); Hans-Ludwig Schreiber, *supra* note 123, at 629-630 (discussing a scenario where the "accomplice" deliberately initiates a situation where you kill Mr. W in self defense.).

another."[518] In particular, it declared that "complicity is borrowed criminality (criminalité d'emprunt)."[519] In drawing on this notion of *criminalité d'emprunt*, the Tribunal did not register that the label is a relic of 18th century criminal reform, and that leading French academics in the modern era view it as "[u]ne expression vicieuse".[520] Although the matter has no substantive importance for present purposes, the process of absorption marks an important theme—by borrowing domestic doctrine (not leading theory), international courts incorporate the historical idiosyncrasies of national criminal systems regardless of their compliance with foundational principles.

But is there a danger that complicity *borrows* too much? In addressing this problem, scholars in domestic criminal theory are earnest to ward off allegations that derivative liability amounts to vicarious liability. The former is justifiable, the latter anathema to liberal notions of criminal justice. Sandy Kadish, for example, pleads that we (like Eichmann) should not misconstrue the two terms—vicarious liability is nothing more than punishment based on a relationship between the parties, whereas derivative liability requires action and blameworthy choice on the part of the secondary party, "mak[ing] it appropriate to blame him for what the primary actor does."[521] But Kadish's bright-line distinction begs the more nuanced question. How distant are vicarious and derivative

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[518] *Id.* at 528.

[519] Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 528 (Sep. 2, 1998)

[520] Robert, *supra* note 8, at 351; See also Philippe Salvage, *Le lien de causalité en matière de complicité*, REVUE DE SCIENCE CRIMINELLE ET DE DROIT PÉNAL COMPARÉ 25, 41 (1981).

[521] Kadish, *supra* note 101, at 337.

liability really? In other words, what type of action and choice will suffice to blame the accomplice for "what the primary actor does," especially when the accessory's act and choice is not stipulated in the offense with which she will ultimately be convicted? With an understanding of complicity's conceptual identity in international criminal justice, we now turn to this dilemma.

C. The Mental Element for Complicity

The mental element for accessorial liability is highly debated and inconsistently applied at both international and domestic levels. Most international criminal tribunals formally insist that "the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal",[522] and justify the adoption of this standard as the embodiment of customary international law. Conversely, the Statute of the International Criminal Court demands that the accessory assist the perpetrator "[f]or the purpose of facilitating the commission of such a crime".[523] The intensity of volition then, formally distinguishes complicity within competing international incarnations of the doctrine. And yet, this formalism conceals the reality that

[522] Prosecutor v. Vasiljević, *supra* note 22, at 102; Prosecutor v. Fofana, Case No. SCSL 04-14-T, Judgment, ¶ 145 (Aug. 2, 2007); Prosecutor v. Ntakirutimana, Case No. ICTR-96-10-A and ICTR-96-17-A, Judgment, ¶ 501 (Dec 13, 2004).

[523] Rome Statute of the International Criminal Court, Art 25 (3)(c), 2187 U.N.T.S. 90, July 17, 1998.

neither of these standards is that actually applied most often in practice, and more importantly, that no single static standard is theoretically defensible.

To begin, note the competing rationale for the purpose and knowledge standards. The purpose standard is said to promote autonomy by precluding criminal impediments to otherwise lawful activities that depend on social interaction, especially business. The knowledge standard, on the other hand, promotes social control and the prevention of crime by demanding that agents take interventionist action when aware that their actions are enabling offending.[524] In its most ambitious guise, the knowledge standard posits that the potential aider "might be an educative or moralizing force that causes the would-be offender to change his mind."[525] Given the magnitude of international crimes, the knowledge standard would seem the more reasonable rationale for our purposes, and yet both accounts miss the mark.

At the level of doctrine, the famed purpose/knowledge dichotomy glosses over a complex literature arguing that the accomplice liability actually involves "two dimensional fault",[526] which goes to the assistance provided, the perpetrator's intentions, and/or the ultimate crime facilitated.[527] Later, I argue that it possible to transcend these intermediary

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[524] Louis Westerfield, *The Mens Rea Requirement of Accomplice Liability in American Criminal Law - Knowledge or Intent*, 51 MISS. L.J. 155, 178 (1980).

[525] *Id.*

[526] Ashworth, *supra* note 109, at 415; This also reflects the state of the law in German criminal law, see Bohlander, *supra* note 2, at 168 (discussing "doppelter Anstifter- und Gehilfenvorsatz" twofold intent of the aider or abettor).

[527] Smith, *supra* note 87, at 141-197 (reviewing English and American jurisprudence requiring that the accessory must intend his acts of assistance or encouragement and be aware of their ability to assist or

steps by inquiring whether the accomplice satisfies the mental element of the crime itself. For present purposes though, it suffices to recognize that in international criminal justice, these types of technicalities are completely overshadowed by the intensity of the contest between the knowledge and purpose strands. Thus, when the US Supreme Court was asked to hear allegations that a company was complicit in crimes perpetrated within Apartheid South Africa, it faced a veritable deluge of argument for either side of the purpose/knowledge divide.[528]

The dichotomy, like many other international modes of liability, is inherited from international criminal law's domestic forbearers. The International Criminal Court's reliance on purpose was (perhaps unfaithfully) drawn from a similar standard in the American Law Institute's Model Penal Code, which appears to require that an accomplice provide assistance with the purpose of facilitating the crime.[529] In contrast, other

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encourage the principal offender, then exploring the complexities of these two variations); GLANVILLE LLEWELYN WILLIAMS, CRIMINAL LAW: THE GENERAL PART 394-396 (1953) (reviewing the multiple mental elements required for the accomplice); Eser, *supra* note 70 at 923-924 (discussing the "double intent" in complicity derived from German criminal law).

[528] For comprehensive analyses, see Keitner, *supra* note 7, at 86-96; Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 NW. UNIV. J. INT'L HUM. RTS. 304, 308-315 (2007).

[529] I say perhaps unfaithfully because the Model Penal Code also has a strange provision requiring that "[w]hen causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense if he acts with the kind of culpability, if any, with respect to that result *that is sufficient for the commission of the offense."* See Model Penal Code Commentaries (Philadelphia: American Law Institute, 1985), § 2.06, 296. The significance of this provision is opaque. See Grace E Mueller, *The Mens Rea of Accomplice Liability*, 61 S. CAL. L. REV. 2169, 2178 (1987) (pointing out that there is some ambiguitiy arising from this provision about how to address the accomplice's knowledge of circumstances. but arguing that the accomplice should be required to show the same mental element as that required for perpetration); In any event, even US Federal standards of complicity have varied wildly, involving knowledge, purpose, recklessness and a unitary theory. See Baruch Weiss, *What Were They Thinking: The Mental States of the Aider and Abettor and the Causer under Federal Law*, 70 FORDHAM L.

international criminal courts have drawn inspiration from the vast array of national systems and earlier international precedents, which merely require that an accomplice provide assistance to the perpetrator *knowing* that her actions facilitate the crime. Therefore, to the extent that complicity is a doctrine deeply divided in international criminal justice, the schism mirrors an identical disharmony between domestic traditions.

Remarkably, both sides of the dichotomy are misguided. As a matter of pure doctrine, recklessness is the mental element for complicity most frequently applied by international criminal courts. This is evident, for instance, from the habitual inclusion within most international criminal judgments, of the refrain that "[i]f he is aware that one of a number of crimes will *probably* be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and an abettor."[530] Clearly, awareness of a *probability* is constitutive of culpable risk-taking, not knowledge. It goes without saying that the two concepts are far from synonymous. To paraphrase Glanville Williams, becoming an accessory by providing assistance "knowing that a crime is afoot" is quite different from helping "knowing that a

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REV. 1341, 1486 (2001) (reviewing the relevant caselaw and advocating for the unitary theory, which he describes as a "derivative approach").

[530] Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 246 (Dec. 10, 1998) (emphasis added); Prosecutor v. Blaškić, *supra* note 88, at 50; Prosecutor v. Kvocka, Case No. IT-98-30/1-T, Judgment, ¶ 255 (Nov. 2, 2001); Prosecutor v. Naletilić & Martinović, Case No. IT-98-34-T, Judgment, ¶ 63 (March 31, 2003); Prosecutor v. Strugar, Case No. IT-01-42-T, Judgment, ¶ 350 (Jan. 31, 2005); Other cases refer to accessorial liability for "foreseeable consequences" of one's actions. See Prosecutor v. Kvocka, Case No. IT-98-30/1-T, Judgment, *supra* note 138, at 262 ("The aider or abettor of persecution will . . . be held responsible for discriminatory acts committed by others that were a reasonably foreseeable consequence of their assistance or encouragement."); Prosecutor v. Tadić, Case No. IT-94-1-T, Judgment, ¶ 692 (May 7, 1997) (stating that the aider and abettor "will . . . be responsible for all that naturally results from the commission of the act in question.").

crime may be afoot."[531] Could it be that the purpose/knowledge debate has ignored the true application of complicity in international criminal justice?

Apparently so. To cite but one representative illustration,[532] one International Criminal Tribunal for the former Yugoslavia (ICTY) Trial Chamber first reiterated the widely cited proposition that complicity merely requires awareness that "one of a number of crimes would probably be committed" ,[533] then proceeded to convict a politician named Radoslav Brđanin of the war crime of willful killing for issuing a decree that required the victims to disarm. The key mental element linking Brđanin to the willful killing (of victims and by perpetrators he did not know in anything except broad abstractions) was that he was aware that the disarmament decree "could only be implemented by use of force and fear". [534] But force and fear do not inevitably mean killing. Could his plan not be executed through beatings, torture, forced expulsion and intimidation instead? The only analytically plausible explanation is that the killings were probable but not certain. This, as we suspected, is recklessness.

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[531] Glanville Williams, *Complicity, Purpose and the Draft Code - 2*, CRIM. L. REV. 98, 99 (1990).

[532] For a small selection of further examples, see Prosecutor v. Kunarac et al., Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶ 759 (Feb. 22, 2001) (convicting the accused Kovac for handing over and/or selling two women to other soldiers whom he knew would "most likely continue to rape and abuse them."); Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment, ¶ 602 (July 31, 2003) (convicting the accused Stakic for deliberately placing civilians in harms way "with the knowledge that, in all likelihood, the victims would come to grave harm and even death."); Prosecutor v. Brima, Case No. SCSL 04-16-T, Judgment, ¶ 1786 (June 20, 2007) (convicting the accused Brima for killings because "was aware of the substantial likelihood that his presence would assist the commission of the crime by the perpetrators.") .

[533] Prosecutor v. Brđanin, *supra* note 114, at 272.

[534] *Id.* at 473.

So international criminal justice here tolerates a type of double-speak, claiming knowledge but applying recklessness. This disparity between theory and reality is surely alarming, but we should not lose sight of its origins. As we have seen, a range of theories hypothesize that these types of disparities between rhetoric and practice arise from importing interpretative styles typical of human rights and law of war into international criminal law; the effect of moral outrage on interpretative technique; or the broader political aspirations associated with transitional justice that are said to drive hermeneutics in international criminal adjudication.[535] And yet here, the double-speak has a quite different genesis. Domestic criminal law in a range of countries that officially adopt the knowledge standard not only allows a strikingly similar application of the rule[536]; some of their leading academics openly lament that this "introduces reckless knowledge as sufficient."[537] The origins, therefore, are entirely domestic.

Things only get worse on the conceptual level. On closer inspection, none of the three highly debated standards (purpose, knowledge, recklessness) is theoretically justifiable. Like other modes of liability in international criminal justice, all three violate

[535] See *supra* note 11.

[536] LaFave, *supra* note 2, at 725-727 (discussing the "natural and probable consequence" rule in various American jurisdictions, which is very similar to that adopted in international criminal justice); JACQUES-HENRI ROBERT, DROIT PÉNAL GÉNÉRAL 350 (6e éd. refondue. ed. 2005) (setting out how an accomplice's acts are unlawful if the crime actually committed injures the same *legal interest* as that the accomplice considered); Bohlander, *supra* note 2, at 167-173 (indicating that in German law, dolus eventualis will suffice for the accomplice's intent); Ashworth, *supra* note 110, at 415-420 (discussing English jurisprudence that makes it adequate that the accomplice knows of the "type" of crime the perpetrator will commit).

[537] Ashworth, *supra* note 109, at 419 (cogently pointing out that "the accomplice knows that one or more of a group of offences is virtually certain to be committed, which means that in relation to the one(s) actually committed, there was knowledge only of a risk that it would be committed - and that amounts to recklessness.").

the principle of culpability in certain circumstances because they all tolerate the imposition of a crime's stigma in situations where the person convicted of the offense did not make the blameworthy choice necessary *to be found guilty of that particular offense*. Many point out the perversity of using JCE III to escalate blame for genocide in this manner, but what about instances where complicity has an identical effect?[538] With accessorial liability, individuals are also held responsible for genocide where they knew or were merely aware that genocide was one of a number of crimes that would "*probably* be committed."[539] These scenarios, which are actually more common in practice, violate culpability too. Tellingly, these violations are explicitly based on examples drawn from a host of western systems.[540]

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[538] Prosecutor v. Ntakirutimana and Ntakirutimana, Cases Nos. ICTR-96-10-A and ICTR-96-17-A, Judgment, ¶ 497 (Dec. 13, 2004) ("…this standard (knowledge) does not extinguish the specific intent requirement of genocide. To convict an accused of aiding and abetting genocide based on the "knowledge" standard, the Prosecution must prove that those who physically carried out crimes acted with the specific intent to commit genocide.").

[539] The most famous use of complicity to escalate responsibility occurred in the Krstić case, were the Appeals Chamber of the ICTY overturned the Trial Chamber's conviction of General Krstić as a principal perpetrator in genocide, substituting a conviction for the same crime through complicity. This was necessary, according to the Appeals Chamber, because "[t]here was a demonstrable failure by the Trial Chamber to supply adequate proof that Radislav Krstić possessed the genocidal intent." Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment, ¶ 134 (Apr. 19, 2004). There are, however, many more cases that adopt the same position. For a small subset of such cases across various international criminal tribunals, see Prosecutor v. Krnojelac, *supra* note 84, at 52 (finding that for the crime against humanity of persecution that "the aider and abettor in persecution, an offense with a specific intent, must be aware... of the discriminatory intent of the perpetrators of that crime," but "need not share the intent"). Prosecutor v. Fofana, *supra* note 129, at 145 ("In the case of specific intent offences, the aider and abettor must have knowledge that the principal offender possessed the specific intent required."); Prosecutor v. Bagosora, Case No. ICTR-98-41-T, Judgment, ¶ 2009 (Dec. 18, 2008) ("[i]n cases of specific intent crimes such as persecution or genocide, the aider and abetter must know of the principal perpetrator's specific intent.").

[540] See the discussion of French, German, Swiss, English, Canadian and Australian law within the Krstić Appeal Judgment, which ultimately carried the day in what would rapidly become the accepted position across all international criminal tribunals. Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment, ¶ 134 (Apr. 19, 2004).

Why then are all these standards conceptually problematic? Let us consider the reckless standard of complicity first. On a positive note, recklessness is at least very candid about its function—it avoids complicity being rendered "a dead letter".[541] The argument hinges on the inability to know the future with certainty. Even if member X of a criminal gang provides her terrorist colleague Y with a nuclear warhead for a specific terrorist mission, X cannot know with certainty that a crime will transpire.[542] Short of knowing that water will flow downhill or that the sun will rise in the East, no one can know with certainty what the future will involve, and surely few human actions ever acquire a degree of predictability anywhere close to the direction of the Earth's rotation or laws of physics.[543] Thus, argue the recklessness advocates, we either deny that complicity exists for assistance in advance of the crime (because people can seldom *know* what others will do in the future) or we apply a standard closer to recklessness for accomplices who choose to undertake acts they know are inherently risky.[544]

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[541] BRENT FISSE & COLIN HOWARD, HOWARD'S CRIMINAL LAW 332 (5th ed. 1990).

[542] *Id*.

[543] *Id*. Stephen Shute sees an ability to predict natural phenomena like the sun rising in the East as undermining the argument that "[i]n the strictest sense of the word one cannot 'know' that something will be the case in the future." Stephen Shute, *Knowledge and Belief in the Criminal Law*, *in* CRIMINAL LAW THEORY: DOCTRINES OF THE GENERAL PART 171, 186-187 (Stephen Shute & A. P. Simester eds., 2002); I am doubtful whether these examples do enough to account for Fisse's point about knowledge. Natural phenomena like the sun rising tomorrow are merely examples of future events we can predict with the highest degree of certainty, but these illustrations do not mean that awareness of a probability is automatically equivalent to knowledge. To my mind, G.R. Sullivan offers a more accurate explanation by accepting that we *can* know what the laws of physics will produce in the future, but that many cases involving decisions about what defendants knew of other people's future acts "afford graphic demonstrations of how statutory language is sometimes completely overridden." G.R. Sullivan, *Knowledge, Belief, and Culpability*, *in* CRIMINAL LAW THEORY: DOCTRINES OF THE GENERAL PART 207, 215 (Stephen Shute & A. P. Simester eds., 2002).

[544] Fisse and Howard, *supra* note 148, at 332.

The competing criticisms of recklessness are, however, equally compelling. For many, embracing reckless complicity would require us to continuously vet those with whom we have dealings so that we can ensure that our interactions do not lead to potentially wide-ranging criminal harm. This, according to many scholars, would have the unsavory consequence of creating "blank cheque responsibility",[545] where the aider becomes responsible for all foreseeable consequences of their daily public interactions, transforming the average citizen into an "unpaid auxiliary policeman".[546] Beyond unduly infringing upon liberty and individual autonomy, a reckless standard of complicity would offend liberal notions of punishment and inhibit social intercourse.[547] To return to Glanville Williams, "[t]he law of complicity makes me my brother's keeper, but not to the extent of requiring me to enquire whether he is engaging (or proposing to engage) in iniquity, when my own conduct (apart from the law of complicity) is innocent."[548]

But is this *always* the case? Notice how neither side of this debate mentions desert, even though scholars of international criminal justice rightly hold the concept dear. To

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[545] Smith, *supra* note 102, at 13.

[546] Williams, *supra* note 134, at 101.

[547] Kadish, *supra* note 101, at 353 ("A pall would be cast on ordinary activity if we had to fear criminal liability for what others might do simply because our actions made their acts more probable.") As I set out in the next paragraph, Kadish does not himself agree with this argument.

[548] Williams, *supra* note 134, at 101. Apart from the responses to this line of argument I set out below, I also find Glanville William's argument that recklessness "requir[es] me to enquire" misleading. One either assists someone believing that there is a substantial probability that they will use your assistance to perpetrate a crime, or one declines to offer that assistance. In either scenario, the duty to enquire does not enter in, and the metaphor of unpaid auxiliary police is unsubstantiated. The position assimilates complicity with omission liability perfectly, when there are important differences between these two types of derivative liability. See Fletcher, *supra* note 34, at 676-677 (concluding a comparison between omission and complicity by highlighting the differences between the two, many of which undermine William's arguments).

conform with desert and its analog culpability, recklessness should be appropriate as a standard of liability for the accomplice when it is adequate for the perpetrator. After all, recall that we earlier measured culpability by referencing elements of each particular crime. The argument conveniently dovetails with claims that using reckless as a standard for complicity *where recklessness suffices for the crime in question* would not imperil an individual's autonomy or chill normal social interchange any more than reckless perpetration already does.[549] Consequently, there is no generic difficulty to reckless complicity as such; it is really the application of recklessness across international crimes whose mental elements vary that is unduly harsh. At present, this is the dominant scenario in international criminal law.

The knowledge standard for complicity is just as objectionable, albeit for slightly different reasons. As we have seen, a primary objection to the knowledge standard is that it is an epistemological impossibility for the vast majority of human actions,[550] which probably explains why international criminal jurisdictions follow the many national systems that allow knowledge to surreptitiously dilute into recklessness. All the same, the knowledge standard presents another special peculiarity—knowledge of what? The dilemma is that the offense itself does not help answer the question. After all, many

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[549] Kadish, *supra* note 14, at 387 ("It is not evident to me that subjecting actors in these circumstances to liability for a crime of recklessness need greatly imperil the security of otherwise lawful activities, certainly not any more than holding actors liable for recklessly 'causing' harms, which the law regularly does. People aren't all that unpredictable."); Larry Alexander, *Insufficient Concern: A Unified Conception of Criminal Culpability*, 88 CAL. L. REV. 931, 944-947 (2000) (defending reckless complicity against arguments of overreach). For the traditional response to these arguments, see Simester, *supra* note 46, at 588-560.

[550] See *supra* note 142.

international crimes make no mention of knowledge whatsoever.[551] So as soon as one utters the word knowledge, a whole series of deeply complicated, highly debated and ultimately inconsistent responses arise,[552] born of "uncertainty as to whether the law should be concerned with [the] mental state relating to [the accomplice's] own acts of assistance or encouragement, to his awareness of the principal's mental state, to the fault requirements for the substantive offense involved, or some combination of the above."[553] Unfortunately, in certain contexts, this uncertainty has permeated into international criminal jurisdictions too.[554]

Complication, however, is not the knowledge standard's worst fault. The greater concern is that knowledge also violates culpability since, in David and Goliath fashion, it too overpowers higher mental elements. As previously mentioned, knowledge usually suffices for conviction of international crimes requiring special intents,[555] allowing the

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[551] The offense need not mention knowledge at all. For a war crime like declaring no quarter be given, the basic requirement is only that the perpetrator declared or ordered that there shall be no survivors, and that the declaration or order "was given in order to threaten an adversary or to conduct hostilities on the basis that there shall be no survivors." These elements make no mention of knowledge, leaving a great deal of ambiguity about what the accomplice needs to know in order to be convicted of the offense. This ambiguity also leads to terrible complexity. For example, see LAW COMMISSION, PARTICIPATING IN CRIME, Law Com No. 305 (2007) (UK) (detailing the tremendous complexity of the knowledge based system within England and Wales)

[552] Weisberg, *supra* note 109, at 233 (exploring different interpretations of these three elements); Grace E Mueller, *The Mens Rea of Accomplice Liability*, 61 S. CAL. L. REV. 2169, 2174 (1987), (arguing that, because of these multiple points of inquiry, confusion has existed concerning the mens rea element of accomplice liability for years).

[553] LaFave, *supra* note 2, at 324.

[554] See the summary of inconsistent approaches, and the advent of the double intent in Prosecutor v. Orić, Case No. IT-03-68-T, Judgment, ¶ 286-288 (June 30, 2006).

[555] See above, note 128.

weaker complicity standard to eviscerate the stronger character of the crime. Like genocide, other international offenses from pillage to torture are said to demand a specific purpose, for which knowledge should be perfectly inadequate.[556] For each of these crimes, the objective contribution to the crime must be carried out for a concrete purpose (to destroy, extract information, or for personal or private use). Therefore, by merely requiring knowledge as a necessary mental state for conviction, the test harks back to the characteristics of other international modes of liability so many scholars denounce as excess.

Perhaps purpose is the solution for complicity then? Alas, the purpose standard only fares marginally better—it over-corrects then veers from the path of culpability too. True, in many of the jurisdictions that seemingly embrace purpose, the over-compensation is intentional. The drafters of the US Model Penal Code, for instance, concluded that the purpose standard was the preferable mental element for accessorial liability in order to offset the indirect nature of the accomplice's contribution to the criminal harm.[557] While this approach is often celebrated as a laudable liberal adjustment to normal principles, we

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[556] ICC Elements of Crimes, *supra* note 76, at 26 (pillage requires that the perpetrator intended to deprive the owner of the property and to appropriate it *for private or personal use*,) I am compelled to add, I strongly disagree that this notion of private or personal use is workable or reflects customary international law. See JAMES G. STEWART, CORPORATE WAR CRIMES: PROSECUTING PILLAGE OF NATURAL RESOURCES 19-23 (2010).; *id.*, at 14 (the war crime of torture requires the perpetrator to be aware of the factual circumstances that established the protected status of the victim under the Geneva Conventions of 1949).

[557] Evidently, the point was the subject of heated discussion. See Model Penal Code Commentaries (Philadelphia: American Law Institute, 1985), § 2.06, 318-319 (noting that while the Chief Reporter for the Model Penal Code favored a standard broader than purpose, the Institute rejected the position after tense debate). See also, Simester, *supra* note 46, at 583 (arguing that the protection of potential victims and the preservation of liberties for potential defendants "demand more stringent mens rea standards for secondary liability than is needed to establish culpability.").

should reflect momentarily on its implications—by this doctrine an accomplice who acts in such a way that she not only satisfies the mental element of the crime but makes an essential contribution to its realization is absolved of liability. And yet, if we maintain principle, this too misapplies desert and mis-communicates responsibility.

For one reason, an accessory who assists a crime with intent, recklessness or negligence is not responsible, even though these mental elements are by far and away the most prevalent within the criminal law. Why is our faith in culpability so easily shaken here? If the mental element set out in the criminal offence really does define the degree of *culpability* associated with a crime (as many excellent critiques of other modes of liability in international criminal justice assert), then should it not also define the accomplice's *desert* too?[558] Otherwise, our method of identifying culpability is capable of manipulation based on arguments from policy, in ways we earlier rejected. If we adopt a more sound approach to culpability, then *purpose* is very frequently an unjustifiable over-compensation that, in the final analysis, leads to potentially serious under-punishment.

Coincidentally, a utilitarian concept of responsibility would support the same conclusion. For a utilitarian view of punishment, purpose is unattractive since deterrence (and therefore crime prevention) is maximized by punishing those who are aware of even

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[558] I.H. Dennis, *The Mental Element for Accessories*, *in* CRIMINAL LAW: ESSAYS IN HONOUR OF JC SMITH, 60 (Peter Smith ed., 1987) (criticizing the purpose standard as insensitive to retributive notions of desert); Sullivan, *supra* note 16, at 154-155 (arguing that in order for the accomplice to be convicted of the same offense as the perpetrator, retributive theory would require an equivalence of culpability.) For a competing perspective, see Simester, *supra* note 46, at 600 (arguing that "culpability is not enough... the better approach is to distinguish culpability from responsibility, and to focus on the latter.").

the slightest risk of harm.[559] Admittedly here, there are more complicated questions about over-deterrence, which require a careful calibration of complicity standards with the desire for free social intercourse, especially in the realm of business.[560] Nonetheless, utilitarian concerns tend to militate against adoption of the highest conceivable notion of blameworthy moral choice (i.e., purpose) across the entire panoply of international crimes, since complicity can achieve greater deterrence for such tremendous harm by setting the mental element at levels much closer to that defined in a crime. If recklessness suffices for perpetration of an offense, demanding that the accomplice assist the crime with the *purpose* of bringing it about under-deters accomplices.

Moreover, empirical research suggests that in many instances members of the public believe that the accomplice is blameworthy even though they did not share the perpetrator's criminal purpose. The subjects of one survey reported "stark disagreement" with the "elevation thesis" (*viz.* the idea that the mental element in complicity should be elevated to purpose, that is, beyond that required within the paradigm of the crime itself).[561] Instead, respondents assigned punishments to accomplices "who are knowing or even only reckless

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[559] If, to paraphrase Ian Dennis, more reckless facilitators are deterred, perhaps fewer atrocities will transpire. Dennis, *supra* note 165, at 60.

[560] R A Duff, *"Can I help you?" Accessorial Liability and the Intention to Assist*, 10 LEGAL STUD. 165 (1990); Glanville Williams, *supra* note 135, at 366–380; S Bronitt, "Defending Giorgianni - Part Two: New Solutions for Old Problems in Complicity" (1993) 17 CRIM U 305. For myself, I doubt whether business deserves the privileged status it often receives in the theoretical discussions of this topic, given that it merely represents one facet of social interaction where influence is rampant. What, for instance, about families, literature, music and teachers?

[561] PAUL ROBINSON & JOHN M DARLEY, JUSTICE, LIABILITY AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW 103 (1996).

with respect to the criminal outcome in instances in which the elevation view would assign no liability."[562] We might doubt the extent to which these findings could be extrapolated across an international community,[563] but the research does at least serve as further grounds for caution. Using purpose as the mental element for complicity may badly fail to match popular notions of responsibility, which would diminish international criminal justice's prospects of promoting reconciliation, transitional justice or other desired objectives. From both retributive and utilitarian perspectives then, purpose fails.

Where does this leave us? If the preceding analysis is correct, all static standards of complicity are indefensible. All fixed mental elements for accessorial liability (i.e., purpose, knowledge or recklessness) violate basic principles of blame attribution since in each, there will occasionally be a marked departure from culpability when the elements of the crime do not match those of the mode of liability. In these instances, complicity distorts an accused's degree of responsibility, either by amplifying culpability relative to the elements of the crime with which she is held responsible or artificially elevating culpability

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[562] *Id.* at 103. (concluding that "[f]rom the point of view of our respondents, the culpability requirement as to result should not be elevated to purposeful... instead, the offense should be graded according to the degree of culpability that the accomplice shows.").

[563] Anthony Duff argues that there is a conceptual problem with punishing at the supranational level, to the extent that "[c]alling someone to answer, holding someone responsible, is a communicative endeavor which presupposes normative community; normative community requires at least a modicum of mutuality" Anthony Duff, *Can We Punish the Perpetrators of Atrocities?*, *in* THE RELIGIOUS IN RESPONSES TO MASS ATROCITY 93 (Thomas Brudholm & Thomas Cushman eds., 2009). Although these criticisms are important, they do tend to overlook the growing practice of national courts prosecuting their own nationals for international crimes within domestic courts, and the supranational principle of complementarity, which seeks to institutionalize that shift towards trials in national communities. Moreover, the enforcement of international criminal norms in regional international courts, which represent a more homogenous community, may improve the case for international criminal adjudication. See for instance, William W Burke-White, *Regionalization of International Criminal Law Enforcement: A Preliminary Exploration*, 38 TEX. INT'L L.J. 729 (2003).

beyond its normal parameters to absolve her otherwise blameworthy conduct. In these situations, complicity will only conform with culpability out of chance couplings between mental elements within complicity and those required for crimes. Relative to desert, responsibility becomes arbitrary, replicating the very characteristics so many scholars deride in other international modes of liability.

The consequences are, needless to say, hard to overstate. First, these departures from fundamental principles of blame attribution are not nefarious creations of an illiberal international system; they are borrowed from domestic criminal systems that set bad examples. While JCE and superior responsibility's origins in domestic law are more easily concealed in only a portion of national jurisdictions, there can be little doubt that domestic criminal systems from the vast majority of the world adopt objectionable static mental elements for complicity. The oftentimes heated debate between proponents of these various standards has only obfuscated the reality that none are theoretically defensible, and that the solution lies in transcending rather than deepening terms of the current debate. In this light, international criminal justice's major sin is not that it has allowed policy interests or interpretative styles from branches of international law to crowd out criminal standards; but more that it has showed its domestic antecedents too much reverence.

Thus, if international criminal justice is to acquire normative coherence, it must disassociate itself from objectionable domestic precedent. How would a defensible alternative look? Well, if the only defensible conception of accomplice liability is one where the mental element is the same as that required for perpetration, complicity ceases to retain any independent identity over and above perpetration, at least at the level of moral

choice. And if complicity begins to dissolve into perpetration in this way, should modes of liability as a species not disappear along with it, for exactly the same reasons? In other words, if any static conception of a mental element within a mode of liability violates culpability relative to the mental elements in crimes (which vary from one crime to the next), should we not abolish modes of liability altogether in favor of a more capacious notion of perpetration? To a large extent, the answer to this question depends upon how complicity fares with respect to the second fundamental element of blame attribution. But, as we will soon see, the answer is no more positive.

D. The Physical Element of Complicity

We have established not only that complicity functions as a mode of liability in international criminal justice, but that many international crimes also require harm as a pre-condition for responsibility. Given these characteristics, causation is conceptually necessary to bind accomplices to proscribed criminality if there is any chance of placating the critics of other international modes of liability, and more basically, of respecting the principle of culpability. In other words, having attributed complicity an ultra-orthodox status in international criminal law, we are left with a stark and seemingly intractable choice between only two options: we either accept that causation is an element of accessorial liability, in which case it shares common features with perpetration; or we conclude that complicity is acausal in structure, in which case it violates principles of culpability in ways that scholars of international criminal justice rightly find reprehensible.

Surprisingly, international courts opt for the latter of these approaches. The accepted position before international courts and tribunals is that "proof of a cause-effect relationship between the conduct of the aider and abettor and the commission of the crime, or proof that such conduct served as a condition precedent to the commission of the crime, is *not* required."[564] Needless to say, this defies basic thinking in criminal theory. By this reasoning, international courts define complicity in such a way that it explicitly violates a principle international criminal lawyers view as cardinal; a principle they often employ to passionately censure the breadth of other modes of liability within the field; and a principle that theorists call foundational.

Thankfully, some action relative to the criminal harm is required of the accomplice in international criminal law. International courts and tribunals invariably stipulate that "the actus reus of aiding and abetting is that the support of the aider and abettor has a *substantial effect* upon the perpetration of the crime."[565] But alas, this merely adds new layers of ambiguity to already opaque waters. What could it possibly mean to have a substantial

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[564] Prosecutor v. Blaškić, *supra* note 88, at 48 (emphasis added); For a different rendering of the same idea, see Prosecutor v. Lukić and Lukić, Case No. IT-98-32/1-T, Judgment, ¶ 901 (July 20, 2009) ("There is no requirement of a causal relationship between the conduct of the aider or abettor and the commission of the crime."). The same standard has spread to other international criminal tribunals. Prosecutor v. Fofana, *supra* note 129, at 143 (same); Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T, Judgment, ¶ 33 (June 7, 2001) ("the assistance given by the accomplice need not constitute an indispensable element, i.e. a *conditio sine qua non*, of the acts of the perpetrator.").

[565] Prosecutor v. Blaškić, *supra* note 88, at 48; Prosecutor v. Blagojević and Jokić, Case No. IT-02-60-A, Judgment, ¶ 187 (May 9, 2007) ("the Appeals Chamber reiterated that one of the requirements for the actus reus of aiding and abetting is that the support of the aider and abettor have a substantial effect upon the perpetration of the crime"); Ndindabahizi v. The Prosecutor, Case No. ICTR-01-71-A, Judgment, ¶ 117 (Jan. 16, 2007) (a conviction for aiding and abetting presupposes that the support of the aider and abetter has a substantial effect upon the perpetrated crime."); Prosecutor v. Brima, *supra* note 32, at 775 ("The actus reus of 'aiding and abetting' requires that the accused gave practical assistance, encouragement, or moral support which had a substantial effect on the perpetration of a crime.").

effect upon the perpetration of a crime *without* causing it?[566] The puzzle is how courts can simply do away with causation in favor of this *substantial effect* standard, when by all accepted wisdom, "there is no way of contributing to any result, directly or indirectly, except causally."[567]

The origins of this substantial effect test are obscure in international criminal law,[568] but we can speculate. Perhaps the position was tacitly influenced by English criminal theory, which has traditionally harbored a marked distaste for the view that an accomplice could *cause* the perpetrator's crime. Following the seminal work of H.L.A. Hart and Tony Honoré on causation, the large majority of commentators within the English-speaking world have argued that the volitional actions required to convict the direct perpetrator preclude the claim that the accomplice too *caused* the harm.[569] The perpetrator made a

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[566] The idea is reminiscent of a cartoon in the New Yorker magazine that depicts a meeting between three businesspeople, where one comments to another "we want to include you in this decision without letting you affect it." See *The Cartoon Bank*, (2011) http://www.cartoonbank.com/2011/we-want-to-include-you-in-this-decision-without-letting-you-affect-it/invt/137184/

[567] Gardner, *supra* note 72, at 443.

[568] The International Law Commission's Draft Code of Crimes Against Peace and Security of Mankind adopted a definition of aiding and abetting that required the accomplice to assist "directly and substantially", but the only justification for this was that this was "intended to limit the application of the Code to those individuals who had had a significant role in the commission of a crime". International Law Commission. Summary of the 2437th Meeting, Consideration of the Draft Articles on Second Reading, 6 June 1996, para. 26. The two international judgments that initially endorsed the substantial effect standard relied on the ILC recommendation, together with a selection of WWII caselaw that made no direct mention of substantial effect. See Prosecutor v. Tadić, *supra* note 128, at 688-692); Prosecutor v. Furundžija, *supra* note 137, at 219-231. Accordingly, I conclude that the true criminological motivations for the substantial effect doctrine are mainly unarticulated.

[569] Hart and Honoré, *supra* note 71, at 41 ("A deliberate human act is therefore most often a barrier and a goal in tracing back causes in such inquiries: it is something through which we do not trace the cause of a later event and something to which we do trace the cause through intervening causes of other kinds."); *Id.,* at 129 ("the free, deliberate and informed act or omission of a human being, intended to produce the consequence which is in fact produced, negatives causal connection.").

decision; this interrupts all earlier causal influence, and acts as an intervening cause. On this account, the accomplice's actions are no more the cause of a crime than the perpetrator's genes, family history and socio-economic background, all of which undoubtedly provide influence, without overriding the perpetrator's blameworthy moral choice.[570] Could this reasoning possibly explain the doctrinal ambiguity in the modern international criminal understanding of the relationships between causation and complicity?

It seems doubtful. While Hart and Honoré's work has proved seminal, a competing line of authority has long recognized that in some instances, the perpetrator's actions join rather than break causal chains created by an accomplice.[571] For example, if X pays a hit-man to assassinate his wife, arranges for the wife to be at a specific location at a time he discloses to the hit-man; provides the hit-man with the weapon necessary for the crime and subsequently disposes of his wife's dead body, there is little trouble in declaring that X

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[570] Kadish, *supra* note 101, at 333 (arguing that otherwise, we do violence to notions of agency and the conception of a human action as freely chosen upon which we depend to convict the perpetrator).

[571] Moore, *supra* note 72, at Part IV, The Legal Presupposition of There Being Intervening Causes (criticizing Hart and Honore's views that voluntary actions are intervening causes). Feinberg, *supra* note 23 (arguing, contrary to Hart and Honoré, that "there is no conceptual barrier, at least none imposed by common sense, to our speaking of the causes of voluntary actions."); In particular, Feinberg's conceptual distinction between "causing a person to act" and "making him act" offers a strong critique of Hart and Honoré's thesis. *Id.* at 161, 165 (arguing that although a mother clearly played some (albeit extremely remote) causal role in her 30-year old son's crime by merely having given birth to the perpetrator, it would be "misleading in the extreme" to suggest that his mother thirty years earlier "made" him perpetrate the crime.) For further criticism of Hart and Honoré's thesis, see Smith, *supra* note 87, at 68-70 ("it is possible to construct counter-examples where actions, while voluntary within the meaning accorded by Hart and Honoré, are in 'common speech' reasonably describable as 'caused' by another.") For a similar position in German criminal theory, see GEORGE FREUND, in: Wolfgang Joecks, Klaus Miebach and Bernd von Heintschel-Heinegg (ed.), MUNCHENER KOMMENTAR ZUM STRAFGESETZBUCH BAND 1 1 §§ 1-51 StGB, 2003, Vor §§ 13 ff., marginal number 318; CLAUS ROXIN, Strafrecht. Allgemeiner Teil Band I: Grundlagen, Der Aufbau der Verbrechenslehre, 4th ed. 2006, § 11, marginal number 28, at p. 363.

caused his wife's death.[572] Was X the actual perpetrator (in the sense of breaking the glass)? Obviously not; the crime was committed by the hit-man. Nevertheless, we are by no means precluded from simultaneously holding the hit-man responsible for the killing, given that we have little difficulty saying that both X and the hit-man caused the wife's death.[573] So if Hart and Honoré's vision of perpetrators *always* acting as intervening causes was the inspiration for the international rule, the choice was poor.

Perhaps the motivation for abandoning causation in complicity stemmed from a different concern, namely that the crimes would have occurred whatever the accomplice did.[574] In many instances, complicity is over-determined insofar as the accomplice's assistance was readily substitutable for the assistance of someone waiting in the wings. To return to the Zyklon B example, if the Nazis had access to a long line of willing suppliers of

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[572] Moore, *supra* note 17, at 422-423; Christopher Kutz, *Causeless Complicity*, 1 CRIM. L. PHIL. 289, 294 (2007). In fairness to Hart and Honoré, they viewed instigation as an exception to their general rule that voluntary action breaks causal chains, but as Joel Feinberg retorts "they put forward no more general principle to explain why the exceptions are exceptions." Feinberg, *supra* note 29, at 153.

[573] International criminal courts and tribunals confirm as much. For instance, in the media case where representatives of the Radio television libre des mille collines (RTLM) were convicting of inciting genocide, the Rwanda Tribunal held that "[t]he nature of media is such that causation of killing and other acts of genocide will necessarily be effected by an immediately proximate cause in addition to the communication itself. In the Chamber's view, this does not diminish the causation to be attributed to the media, or the criminal accountability of those responsible for the communication." Prosecutor v. Nahimana et al., *supra* note 76, at 952.

[574] There is some support for this thesis. Both of the first cases to address complicity in modern international criminal justice refer to the problem of over-determination within the context of discussions of the substantial effect doctrine. See (Prosecutor v. Tadić, *supra* note 128, at 688 (acknowledging that "in virtually every situation, the criminal act most probably would have occurred in the same way had not someone acted in the role that the accused in fact assumed"). Prosecutor v. Furundžija, *supra* note 137, at 224 (discussing a WWII case the defendant claimed that his conduct in no way contributed to the crimes because others would have taken his place). Nonetheless, this explanation is not entirely convincing, since the same judgment also acknowledged that "the culpability of an aider and abettor is not negated by the fact that his assistance could easily have been obtained from another." *Id.*

chemical asphyxiants (or variants that had comparable effects), then it would be difficult to argue that the suppliers of Zyklon B really *caused* the unspeakable consequences their chemicals enabled. As one of the defendants claimed, had he not agreed to supply the chemicals to Auschwitz, "the S.S. would certainly have achieved their aims by other means."[575] Which judge, who knew anything about the stunning efficiency of the Nazi regime, could doubt the claim? So if causation means "but for" causation then, even if this firm did not furnish the S.S. with the means of exterminating humans, the horror of Auschwitz would still have unfolded almost identically. Thus, these particular vendors of Zyklon B did not really *cause* anything.

This position, however, presumes an ill-informed notion of causation. In the vast literature on the topic, over-determination features as a recurrent theme.[576] Throughout this extensive treatment, over-determined causes are consistently treated as a form of causal contribution, not grounds for adopting a substantial effect test in lieu of basic principles.[577]

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[575] UNITED NATIONS WAR CRIMES COMMISSION, *supra* note 116, at 102; indeed, even if the S.S. were bent on using Zyklon B for the purposes, there were many other sources. Representatives of the firm I.G. Farben were also prosecuted for supplying large quantities of Zyklon-B that "was actually used in the mass extermination of inmates of concentration camps, including Auschwitz." UNITED NATIONS WAR CRIMES COMMISSION, Trial of Carl Krauch and Twenty-Two Others "The I.G. Farben Trial," 10 LAW REPORTS OF TRIALS OF WAR CRIMINALS 1, 23-24 (1947).

[576] For an elegant philosophical discussion of the problem, which draws on examples of complicity, see Jonathan Glover, *It Makes No Difference Whether or Not I Do It,* 49 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY (1975) (discussing over-determination with reference to a scientist producing chemical and biological weapons); Kutz, *supra* note 105 (exploring the responsibility of pilots in the Dresden fireboming on the basis of over-determined causes); JOHN GARDNER, OFFENCES AND DEFENCES: SELECTED ESSAYS IN THE PHILOSOPHY OF CRIMINAL LAW 57 (2008) (discussing over-determined causality in the context of complicity, although he does not use the term over-determination).

[577] Hart and Honoré, *supra* note 71, at 117-119 (discussing what they describe as additional causes, and the need for assessing sine qua non based on events that occurred "in this particular way"); Smith, *supra* note 102, at 84 ("the sine qua non condition is concerned with an event's exact occurrence, including time, place,

In line with this reasoning, a slew of commentators from different legal traditions consider that *sine qua non* causation must be assessed relative to events "as they took place",[578] in order to avoid allowing defendants like these to wash their hands of responsibility. So, by selling vast quantities of chemical gases to the S.S. for use in Auschwitz, Dr. Tesch and his colleagues made an important causal contribution to the mass killing *as it actually transpired*. After all, ignoring how things actually transpired would mean that no one could ever *cause* murder. Everyone eventually dies, so the serial killer merely modifies the time, place and manner of an inevitability. Clearly, the modifications matter.

In fact, if there is a deeper unspoken influence in this perplexing international account of complicity, it may herald from an unlikely domestic source. In a surprising parallel with international principles, German courts apply what is described as a *furtherance formula* ("Förderungsformel"), according to which, the aider and abettor need not have caused but must have actually furthered ("tatsächlich gefördert") the perpetrator's crime.[579] And yet, the vast majority of German academics strongly disagree with this

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extent and type of harm, and so on."); Tatjana Hörnle, *Commentary to "Complicity and Causality,"* 1 CRIM. L. PHIL. 143, 144 (2006) (using the example of a firing squad to show how the "subtraction method" of calculating causation leads to injustice, which might be overcome by focusing on events "as they happened."); For criticism that this approach misuses the term causation, see Yeager, *supra* note 110, at 29 (arguing that this approach "simultaneously uses a word [cause or causation] in a special or technical sense that need not confirm to our ordinary use of the word, while still trading on what we normally mean by it."). Likewise, for further criticisms, see Moore, *supra* note 15, at 406-407.

[578] *Id.*

[579] RGSt 58, 113 (114-115) (Entscheidungssammlung des Reichsgerichts in Strafsachen Vol. 58, p. 113, at pp. 114-115"). See also, CLAUS ROXIN, Strafrecht. Allgemeiner Teil Band II : Besondere Erscheinungsformen der Straftat, 2003, § 26 marginal number 186, at p. 194.

approach on the predictable grounds that it unjustifiably discards causation.[580] In fact, they are only consoled by the impression that the *furtherance formula* probably differs little in practice from causality, especially when causation is calculated based on "the harm in its concrete appearance."[581] The parallel is illuminating. Even if the influence of this German position on the international rule is unavoidably speculative, its incongruity with accepted theory should dampen our assurance that unprincipled international rules necessarily reveal the triumph of international agenda over the restraining force of the criminal law—departures from principle are ubiquitous.

If all this is sound, we are still left with the challenge of rescuing the international definition of complicity from the jaws of domestic incoherence. To achieve this, the standard international position requires inversion. If we remove the word "not" from the accepted judicial reasoning,[582] the legal position becomes that "proof of a cause-effect relationship between the conduct of the aider and abettor and the commission of the crime *is* required," and having a *substantial effect* on a crime (in the sense of making a causal contribution to events as they transpired) *is* a form of causation. This quick (but admittedly major) fix protects complicity against the criticisms other modes of liability have correctly

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[580] See, WOLFGANG JOECKS, in: Wolfgang Joecks, Klaus Miebach and Bernd von Heintschel-Heinegg (ed.), Münchener Kommentar zum Strafgesetzbuch. Band 1 §§ 1-51 StGB, 2003, § 27, marginal numbers 23-37; STEPHAN A. OSNABRÜGGE, Die Beihilfe und ihr Erfolg. Zur objektiven Beziehung zwischen Hilfeleistung und Haupttat in § 27 StGB, 2002, at 159-160, 261; Roxin, *supra* note 178.

[581] Joecks, *supra* note 188, at marginal number 27; Roxin, *supra* note 178.

[582] To recall, the accepted position in international criminal justice is "proof of a cause-effect relationship between the conduct of the aider and abettor and the commission of the crime, or proof that such conduct served as a condition precedent to the commission of the crime, is not required." See *supra* note 166 and accompanying text.

endured within the field by ensuring that causality plays a role in allocating blame to the accomplice. But it still leaves one further matter conspicuously unexplored: why must the accomplice's effect be *substantial*?

At first blush, this requirement is just as bizarre as the others. On the prevailing account of causation, an action is either a cause of an event or it is not—why the extra element? Again, the pull of mainstream domestic notions of complicity probably explains the doctrinal position. In both Anglo-American and Continental traditions, concepts of proximity or normative attribution intervene to preclude responsibility, where the causal contribution is trivial, remote or unusual.[583] A member of the public who opens the door of a bank to let in a robber; [584] a restaurateur who serves a murderer dinner prior to a killing; or an onlooker who encourages the beating of a man who subsequently dies in an accident on the way to the hospital all make causal contributions to criminal harm, but these contributions are deemed too remote to warrant criminal punishment. The *substantial effect* doctrine precludes liability even though the assistance in each of these scenarios unequivocally contributed to crimes *as they transpired*.

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[583] Fletcher, *supra* note 33, at 590 ("Because the causal link is limitless, some new concept must be devised to eliminate far-flung effects from the range of liability. Common lawyers speak about proximate cause".); in German criminal theory, normative attribution ("objektive Zurechnung") is considered an additional element of any actus reus, in order to restrict the broad effect of causality. CLAUS ROXIN, STRAFRECHT: ALLGEMEINER TEIL. GRUNDLAGEN, DER AUFBAU DER VERBRECHENSLEHRE 372 (2006); HEINZ KORIATH, KAUSALITÄT UND OBJEKTIVE ZURECHNUNG 15 (1 ed. 2007) (discussing the implications of normative attribution); MANFRED MAIWALD, KAUSALITÄT UND STRAFRECHT. STUDIEN ZUM VERHÄLTNIS VON NATURWISSENSCHAFT UND JURISPRUDENZ 4-5, 9 (1980); for a helpful English language summary, see Krey, *supra* note 28, at 59-101.

[584] I borrow the example from Joshua Dressler, although he uses it in a different context. Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L. J. 91, 133 (1985).

Perhaps the incorporation of the substantial effect doctrine in international criminal law reveals the positive side of domestic influence, even if it is part and parcel of a dependence that sometimes has perverse consequences. In some instances, international criminal justice imitates bad domestic examples that transgress culpability; but othertimes, domestic influences serve commendable liberal purposes. If normative attribution does explain the need for a substantial effect it might fit into the latter category, even if the process of absorption into the international is not more conscious than that which produces international standards of blame attribution scholars rightly reject. In either case though, international political agenda and interpretative cultures from other branches of international law appear to play only back seat roles to the driving force of preconceptions derived from domestic criminal law.

In any event, once we return to the substance of complicity, our analysis indicates that it a defensible notion of complicity incorporates both causation and normative attribution (or its equivalent proximity). As soon as we recognize this, we are immediately drawn back into Gardner's "splendid paradox": if these elements are common to perpetrator and accomplice alike, why are accomplices not simply a subset of perpetrators?[585] As Michael Moore asks, "[a]ll substantially cause the harm, so why is one treated as an accomplice and the others treated as principals?"[586] To answer this, we must next investigate whether there is anything that necessitates a distinction between perpetrators

[585] Gardner, *supra* note 9, at 231. Gardner views the paradox as more apparent than real because causal relations come in stronger and weaker versions. *Id.*

[586] Moore, *supra* note 39, at 423.

and accomplices *at the stage of attribution*, and assuming a negative answer, whether complicity (like modes of liability in international criminal justice generally) occasions more departures from coherent philosophical principles, doctrinal uncertainties and hours of costly intellectual labor than it is worth.

III. Towards a Unitary Theory of Perpetration for International Crimes

Up until now, we have observed how causation and the moral choice contained in the definition of the crime are necessary conditions for allocating blame to the perpetrator *and the accomplice*. I now argue that these criteria are also sufficient. Although I do not endorse any particular incarnation of the unitary theory, the Austrian concept of perpetration offers helpful introductory flavor: "a punishable act is not simply committed by the person who is a direct author of it, but also by all other persons who cause another to execute it or who contribute in any other manner to its execution. Consequently, the distinction between perpetrators, instigators and accomplices is only of interest in order to permit the judge to individualize the sentence, he who plays a modest role being punished less than essential actors."[587] In the discussion that follows, I first inquire whether there is

[587] Article 12, Austrian Criminal Code, translated from the French version in Pradel, *supra* note 15, at 133. It is interesting to note that according to § 15 sec. 2 of the Austrian Penal Code, the attempt to facilitate an offense is not punishable. This reveals that the Austrian system still requires a distinction between instigators and aiders and cannot therefore be considered a pure unitary system. I am grateful to Thomas Weigend for the point.

anything of a normative nature that theoretically *precludes* this approach in the abstract, then offer a range of pragmatic reasons why a similar approach for international crimes may be preferable to the status quo.

A. An Abstract Theoretical Defense

International criminal justice's response to the Hitler-as-accomplice dilemma has played out in three overlapping phases. Initially, superior responsibility emerged as the theoretical response, but its popularity was quickly surpassed by the rise of joint criminal enterprise as the new prosecutorial doctrine of choice. Even though both of these modes of liability were drawn from Anglo-American criminal traditions then incorporated into the corpus of international criminal law as "sui generis" forms of responsibility in international law,[588] they both over-extend basic principles of criminal responsibility. As this became increasingly apparent, these initial solutions for the problem were denounced as illiberal, sending decision-makers, practitioners and academics back to the drawing boards. Once again, they would look for domestic examples, this time drawing on the German doctrine used to separate perpetrators from accomplices as the next borrowed domestic solution. Arguably, this was another false step.

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[588] In my view, any time a court refers to a mode of attribution as "sui generis," the latin acts as a mask for the departure from basic principles. The phrase is thus a telltale sign that the mode of liability cannot be philosophically justified. Prosecutor v. Halilović, *supra* note 52, at 78 ("The Trial Chamber further notes that the nature of command responsibility itself, as a sui generis form of liability, which is distinct from the modes of individual responsibility set out in Article 7(1), does not require a causal link"); Prosecutor v. Orić, *supra* note 152, at 293 ("the superior's responsibility under 7(3) of the Statute can indeed be called a responsibility sui generis.").

Early on in its existence, the International Criminal Court embraced the German "control over the crime" doctrine as a basis for differentiating perpetrators from accomplices.[589] On this understanding, Hitler was a perpetrator because he had hegemonic control over the atrocities in concentration camps, leaving the camp guards, bureaucratic administrators and vendors of Zyklon B as mere accomplices. Domestically, this "control over the crime" theory was viewed as a major advance on earlier objective and subjective notions of perpetration. The first of these viewed a perpetrator as someone who actually swung the machete, but this failed to account for the fact that a perpetrator could use an innocent agent to carry out a crime on her behalf. The second subjective theory focused uniquely on whether the actor takes the crime "to be his own," but this calculation cannot be easily established, and allows a person who perpetrates the crime with their own hand to be described as an accomplice.[590]

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[589] The standard was initially adopted in Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the confirmation of charges, ¶ 341 (June 15, 2009); See also Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07, Decision on the confirmation of charges, ¶ 486 (Sep. 30, 2008) (finding that the criminal responsibility of a person "must be determined under the control over the crime approach to distinguishing between principals and accessories."). The concept was also employed at the ICTY by one German judge, but the use of the doctrine was rejected on appeal. See Prosecutor v. Stakić, *supra* note 139, at 440; Prosecutor v. Stakić, Case No. IT-97-24-A, Judgment, ¶ 62 (Mar. 22, 2006) (finding that "[t]his mode of liability, as defined and applied by the Trial Chamber, does not have support in customary international law or in the settled jurisprudence of this Tribunal, which is binding on the Trial Chambers.").

[590] Fletcher, *supra* note 33, at 655 (pointing out that the subjective test was unworkable in practice because a trier of fact could not easily determine the attitude of the suspect at the time of the deed.); Schreiber, *supra* note 123, at 626 (detailing the criticism that the person swinging the machete could consider herself an accomplice, and thereby benefit from lower penalties afforded accessories). Ultimately, some consider that this could also lead to a situation where differences of opinion among assailants mean that there are no perpetrators of a crime at all. This would arise where all participants in a criminal offense believed that they left the decision whether to commit the crime to others. For a full discussion, see Olásolo et al., *supra* note 17, at 30-33.

This initial influence quickly led to a major invocation of German doctrine, even when certain doctrines were highly disputed domestically. The international experiment with "control over the crime" was soon followed by the adoption of German theories of co-perpetration, hitherto rejected in international criminal justice. Likewise, indirect perpetration was spawned as a viable mechanism for accounting for the Hitler-as-accomplice dilemma, at least in certain circumstances where the perpetrator's will was overcome by that of a mastermind at headquarters—in a command post, or behind a desk far from the bloodletting. To cap off the unconditional embrace of German criminal theory in international criminal practice, the ICC even adopted a more controversial German notion of functional perpetration through a bureaucracy,[591] even though one leading German theorist feared that this "may create more problems than it solves."[592]

Could the same thing be said for modes of liability *in toto*? Aside from the wider concern that these types of uncritical domestic transplants replicate the failed methodologies of the first two solutions to the Hitler-as-accessory dilemma, it also conceals major philosophical assumptions. One is especially important. Is there is any *necessary* distinction between perpetrators and accomplices? Perplexingly, the ICC treats the question as axiomatic; as if it is beyond all dispute. For instance, the decision that first adopts the

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[591] See the discussion of Organisationsherrschaft (control over an organization), in Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, *supra* note 179, at 498-518.

[592] Thomas Weigend, *Perpetration Through an Organization: The Unexpected Career of a German Legal Concept*, 9 J. INT'L CRIM. JUST. 91, 105 (2011) ("Since criminal liability for ordering or instigation is a sufficient basis for imposing severe sentences on responsible figures in the background of the actual crimes, adopting the notion of 'perpetration through an organization' may create more problems than it solves.").

doctrine into international criminal justice simply states that "the definitional criterion of the concept of co-perpetration is linked to *the distinguishing criterion* between principals and accessories to a crime where a criminal offence is committed by a plurality of persons."[593] We are told nothing more about why *the distinguishing criterion* is so conceptually inevitable, perhaps revealing a blindspot in the enthusiasm for law crafted in a particular domestic system.

In reality, the division is far from conceptually inevitable. A number of other jurisdictions happily dispense with it (and its attendant technicalities) in favor of only the two elements used to dissect international modes of liability like JCE and superior responsibility. What matters on a unitary account of perpetration it that the assailant made a substantial causal contribution to a prohibited harm while harboring the mental element necessary to make him responsible for that crime. To be clear, I do not consider that the unitary theory of perpetration is the only defensible account of perpetration or that differentiated models are inherently harsh. Quite the contrary, my ambition here is simply to point out that a unitary theory is at least as conceptually coherent as its counterpart.

To start, notice that the real question is not whether there is a moral difference between perpetration and complicity, but if there is such a difference, whether it must feature at the initial stage of determining liability rather than later during the sentencing

[593] Prosecutor v. Bemba, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶ 326 (June 15, 2009) (emphasis added). I add emphasis to the words *the distinguishing criterion* because the use of the singular, without further discussion, evidences an unquestioning allegiance to established dogma. This is precisely the parochial influence of the domestic that often influences international criminal doctrine too.

phase. There is no obvious structural impediment to taking accessories' generally relatively lesser culpability into account at the sentencing phase along with other factors that are important to culpability but extraneous to the label visited upon the accused. If a defendant's motive for the crime, co-operation during trial, or history of recidivism are factors that appropriately reflect on the sentence they *deserve*, what rationale exists for treating the defendant's "important criminal energy" differently?[594] Certainly, it is difficult to see why one would choose to maintain an overly complicated, ever-expanding and occasionally harsh set of "modes of liability" in international criminal justice, if a more streamlined system can also mitigate punishment as necessary.

To a large extent, this approach answers those who view perpetration and complicity as inherently distinct. For John Gardner, for instance, there is something innately privileged about being a perpetrator as compared with "mere" complicity,[595] such that "the attempt to eliminate complicity from the moral landscape, in favor of a more capacious domain of principalship, fails."[596] The distinction between principals and

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[594] I refer to "important criminal energy" because it is the classic justification for a distinction between perpetrators and accomplices founding German criminal theory. The argument is that extensive participation shows important criminal energy, and that qualitatively significant contributions are more culpable. So in contrast to the principal and instigator, whose contributions drive the wrongdoing, the aider's contribution is of minor relative significance. CLAUS ROXIN, STRAFRECHT, ALLGEMEINER TEIL. BD. 2: BESONDERE ERSCHEINUNGSFORMEN DER STRAFTAT 231 (1. A. ed. 2003); See also WOLFGANG JOECKS, KLAUS MIEBACH & GÜNTHER M. SANDER, MÜNCHENER KOMMENTAR ZUM STRAFGESETZBUCH. GESAMTWERK: MÜNCHENER KOMMENTAR ZUM STRAFGESETZBUCH 3. §§ 185 - 262 STGB: BD. 3 (1 ed. 2003) § 27, marginal number 1.

[595] John Gardner argues that the distinction between principals and accessories is embedded in the structure of rational agency. There is, in his view, a moral split between what one must do simpliciter, and what one must do by way of contribution to what someone else does. See Gardner, *supra* note 19, at 141.

[596] Gardner later acknowledges in response to critics that "the distinction between principals and accomplices might perhaps be excised from the law (e.g. for rule of law reasons), but… it cannot be excised from life." Gardner, *supra* note 183, at 253. I am tempted to read this as a concession that a unitary theory of perpetration

accessories, he argues, is embedded in the structure of rational agency—there is a moral split between what one must do *simpliciter*, and what one must do by way of contribution to what someone else does. While I tend to doubt the veracity of that claim,[597] observe how it does no work to maintain the segregated notion of complicity he defends—if there is such a distinction, it could figure at sentencing once the crime in question is coherently settled. Thus, the metaphysical distinction may well exist, but it has no obvious relevance for or against the unitary theory of perpetration.

Similarly, the derivative nature of complicity is also neutral as between differentiated and unitary models of perpetration.[598] George Fletcher, for instance, insists that "[p]erpetrators or principals are those who are directly liable for the violation of a norm; accessories are those who are derivatively liable."[599] This is perfectly unobjectionable as far as definitions of a differentiated system go, but the definition does not purport to address (let alone justify) the partition of forms of attribution into a differentiated model. Clearly, we cannot escape our earlier analysis of derivative liability

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is legally justifiable provided moral distinctions are respected within the sentencing phase, but I no doubt read more into the comment than he might accept.

[597] I doubt this because the point seems entirely contingent on the construction of the particular offence in question. If, for example, an offence is defined as "causing rape," then the criminal offence itself collapses the distinction between perpetrators and accomplices. Thus, if there is a distinction between perpetrators and accomplices, it is a byproduct of the drafting of criminal codes, not a innate property of principal perpetration or accessorial liability themselves. Curiously, the point is not entirely academic for international criminal justice—the war crime of "willfully causing great suffering or serious injury and cruel treatment" presumably furnishes a practical illustration. Conceptually, there is no difference between perpetrators and accomplices of this war crime, since treaty-makers have expunged any difference by employing causation in the crimes' definition.

[598] For background to the derivative nature of complicity, see *supra* Part II.B above.

[599] Fletcher, *supra* note 27, at 636.

entirely—an individual's responsibility for the glass others broke will always be at least partially derivative of at least one other person's wrongdoing,[600] but nothing impedes treating the considerable assistance Eichmann or others provide to direct perpetrators as one of very many means of *perpetrating* an international crime. Perpetrators *can also* be all those who contribute to a crime, whether directly or through another.

This brings us to grammatical arguments. For many, the literal construction of certain offenses uses terms that only a certain class of perpetrator can satisfy, creating a category of crimes often dubbed "non-proxyable."[601] The classic illustrations on non-proxyable crimes include bigamy (which only married people can perpetrate) and being drunk and disorderly in a public place (which only drunk people can perpetrate), so the argument is that a sober or unmarried person who assists these offenses cannot *perpetrate* the crimes. If these examples seem too distant from international criminal justice, consider Pauline Nyiramasuhuko, the Rwandan Minister of Women's Development, who was found guilty of rape for ordering militia under her influence to sexually violate Tutsi women by the thousands.[602] For many proponents of the "non-proxyable" problem, convicting Nyiramasuhuko as a perpetrator of rape intolerably pretends she has a capacity she does not—if rape is defined as requiring the insertion of a penis into a woman's vagina, she cannot be a perpetrator.

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[600] For discussion of the partial derivative nature of accomplice liability, see *infra* section III.A.2.

[601] Kadish, *supra* note 101, at 373; Smith, *supra* note 102 at 107-110; Moore, *supra* note 15, at 418-420; Gardner, *supra* note 19, at 127, 136.

[602] Prosecutor v. Nyiramasuhuko et al., Case No. ICTR-98-42-T, Judgment, ¶ 6087-6088 (June 24, 2011).

Yet, I am not confident that this reasoning holds any real normative value. This because complicity replicates the problem it is employed to solve—Nyiramasuhuko is found guilty of rape as an accomplice too.[603] So if accessorial liability also fails to solve the non-proxyable problem, these sorts of crimes are of no value in delimiting principal from accessorial liability. True, re-casting complicity as the inchoate crime of *criminal facilitation* might solve the problem outright (because Nyiramasuhuko would not be labeled a rapist), but as I have highlighted earlier, this ignores the sometimes tremendous harm accomplices' actions actually facilitate and discounts the fact that modern international criminal law unfalteringly treats complicity as a means of participating in the perpetrator's crime, not as a separate inchoate offence. As such, we can only soothe our anxieties about the non-proxyable problem by understanding that it is inevitable in a system that views harm as morally significant.

Indeed, the problem remains unresolved in ordering, instigating, JCE, superior responsibility, indirect perpetration, control over the act, co-perpetration and functional perpetration; in short, all modes of liability. With each of these doctrine, the perpetrator need *not* satisfy the physical element in a criminal code. So why give Nyiramasuhuko's anatomical status special significance over other physical elements in the definition of the crime? Doing so assumes an objective theory of perpetration: the assumption that the perpetrator is *only* the person who pulls the trigger, releases the gas, or, to borrow

[603] For proof of this in international criminal justice, see *supra* note 109 (showing that the dispositions of international courts and tribunals make no mention of complicity in over 95% of complicity cases that lead to conviction. Instead, they merely declare the name of the crime with which the accomplice is convicted.)

Eichmann's metaphor, breaks the glass. And yet, the objective theory of perpetration is entirely discredited elsewhere,[604] and the struggle for defensible solutions to the Hitler-as-accomplice dilemma in international criminal justice is a testament to its inadequacy in practice.

This, admittedly, involves tolerating a type of fiction (here, that Nyiramasuhuko inserted a penis in a woman's vagina, when she did not). This fiction could, of course, be quickly overcome by redefining rape (and other international crimes) in causal terms (i.e., as "causing rape"),[605] but even absent this kind of major legislative exercise, "what matters morally is significant causal contribution, not the kinds of limitations marked by the causative verbs of English."[606] To absolve Nyiramasuhuko of liability for the mass rape she caused based on a reference to physical attributes in the offense that she does not possess is to prefer fidelity to verbal semantics over substantive coherence. Like others, I believe that "normative rather than linguistic considerations would seem the more persuasive."[607] The overarching point, however, is that whatever real problems non-proxyable crimes present

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[604] Fletcher, *supra* note 33, at 654-656 (highlighting reasons for the departure from the objective theory of perpetration); Hans-Ludwig Schreiber, *supra* note 123, at 614 (placing the objective theory of perpetration in historical context, and demonstrating the passage to a subjective theory, then the turn to "control over the act."); Dubber, *supra* note 7, at 983 (highlighting how the position in the US Model Penal Code resembles the objective theory, perhaps explaining why the non-proxyable problem remains so vital in English language theory).

[605] As mentioned earlier, the war crime of "willfully causing great suffering" already takes this form. See supra note 202.

[606] Moore, *supra* note 15, at 417.

[607] Kutz, *supra* note 105, at 303.

are equally true of unitary and differentiated models of perpetration alike, depriving this line of reasoning of any analytical purchase in debates between the two models.

Another frequent argument is that the unitary theory of perpetration violates the principle of legality by conferring judges with undue discretion in sentencing? For many, if statutory offences were meant to include even remote causal contributions, the legislature would have to enact even greater sentencing ranges below usual minimums, conferring judges with extreme discretion in sentencing.[608] This renders law insufficiently certain. Worse, the breadth of this discretion would be all the more worrisome as judges would still have to make the types of intricate differentiations that are presently undertaken at the attribution level (i.e., distinguishing between aiding, co-perpetration, indirect perpetration, instigation, etc.) when calculating sentences, only these determinations would take place without conceptual guidelines and behind closed doors.[609] Consequently, a unitary system just brushes the problems under the carpet.

But these arguments are also unpersuasive. Although the point is obscured by the ICC's assumption of the differentiated model, the truth is that in the many differentiated jurisdictions, judges reason inductively to force facts into legal categories they feel allow for an appropriate punishment.[610] Instigation is elevated to indirect perpetration; aiding is

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[608] CLAUS ROXIN, in: Burkhard Jähnke/Heinreich W. Laufhütte/Walter Odersky (ed.), Strafgesetzbuch. Leipziger Kommentar :Erster Band, 11th ed. 2003, Vor § 25, marginal number 6. See also, HANS-HEINRICH JESCHECK and THOMAS WEIGEND, Lehrbuch des Strafrechts. Allgemeiner Teil, 5th ed. 1996, 646.

[609] *Id*., marginal number 8.

[610] THOMAS ROTSCH, "EINHEITSTÄTERSCHAFT" STATT TATHERRSCHAFT: ZUR ABKEHR VON EINEM DIFFERENZIERENDEN BETEILIGUNGSFORMENSYSTEM IN EINER NORMATIV-FUNKTIONALEN STRAFTATLEHRE

recast as co-perpetration. To illustrate, certain courts describe a case of acting as a lookout for a criminal perpetrator—everywhere the textbook example of aiding—as co-perpetration in order to allow for the full scope of punishment afforded a perpetrator.[611] In fact, this trend is so dominant in practice that "[i]t seems that no longer the dogmatic categorization determines the severity of the sentence imposed, but conversely that the severity of the sentence deemed desirable determines the categorization of the conduct in question."[612] If this is true, fears of judicial discretion are unavoidable for both theories, meaning that the argument from legal certainty does not lead inexorably to a differentiated system of perpetration.

Finally, arguments about the expressive capacity of a differentiated model do not appear to furnish it with great legitimacy. Under a differentiated scheme, a defendant's responsibility is expressed through the combination of at least two essential components: (a) the mode of participation; and (b) the name of the crime with which she is convicted. To eliminate (a) returns us to the problem of fair labeling principle—the criticism is that

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462 (1. Auflage. ed. 2009) (showing how considerations of culpability and sentencing prompt practitioners and theorists to choose somewhat arbitrarily between modes of attribution to apply.) Evidently, these practices have a long history. Schrieber explains that during the Weimar Republic reform efforts were undertaken to relax strict insistence on the derivative nature of complicity so as "to constrain the scope of indirect perpetration and to relegate many of the cases that were thus being dealt with as a species of perpetration back to the category of complicity." Hans-Ludwig Schreiber, *supra* note 123, at 620. This is also true in France, where the fact that complicity does not attach to the lowest form of crimes (called "contraventions") leads the French Cour de Cassation to declare accomplices co-perpetrators to avoid their acquittal. For details, see BERNARD BOULOC, GASTON STEFANI & GEORGES LEVASSEUR, DROIT PÉNAL GÉNÉRAL 287-288 (19e édition ed. 2005). For further modern examples from the Netherlands and elsewhere, see Johannes Keiler, *supra* note 18, at 186-190.

[611] HR 23 oktober 1990, NJ 1991, 328, cited in Keiler, *supra* note 18, at 187.

[612] Keiler, *supra* note 18, at 190.

grouping the people who shot helpless refugees with AK-47s and the businessman who supplied the weapons under a single banner of say murder unfairly groups disparate degrees of responsibility, which a fair system of representation ought to segregate by employing additional qualifiers.[613] This observation leads into often implicit normative differences between perpetration and participation,[614] and provides the impetus for the invention of notions like functional perpetration, that allow the doctrinal label to encapsulate an element of the collectivity through which the crime came about.[615]

There are, in my view, at least four problems with this account, each of which shows how a unitary theory is arguably more capable of fine-tuned expression than its counterpart. First, and least importantly, the argument for the expressive capabilities of a differentiated model ignores that international courts and tribunals do not mention the mode of liability within the disposition of their judgments in more that 95% percent of cases surveyed.[616] As we have seen, in the vast majority of instances, dispositions contained in

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[613] See *infra* section II.A; Frédéric Mégret also elevates fair labeling to a principle of fairness in human rights. See Frédéric Mégret, *Prospects for "Constitutional" Human Rights Scrutiny of Substantive International Criminal Law by The ICC With Special Emphasis on the General Part*, http://law.huji.ac.il/upload/Evaluating_FM.pdf

[614] van Sliedregt, *supra* note 59 (arguing that whether members of a JCE must comply with the full mens rea of genocide turns on whether they are perpetrators or participants); Cassese, *supra* note 25, at 26 (arguing that it is a logical impossibility for someone who does not have the necessary mens rea for genocide to "commit" the crime, but accepting that he or she may aid and abet the crime nonetheless). I am grateful to Thomas Weigend for confirming that the fact that JCE and Superior Responsibility purport to act as forms of "committing" a crime whereas complicity is a mere means of participation is the normative basis upon which the two concepts might diverge within a differentiated model.

[615] For one of the most thoughtful discussions, see Harmen van der Wilt, *Joint Criminal Enterprise and Functional Perpetration*, *in* SYSTEM CRIMINALITY IN INTERNATIONAL LAW (Andre Nollkaemper & Harmen van der Wilt eds., 2009)

[616] See supra note 104.

international judgments merely list element (b), the crime with which an accused is convicted.[617] That there is almost never mention of element (a) viz. the mode of liability within dispositions tends to suggest an unfortunate mismatch between abstract theorizing and practice—international criminal justice does not presently offer a vehicle for the expressive capacity the differentiated model demands.

Other difficulties are more difficult to overcome. Take, for instance, the miscommunication of responsibility inherent in labeling an accomplice a *genocidaire* when she does not have the requisite special intent. Some justify this disparity by pointing to a normative divide between "committing" a crime and other forms of "participation,"[618] although the rationale for the division invariably goes unannounced. In purely analytical terms though, one struggles to see a justification for the division when commission and participation both make an accused responsible for one and the same crime. As a matter of logic, the amalgamation of misaligned modes of liability and elements of crimes must corrupt one or both concepts, and branding an accomplice with a label he does not deserve still misrepresents responsibility, even if you have diminished the time she will serve in prison.

A differentiated model uses legal terms to express graduated degrees of blame, but there is also a danger that labels for modes of liability need not carry any great meaning for relevant audiences, further undermining the differentiated model's expressive capacity.

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[617] *Id.*

[618] See above note 208.

Arguably, describing someone as an "instigator" of genocide means something comprehensible to lay stakeholders in certain jurisdictions, but I have grave doubts whether murder through a combination of indirect and co-perpetration holds any comparable significance. The risk is that the meaning of increasingly abstract legal terms used to describe modes of liability seems esoteric to ordinary citizens, who no longer understand the terminology or its moral implications.[619] If this is true, a lack of comprehension among the public adds another layer of distortion to the condemnatory aspirations of international trials.

Contrary to usual expectations, the unitary theory may offer greater expressive capacity here. Under the unitary model, an accused could be convicted of genocide, denoting that she made a substantial contribution to the destruction of an ethnic group with the requisite intention to bring the crime about, then a judgment could append a single concise plain language explanation of her contribution i.e. GUILTY of genocide for supplying machetes to the Interahamwe. Structurally, one would immediately know that this conduct led to the crime described and that the defendant adopted a subjective disposition necessary to constitute genocide—she really wanted the Tutsi exterminated. The differentiated alternative (i.e. GUILTY of (a) aiding and abetting (b) genocide) does not tell us nearly as much about the culpability of the accused, because the formalistic concept "aiding and abetting" varies so widely from jurisdiction to jurisdiction and, just as importantly, may spoil the identity of the crime.

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[619] Rotsch, *supra* note 14, at 468.

This leads to a final related observation. To date, much of the debate around modes of liability in international criminal justice seems to have presumed that the crime and the mode of liability must do all the expressive work. But what prevents the judgment itself shouldering some of this load? For example, functional perpetration is necessary, we are told, to symbolically denounce the collective apparatus that enabled the individual crime.[620] And yet this begs the question why a court could not simply state whatever collective structures enabled the offence as part of its narrative. Without addressing this question, these often very insightful analyses of how traditional notions of perpetration do not adequately capture the reality of collective action that are so frequently part and parcel of atrocity risk overburdening "modes of liability," when a plain language explanation within a judgment may suffice.

B. The Specificities of International Crimes

If a unitary theory of perpetration is not theoretically foreclosed, we must inquire which of the two models is preferable for the particularities of international crimes. From the very beginning, the fact that an international system of blame attribution does not already exist is surely anomalous—for all the international interest in ending impunity, transitional justice and modes of liability, there is no treaty regime that defines modes of

[620] See van der Wilt, *supra* note 222. Harmen van der Wilt also argues that we should not underestimate the symbolic expressive value of JCE. While I agree with everything in this excellent article, I merely disagree with the final step where they seek to rely on a differentiated model of perpetration for expression.

participation international crimes. With war crimes for instance, the Geneva Conventions themselves furnish "only keywords to designate a criminal act, nothing which can be called a definition",[621] leaving a range of indispensable criminal concepts "under a cloud of obscurity."[622] This is most certainly true of modes of participating in these crimes—while the Conventions require states to implement legislation allowing for the prosecution of those responsible for "committing or ordering to be committed",[623] they deliberately stopped short of elaborating on the extent of these concepts.[624] Whatever might be said about the merit of this approach as a means of securing broad participation in the treaty regime, it has proved to be a thorn in the side of practitioners ever since.

Despite popular views to the contrary, the ICC Statute does not markedly change this situation. For one reason, some of the world's leading countries are not party to the ICC Statute, meaning that recourse to customary international law remains inevitable in many instances where international crimes might be enforced. As a reflection of this, the ICC Statute formally safeguards the continued co-existence of customary international law

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[621] Michael Bothe, *War Crimes*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, 392 (Antonio Cassese, Paola Gaeta, & John R. W. D. Jones eds., 2002).

[622] G.I.A.D Draper, *The Modern Pattern of War Criminality*, *in* WAR CRIMES IN INTERNATIONAL LAW, 160 (Yoram Dinstein & Mala Tabory eds., 1996).

[623] See, for example, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Art. 146 3, Aug. 12, 1949, 75 U.N.T.S 287/1958 A.T.S No 21 ("The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.").

[624] This is evident, for instance, from the statement of one negotiator at the time who observed that "'[t]he Conference is not making international penal law". Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II, Section B, at 116.

outside the treaty regime,[625] allowing for a complex mosaic of blame standards that stem from all range of international legal sources to simultaneously co-habitat the discipline. Even states that have signed and ratified the Rome Treaty are not required to emulate modes of attribution as defined in the ICC statute within their domestic legal orders. As a consequence, international modes of liability are extremely difficult to identify.

The first problem with the scheme is methodological. While the ICC Statute brings a degree of clarity to cases arising within its four walls, many international trials still depend on custom as a source of law. The difficulty is, as Martii Koskiennemi famously argued, that custom is quite "useless" at generating definitive standards.[626] So even in a field like international human rights, where legal precision is comparatively less important, some of the leading exponents observe that "the human rights movement's quest for additional sources finds its favorite candidate, customary international law, in the midst of a profound identity crisis."[627] Despite this crisis, a differentiated system of blame attribution

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[625] Article 10 ICC Statute stipulates that "[n]othing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute."

[626] Martti Koskenniemi, *The Pull of the Mainstream*, 88 MICH. L. REV. 1946, 1952 (1990). This, as Koskiennimi memorably argues, "because the interpretation of 'state behavior' or 'state will' is not an automatic operation but involves the choice and use of conceptual matrices that are controversial and that usually allow one to argue either way." Koskiennimi's principal point is that it is really our moral certainty that something should be prohibited that is driving the analysis of custom, not some objectively ascertainable standard that might be obtained in a dispassionate positivist fashion.

[627] Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AYIL 82, 88 (1988); The attempts to justify concepts in human rights (and international criminal law) into the corpus of customary international law even though they are not easily reconciled with normal standards for identifying custom is, I suspect, an example of what David Kennedy calls "a combination of overly formal reliance on textual articulations that are anything but clear or binding and sloppy humanitarian argument." See David Kennedy, *International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 101, 120 (2002).

in international criminal justice depends on the very same candidate for defining the terms of serious criminal responsibility.

This leads to major practical difficulties. For instance, despite the prolific use of JCE III over the past debate, the Extraordinary Chambers in Cambodia recently disagreed with the original Tadić decision that had declared JCE III part of customary international law.[628] Whatever might be said about the relative strengths of either court's reasoning, the content of customary modes of attribution is clearly unacceptably uncertain if different judicial bodies can reach diametrically opposed conclusions based on similar materials. While it is arguably not the business of international criminal justice to overcome the latent deficiencies with customary international law writ large, the absence of any restriction on the *number* of "modes of liability" enables types of scenario to continue unchecked. Put differently, a unitary theory of perpetration precludes the uncertainties of custom infiltrating the criminal process.

The wider concern is that such an ill-defined set of differentiated "modes of liability" violate the principle of legality. As we well know, the principle of legality has a rich but troubled history in international criminal law, from its identification as a merely principle of justice at Nuremberg to more definite modern accounts that sometimes do not

[628] Prosecutor v Ieng et al, Case No: 002-19-2007-ECCC/OCIJ (PTC38), para. 83 "For the foregoing reasons, the Pre-Trial Chamber does not find that the authorities relied upon in Tadic…constitute a sufficiently firm basis to conclude that JCEIII formed part of customary international law at the time relevant to Case 002."

restrain any better.[629] When the methodology for identifying customary standards is so vague, and there is no numerical cap on how many modes of liability might be "discovered" in customary international law, the danger is that international blame attribution seriously threatens legality.[630] As Beth Van Schaack points out, most common law jurisdictions prohibited the notion of common law crimes in the 19th century, precisely because the combination of judge-made law and serious criminal liability was perceived as compromising legality and its liberal underpinnings.[631] And yet modern international criminal justice not only permits the historical anachronism, it also places no limit on the *quantity* of modes of liability the methodology can generate.

This leads to a further set of problems. Even where the principle of legality is honored, international standards of blame attribution remain seriously fragmented. Complicity itself is an illustration. If we accept the differentiated system incorporated in the ICC together with the German mechanisms for dividing perpetrators and accomplices, we are still left with a mental standard for complicity in the ICC that is markedly higher than the equivalent in the vast majority of crimes within that court's jurisdiction, with standards before other international courts that claim knowledge but contract to recklessness in practice (thus violating culpability in certain circumstances), and with all range of domestic variants of complicity across the spectrum of national courts capable of trying international

[629] For an excellent overview of this history together with modern manifestations of the problem, see Beth Van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO. L.J. 119 (2008).

[630] Mirjan Damaška, *supra* note 5, at 469.

[631] Van Schaack, *supra* note 236, at 191.

crimes. If we are serious about international expressive accounts of international justice,[632] a real danger is that the meaning of international condemnation is lost in translation.

This draws us back into earlier discussion about the superior expressive capabilities of a unitary theory. In our previous theoretical discussion, we observed how a unitary theory allows a principled determination of criminal responsibility, then flexible opportunities to describe the nature of the contribution without legalese. I the expressive value of modes of are not fully comprehended within the national jurisdictions where they originated, they are likely to export very poorly to foreign cultures as part of the international adjudicatory process, given that victims, perpetrators and members of their communities are even less familiar with the significance of terms like "instigation," "joint criminal enterprise" or "indirect perpetration."[633] In the words of Immi Tallgren, the disapproval communicated by international criminal justice "risks being unclear or having adverse connotations, depending on the background of the offender." The same is true for victims and local communities.

Aside from concerns about the quality of the responsibility expressed, there are also the absence of substantive restraints on the scope of international modes of liability—the open-ended system of differentiated "modes of liability" does little to ensure that the

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[632] Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 STAN. J. INT'L L. 39, 42–44 (2007) (arguing that expressive theories of punishment are likely to capture the nature of international sentencing better than other retributive or utilitarian conceptions); See also MARK DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW 173–179 (2007) (discussing the role of expressivism in international criminal punishment).

[633] Tallgren, *supra* note 30, at 583.

standards courts apply accord with any conceptual foundations. This, as we have seen, is an acute problem when international courts draw so heavily on national doctrine that may or may not accord with basic principles in blame attribution, and when universal jurisdiction allows all range of courts to hear these cases. The open ended nature of modes of liability acts as an invitation for practitioners socialized in different systems to prioritize their own domestic schooling in criminal law, since that is what most senior practitioners bring to international prosecution. The differentiated system does not tell us which of the myriad variants international courts should adopt nor place conceptual restrictions on modes of liability of the type outlined here. In the face of this reality, a unitary theory of perpetration might better preserve (and advertise) culpability as the benchmark for international criminal responsibility, ending the various phases of international courts mimicking of domestic practice and shifting academic debates to issues of sentencing, where these discussions belong.

Equally importantly, the unitary theory would simplify a body of rules governing international modes of liability that has attained a degree of technicality that is in jeopardy of alienating those who matter most. From experience, very few practitioners of international criminal justice understand the full import of "modes of liability," which they tend to allocate to experts trained in relevant national jurisdictions wherever possible. This tendency is exacerbated when leading texts describing prominent international modes of liability are not available in official United Nations languages, further reinforcing the professional dependence on experts socialized in only a small number of jurisdictions. It goes without saying that these issues are likely to inhibit the engaged participation of

victims, perpetrators and affected communities, who are generally even less equipped to deal with technocratic jargon than the professionals who represent them. It would probably be easier to endure these struggles if they were conceptually unavoidable, but of course, they are not.

A unitary theory might also mediate the dissonance between national and international concepts of blame attribution more meaningfully. At present, standards of blame attribution vary wildly from one jurisdiction to the next, producing a fragmented array of rules. Predictably, the dissimilarity in international versus domestic standards has and will continue to cause major practical problems. In one case tried within the Netherlands, for instance, a Dutch court invested considerable energy into determining whether it was required to apply international or domestic notions of complicity when prosecuting its own national for genocide.[634] From the reasoning in the decision, the question appeared determinative of the defendant's responsibility for a crime no less than genocide—application of the national standard of complicity led to conviction; the international equivalent did not. Without common standards of blame attribution, serious criminal responsibility presently turns on largely arbitrary elections between two competing notions of blame attribution.

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[634] For an insightful discussion, see Harmen van der Wilt, *Equal Standards? On the Dialectics between National Jurisdictions and the International Criminal Court*, 8 INT'L CRIM L. REV 229, 244-245 (2008). This concern is apparent in the United States too, where courts asked to deliberate on Alien Tort Act cases must decipher whether they apply domestic or international standards of complicity, before they attempt to ascertain which of the competing standards represents customary international law. Keitner, *supra* note 7, at 73-79.

The system that is also highly inefficient. As is well known, the two ad hoc UN international tribunals alone are estimated to have claimed roughly 15 percent of the United Nations annual budget, which a projected cost of around $25 million per case.[635] While it is nigh on impossible to quantify the portion of that figure attributable to the unsettled pluralistic nature of international modes of liability, there can be little doubt that radically limiting litigation over these concepts would free up considerable capacity, save donors resources and hasten trials.[636] Just a short glance at the number of appellate cases that involve complex (but conceptually unnecessary) questions about modes of liability confirm as much. A more efficient system promotes rights to expeditious trial that are frequently in jeopardy internationally, and makes capital available that might minimize the selectivity of trials. As such, a more streamlined concept of perpetration promotes accountability.

Finally, to return to one of the central themes of this paper, a unified theory of perpetration is important from a purely functional perspective. Throughout, much of the debate about "modes of liability" has assumed a false duality between mastermind and physical perpetrator. In reality, there are also accomplices who make important (sometimes indispensible) contributions to the ways atrocities unfold. I have in mind corporations—the

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[635] UN SC, The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies, Report of the Secretary-General, UN Doc. s/2004/616 (2004); Mark Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity* 99 NW. U. L. REV. 539 (2005) (calculating average cost of trials as $25 million per case).

[636] Ralph Zacklin, *The Failings of Ad Hoc Tribunals,* 2 J. INT'L CRIM. JUST. 541, 543 (2004) ("The delays in bringing detainees to trial—and the trials themselves—have generally been so lengthy that questions have been raised as to the violation by the tribunals of the basic human rights guarantees set out in the [ICCPR]"); One commentator described the ICTY's proceedings as "as annoying and interminable as the Tour de France." PIERRE HAZAN & JAMES THOMAS SNYDER, JUSTICE IN A TIME OF WAR: THE TRUE STORY BEHIND THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 187 (2004) (citing Jacob Finci);

suppliers of weapons, the banks who finance military offensives, representatives of extractive industries who bankroll warlords—all play surprisingly important roles in sustaining modern bloodshed. Although these sorts of inputs have received little more than hortatory acknowledgement in modern international criminal justice, as soon as this veil is lifted, we will see that unified standards of blame attribution are essential to creating a level playing field capable of treating accomplices equally.

Without this, the system of international criminal law enables safe-havens, corporate races to the regulatory bottom to avoid liability, and perceptions that businesses in certain jurisdictions are at a competitive disadvantage vis-à-vis those elsewhere. In other areas, international law has some great experience in erecting universal standards in order to deal with these global realities—in treaties ranging from the Warsaw Convention for the Unification of Certain Rules relating to International Carriage by Air to the United Nations Convention on Contracts for the International Sale of Goods, states have rationalized a single set of standards to address transnational practices. So while I am sensitive to the compelling arguments for pluralism in international criminal justice,[637] I can only assume that in international criminal justice too, the need to avoid overt injustice trumps the otherwise understandable desire for doctrinal heterogeneity between legal systems.

How then would this uniformity be achieved? A unitary theory of perpetration for international crimes cannot simply replace all standards of attribution everywhere—the

[637] For strong arguments for heterogeneity between jurisdictions in international criminal justice, see Greenawalt, *supra* note 11; van der Wilt, *supra* note 242, at 244-245.

prospect of revolutionizing global standards of attribution is politically unthinkable and culturally undesirable. Nonetheless, national courts prosecuting international crimes could use an international unitary standard of perpetration in domestic cases involving international crimes, leaving habitual modes of attribution to continue unaffected for everyday domestic crimes. As a matter of ironic coincidence, this would emulate an extant scheme in German law, which applies a unitary theory of perpetration to a specific subset of administrative offences, even though it maintains its famous differentiated model for other crimes.[638] The only difference would be that this model would displace and annul customary international standards then apply uniformly throughout all courts capable of exercising jurisdiction over international crimes.

VI. CONCLUSION

In a recent article questioning the merit of a continued distinction between perpetration and complicity, one eminent expert in criminal theory asks, "how can there be such frequent disparities of responsibility and culpability between perpetrators and accomplices when both are equally guilty of the crime in question?"[639] The answer to the question in domestic criminal law lies in fragmented growth of criminal law in stages

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[638] Bohlander, *supra* note 2, at 153 (discussing the use of of unitary theory of perpetration (Einheitstaterbegriff) for administrative offences (Ordnungswidrigkeiten). For further information about administrative offences, see Krey, *supra* note 34, at 21.

[639] Sullivan, *supra* note 14, at 156.

though different epochs, leaving a unified body of rules that need not coincide with rational principles.[640] In international criminal law, however, the answer lies in the fact that international courts have borrowed historically contingent doctrine from these domestic systems, even when they defy accepted principles international courts themselves nobly endorse as a matter of course. Modes of liability, and complicity in particular, typify this trend.

Ever since the modern revival of the international criminal project, "modes of liability" have arguably featured as the most debated topic. In response to an acute unease with treating Hitler as an accessory, international criminal courts and tribunals have adopted controversial domestic models that resolve the problem, but scholars have more recently exposed the objectionable nature of aspects of these doctrines, forcing international courts into a third phase characterized by a sweeping receptivity to German distinctions between perpetrators and accomplices. In each of these phases, we scholars have only focused on a limited set of modes of liability, without considering the broader implications for international blame attribution writ large. Simultaneously, international influence, both legal and political, has emerged as the dominant explanation for the various departures from basic principles in blame attribution.

Complicity, however, also fails many of the standard tests employed to criticize modes of liability in international criminal justice, and in all likelihood, modes of liability as a species will suffer the same fate. As I suggest throughout, this troubling reality stems

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[640] ALAN NORRIE, CRIME, REASON, AND HISTORY : A CRITICAL INTRODUCTION TO CRIMINAL LAW 8-9 (1993).

less from international influence and more from the natural infiltration of indefensible domestic doctrine into the international arena. Thus, while the common criticism is that international modes of liability have lost touch with "the restraining force of the criminal law tradition,"[641] this perspective overlooks the domestic criminal law's long history of internal inconsistency and the great influence of domestic principles internationally. So if experts sadly observe a "gap" between liberal rhetoric (general principles) and practical reality (pervasive exception) within national criminal systems,[642] we should be unsurprised to find that it resurfaces internationally.

This said, there may be scope for reversing this trend. In his seminal work on the grammar of criminal law, George Fletcher posits that international law, and international criminal law in particular, can come to play a vital role in the development of defensible domestic doctrine. He argues that "the task of theorists in the current century is to elaborate the general principles of criminal law that should be recognized not only in the International Criminal Court, but in all civilized nations."[643] If this framing is correct, a unitary theory of perpetration for international crimes could overcome the sometimes major shortcomings of modes of liability in international criminal law and act as a constructive influence on domestic practices. Until then, domestic criminal law will remain a vital and predominantly welcome point of reference for international courts and tribunals, but a

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[641] Danner and Martinez, *supra* note 5, at 132.

[642] Simon Bronitt, *Toward a Universal Theory of Criminal Law: Rethinking the Comparative and International Project*, CRIM. J. ETHICS 53-66, 55 (2008).

[643] Fletcher, *supra* note 2, at 20.

mature international system also recognizes the darkness it stands to inherit from its domestic predecessors and opts for a different path.

A Pragmatic Critique of Corporate Criminal Theory: Atrocity, Commerce and Accountability

Corporate criminal liability is a controversial beast. To a large extent, the controversies surround three core questions: first, whether there is a basic conceptual justification for using a system of criminal justice constructed for individuals against inanimate entities like corporations; second, what value corporate criminal liability could have given co-existent possibilities of civil redress against them; and third, whether corporate criminal liability has any added value over and above individual criminal responsibility of corporate officers. This article criticizes all sides of these debates, using examples from the frontiers of international criminal justice as illustrations. In particular, I highlight the shortcomings of corporate criminal theory to date by examining the latent possibility of prosecuting corporate actors for the pillage of natural resources and for complicity through the supply of weapons. Throughout, the article draws on principles derived from philosophical and legal pragmatism to reveal a set of recurring analytical flaws in this literature. These include: a tendency to presuppose a perfect single jurisdiction that overlooks globalization, the blind projection of local theories of corporate criminal responsibility onto global corporate practices and a perspective that sometimes seems insensitive to the plight of the many who have fallen victim to corporate crime in the developing world. To begin anew, we need to embrace a pragmatic theory of corporate

criminal liability that is forced upon us in a world as complex, unequal, and dysfunctional as that we presently inhabit.

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When the formalist dream of finding invariant meanings underwritten by God or the structure of rationality is exploded, what remains is not dust and ashes but the solidity and plasticity of the world human beings continually make and remake.

Stanley Fish[644]

I. INTRODUCTION

The history of corporate criminal liability is pragmatic. In the United States, the seminal decision authorizing the curious practice of holding corporations criminally responsible explicitly reasoned that disallowing the practice "would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at."[645] Corporate criminal liability was, in effect, a practical necessity given the absence of other viable forms of redress. The rapid uptake of corporate criminal liability in Europe several decades later was inspired by similar thinking. In calling European nations to embrace corporate criminal responsibility despite the anthropomorphism inherent in treating inanimate entities as having mental states, the Council of Europe argued that

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[644] Stanley Fish, *Truth and Toilets: Pragmatism and the Practices of Life*, in THE REVIVAL OF PRAGMATISM: NEW ESSAYS ON SOCIAL THOUGHT, LAW, AND CULTURE 418, 419 (Morris Dickstein ed., 1998).

[645] New York Central R. Co. v. United States., 212 U.S. 481, 496 (1909). See also Kathleen F. Brickey, *Corporate Criminal Accountability: A Brief History and an Observation*, 60 WASH. U. L. REV 393, 421–22 (1982) (concluding that within Anglo-American systems, "recognition of corporate criminal accountability constituted a more effective response to problems created by corporate business activities than did existing private remedies.").

individual criminal liability of corporate officers left an unacceptable regulatory gap, which corporate criminal responsibility could fill.[646] In both instances, the justifications for the concept were, first and foremost, highly pragmatic.

By no small coincidence, these events took place (in the United States at least) at almost precisely the same time as the advent of philosophical pragmatism. In 1907, only two years prior to the US Supreme Court's landmark decision approving corporate criminal liability, William James published his celebrated philosophical text, *Pragmatism*.[647] James was a gentleman. While he accepted credit for the label, he magnanimously conceded that the underlying theory originated with his friend Charles Peirce.[648] The great philosopher John Dewey continued the burgeoning pragmatic philosophical tradition,[649] before it fell into a long period of stasis, only to be resurrected by Richard Rorty some fifty years later.[650] While there is much variation within the school these philosophers initiated, they shared a distaste for what they describe as "philosophical escapism." For the philosophical

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[646] In 1988, the Council of Europe recommended that European states rapidly overcome their earlier misgivings with corporate criminal liability, on the bases of "the increasing number of criminal offences committed in the exercise of the activities of enterprises which cause considerable damage to both individuals and the community" and "the difficulty, rooted in the legal traditions of many European states, of rendering enterprises which are corporate bodies criminally liable." *See* Council of Europe, *Recommendation no. R (88) 18 of the Committee of Ministers to Member States Concerning Liability of Enterprises Having Legal Personality for Offences Committed in the Exercise of Their Activities* (adopted by the Committee of Ministers on 20 October 1988 at the 420th meeting of the Ministers' Deputies).

[647] WILLIAM JAMES, PRAGMATISM (1907)..

[648] Charles S. Peirce, *How to Make Our Ideas Clear*, 12 POPULAR SCI. MONTHLY 286 (1878); Charles S. Peirce, *The Fixation of Belief*, 12 POPULAR SCI. 1 (1877).

[649] *See*, in particular, JOHN DEWEY, EXPERIENCE AND NATURE (1929).

[650] RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE (1981). For a beautiful discussion about the relationship between pragmatic philosophy and law, *see* Richard Rorty, *Pragmatism and Law: A Response to David Luban*, *in* THE REVIVAL OF PRAGMATISM, *supra* note 1, at 304.

pragmatists, the rest of philosophy had become overly abstract, self-referential, and practically disengaged.

In the past decades, scholars have incorporated aspects of this philosophical tradition into legal theory, claiming to have developed a middle way between legal formalism and realism. A number of distinguished legal theorists have adopted some variant of legal pragmatism as a methodology,[651] but none more prominent than Richard Posner.[652] Initially an academic pioneer of law and economics then an appellate judge in the United States, Posner's work on pragmatism sought to censure the tendency, in his view rife within the legal academy, to offer theories that amounted to little more than "highfalutin rhetoric of absolutes."[653] Instead of engaging with these absolute theories, Posner maintained that his iteration of legal pragmatism was normatively preferable. For Posner, his approach entailed "a disposition to base action on facts and consequences rather than on conceptualisms, generalities, pieties, and slogans."[654]

Strangely, though, legal pragmatism has not been harnessed to criticize corporate criminal theory, despite this concept's unquestionable origin in highly pragmatic thinking and its remarkable coincidence with the rise of philosophical pragmatism. However, only legal pragmatism can offer anything approaching an adequate account of corporate criminal

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[651] *See,* in particular, JULES COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY (2003).

[652] Posner's most prominent text on pragmatism is RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY (2005).

[653] POSNER, *id*. at 12.

[654] *Id.* at 3.

liability in its full complexity, which must account for the following variables: the application of corporate criminal liability to crimes that vary from tax evasion to genocide; corporate actors as diverse as gigantic multinational enterprises whose revenues exceed those of most states and closely held family businesses; corporations operating uniquely within the borders of a single state and those engaged in transactions across the four corners of an increasingly globalized planet; and companies that are incorporated for profit as compared with others that pursue charity. What theory can account for the innumerable contingencies corporate criminal theory must navigate in these circumstances, other than a pragmatic theory that resists absolute claims?

Two examples from the frontiers of international criminal justice substantiate this point. The first involves corporate responsibility for the war crime of pillage, for illegally exploiting natural resources from modern conflict zones. Modern national courts not only enjoy jurisdiction over corporations who perpetrate this war crime,[655] they can draw on a rich body of precedent to articulate the parameters of the offense as applied to corporations.[656] For instance, at the end of the Second World War, a range of corporate officers from German businesses were prosecuted for pillaging natural resources like coal, iron and oil,[657] all of which were exploited to fuel the Nazi apparatus. But since then,

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[655] For an overview of the law likely to govern corporate responsibility for pillaging natural resources from conflict zones, including the bases upon which many national courts can prosecute corporations for international crimes like pillage, *see* JAMES G. STEWART, CORPORATE WAR CRIMES: PROSECUTING PILLAGE OF NATURAL RESOURCES (2010).

[656] *Id*.

[657] *Id*. Walther Funk was convicted of pillage achieved through his role in the management of a commercial enterprise named the Continental Oil Company, which exploited crude oil throughout occupied Europe; Paul

legally comparable commercial practices have led to little real accountability, despite the fact that illegal exploitation of natural resources from conflict zones has substituted for superpower sponsorship as a predominant means of conflict financing since the end of the Cold War.[658] Joining corporate criminal liability, the war crime of pillage and the jurisdiction of domestic courts over these crimes offers a new means of ending this impunity, which is very much in keeping with the pragmatic origins of corporate criminal liability as a concept.

The second illustration looks to the arms industry. Advocates suggest that over 2,000 civilians die each week from weapons-related injuries, many at the hands of notoriously brutal regimes that acquired this weaponry from corporations.[659] I argue that under certain circumstances, corporations that manufacturer, sell and distribute weaponry become complicit in the international crimes their commerce enables.[660] To draw again on illustrations from practice, corporate officers were prosecuted for selling the chemicals used

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Pleiger, the manager of a company known by the acronym BHO, was found guilty of pillaging coal from mines located in Poland; businessman Hermann Roechling was convicted of pillage after he seized and exploited steel plants at Moselle and Meurthe-et-Moselle that yielded 9 million tons of liquid steel per annum.

[658] PHILIPPE LE BILLON, WARS OF PLUNDER: CONFLICTS, PROFITS AND THE POLITICS OF RESOURCES (2012); NATURAL RESOURCES AND VIOLENT CONFLICT: OPTIONS AND ACTIONS (Ian Bannon & Paul Collier eds., 2003); MICHAEL KLARE, RESOURCE WARS: THE NEW LANDSCAPE OF GLOBAL CONFLICT (2002).

[659] ANDREW FEINSTEIN, THE SHADOW WORLD: INSIDE THE GLOBAL ARMS TRADE (2011); LORA LUMPE, RUNNING GUNS: THE GLOBAL BLACK MARKET IN SMALL ARMS (2000); RACHEL STOHL & SUZETTE GRILLOT, THE INTERNATIONAL ARMS TRADE (2009).

[660] I concede that this point is not beyond dispute as a matter of criminal theory. *See* R.A. Duff, *"Can I Help You?" Accessorial Liability and the Intention to Assist*, 10 LEGAL STUD. 165 (1990) (arguing that using complicity in the ordinary course of business is structurally akin to omission liability since it requires the businessperson to break with their usual course of conduct). For different views that use arms vendors as examples of accessorial liability, *see* John Gardner, *Complicity and Causality*, 1 CRIM.L.&PHIL. 127 (2007); Christopher Kutz, COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE AGE (2000).

to asphyxiate civilians at Auschwitz after WWII,[661] and modern courts have also begun to prosecute individual arms vendors for complicity in international crimes for knowingly transferring weapons to recipients who use them to perpetrate atrocities.[662] While these precedents are presently focused on corporate officers as individuals, a turn to corporations is imminent. In good pragmatic tradition, this shift is likely to appeal given the paucity of other viable avenues for redress.

What then are the key tenets of legal pragmatism, and how do these examples from the forefront of international criminal justice help demonstrate its necessity in corporate criminal theory? To begin, note that there is little agreement among self-styled pragmatists about the content of their method, which requires that I pick and choose certain themes to inform this critique.[663] In so doing, I neither concur with the controversial conclusions some pragmatisms reach,[664] nor defend pragmatism against its many detractors.[665] Instead, I use five central themes distilled from philosophical and legal pragmatism in order to

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[661] Trial of Bruno Tesch and Two Others (The Zyklon B Case), British Military Court, Hamburg, 1 *Law Report of Trials of War Criminals*, 93 (March 8, 1946).

[662] Prosecutor v. Van Anraat, Netherlands, LJN: BA6734, Gerechtshof's-Gravenhage, 2200050906-2, (May 9, 2007) (charging Frans Van Anraat with complicity in genocide and war crimes for selling chemical weapons to Saddam Hussein, which were ultimately used to gas civilians); Prosecutor v. Kouwenhoven, Netherlands, LJN: AY5160, Rechtbank's-Gravenhage, 09/750001-05 (July 28, 2006) (charging Guus Kouwenhoven with complicity in international crimes perpetrated by Charles Taylor's regime in Liberia).

[663] To some extent, many scholars consider that legal pragmatism can stand apart from its predecessor philosophical pragmatism, but I choose to draw from both traditions. Thomas Grey, *Freestanding Legal Pragmatism*, in THE REVIVAL OF PRAGMATISM, *supra* note 1, at 254.

[664] I am opposed, for instance, to Posner's reasoning about the role of pragmatism in the war on terror. *See* POSNER, *supra* note 9.

[665] RONALD DWORKIN, LAW'S EMPIRE 150–53 (1986); BRIAN Z. TAMANAHA, REALISTIC SOCIO-LEGAL THEORY: PRAGMATISM AND A SOCIAL THEORY OF LAW 26–57 (1999); David Luban, *What's Pragmatic about Legal Pragmatism?*, in THE REVIVAL OF PRAGMATISM, *supra* note 1.

highlight significant structural flaws in thinking about corporate crime. In many respects, examples from international criminal justice suit these purposes ideally; their extreme nature allows us to test the integrity of categorical models from the periphery rather than the core, and the highly transnational character of the underlying transactions upsets the state-centric thinking that animates many existing accounts of corporate criminal liability. Let me proceed, then, to introduce the five pragmatic themes.

First, pragmatism rejects abstract theories that are absolute in formulation. In its philosophical guise, this arises from an anti-foundationalist view of epistemology, which denies that there are fundamental and indubitable truths. As John Dewey explains, when a theory is "[n]ot tested by being employed to see what it leads to in ordinary experience and what new meanings it contributes, this subject-matter becomes arbitrary, aloof—what is called 'abstract' when that word is used in a bad sense to designate something which exclusively occupies a realm of its own without contact with the things of ordinary experience."[666] Once incorporated into legal theory, this idea clashes with formalism—the notion that abstract concepts rationally applied mechanically produce specific answers in concrete cases.[667] By contrast, pragmatists distrust "pretensions of totalizing Big Think theories to capture all that is important in law."[668] And yet, as we will soon see, existing

[666] DEWEY, *supra* note 6, at 6.

[667] TAMANAHA, *supra* note 22, at 35 (discussing formalism within the context of pragmatism more broadly).

[668] Luban, *supra* note 22, at 275.

theories of corporate criminal liability are almost invariably couched in absolutist terms, in ways pragmatism is so keen to expose as either fallacious or meaningless.

Second, pragmatism evaluates the merit of a theory in purely instrumental terms. In the earliest stages of this critical philosophy, William James famously announced that pragmatism "has no particular results. It has no dogmas, and no doctrines save its method."[669] The quintessence of the method he imagined was to dispassionately ascertain whether a given theory was "good for anything."[670] To return to Dewey, the acid test of any philosophical concept is: "[d]oes it end in conclusions which, when they are referred back to ordinary life-experiences and their predicaments, render them more significant, more luminous to us, and make our dealings with them more fruitful?"[671] Alas, I fear that the answer to this question for much of current corporate criminal theory is no, and that cases at the brink of international criminal justice help expose this reality most clearly.

Third, pragmatists undertake their assessment of theories with great sensitivity to context. In keeping with the understanding that truth is dynamic, not eternal, many pragmatists look to realities within particular historical and cultural contexts to gauge the merit of conceptual models.[672] In the legal realm, Thomas Grey eloquently argues that "[p]ragmatists remind lawyers that their activities are complex and multifarious, and

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[669] JAMES, *supra* note 4, at 47.

[670] Grey, *supra* note 20, at 265 (Pragmatists ask, in assessing theories, "what good they are for anything").

[671] DEWEY, *supra* note 6, at 9–10.

[672] POSNER, *supra* note 9, at 52. ("[P]ragmatists justify their recommendations contextually. They see the quest for livable ethical principles as arising from concrete practices and predicaments, situated in particular historical and cultural contexts").

unlikely to be completely accounted for by any single theory, however compelling its application in any particular context."[673] Despite this warning, much of the literature offering theoretical accounts of corporate criminal liability is universal in conception but informed by only a single context. Corporate responsibility for tax fraud in Delaware need not hold to the same conceptual principles as corporate war crimes in Iraq, the Congo or East Timor, but theorists often gloss over these nuances, offering accounts that presume one-size-fits-all.

Beneath this commitment to assessing theories in context lies an associated concern about perspective. Because truth is contingent rather than universal, the perspective of those offering theoretical explanations colors the validity of their conceptual models. In addressing this point, Martha Minow and Elizabeth Spelman emphasize "how apparently neutral and universal rules in effect burden or exclude anyone who does not share the characteristics of privileged, white, Christian, able-bodied, heterosexual, adult men for whom those rules were actually written."[674] Even if some of these biases are less obvious in the context of corporate criminal theory, many commentators do assume a *single perfect jurisdiction,* which plays down widespread corporate crimes in the Global South, and in the case of international crimes in particular, their terrible continuity with colonialism and slavery. Asking how to best achieve justice for corporate crimes in these contexts inserts a new perspective that immediately disrupts the discourse.

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[673] Grey, *supra* note 20, at 266.

[674] Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597, 1601 (1989).

Fourth, and relatedly, pragmatisms are weary of universalizing local experience. In a world where truth is malleable and dynamic, conceptual principles that are valid within one community are not immediately transposable across all manifestations of the phenomena. As Dewey puts it, we should resist the temptation to "transform purely immediate qualities of local things into generic relationships."[675] This proposition perhaps warrants no real emphasis in an age that has finally begun to embrace legal pluralism, and yet in some instances, corporate criminal theory still contravenes this principle by adopting a parochial understanding of the concept even though others exist elsewhere and by overlooking that many corporations are operating in contexts that are not local, i.e., in countries foreign to theorists. At points, this tendency in corporate criminal theory is so pronounced that it risks substantiating Richard Posner's concern that "[o]ur minds race ahead of themselves… inclining us to universalize our local, limited insights."[676]

Fifth, pragmatism is committed to experimentation. As a philosophical principle, pragmatism "is eclectic, a thing of compromises, that seeks a modus vivendi above all things."[677] This implies a desire for rigorous conceptual explanations, but ones that are consistent with practice rather than pure abstractions in the sense pejorative to pragmatisms. So, contrary to Posner's appreciation of the concept, pragmatism does not eschew moral theorizing or its relevance to law; it recommends instead that each and every

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[675] DEWEY, *supra* note 6, at 128–29.

[676] POSNER, *supra* note 9, at 5.

[677] JAMES, *supra* note 4, at 25.

conceptual ideal is tested in the laboratory of real-world experience.[678] On a superficial level, all of our attempts to regulate the might of corporate power follow this model, from the advent of corporate criminal liability to the Alien Tort Claims Act and beyond. The challenge is for theoretical understandings to catch up with these ongoing acts of experimentation, which will soon move into a new international phase. In a world as complex and dysfunctional as that we inhabit, experimentation like this is a necessity.

Finally, let me qualify the foregoing and situate these principles within criticisms of pragmatism. On the one hand, I remain agnostic about pragmatism as an interpretative technique, and I certainly see enormous value in an ongoing engagement between philosophy and law. I am also almost entirely on board with Steven Smith's thoughtful argument that "[l]egal pragmatism is best understood as a kind of exhortation about theorizing; its function is not to say things that lawyers and judges do not know, but rather to remind lawyers and judges of what they already believe but often fail to practice."[679] While most of the key tenets of pragmatism are just basic measures of any defensible theory, there is still something unique to the pragmatic method in an area such as corporate criminal theory, where the contingencies are immense and cannot be known ahead of time. In essence, at least here, pragmatism has unique value. Thus, we should embrace a pragmatic theory of corporate criminal liability that circumstance forces upon us.

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[678] Michael Sullivan & Daniel J. Solove, *Can Pragmatism Be Radical? Richard Posner and Legal Pragmatism*, 113 YALE L.J. 687, 708 (2003).

[679] Steven D. Smith, *The Pursuit of Pragmatism,* 100 YALE L.J. 409, 411 (1990).

My argument elaborating on these views proceeds in three phases. Having set out basic themes of legal pragmatism that I use as benchmarks throughout the remainder of this article, Part I expands on the two sets of cases at issue, namely corporate responsibility for pillaging natural resources and the accomplice liability of arms vendors for international crimes. With this background, Part II then addresses the first of three components of the discourse in corporate criminal theory: arguments for and against corporate criminal liability as a concept. I find that those who argue that we need corporate criminal liability may be correct as a generic policy, but their arguments cannot be universalized for every iteration of corporate offending. Likewise, attempts to account for the guilt of corporations in retributive terms are, sometimes by their own admission, contingent in ways that often pass unnoticed. Part III then employs the same methodology to criticize debates about the relative merit of corporate criminal liability as compared with corporate civil liability. Here, we witness violations of all principles pragmatists revere: local experience universalized without regard to context, perspective or heterogeneity in the real world. Part V continues the pragmatic critique by highlighting how many of the arguments for corporate criminal liability over and above individual liability of corporate officers do not automatically apply to international crimes. I conclude by arguing that in order to make sense of all this, we require a entirely new pragmatic model that grapples with the many hidden variables, exposes the vast array of applicable laws as best possible, and develops conceptual priorities that operate on a provisional not fixed basis.

II. Corporate Responsibility for International Crimes: Two Illustrations

In order to flesh out shortcomings of corporate criminal theory, we must begin by providing some background on the two examples of corporate responsibly for international law that serve as touchstones in the criticism that follows. To recall, I argue that corporations can and soon will be held responsible for the war crime of pillage through the illegal exploitation of natural resources from conflict zones, and that arms vendors are susceptible to criminal responsibility arising out of their complicity for selling merchandise that facilitates atrocities. In this Part, I provide more detail about each of these two forms of commercial responsibility for international crimes. With each, the concerns that animate pragmatists already begin to reveal themselves, although it is only when these experiences are viewed within the confines of core arguments within corporate criminal theory that one fully appreciates the extent of the discourse's shortcomings for these and other transnational cases.

A. The Accomplice Liability of Corporate Arms Vendors

Weapons are one of the largest commercial markets in the world. Global spending on weaponry is estimated at approximately US$ 1,226 billion per annum, a figure 15 times

greater than the current worldwide expenditure on aid. [680] The production and sale of these weapons frequently serves legitimate purposes, such as peacekeeping, national or collective self-defense, law enforcement and recreation. But in a number of well-documented instances, the sale of weapons has taken place as part and parcel of very serious atrocities,in countries as diverse as South Africa, Myanmar and Syria. In each of these (and the many similar incidents), weapons vendors have conducted themselves in ways that may well render them complicit in the atrocities that ensued. Scholars in the field of corporate criminal theory should take note of this prospect, since the manufacturers, vendors and distributors of weapons systems are almost invariably corporations.

Supplying weapons has often been understood as a classic illustration of complicity. Technically speaking, an accomplice is simply someone who helps a third party commit a crime, and help can take many forms.[681] But in spite of this incredibly open-ended structure, supplying weapons is one of the few forms of assistance that is often explicitly mentioned as one possible manifestation of the broader concept. Coke's commentary to the Statute of Westminster, for example, explicitly listed "furnishing with weapon" as an appropriate example of accomplice liability.[682] While modern instantiations of the concept

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[680] See SIPRI, 'Military Expenditure by Region in Constant US Dollars, 1988-2008', available online at http://www.sipri.org/research/armaments/milex/resultoutput/worldreg (visited 3 January 2010).

[681] On this basis, some important commentators like Glanville Williams, describe the conduct required for establishing complicity as "otherwise innocent." See Glanville Williams, *Complicity, Purpose and the Draft Code - 2*, CRIM. L. REV. 98, 101 (1990) (discussing conceptual limitations on complicity that, in Glanville William's mind, are made necessary because " my own conduct (apart from the law of complicity) is innocent.")

[682] Coke's Commentary on the Statute of Westminister (Co. Inst. Ii. 182) distinguishing perpetration from complicity on the basis of presence at the scene of the crime. After dividing accessories before the fact into

seldom cite specific illustrations in quite the same way, several do include "providing the means."[683] Needless to say, this language is clearly a tacit reference to the supply of weaponry, even if it also includes the provision of tools, expertise and getaway cars. At the level of theory, the very best scholars of criminal theory frequently resort to weapons suppliers as exemplars of the concept's scope.[684]

One can readily understand the popularity of the example. The supplier of weapons makes a very clear causal contribution to crime, either because the weapon supplied is the very mechanism by which the crime is achieved (say when a jealous husband uses a gun and bullet to kill his unfaithful wife), or because it is employed as a threat to facilitate the offence (say when a weapon is used to hold up a bank, to placate a rape victim or to otherwise coerce behavior as part of a criminal enterprise). Thus, there is frequently a very conspicuous counterfactual dependence between a supplier of weapons and resulting

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three categories: commandement, force and aide, he explained *aide* in the following terms: "Under this word is comprehended all persons counseling, abetting, plotting, assenting, consenting, and encouraging to do the act, and are not present when the act is done; for if the party is commanding, furnishing with weapon, or aiding be present when the act is done, then he is principal."

[683] For example, Article 25(3)(c) of the Statute of the International Criminal Court makes criminally responsible one who, "[f]or the purpose of facilitating the commission of such a crime, aids, abets, or otherwise assists in its commission or its attempted commission, *including providing the means for its commission* ...." (emphasis added).

[684] For a small set of illustrations, see John Gardner, *Complicity and Causality*, 1 CRIM. LAW AND PHILOS. 127–141, 138–139 (2007) (discussing how the arms vendors is responsible as an accomplice, even though the crimes would have taken place without her contribution); I.H. Dennis, *The Mental Element for Accessories*, *in* CRIMINAL LAW: ESSAYS IN HONOUR OF JC SMITH , 60 (Peter Smith ed., 1987) (discussing the arms vendor as an illustration of accomplice liability; Duff, *supra* note 17 at 169–170 (also discussing arms vendors); GEORGE FLETCHER, RETHINKING CRIMINAL LAW 582 (1978). ("the accessory 'causes' the wrongful act of the perpetrator in the sense that he renders concrete assistance by supplying the weapon or giving counsel and advice to the perpetrator.)

crimes.[685] As one leading commentator on complicity has argued, "one who hands an actual killer the murder weapon is performing an act essential to that killing."[686] Arguably, this causal relationship is most evident on an international stage, where specific rules governing transfer of weaponry have remained a regulatory "blind spot."[687]

On occasion, domestic criminal courts throughout the world have invoked complicity to hold individuals responsible for crimes that resulted with weapons they supplied.[688] As one judge within the United States controversially opined "one who sells a gun to another knowing that he is buying it to commit a murder, would hardly escape conviction as an accessory to the murder by showing that he received full price for the

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[685] I acknowledge, of course, that many commentators do not believe that causation can pass through the autonomous decision of the perpetrator. H. L. A. HART & TONY HONORÉ, CAUSATION IN THE LAW 41 (2 ed. 1985) ("A deliberate human act is therefore most often a barrier and a goal in tracing back causes in such inquiries: it is something through which we do not trace the cause of a later event and something to which we do trace the cause through intervening causes of other kinds."); Sanford H Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 333 (1985) (arguing that the accomplice's actions are no more the cause of a crime than the perpetrator's genes, family history and socio-economic background). For myself, I have always found these positions far too extreme, and was relieved to find that Michael Moore ably defended a middle ground that finds that both perpetrator and accomplice are causal ingredients in a crime's commission. See MICHAEL S. MOORE, CAUSATION AND RESPONSIBILITY: AN ESSAY IN LAW, MORALS, AND METAPHYSICS kindle loc 4049 (2009).

[686] K. J. M. SMITH, A MODERN TREATISE ON THE LAW OF CRIMINAL COMPLICITY 28 (1991).

[687] C.G. Weeramantry, 'Traffic in Armaments: A Blind Spot in Human Rights and International Law', 2 Development Dialogue (1987) 68-90; See also Harold Hongju Koh, *A World Drowning in Guns*, *in* INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: BRIDGING THEORY AND PRACTICE 59–76 (Thomas J. Biersteker ed., 2007).

[688] United States v Fountain 768 F.2D 790 (7th CIR. 1985), Opinion by: Posner J (discussing a US Federal case involving a conviction for murder, where an inmate passed a fellow prisoner a knife that was used to kill a prisoner guard); SHIGEMITSU DANDO, THE CRIMINAL LAW OF JAPAN: THE GENERAL PART 249 (First Edition ed. 1997) (discussing a series of cases in Japanese criminal law that show that "[a]iding can consist of physical or technical assistance like lending a weapon"); R v. Bainbridge [1960] 1 Q.B. 129 (an English case convicting Bainbridge of burglary for providing the tools necessary for the crime).

gun..."[689] On the strength of this type of reasoning, a Tribunal convened within the US occupied zone of post-war Germany prosecuted and convicted a range of businesspeople for selling the Chemical Zyklon B to the Nazi government, which was ultimately used to asphyxiate Jews within concentration camps by the millions.[690] True, the corporation itself was never prosecuted, but this only invites us to hypothesize why, and whether adopting this variation might have important implications for regulating the supply of weapons in modern conflict zones.

Already, domestic courts are pushing this envelope; there is a growing trend toward holding arms vendors liable for the international crimes their commerce facilitates, particularly when they supply weapons to notoriously brutal regimes. For example, a Dutch court found Frans van Anraat guilty of complicity in war crimes for supplying chemicals to Saddam Hussein that were used to produce chemical weapons later deployed against Iraqi Kurds and within Iran.[691] In sentencing Van Anraat to 17 years imprisonment for his complicity in the war crimes that resulted, the appellate court cautioned that "[p]eople or companies that conduct (international) trade, for example in weapons or raw materials used for their production, should be warned that—if they do not exercise increased vigilance—

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[689] *Judge Parker, Blackun v United States, 112 F.2d 635 (4th Cir. 1940)*

[690] See UNITED NATIONS WAR CRIMES COMMISSION, Trial of Bruno Tesch and Two Others "The Zyklon B Case", 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS 93.

[691] *Prosecutor v. Van Anraat*, *supra* note 9. The court held Van Anraat personally responsible for transactions performed through intermediary firms in which he was a leading figure. These subsidiaries supplied a total of 1,400 metric tons of a vital chemical precursor to the then government of the Republic of Iraq knowing that the chemicals would used as mustard gas during the ongoing hostilities against Iran.

they can become involved in most serious criminal offences."[692] But as we begin to interrogate corporate criminal theory, one discovers that the arguments on all sides of this discourse are ill-prepared to accommodate the pragmatics required to make this threat credible.

Reimaging Van Anraat as a case in corporate criminal liability is certainly realistic. There is, of course, no corporate criminal liability within the statute of the International Criminal Court,[693] but a large number of national jurisdictions have adopted the concept for international crimes within their own domestic legislation, either by including corporate criminal liability as part of their General Part within a comprehensive criminal code that includes these international offenses,[694] or by promulgating separate legislation that mandates an interpretation of "person" in criminal law that would extend liability to companies in these circumstances.[695] The complicity of arms vendors presents an ideal

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[692] *Id.,* section 16 "Grounds for the punishment."

[693] Assembly of States Parties, Press Release L/2769, STATUTE OF INTERNATIONAL COURT MUST NOT BE RETROACTIVE, SAY SPEAKERS IN PREPARATORY COMMITTEE, 3 (Mar. 29, 1996); PROCEEDINGS OF THE PREPARATORY COMMITTEE DURING THE PERIOD 25 March-12 April 1996, A/AC.249/CRP.3/Add.l, ¶ 6 (April 8, 1996); Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I (Proceedings of the Preparatory Committee during March-April and August 1996) General Assembly Official Records · Fifty-first Session Supplement No.22 (A/51/22), para. 194 (1996); United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, REPORT OF THE WORKING GROUP ON GENERAL PRINCIPLES OF CRIMINAL LAW, A/CONF.183/C.1/WGGP/L.4/Add.1, 1-2 (June 29, 1998).

[694] In Australia, for example, the Commonwealth Criminal Code of 1995 first states that "[t]his Code applies to bodies corporate in the same way as it applies to individuals," then explicitly lists the offense of pillage together with a codification of the elements of the crime. See §§ 12.1(1) and 268.54, Commonwealth Criminal Code Act 1995 respectively. For similar arrangements, see Section 48 a, Norwegian General Penal Code; Section 5, Code Pénal Belge ; Article 121 French Penal Code.

[695] Section 51(2)(b). of the UK International Criminal Court Act 2001 confers British courts with jurisdiction over acts of pillage orchestrated "outside the United Kingdom by a United Kingdom national, a United Kingdom resident or a person subject to UK service jurisdiction." Article 67(2) states that "[i]n this Part a

opportunity to test this thesis, as other pragmatic initiatives like the Alien Tort Statute flounder under judicial authorities that seem highly revisionist in tone.

The transnational character of accomplice liability of arms vendors also provides a valuable illustration of the inevitability of pragmatic experimentation—arms vendors herald from all corners of the globe, operate outside their home jurisdictions, and both complicity and corporate criminal liability are understood very differently from one legal jurisdiction to the next. Consequently, pointing to the decision of the drafters of the Model Penal Code to elevate the mental element of complicity to *purpose* in order to defeat these types of cases,[696] only deals with one piece of a much larger international puzzle that involves multiple variables within a globalized society. Taking just complicity, the vast majority of foreign jurisdictions have much lower mental elements for establishing this form of criminal participation. Even a limited survey suggests that recklessness is the dominant test,[697] which suddenly requires that corporate criminal theory account for the many

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"United Kingdom resident" means a person who is resident in the United Kingdom." Finally, section 5 of the Interpretations Act 1978 states that "[i]n any Act, unless the contrary intention appears, words and expressions listed in Schedule 1 to this Act are to be construed according to that Schedule." The Schedule states that "'[p]erson' includes a body of persons corporate or unincorporate." The U.S. War Crime's Act stipulates that "whoever" commits a war crime is subject to criminal punishment including fine, imprisonment and death. The Dictionary Act of 2000 states that "[i]n determining the meaning of any Act of Congress… the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." Dictionary Act, 1 U.S.C. § 1 (2000).

[696] While drafters of the Model Penal Code initially favored adopting "knowledge" as the requisite mental element for complicity, they abandoned this draft at the eleventh hour out of concerns for untoward consequences for commerce. See LAW AMERICAN LAW INSTITUTE, Part 1, §§ 1.01 to 2.13 MODEL PENAL CODE AND COMMENTARIES 2.06, at 316 (1980). Note that as a normative matter, I also strongly disagree with the purpose standard espoused in the Model Penal Code. For further details, see James G. Stewart, *The End of "Modes of Liability" for International Crimes*, 25 LEIDEN JOURNAL OF INTERNATIONAL LAW 196–198 (2012)

[697] *The End of "Modes of Liability" for International Crimes*, Id., at 192–194 (showing how most jurisdictions, international and domestic, formally treat knowledge as the requisite mental element for

businesses that trade highly risky products to the most volatile places on earth. Arms vendors personify this category of corporate actor.

What about conceptual objections to the idea that arms vendors might be held responsible as accomplices for "regular" commercial transactions? A number of leading criminal theorists harbor misgivings about allowing complicity to capture commercial transactions that arise through the ordinary course of business.[698] For instance, at one point in his groundbreaking monograph *Rethinking Criminal Law*, George Fletcher refers to "the perpetrator who fired the fatal shot and the accessories that supplies the weapon,"[699] but he subsequently problematizes the use of accomplice liability in business contexts since, even though "[t]he supplier knowingly contributes to the crime… the question is whether he must deviate from the ordinary course of commercial life in order to hinder his customer's criminal plan."[700] This idea has sparked much confusion among scholars, who too quickly

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complicity, but that this surreptitiously dilutes into recklessness very frequently because of the difficulty of establishing anyone's knowledge of a future event.)

[698] Grace E Mueller, *The Mens Rea of Accomplice Liability*, 61 S. CAL. L. REV. 2169 (1987); Robert Weisberg, *Reappraising Complicity*, 4 BUFF. CRIM. L. R. 217–281 (2000); Simon Bronitt, *Defending Giorgianni - Part One: The Fault Required for Complicity*, 17 CRIMINAL LAW JOURNAL 242 (1993) (arguing for restrictive understandings of complicity in Australian law based on concerns for business); Duff, *supra* note 17; K. J. M. SMITH, A MODERN TREATISE ON THE LAW OF CRIMINAL COMPLICITY 154 (1991) (discussing the various pros and cons of mental elements for complicity in response to the business problem); Dennis, *supra* note 41, at 77 (arguing for a knowledge requirement based in part on commercial; Johannes Keiler, *Towards a European Concept of Participation in Crime*, *in* SUBSTANTIVE CRIMINAL LAW OF THE EUROPEAN UNION, 195 (arguing for a higher mental element for complicity in European criminal law to avoid "hardship cases as is demonstrated by the aforementioned shopkeeper example".).

[699] FLETCHER, *supra* note 41, at xxi.

[700] *Id.* at 640–641.

conclude that the application of complicity within the realm of commerce is tantamount to omission liability, i.e. for failing to break with their "normal course of business."[701]

This assimilation does not work. Weapons do not sell themselves! The *normal course of business* enjoys no privileged point of focus in determining whether a person has participated in a crime or not. In reality, we are frequently required to modulate our everyday behavior when a change of circumstances means that repetition would result in our causing criminal harm: if I habitually come home to light my gas fire after work and continue to do so even though there is a strong gas leak on one particular day, I commit a crime; if I secretly maintain my normal sexual relations with my partner having discovered that I have HIV/AIDS, I potentially commit a crime; and if I cook my favorite dish knowing that my guest has a lethal allergy to a key ingredient, the same responsibility arises. But my purpose is not to labor these conceptual disputes here, which I address in a much larger forthcoming work; it is merely to highlight how these views of complicity cannot save corporate criminal liability from the problem of weapons vending and the pragmatic forces likely to harness this framing to counteract the almost total lack of accountability this industry presently enjoys.

B. The Corporate Pillage of Natural Resources

[701] See *above* note 55 and references cited therein.

Pillage means theft during war. Since the end of the Cold War, pillage of natural resources has substituted for superpower sponsorship as the predominant means of conflict financing.[702] In countries as diverse as Cambodia, Iraq and the Democratic Republic of Congo, warfare has become "self-financing" as revenues generated from natural resource predation supply both the means and motivation for violence.[703] At a second level, the availability of resource wealth also poses serious problems for peacebuilding, since various factions often have more to gain from continued instability than a return to peace.[704] To compound matters further, these factors inevitably contribute to the famed resource curse, whereby the richest nations in terms of latent mineral wealth are in fact the least developed and most prone to violent upheaval. Western companies enable all levels of this vicious cycle, by purchasing natural resources from warring factions who have no title in the rare earth they trade.

As was the case with accomplice liability of arms vendors, those considering corporate criminal theory cannot hide from these important acts of corporate malfeasance by assuming that pillage is a boutique offense available in only a small set of far-flung

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[702] Ian Bannon & Paul Collier, *Natural Resources and Conflict: What Can We Do?* in *Natural Resources and Violent Conflict, supra* note 15, at 4 (arguing that unless a rebel movement is bankrolled by another state or an extensive and willing diaspora "it must generate income by operating some business activity alongside its military operation."); Michael Ross, *The Natural Resource Curse: How Wealth Can Make You Poor* in *Natural Resources and Violent Conflict,* at 30; DAVID KEEN, THE ECONOMIC FUNCTIONS OF VIOLENCE IN CIVIL WARS (International Institute of Strategic Studies). Charles Cater, *The Political Economy of Conflict and the UN Intervention: Rethinking the Critical Cases of Africa*, in *Beyond Greed and Grievance,* at 1-2.

[703] KAREN BALLENTINE & HEIKO NITZSCHKE, BEYOND GREED AND GRIEVANCE: POLICY LESSONS FROM STUDIES IN THE POLITICAL ECONOMY OF ARMED CONFLICT : IPA POLICY REPORT 3 (2003).

[704] *Id.*

international courts—pillage is a corporate crime in many national legal systems. To take the United States, the US War Crimes Act exemplifies a trend amongst several domestic lawmakers towards criminalizing pillage by simply cross-referencing pertinent treaty provisions within a criminal statute. Section 2441(c)(2) of the US War Crimes Act 1996 defines war crimes as including any conduct "prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907. " Article 28 of the Hague Regulation refers to pillage. Thus, by this opaque process, US federal courts are able to try corporate entities and their officers for pillaging property from war zones. Formally, pillage is part of corporate criminal law.

Pillage is frequently enforced, albeit in cases that do not involve natural resources or corporate officers. In the past decade alone, international courts have found numerous members of the Yugoslav armed forces and Sierra Leonean rebel leaders guilty of pillaging property ranging from jewelry to vehicles,[705] and the one-time Presidents of Liberia and Sudan, together with a former Vice President of the Congo, presently face trial for allegedly pillaging various types of property.[706] But for pillage to pose an important challenge to the

[705] Prosecutor v. Simić, Case No. IT-95-9-T, Judgement, ¶ 873 (Oct. 17, 2003) ("Cars, money, and jewellery were plundered from civilians") Prosecutor v. Jelisic, Case No. IT-95-10-T, Judgment ¶ 48-49 (Dec. 14, 1999) ("the accused stole money, watches, jewellery and other valuables"); Prosecutor v. Hadžihasanović et al. Case No. IT-01-47-T, Judgement, ¶ 49 (Mar. 15 , 2006), ¶ 1875 (finding that household appliances, furniture, and clothing were pillaged); Prosecutor v. Brima et al. Case No. SCSL-04-16-T, Judgment, ¶ 754 (June 20, 2007) ; See also Prosecutor v. Fofana et al. Case No.SCSL-04-14-T, Judgement, § 5.1.1.1. (Aug. 2, 2007) (finding that armed groups pillaged medicines).

[706] Prosecutor v. Charles Ghankay Taylor, Pre-Trial Brief, Case No. SCSL-03-01-PT, ¶ 6 (Apr. 4, 2007) (stipulating that "[p]rior to the commencement of the armed conflict in Sierra Leone, and through the armed conflict, the Accused participated in a common plan, design or purpose to gain and maintain political power and physical control over the territory of Sierra Leone, in particular the diamond mining areas, in order the exploit the natural resources of the country."); Situation in Central African Republic in the Case of Prosecutor

contours of corporate criminal theory, the offense must encapsulate the one property type that corporations so frequently acquire from conflict zones—natural resources. Does the prohibition of pillage reach far enough to cover the illegal exploitation of blood diamonds later used for jewelry, the coltan essential in cellphones, laptops and game consoles and the oil in our cars, engines and airplanes? If so, the ramifications for corporate criminal theory are hard to overstate.

Precedents confirm our suspicions. In the aftermath of WWII, a host of businessmen were convicted of pillaging natural resources and raw materials. A German businessman named Hermann Roechling, for instance, was found guilty of pillaging 100 million tons of iron ore from mines in occupied France.[707] Within the Nuremberg Trial itself, Walther Funk was convicted of pillage for his role in the management of the Continental Oil Company, which exploited prodigious quantities of crude oil throughout occupied Europe.[708] Likewise, a manager of a company known by the acronym BHO, was

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v. Jean-Pierre Bemba Gombo, Warrant of Arrest for Jean-Pierre Bemba Gombo Replacing the Warrant of Arrest Issued on 23 May 2008, Case No.: ICC/01/05/01/08, ¶ 5 (vi) (June 10, 2008) (charging Bemba with pillage); In the Case of the Prosecutor v. Omar Hassan Ahmad al Bashir ("Omar al Bashir"), Warrant of Arrest for Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09 5 (Mar. 4, 2009) (indicting Bashir for pillage perpetrated by his troops); See Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges, ¶ 575 (Sept. 30, 2008) (confirming charges against both Katanga and Chui for pillage);

[707] France v. Roechling, 14 Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, at 1113 and 1124 (1949)

[708] International Military Tribunal (Nuremberg) Judgment (1946), 1 Trial of the Major War Criminals before the International Military Tribunal 171, 306 (1945) [hereafter *Nuremberg Judgment*]; Representatives of IG Farben were also charged with the pillage of oil as a consequence of their association with the Continental Oil Company, but the court found that the allegations were not proved. Whilst Farben made elaborate plans to plunder Russia, they were never completed and there was inadequate evidence to link Farben to plunder in the Russian theatre. United States v. Krauch et al (I.G. Farben), 8 Trials of War Criminals 1081, 1152. Likewise, Keppler, the deputy-chairman of the Continental Oil Company, was tried for plundering Soviet oil, but the

found guilty of pillaging coal from mines located in Poland.[709] In these and a host of related cases, courts have consistently crafted pillage in terms that affirm the salience of the war crime to modern commerce within resource wars. In so doing, they make corporate criminal law that much larger, necessitating a supple and contingent self-concept, not rigid absolutisms.

Note also that corporate pillage of natural resources need not involve complicity. This reality arises because pillage is understood as incorporating both direct and indirect forms of appropriation; mining as well as purchasing unambiguously satisfies the elements of the term "appropriation" within the offense.[710] Thus, there is good reason to agree with the United Nations War Crimes Commission's conclusion that "[i]f wrongful interference

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Court acquitted him stating that "from the evidence, we cannot draw the conclusion that he participated or directed the Continental Oil Company, in its spoliation activities or programs." *U.S.A. v. Von Weizsaecker et al. (Ministries Case)*, 14 Trials of War Criminals 314, p. 296 (1949) [hereafter *Ministries Case*].

[709] *Id.,* at 741. BHO standards for Berg und Huettenwerke Ost, which means Mining and Smelting Works East, Inc. The defendant was Paul Pleiger. According to the Tribunal, BHO exploited these Polish coalmines after the Reich government issued a so-called trusteeship to the company. Given that the Reich government had no authority to seize these properties, Pleiger became personally culpable for the appropriation his company carried out. In particular, Pleiger personally appointed a local manager to the mines, maintained an active interest in the development of these sites, and supervised a yield in excess of 50,000 tons of coal from the area each year of the war.

[710] A considerable body of international precedent explicitly supports this interpretation of the term "appropriate." In one example, an individual named Willi Buch was convicted of pillage for purchasing silverware at auction, which the German Kommandantur at Saint-Die had illegally requisitioned in occupied France. See Judgment of the Permanent Military Tribunal at Metz, 2nd December, 1947, in 9 *Law Reports of Trials of War Criminals,* p. 65. Herman Roechling, the director of the Roechling firm, was convicted of pillage for purchasing illegally seized property known as "Booty Goods" from a Nazi company known as ROGES. The Tribunal stated that Roechling was convicted of pillage on the basis that he was "a receiver of looted property." France v. Roechling, 14 Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, app. B, (1949), pp. 1117-1118. This definition is not conceptually troubling. As the commentary to the US Model Penal Code argues, "[a]nalytically, the receiver does precisely what is forbidden by [the prohibition against theft] – namely, he exercises unlawful control over property of another with a purpose to deprive." …" AMERICAN LAW INSTITUTE, MODEL PENAL CODE AND COMMENTARIES, Part II, §223.6 (The American Law Institute, 1980).

with property rights has been shown, it is not necessary to prove that the alleged wrongdoer was involved in the original wrongful appropriation."[711] As a result, commercial actors "appropriate" natural resources within the meaning of pillage regardless of whether they were involved in the initial extraction, and as a consequence, the concept of complicity that is so dear to human rights advocates need do no work in these cases.

Moreover, access to legal remedies is seldom ideal in these situations, as scholars in corporate criminal theory assume. Take the apartheid occupation of Namibia in the 1980's, which involved prodigious exploitation of Namibian oil, uranium and other resources by prominent western businesses at the behest of a foreign apartheid government. An investigative body established by the UN Council for Namibia and the UN General Assembly both openly denounced a large number of western companies for the "plunder of Namibian natural resources."[712] The UN Council's repeated attempts at initiating legal proceedings against the companies in domestic courts were stymied, however, by ineffectual theories of civil liability.[713] Although it was never attempted, pillage was

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[711] *Digest of Laws and Cases*, 15 Law Reports of Trials of War Criminals, p. 130.

[712] UN General Assembly, Fourth Committee Report, A/41/726, 17 October 1986, (recalling "that the exploitation and depletion of those resources, particular the uranium deposits, as a result of their *plunder* by South African and certain Western and other foreign economic interests…") (emphasis added); Report of the United Nations Council for Namibia, General Assembly, 41st Session, Supplement No. 24 (A/41/24), ¶ 348 ("Since 1920, CDM has been *plundering* Namibia's gem diamond deposits, which are the most extensive in the world.") (emphasis added).

[713] *Implementation of Decree No. 1 for the Protection of the Natural Resources of Namibia: Study on the Possibility of Instituting Legal Proceedings in the Domestic Courts of States*, reproduced in 80 Am. J. Int'l L. 442 (1986) (surveying numerous states to determine whether a decree of the UN Council for Namibia was justiciable within national legal systems); See also Nico Schrijver, *The UN Council for Namibia vs. Urenco, UCN and the State of the Netherlands*, 1 LEIDEN J. INT'L L. 25-49 (1998) (discussing the one case that was brought in the Netherlands because it had "fully recognized the Council and its competence to enact the

arguably a far superior basis for redress, since many states had implemented war crimes within national legal systems and labored under an obligation to exercise this jurisdiction in appropriate cases. In any case, the story here (and the refrain within the critique to come) is that access to civil, criminal and administrative remedies is seldom optimal in these scenarios, militating against categorical positions that are insensitive to hard realities.

Similarly, it also bears recalling that even when the unlikely event of some accountability does come to pass, that accountability is often very close to a mere farce. For instance, in the year 2000, a Panel of Experts appointed by the UN Security Council to investigate the link between illegal exploitation of natural resources and ongoing violence in the Democratic Republic of Congo unearthed what it described as a "self-sustaining war economy" in which hostilities create "win-win situations for all belligerents."[714] But in denouncing 85 predominantly western companies and 54 individuals for illegally exploiting gold, diamonds, coltan and other resources during the war,[715] the Panel relied on the OECD Guidelines on Multinational Enterprises as the guiding legal framework.[716] This appeal to OECD Guidelines was highly lamentable—after much public interest in these allegations,

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Decree"); See also NICO SCHRIJVER, SOVEREIGHTY OVER NATURAL RESOURCES, 149-152 (Cambridge Univ. Press, 1997)

[714] UN Panel Report, S/2001/357, *supra* note _, ¶ 218.

[715] *Id.* Annexes I-III.

[716] The OECD Guidelines for Multinational Enterprises area a set of voluntary principals and standards adopted by OECD governments, with which companies are expected to comply. In 2000 the guidelines were revamped to create National Contact Points capable of hearing cases, although these contact points have no investigative capacity, cannot sanction violations and only apply in a limit number of countries. OECD Watch, *Guide to the OECD Guidelines for Multinational Enterprises' Complaint Procedure: Lessons from Past NGO Complaints*, (Nov. 2006), http://oecdwatch.org/publications-en/Publication_1664/.; NICOLA JÄGERS, CORPORATE HUMAN RIGHTS OBLIGATIONS: IN SEARCH OF ACCOUNTABILITY, 101-109 (2002)

the best justice offered was an inconsequential statement by a British National Contact Point for OECD Guidelines announcing that a British company had indeed violated the terms of the document,[717] even though the conduct at issue probably constituted a corporate war crime. So armed with this dose of realism, we move to the first of the three components of corporate criminal theory, all of which prove wanting.

III. JUSTIFICATIONS OF CORPORATE CRIMINAL LIABILITY

Corporate criminal liability is a controversial creature. To essentialize the competing arguments, the debate is between those who argue that we need corporate criminal liability and others who complain that it jeopardizes the criminal law's exclusively individualistic focus, thereby endangering the discipline and society. Indeed, when puzzling over the curious practice of blaming inanimate entities, many doubt "the justice and wisdom of imposing a stigma of moral blame in the absence of blameworthiness in the actor."[718] In this section, I criticize both sides of this debate, arguing that much of this discourse has fallen into the unconvincing habit of over-generalization, in ways that contravene almost all of the tenets pragmatists hold dear. Once we correct for these

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[717] UK National Contact Point for OECD Guidelines for Multinational Enterprises, *Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) Ltd*, URN 08/1209, 28 August 2008, (finding that a UK company named Afrimex had violated OECD guidelines for sourcing natural resources from brutal rebel groups.) In all likelihood, this also amounted to the war crime of pillage.

[718]Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U.CHI. L.REV. 422, 422 (1963).

structural flaws, as the advent of corporate responsibility for international crimes will demand, we begin to observe the highly contingent character of arguments for and against corporate criminal liability. This, in turn, should lead inexorably to the triumph of a pragmatic, not absolute, explanation of the concept.

A. The Occasionally Overstated Need for Corporate Criminal Liability

If one were to reduce consequentialist accounts of corporate criminal liability to a slogan, it might be this: one legal fiction deserves another. The decision to grant corporations personhood was the original conceptual evil, so having endorsed this initial untruth, we should at least follow the fiction through to its logical conclusion. Otherwise, if we tolerate the half-measure, corporations are assigned all the normal human propensity for causing harm, but no possibility of being called to account before one of society's strongest means of expressing moral condemnation. Put differently, to entertain the magical thinking that corporations are people to the tremendous benefit of these entities, then to slam the door on arguments that they should be held responsible like people seems badly lop-sided. In the name of consistency, we need corporate criminal liability to balance the conceptual scales; we need a second lie to counterbalance the first.

But on closer inspection, the idea of pursuing the fallacy to its logical ends invites dangerous floodgate arguments in two directions. In the first, does this commitment mean that we could also have a corporation as President of the United States? If not, why not? In the second, would the theory of moral agency this would entail also mean that states, rebel

groups, international organizations and the Holy See could be held criminally responsible? If not, why? Without clear philosophical parameters preventing this multi-directional slippage, the argument for complete embrace of corporate personality seems too absolute, in ways pragmatists rightly reject. Legislatures and courts do not adopt corporate criminal liability because of its philosophical coherence within the surrounding legal system, they do so out of a very pragmatic concern that there is no other meaningful option.

It is not difficult to sympathize with the anxiety that feeds this posture—evidence of corporate power makes for staggering reading. Of the 100 largest economies in the world, 51 are corporations,[719] and the revenues of just General Motors and Ford "exceed the combined GDP for all of sub-Saharan Africa."[720] To draw on one sector that is especially relevant to our present inquiry, the top 100 companies involved in the production and marketing of arms and ammunition reportedly posted a 60% increase in profit between the years 2000 and 2004 alone. And yet already, the intuition that corporate might necessitates corporate criminal liability reveals an argument whose boundaries are ill-defined and a one-size-fits-all approach that need not coincide with every instance of corporate criminality. True, many international crimes are occasioned by the actions of these leviathans, but some are also carried out by their miniscule siblings.

The extractive industry, for instance, habitually relies on much smaller risk-embracing "juniors" to operate in conflict zones in order to acquire cheaper access to

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[719]SARAH ANDERSON, TOP 200: THE RISE OF CORPORATE GLOBAL POWER 1 (2008).

[720]JOSHUA KARLINER, THE CORPORATE PLANET 5 (1997).

precious metals such as coltan, cassiterite, gold and wolframite. These "juniors" tend to be closely held companies, some of which are just shells specifically created for single high-risk commercial speculation carried out by individual businesspeople. In certain circumstances, there is evidence to suggest that some of these companies have been instrumental in determining the course of major international armed conflicts, installing new governments by signing lucrative extractive contracts with rebel groups *en pleine guerre*. And yet, if any of these companies are ever criminally prosecuted, the size and strength of multinational corporations globally will provide no justification for the practice.

Perhaps deterrence is the better rationale? Indeed, many argue that corporations may be more rational than individuals, thus allowing the criminal law to better stymie future offending. As Brent Fisse has cogently argued, the reality with criminal law in its individualistic orientation is that society expresses condemnation in a way that ostracizes the people who perpetrate crimes, exacerbating rather than correcting the social deviance that led to the offending.[721] By contrast, "corporations are more likely to react positively to criminal stigma by attempting to repair their images and regain public confidence."[722] Despite the inherent difficulty of measuring deterrence, there is stimulating literature that

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[721] Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S.CAL. L. REV. 1141, 1164 (1983).

[722] *Id.* at 1153–54. In the same vein, Walsh & Pyrich note that corporate criminal convictions can strongly impact consumer purchasing decisions, and that criminal conviction may have other effects such as barring a corporation from certain kinds of business activity. Charles J. Walsh & Alissa Pyrich, *Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save Its Soul?*, 47 RUTGERS L. REV. 605, 635 (1995).

suggests corporations may be more deterrable than individuals in certain circumstances.[723] If this is true, corporate criminal liability offers very new opportunities for deterring crime,[724] which tends to remain under-appreciated in the literature on deterrence of atrocity, which is almost exclusively oriented toward individuals alone.

Let me expand. To date, much of the literature on deterrence of atrocity has focused uniquely on the social foment necessary to generate mass violence, pointing out that any rational incentive generated by criminal law is unlikely to restrain the fierce passion required to perpetrate offences of this barbarity, particularly when the probability of prosecution is so low.[725] And yet, this assumes that only individuals are guilty of international crimes. On the contrary, corporations pursuing profit rather than inter-ethnic rivalries also satisfy the formal elements of international crimes. And importantly, the corporations that sustain bloodshed are more exposed to foreign law enforcement, more prone to rational deliberation through their commitment to profit maximization, and likely to perceive conviction for a war crime as nothing short of a commercial catastrophe. Thus, there is reason for some jubilation at this promising new stratagem for inhibiting mass violence, even if it remains latent at present.

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[723] SALLY S. SIMPSON, CORPORATE CRIME, LAW, AND SOCIAL CONTROL 36 (2002).

[724] In fairness, not everyone shares this view. For example, though Eli Lederman is open to considering "self-identity" models of corporate criminal liability, he views individual liability as a more compelling and efficient deterrent. Eli Lederman, *Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity*, 4 BUFF. CRIM. L. REV. 641, 702 (2000).

[725] Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?,* 95 AM. J. INT'L L. 7, 10 (2001); David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 FORDHAM INT'L L.J. 473, 474 (1999); Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities*, 84 WASH. U. L. REV. 777, 832 (2006).

To placate the pragmatists, though, we should still qualify our enthusiasm. For one reason, some companies are very much part and parcel of a genocidal apparatus, undermining the arguments that corporations are more prone to general or specific deterrence than those who fiercely swing the machetes. During WWII, the Nazi regime created all range of companies to implement their terrifying expansionist agenda,[726] but a more modern example better illustrates the point. During the Rwandan genocide, calls to butchery were constantly issued and co-ordinated by the infamous Radio Télévision Libre des Mille Collines (RTLM).[727] These acts constitute corporate crime *par excellence,* even if they were never tried as such. Only here, the corporate officers were every bit as "impassioned" as those who obediently responded to their instigations. Consequently, deterrence may well be illusory here, for reasons many excellent scholars of international criminal justice point out.[728] The overarching point, which coincides perfectly with core concepts in pragmatism, is that reality is far more complex than any one absolute conceptual model can explain.

Enter law and economics, where the habit of over-generalizing plays out in different garb. While corporate criminal responsibility has inspired excellent scholarship in law and

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[726] *See*, for instance, the discussion of the Continental Oil Company, a company aptly dubbed "ROGES", and Mining and Steel Works East Inc. (BHO) in STEWART, *supra* note 12, ¶¶ 41, 42, 105; For a more complete history, *see* J.A. Bush, *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said*, 109 COLUM. L. REV. 1094 (2009).

[727] The employees of the company were tried and convicted for instigating and inciting genocide. *See* Prosecutor v. Nahimana et al., Case No. ICTR-99-52-T, Judgment; Prosecutor v. Nahimana et al., Case No. ICTR-99-52-A, Judgment.

[728] See *supra* note 22.

economics, much of it fails adequately to tailor pure theory to the realities of globalized markets. As Jennifer Arlen explains, the tendency among commentators is to "present the classic economic analysis of corporate liability for crime, focusing on optimal individual and corporate liability in *a* '*perfect world*'[729] But what of the deeply flawed one we populate? Jennifer Arlen's work is very good at offering altered iterations based on real-world contingencies, but this approach must be extended still further, such that a pragmatic attitude becomes the norm rather than the exception. If we view the problem of corporate offending as a global phenomenon and purge ourselves of our understandable proclivity to view law through a very local lens, leading economic theory suddenly fails to explain many iterations of the subject in its extremity.

Take the gravity of international crimes like genocide, crimes against humanity, and war crimes. If the utility of criminal law is at least partially dependent upon the social meaning of a crime's stigma,[730] it stands to reason that the utility of corporate criminal responsibility is not constant across different crimes. The extreme character of international offenses is helpful in exposing the point: corporations will probably react differently to being convicted of a war crime than an everyday domestic offense. In fact, popular associations with international crimes might be so intense that companies are over-deterred from operating in volatile political climates, creating a counterproductive economic trap for

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[729] Jennifer Arlen, *Economic Analysis of Corporate Criminal Liability: Theory and Evidence*, in RESEARCH HANDBOOK ON THE ECONOMICS OF CRIMINAL LAW, 144–203 (Alon Harel & Keith Hylton, eds., 2012).

[730] For an excellent articulation of this point, including in the context of corporate criminal liability, *see* Dan M Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609 (1998).

nation-states struggling to avoid or emerge from episodes of mass violence. And yet, these intricacies do not feature in the justifications for corporate criminal liability on offer within law and economics,[731] which sometimes seem to assume transactions within a single pristine legal system. By definition, corporate crimes in war zones fall outside this model.

Maybe stigmatizing companies is the better rationale for corporate criminal liability? The argument goes that "[t]he stigma and sanctions of the criminal law promise greater deterrence from corporate misconduct and more opportunities for asset recovery, compensation, and mandatory corporate reform."[732] In addition, many also speak to the role of criminal justice in propagating moral values within a post-modern world that has seen the decline of alternative moral systems.[733] To bring things back to international criminal justice, prosecuting corporations involved in the sale of weapons or the pillage of natural resources from war zones can transmit values across a global market in a singly unique manner. Given the ubiquity of these corporate crimes and the market's spectacular success in insulating itself from the sharp end of all other forms of accountability, might corporate convictions for international crimes not harness stigma to good effect?

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[731] In fairness, Jennifer Arlen's work does helpfully distinguish between the implications of fraud convictions as compared with environmental harm. My thesis is merely that these types of distinction should feature more centrally in corporate theory, since corporate liability for international crimes will exponentially magnify the discrepancy. Arlen, *supra* note 48, at 9.

[732] CORPORATE CRIMINAL LIABILITY: EMERGENCE, CONVERGENCE, AND RISK 9, 4–5 (Mark Pieth & Radha Ivory eds., 2011).

[733] *See*, e.g., Cristina de Maglie, *Societas Delinquere Potest? The Italian Solution*, in CORPORATE CRIMINAL LIABILITY , *supra* note 51, at 255–70, 268–69.

Sometimes, however, corporate criminal liability may be too blunt an instrument. An alternative strategy geared toward acculturation rather than stigmatization may prove more successful in changing endemic commercial practices, depending on the prevailing circumstances. In the sister field of international human rights, Ryan Goodman and Derek Jinks have pointed to the potential superiority of strategies that employ acculturation to promote compliance, beyond those that are coercive or persuasive in character.[734] So, if acculturation is likely to be more effective as a tool for restraining corporate excess in any given situation, sharper punishments could actually run counter to the expressive purpose many view as a key justification for corporate criminal liability.[735] We should, therefore, recoil from the proposition that corporate criminal liability is *always* preferable or even useful as a communicative device, in favour of a theory that responds to realities on the ground in a more dynamic fashion. That theory is pragmatic.

B. The Contingencies of Corporate Desert

In the preceding section, we considered a small set of consequentialist arguments for corporate criminal liability. The classic response is simple—they leave out *guilt.* In his famous reconciliation of the general theoretical purpose of criminal law as a system as a

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[734] Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004); *see* in particular, the table at page 699 summarizing these arguments in the context of implementation.

[735] *Id.* at 687–99.

whole and the principles to be employed in attributing blame in concrete cases, HLA Hart pointed out that even if your rationale for punishment within a criminal system generally is deterrence, it is clearly morally vulgar to punish family members of those who carried out criminal offenses, even if doing so has massive deterrent effects.[736] By analogy, the use of criminal law as mechanism of regulatory control over corporations in the sale of weapons to warring African countries, say, is only defensible if the corporation is first culpable of some established crime. And here, many argue, corporate criminal liability fails to comply with first principles of criminal responsibility.

Consider some of the effects of shoehorning corporations into a criminal structure built for individuals: a corporation has no mind and therefore cannot experience guilt; it has no body so cannot therefore act in a sense that is not entirely derivative; punishing it would violate the fundamental principle that punishment must be imposed only on the actual offender; and the usual penalties envisaged within the criminal law are frustrated where the nature of the convicted party precludes incarceration.[737] For many commentators, forcing a square peg into a round hole like this is not only unfair to the corporation called to answer within a criminal trial, it does violence to the discipline that is obliged to accommodate the poor fit. If we are interested to construct a coherent, holistic account of criminal justice, instead of treating corporations as a category apart, these concerns are worrisome. [738] Might

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[736] H.L.A. HART, PUNISHMENT AND RESPONSIBILITY, 5-6 (Rev. ed. 1984)

[737] L. H. LEIGH, THE CRIMINAL LIABILITY OF CORPORATIONS IN ENGLISH LAW 1509 (1969).

[738] In response to this concern, Ana-Maria Pascal argues that corporations cannot have a moral conscience, but that instead of rejecting corporate criminal liability on that basis, we should formulate an entirely different

it be, then, that the discussions about the utility of corporate criminal liability miss this broader picture, and the foundations upon which criminal justice rests?

Many would say no. Indeed, there is much excellent work refuting each of these propositions, but in some instances it too overstates the generality of a principle that may not obtain in concrete circumstances. Corporate guilt is a case in point. At one level, the fact that we frequently blame corporations is a popular rejoinder to those who argue that corporations cannot be guilty. As Samuel Buell argues, we hold BP responsible for massive damage caused by a faulty oil drill in the Gulf of Mexico, or experience moral shock that a weapons manufacturer would sell weapons to Hutu extremists at the zenith of the Rwanda Genocide, which *demonstrates* that corporations also populate our moral universe. He opines that, "[i]t is a fact of contemporary life that our conception of responsibility includes beliefs about institutional responsibility."[739] These sorts of practice-oriented explanations for moral agency elevate corporations to a position alongside individuals as deserving of criminal blame based on common moral intuitions.

Of course, intuitions might be valuable in developing stereotypes, but they are often wrong in specific contexts. So instead of crafting corporate criminal liability from common public sentiment, we are compelled to imagine an ontological basis for liability that reflects

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conception of crime and responsibility based on "socio-legal circumstances." Ana-Maria Pascal, *A Legal Person's Conscience: Philosophical Underpinnings of Corporate Criminal Liability*, in EUROPEAN DEVELOPMENTS IN CORPORATE CRIMINAL LIABILITY 33–52, 49-50 (James Gobert & Ana-Maria Pascal eds., 2011).

[739]Samuel W Buell, *The Blaming Function of Entity Criminal Liability,* 81 IND. L.J. 473, 491 (2006) (discussing the social practice of blaming institutions for crime).

the corporation's own blameworthiness. Christian List and Philip Pettit offer a profound justification for blaming corporations along these lines,[740] and for once, it comes replete with a range of qualifications that, perhaps unbeknownst to its authors, render the account somewhat pragmatic. They start by identifying conditions for agency, which include: the ability to make a *normatively significant choice*; *judgmental capacity*, in the sense of understanding what is at stake and having the ability to access evidence; and *relevant control* to choose between the options.[741] Having posited these as necessary and sufficient conditions for agent responsibility, they hold that many group agents such as corporations can satisfy these requirements,[742] but they also carve out circumstances where these standards are not met.[743] All this means that the best conceptual justifications are sensitive to the type of corporation on trial, as pragmatism would implore.

Having established that *some* corporations can be blamed, a number of difficult practical questions arise. Where, for instance, do we look to prove a corporation's culpability? For Pamela Bucy, corporate culpability is to be located in a "corporate ethos," which is identified through inspecting the role of the board in monitoring compliance, corporate goals, emphasis on educating employees about legal requirements, compensation

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[740] CHRISTIAN LIST & PHILIP PETTIT, GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS 153–67 (2011).

[741] *Id.* at 155.

[742] *Id.* at 158–63.

[743] *Id.* at 159, 162–63.

incentives and the like.[744] Models of this sort seek to capture "genuine corporate culpability,"[745] instead of depending on the double-derivative character of corporate liability in complicity cases (where an employee is derivatively liable for use of weapons by an African warlord, and the company becomes derivatively liable through the employee).[746] The corporation is an entity capable of deserving punishment in its own right, quite apart from the actions of its individual representatives. To find the corporate culture that is the blameworthy source of responsibility, we simply look to corporate practices that reflect the organization's identity.

Admittedly, this idea of corporate culture is hotly contested, but the pragmatist acknowledges the circumstances where the proposition is true. In the view of John Braithwaite and Brent Fisse, for instance, we should not dwell on our inability to see corporate culture in physical form both individuals and corporations are an amalgam of observable and abstract characteristics.[747] Moreover, corporations and their representatives are not one and the same; they have symbiotic relations to one another. The Navy is constituted by the actions of individual sailors, but so too the existence of the sailor is

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[744] Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1138 (1991).

[745] William S. Laufer, *Corporate Bodies and Guilty Minds*, 43 EMORY L.J. 647, 664 (1994) (discussing four models of corporate culpability that he considers capture genuine corporate culpability).

[746] James G. Stewart, *The End of "Modes of Liability" for International Crimes*, 25 LEIDEN J. INT'L L. 165, 188–90 (2012).

[747] Brent Fisse & John Braithwaite, *The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability*, 11 SYDNEY L. REV. 468, 476 (1988) ("The notion that individuals are real, observable, flesh and blood, while corporations are legal fictions, is false. Plainly, many features of corporations are observable (their assets, factories, decision-making procedures), while many features of individuals are not (e.g., personality, intention, unconscious mind).").

constituted by the existence of the Navy.[748] Thus, corporations have their own separate ontology, which cannot be reduced to individual agency without turning a blind eye to the formative influence of the overarching organization and the unique role this can play in bringing about harm.

Once again, however, one wonders whether this thesis can hold true across all corporations. A behemoth bureaucracy like the Navy, for example, that deliberately attempts to shape individual behavior of members, is not necessarily the same as the relatively minute corporate structures that instigate the pillage of natural resources in modern conflict zones. Earlier, we discussed the use of "juniors" in the illegal exploitation of conflict minerals, precisely because they are closely held shells that are easily discarded to avoid detection. It is not clear to what extent there is any real symbiosis between individual and corporation within these entities, whether "juniors" have any identifiable culture, or where we are to draw the line in isolating these phenomena as companies increase in size and sophistication. Braithwaite and Fisse's otherwise outstanding explanation only speaks to a certain type of corporate reality, and therefore offers a justification that is dependent on contingencies that only pragmatism can accommodate.

The next set of arguments suffers from similar deficiencies. What of the retort that corporate criminal liability punishes innocent individuals, which forms a key part of the conceptual backlash against corporate criminal liability? A significant portion of the

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[748] *Id.* at 477–78. Braithwaite and Fisse also make a beautiful parallel to a reduction of language to words without syntax, vernacular, irony, and other elements of communication.

literature regrets the "reputational rub-off" effect of corporate criminal liability on senior managers,[749] and more frequently, the fact that the costs of a corporate conviction tend to be borne by employees and shareholders who are presumptively innocent. If Arthur Andersen's conviction for obstructing justice in the Enron fiasco ultimately cost 80,000 people their jobs,[750] would convicting a major diamond producer for pillaging blood diamonds from warring African states not amount to an instantaneous corporate death sentence, which would ultimately punish innocent company affiliates indiscriminately and in great disproportion to the atrocities the company had enabled?

Already, adding atrocities to this hypothetical changes the terms of the usual debate, showing the weakness of these arguments as a ground for abolishing corporate criminal liability across the board. Sometimes, the harm averted clearly outweighs that incidentally visited upon shareholders and employees, but surely not always. In any event, the double standards that lurk just beneath the surface are difficult to swallow. The sudden concern for indirect victims of corporate criminal liability sits uncomfortably with the almost total lack of empathy for the plight of family, children and community members when a person is invited to serve time. On a broader level, capitalism postulates that the brutality of forcing 80,000 people onto the streets to find new work is justifiable—nay, desirable—when market forces dictate that their employer is no longer economically competitive, but the

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[749] V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?* 109 HARV. L. REV. 1477, 1510 (arguing that reputational rub-off on corporate managers risks increasing the total penalty to exceed optimal damages).

[750] LAWRENCE M. SALINGER, THE ENCYCLOPEDIA OF WHITE-COLLAR & CORPORATE CRIME 574 (2005).

same effects that flow from market reactions to their employer's moral turpitude are denounced as an aberration.

But we need not decide the issue definitively in the abstract. It may be that in weighing the strengths and weaknesses of a corporate prosecution, the perceived benefit of proceeding against a corporation is superseded by the immediate negative ramifications to individuals. While the slogan "too big to fail" is politically distasteful, it should alert us to the fact that the incidental implications of corporate failure are not constant across all corporations or contained within national borders. By attempting to find categorical positions on issues that simultaneously address the family carpet company in India and Goldman Sachs on Wall Street, we risk advocating for absolute standards that have potentially tremendous ramifications when applied without sensitivity to context. Without excusing big banks, it is possible to offer a pragmatic middle ground that moves beyond black-and-white arguments whose rigidity will prove harsh if applied blindly in all conceivable scenarios.

IV. Corporate Criminal Liability Versus Corporate Civil Liability

The second set of arguments that influence the identity of corporate criminal liability relates to the relationship between corporate criminal liability and civil remedies. Might corporate criminal liability be specious given the availability of civil redress, which explicitly attaches to the corporation without upsetting basic premises in the criminal law? While this section deals with a range of arguments for and against this proposition, it bears

recalling at the outset that the common law model of corporate criminal liability developed because it provided "a more effective response to problems created by corporate business activities than did existing private remedies."[751] The same pragmatic rationale will likely necessitate corporate criminal responsibility for international crimes, although much depends on the specificities of individual cases. In many instances, both sides of the debate overlook this nuance.

A. Qualifying the Categorical Preferences for Civil Liability

Let us begin with the argument, already troubling to the pragmatist, that civil claims are per se superior to corporate criminal liability. According to Vikramaditya Khanna, civil liability can better capture the desirable effects of corporate criminal liability, without emulating several sub-optimal downsides. Surveying the history of corporate criminal responsibility within the United States, Khanna opines that the criminal angle appeared to be "the only available option"[752] that met the need for public enforcement and corporate liability at the time of its development, given the absence of widespread public civil enforcement prior to the turn of the 20th century.[753] Thus, Khanna and I agree that the concept developed pragmatically to fill a perceived regulatory gap. We disagree, however,

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[751] Brickey, *supra* note 2, at 423

[752] Khanna, *supra* note 68, at 1486.

[753] *Id.* at 1486.

that the gap is now filled; if one accepts that corporations are operating transnationally, including in regulatory vacuums created by war and social turmoil, corporate criminal liability is still "the only available option" in many instances.

Professor Khanna offers other arguments that also seem too sweeping in breadth. For instance, he argues that reputational loss is not effective against certain corporations, since activities that harm third parties, such as environmental pollution, do not directly affect a firm's customers.[754] Here again, Khanna's reasoning is not adequately calibrated to the moral magnitude of certain systems of criminal law and the historical associations that, for better or worse, accompany them. Take the diamond industry. The tremendous success of the media campaign against furs that brought that industry to its knees more or less directly led to the Kimberley Process for monitoring conflict diamonds. Perhaps convicting a major diamond producer of war crimes last visited upon businessmen who sustained the Nazi apparatus could stimulate a comparable moral avalanche, even though the harm at issue is to African civilians in survival economies, not to consumers.

Thus the extremity of international justice helps reveal a hidden truth that cautions against rigid, categorical, or universal preferences of this sort. It may well be true that civil liability is preferable in a whole raft of instances, including for reasons Khanna so ably elucidates, but the need for qualification is unavoidable. In this instance, the sheer heterogeneity of crimes for which corporations might be held responsible, which range from possession of marijuana to insider trading and genocide, militates against conceptual

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[754] *Id.* at 1500.

positions that are so definitive.[755] The moral weight that attaches to each is, quite simply, not constant.[756] Therefore, whether consumers react in ways that promote accountability and responsibility will depend on the moral gravity of the crime, historical associations with its perpetration, the surrounding political climate and a host of other variables, all of which resist processing in the abstract for every conceivable manifestation of the problem. Consequently, pragmatism must do much more of the heavy lifting.

Later, Khanna prefers civil liability because cash fines are optimal as long as the corporation is not judgment-proof.[757] Given the viability of cash claims against the corporation, he concludes that corporate criminal liability only detracts from the greater efficacy of civil sanctions.[758] But there is one problem with this explanation, which cases from the frontiers of international criminal justice again help unveil. Judgment-proof corporations are likely a relatively finite class within a single functional North American legal system, where access to justice is comparatively trouble-free, but this cannot be said for victims of transnational corporate crimes from the Global South, who are likely to have little to no access to the civil liability mechanisms we take for granted. A Syrian father of a child killed in a rocket attack cannot easily sue Russian arms vendors for contentedly

[755] Celia Wells agrees that "[t]he variety in corporate form, reach and activity requires a flexible response both in terms of forms of regulation and in terms of corporate liability models." Celia Wells, *Containing Corporate Crime: Civil or Criminal Controls?,* in EUROPEAN DEVELOPMENTS IN CORPORATE CRIMINAL LIABILITY, *supra* note 57 at 13, 27.

[756] Indeed, in some cases, the "crimes" in question may arguably lack moral weight entirely. Sanford Kadish identifies certain economic crimes as "morally neutral" and argues against the use of criminal liability in such cases. Kadish, *supra* note 37, at 442.

[757] Khanna, *supra* note 68, at 1504.

[758] *Id.* at 1534.

furnishing the perpetrators with weapons used for the atrocity. So once the *single perfect jurisdiction fallacy* is withdrawn, it leaves a sense that the exception is actually the norm.

The essential point, though, is that criminal liability might occasionally fill accountability gaps like this where civil liability falls short. To draw a vague parallel, US prosecutors recently indicted the British weapons giant BAE Systems for violating the US *Arms Export Control Act* and making false statements concerning its compliance with the *Foreign Corrupt Practices Act*[759] when the company's tremendous political power in Britain effectively rendered it judgment-proof there for allegedly paying billion-dollar kick-backs to the Saudi government over a lucrative weapons deal.[760] The parallel with complicity and the Syrian hypothetical is loose but meaningful—criminal and civil liability may overlap to some extent, but any congruence is far from perfect, and the portion of the set outside the intersection creates opportunities for prosecutors that have no equivalent elsewhere. As a result, prosecutors may find themselves jumping through hoops that are more numerous and demanding in order to make cases in corporate criminal liability, even though alternative strategies might be preferable if the case were a uniquely domestic affair.

Issues of procedure can have a similar effect. In what he describes as "a pragmatic reassessment" of corporate criminal responsibility,[761] John Coffee references two salient examples of procedural factors that might favor criminal rather than civil liability. The first

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[759] For a helpful summary, *see* Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1775, 1842 (2011).

[760] For a full and harrowing account, *see* Section III: Business as Usual, in FEINSTEIN, *supra* note 16.

[761] John C. Coffee, Jr., *No Soul to Damn: No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 444–48 (1980).

involves the relative celerity of the criminal trial compared to civil litigation: "because criminal cases are typically concluded in a much shorter timespan than civil cases, the criminal law potentially can serve as an engine by which to expedite restitution to victims."[762] In the context of corporate responsibility for international crimes, this could be very attractive, even determinative. One of the only successful civil cases brought against corporations under the aegis of the *Alien Tort Claims Act* took 14 years in the pre-trial phase alone before Shell gallantly fell on its own sword over allegations of complicity in Nigeria.[763] If justice delayed is justice denied, this delay may constitute a basis for prioritizing criminal cases over other civil alternatives, even if this choice comes with greater epistemic burdens for litigants.

Moreover, the criminal angle is attractive since the state brings charges and absorbs associated costs. Needless to say, this might override all other conceptual preferences, providing further incentives to pursue corporate criminal liability over routes that may well be absolutely optimal within the *single perfect jurisdiction*.[764] Take a seemingly banal comparative issue like the availability of contingency fees: the idea that attorneys can take cases in exchange for a percentage of any eventual award resulting from litigation they undertake on a client's behalf. In the United States, these arrangements are by and large condoned, but "[t]he situation outside the United States is different in virtually every

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[762]*Id.* at 447.

[763]Jad Mouawad, *Shell to Pay $15.5 Million to Settle Nigerian Case*, N.Y.TIMES, June 9, 2009, http://www.nytimes.com/2009/06/09/business/global/09shell.html.

[764]Coffee, *supra* note 80, at 447.

regard."[765] The vast majority of foreign jurisdictions prohibit contingency fees categorically.[766] But saddled with the burden of paying their own way in private suits against powerful corporations in first-world jurisdictions (not to mention the risk of having to pay the other side's costs), victims of transnational corporate malfeasance may rightly see corporate criminal liability instigated at a foreign state's behest as their only hope.

Finally, criminal cases may offer real substantive advantages too. In the types of scenarios where corporations participate in international crimes, processing these incidents as civil cases would require plaintiffs to engage in lengthy litigation dealing with jurisdiction, *forum non conveniens*, choice of law and, potentially, enforcement of foreign judgments. Each of these components erects potential barriers that can and do prove insurmountable for would-be litigants of transnational corporate crimes. By contrast, extraterritorial jurisdiction exists over international crimes most everywhere, allowing prosecutors to bypass these impediments in private international law through a more streamlined criminal framing. This resort to extraterritorial application of criminal law is certainly no panacea,[767] but it does second-guess categorical preferences for civil liability in a world where access to justice is so acutely under-developed, to the obvious benefit of corporations.

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[765]D. R. Hensler, *The Globalization of Class Actions: An Overview*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 7, 22 (2009) (summarizing an extensive global study of provisions governing access to civil remedies).

[766]*Id.* at 22.

[767]Austen Parrish, *Domestic Responses to Transnational Crime: The Limits of National Law*, SSRN ELIBRARY (2011).

C. Over-Generalizing the Utility of Corporate Criminal Liability

The *single perfect jurisdiction* fallacy also appears on the opposite side of the equation. Unlike the abolitionists who view corporate criminal responsibility as an unjustifiable mistake that only obscures civil remedies,[768] the advocates for corporate criminal liability argue for the co-existence of corporate and civil remedies. This difference in argumentative strategy affects the discourse in important ways; while critics of corporate criminal responsibility are content to call for its abolition, advocates who feel they have justified using criminal law to blame corporations then shift focus to articulate the terms of the relationship between the two limbs of accountability they view as acting in concert. Part I addressed certain core philosophical arguments, leaving us to consider the arguments for corporate criminal liability relative to the private alternative. The difficulty is that advocates are also often seduced by the *single perfect jurisdiction* fallacy and their adversaries' tendency to over-generalize.

To begin, note the view that one of corporate criminal liability's real competitive advantages over civil alternatives is the criminal law's ability to transform commercial practices across an entire industry. These commercial practices are ubiquitous, requiring the expressive power of criminal denunciation. For Brandon Garrett, for instance, "[t]aking strong action against a single firm can also impact an industry to the extent that the firm

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[768] John Hasnas, *The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1329 (2009).

behaved in a manner common to other similarly situated firms."[769] A possibility like this is enticing to prosecutors of international crimes, who face pervasive corporate offending of long historical pedigree (of which the arms and extractive industries are exemplars), severe financial pressures to get as much "justice" as possible for each dollar spent, and expectations that their work will have transformative effects in ending culture(s) of impunity that sustain international crimes. In many senses, then, these arguments are a natural fit within international criminal justice, perhaps explaining why many view corporate criminal liability as the next frontier in this trajectory.

But where does this leave civil liability? To begin, those who view civil liability as valuable but singly inadequate sometimes build models to explain when one form of liability should prevail over the other, but these models do too little to control the numerous variables of corporate criminal offending globally. Samuel Buell, for instance, supports the continued availability of corporate criminal liability, but argues that it should feature as the "sharp point" of a pyramid, which includes all range of civil remedies, including those enforced by public administrative agencies.[770] While I have no doubt that the pyramid has insightful implications for a certain class of cases, my fear is that extrapolating it across the variegated types of corporate crimes committed globally (even by American firms, if one wants to retain a local focus) assumes a more mature system of global accountability than

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[769]Brandon L. Garrett, *Collaborative Organizational Prosecution*, in PROSECUTORS IN THE BOARDROOM, *supra* note 70, at 154, 158.

[770]Samuel W. Buell, *Potentially Perverse Effects of Corporate Civil Liability*, *in* PROSECUTORS IN THE BOARDROOM, *supra* note 70, at 87, 88.

we have. All things being equal, the model makes great sense, but prosecutors of international crimes operate in a space where opportunities for accountability seldom present in that way.

Another of the best-known divisions between criminal and civil liability draws the line between corporate actions that society wants to prohibit outright (which should be criminalized) versus practices it wants to price (which should attract civil penalties companies can pass on to consumers).[771] Regrettably, this dichotomy too translates poorly into the new corporate dimensions of international criminal law. Perhaps it suggests that the complicity of arms vendors in crimes like genocide should be criminalized because reducing human suffering of this order to economic terms would be morally outrageous, whereas the illegal exploitation of natural resources should figure within civil actions where legal damages can simply ratchet up the cost of laptops, cars and wedding rings. And yet, this neat division again presupposes an equality between criminal and civil opportunities for accountability, which seldom exists outside the *single perfect jurisdiction*. Once the theory is subjected to the international experimentation pragmatists demand, it often leads to no accountability at all.

Similarly, the political influence of particular industries on legislatures and law enforcement agencies is not uniform, thereby further distorting any notional equality between civil and criminal forms of redress. This point is nowhere more true than in the

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[771]John C. Coffee Jr., *Does "Unlawful" Mean "Criminal"? Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U.L.REV. 193, 230 (1991).

weapons sector. For instance, while civil litigation in the United States has had a tremendous regulatory effect on the tobacco industry, attempts to emulate that effect within the arms industry have achieved very little—cities such as Chicago, New York and Philadelphia have almost invariably lost civil suits against arms manufacturers.[772] If a combination of complicity and corporate criminal liability generates better results, it will most likely be because the applicable law and procedure interacted more favorably with the countervailing constellation of power politics in concrete cases; less because some commercial practices cannot be priced.

What about having corporate criminal liability operate hand in hand with corporate civil cases? True, corporate criminal liability can also create incentives for other forms of liability, be they civil liability of the corporation or criminal responsibility of individuals. In keeping with this insight, Harry Ball and Lawrence Friedman argue that corporate criminal liability is useful insofar as it allows prosecutors to threaten "the full treatment,"[773] that is, all heads of accountability for the single crime. The idea is that corporate criminal liability acts as a threat for cumulative accountability, unless corporations play along with prosecutors' desires to pursue individual representatives of a business, and to a lesser extent, modulate systems of corporate governance.[774] By and large, this is a welcome proposition, but it still assumes a spectrum of different forms of accountability, which is

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[772] TIMOTHY D. LYTTON, SUING THE GUN INDUSTRY (2009).

[773]Harry V. Ball & Lawrence M. Friedman, *The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View*, 17 STAN.L.REV. 197, 215 (1965).

[774]*Id.* at 215.

frequently unlikely for disaffected communities in say Africa, who cannot draw on multiple options and will consider one a luxury. From this different perspective, the "full treatment" seems overly abstract, when treatment of any sort remains illusive.

Admittedly, there are real chances that corporate criminal liability will accentuate the likelihood of civil claims. Mariano-Florentino Cuéllar ably points out as much, when he argues that "some will recognize how the presence of overlapping criminal and civil jurisdiction can facilitate the imposition of more severe civil penalties."[775] In particular, Cuéllar suggests that the acquisition of information from one legal process might feed into the other, meaning that the two operating in tandem create results a single form of accountability would not have achieved independently. At the same time, while one certainly hopes that this type of cooperation blossoms for cases involving international crimes at the hands of corporate actors, we should not lose sight of the competing possibility that one will be used to thwart the other.[776] For international crimes involving corporations, the latter appears more probable.

Take the US *Alien Tort Claims Act.* Over the past several decades, the ATCA has emerged as the framework of choice for human rights advocates, largely on the back of the same types of pragmatic sentiment that fuelled the growth of corporate criminal liability

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[775]Mariano-Florentino Cuéllar, *The Institutional Logic of Preventive Crime*, *in* PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT, *supra* note 70, at 132, 143.

[776]Sara Sun Beale, *What Are the Rules If Everybody Wants to Play? Multiple Federal and State Prosecutors (Acting) as Regulators*, *in* PROSECUTORS IN THE BOARDROOM, *supra* note 70, at 202, 214 (discussing how prosecutors may have good political reasons for favoring civil rather than criminal charges, including the fear of putting a major corporation out of business).

(decades prior in Anglo-American systems, but contemporaneously in Europe). Having read international human rights into the ATCA and somewhat awkwardly borrowed complicity back into civil liability, human rights advocates brought civil cases against Yahoo! Inc, Shell, Rio Tinto and a host of other corporations for enabling human rights abuses in the four corners of the world. But if there is some synergistic effect between civil and criminal liability, where are the parallel criminal prosecutions here? There are, quite simply, none. Again, this suggests that we should be slow to adopt strong prescriptive positions about the relationship between civil and criminal liability of corporations, when context yields such disappointing outcomes.

In sum, our attempts to ascertain the relative merit of civil and criminal claims against corporations can only be definitive if we exclude certain classes of cases, thereby undermining our claim to universalism. To a large extent, pragmatism governs preferences for one system over the other, which is not to say that no theoretical explanation is relevant. This, of course, leaves the field open to the retort that the division between civil and criminal responsibility of corporations is entirely arbitrary,[777] but this statement too requires qualification. In any event, if we can avoid the pragmatism that now seems inevitable in seeking justice for corporate offending globally, more stable theories will not emerge by pretending that corporations do not operate internationally or that opportunities for law enforcement are constantly ideal everywhere. To assume these things risks a

[777] *Developments in the Law—Corporate Crime: Regulating Corporate Behavior through Criminal Sanctions*, 92 HARV.L.REV. 1227, 1311 (1979) (lamenting the arbitrariness created by broad statutory discretion in deciding between criminal and civil corporate liability, which is guided only by largely subjective standards).

collapse into what pragmatists call "philosophical escapism," where theory loses touch with the world we live in. In reality, pragmatism seems destined to play the driving role in delineating criminal from civil forms of corporate accountability for some time to come.

V. INDIVIDUAL VERSUS CORPORATE CRIMINAL LIABILITY

Even if we suppose that corporate criminal liability will prevail over philosophical resistance to the ugly process of forcing corporations into a system built for individuals and that corporate criminal liability emerges triumphant over civil alternatives, we still face the daunting intellectual challenge of formulating a defensible philosophical rationale for distributing blame between corporations and the personnel that operate them. Here, too, the debate has struggled to conceptualize the full spectrum of corporate offending to which this philosophy must cater, in ways that assume a parochial sense of criminal justice, a world without globalization or a utopian system of global justice that remains some distance from reality. In this third part, I criticize both sides of the literature that disputes the significance of corporate criminal liability as compared with the individual criminal responsibility of corporate officers as again failing to respond to the core precepts of pragmatism.

A. Unnecessarily "Local" Preferences for Individual Liability

In a classic criticism of corporate criminal liability, Gerhard Mueller denounces the instrumental punishment of the corporation for acts that were undoubtedly carried out by

individuals within the company. In lamenting the pragmatics that gave rise to corporate criminal liability, he famously compared the concept to a weed: "[n]obody bred it, nobody cultivated it, nobody planted it. It just grew."[778] His blanket preference for individual responsibility focused on a number of factors, but one speaks to a wider set of problems in this literature. For Mueller, "[i]t is a poor legal system indeed which is unable to differentiate between the law breaker and the innocent victim of circumstances so that it must punish both alike."[779] But this begins a set of arguments that are premised on a very parochial notion of corporate criminal liability, which crowds out other understandings of the concept and therefore sheds too little light on corporate problems that span the globe.

Mueller's inspiration is exclusively American. In the United States, corporate criminal liability developed in a highly pragmatic fashion, drawing heavily on tort law that eschewed traditional notions of criminal blame. As Kathleen Brickey has noted, "the early doctrine through which corporations and their managers were held criminally liable developed with little or no heed to traditional notions of culpability."[780] The notion of *respondeat superior* epitomized this methodology; it was simply plucked out of tort law then deposited in the adjacent criminal field, regardless of its incongruence with foundational notions of criminal responsibility. So when Mueller objects to the inability of corporate criminal liability to differentiate between corporation and individual, he

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[778]Gerhard O.W. Mueller, *Mens Rea and the Corporation: A Study of the Model Penal Code Position on Corporate Liability*, 19 U. PITT. L. REV. 21, 21 (1957).

[779]*Id.* at 45.

[780]Brickey, *supra* note 2, at 421.

references the fact that *respondeat superior* makes the corporation criminally responsibility for acts of all employees,[781] creating an objectionable guilt by proxy that flies in the face of liberal notions of punishment.

A number of very distinguished scholars emulate this approach, arguing that individual criminal liability is sufficient, at least in part, because *respondeat superior* enables vicarious liability. For example, Richard Epstein criticizes corporate criminal liability on the basis that "potency is not enough; specificity and overkill matter as well".[782] Corporate criminal liability may be a very sharp weapon, but it fails to calibrate punishment with responsibility, and is therefore harsh as a distributive principle. But in preferring individual criminal responsibility as a blanket rule (to function in parallel with corporate civil liability), Epstein and others fail to distinguish corporate criminal liability *qua* concept from the vicarious liability model applicable as a matter of extant doctrine in the United States. This not only overlooks the extensive literature that argues for alternative theoretical models that better capture "genuine corporate culpability"[783]; it is closed to the foreign versions of corporate criminal liability that stand ready to apply these alternative standards to live cases, including where American corporate interests are in question.

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[781]*Id.* at 423.

[782]Richard A. Epstein, *Deferred Prosecution Agreements on Trial: Lessons from the Law of Unconstitutional Conditions*, *in* PROSECUTORS IN THE BOARDROOM, *supra* note 70, at 38, 44–45. In fairness, Epstein also criticizes corporate criminal liability for its anthropomorphic character and its tendency to punish innocent shareholders and employees.

[783]Laufer, *supra* note 64, at 664 (discussing four models of corporate culpability that he considers capture genuine corporate culpability).

This oversight has no real relevance for cases that fall within a *single perfect jurisdiction*, but the same cannot be said for transnational crimes, such as those involving the complicity of arms vendors in genocide or the corporate pillage of resources from conflict zones. In these sorts of trans-boundary cases, which involve overlapping criminal jurisdictions, corporate criminal liability cannot be summarily reduced to a single monolithic doctrine. For instance, in the context of allegations that a company named Anvil Mining was complicit in a very serious massacre in the Democratic Republic of Congo (DRC), courts in Australia, Canada, the DRC and potentially the United States all enjoyed criminal jurisdiction over the case, leaving the *per se* preference for individual criminal responsibility blind to divergent potential consequences generated by very different understandings of corporate criminal responsibility in each of these jurisdictions. Is this an example of "transform[ing] purely immediate qualities of local things into generic relationships"?[784]

Once again, these different sets of rules must also be seen together with procedural disparities between jurisdictions. For instance, in the United States, prosecutors have come to use the threat of corporate criminal liability as an incentive to ensure that large corporations sacrifice their guilty corporate officers for individual prosecutions.[785] This highly instrumentalist use of corporate criminal liability allows a very broad prosecutorial

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[784] DEWEY, *supra* note 6, at 128–29.

[785] WILLIAM S. LAUFER, CORPORATE BODIES AND GUILTY MINDS: THE FAILURE OF CORPORATE CRIMINAL LIABILITY 5 (2006); Jennifer Arlen, *Removing Prosecutors from the Boardroom: Limiting Prosecutorial Discretion to Impose Structural Reforms*, *in* PROSECUTORS IN THE BOARDROOM, *supra* note 70, at 62, 71.

discretion to overcome rules of procedure that inhibit prosecutions of corporate officers.[786] But importantly, these procedural hurdles do not exist in other jurisdictions.[787] As a consequence, theories of the optimal relationship between individual and corporate responsibility, which take transnational corporate crimes seriously, also require more holistic appreciations of surrounding legal norms. Given the complexity and heterogeneity of legal systems throughout the world, categorical solutions seem almost impossible to ascertain ahead of time.

Instead of seeking to establish that individual criminal liability is immutably preferable, it might be better to isolate *when* corporate criminal liability is *not* sufficient, i.e., when is individual criminal responsibility *necessary?* At the level of organization theory, this might occur where: (1) the financial gain to the corporation exceeds that acquired by the manager, making the manager more vulnerable to measures directed at prohibiting conduct than the corporation; or (2) the criminal law is able to generate a deterrent effect that exceeds that which will befall a manager through internal retaliation within a company for refusing to violate a legal norm.[788] If a corporate manager is called to purchase blood diamonds or other conflict commodities by senior management, the less probable chance of individual criminal responsibility for a war crime may seem sufficiently

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[786] Edward B. Diskant, *Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine through Comparative Criminal Procedure*, 118 YALE L. J. 126, 152 (2008) (discussing the extent to which procedural rules in the United States insulate corporate officers from individual liability in ways not true of German criminal law).

[787] *Id*.

[788] Coffee, *supra* note 80, at 409. Coffee suggests a range of other rationales for why individual criminal responsibility cannot be ignored too.

unappealing to offset the very likely repercussions from higher-ups in the corporate structure.

Here too, however, one must be wary of the one-size-fits-all approach that pervades much of this discourse. In many instances, the grounds for preferring individual criminal responsibility will be perfectly banal. For instance, when US prosecutors arrested the famed "Merchant of Death" Viktor Bout on charges of attempting to sell weapons to the Colombia rebel group FARC,[789] there was little suggestion that his shell company Cess Air would also be tried, even though the corporate website unashamedly bragged about much greater sins elsewhere.[790] Cess Air had no assets, little real contact with US jurisdictions, and no good-will capable of being tarnished. To return to the theorists of corporate criminal liability, the more controversial focus on criminal responsibility of corporations is often redundant in closely held companies,[791] where the organization is a mere subterfuge for individual exploits.[792] So if individual criminal responsibility is a necessity in these situations, it is more because all other options are practically foreclosed, and less because

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[789] Noah Rosenberg, *Viktor Bout Guilty in Arms-Trafficking Case*, N.Y.TIMES, November 2, 2011, http://www.nytimes.com/2011/11/03/nyregion/viktor-bout-guilty-in-arms-trafficking-case.html, For more detailed accounts, see Nicholas Schmidle, *Disarming Viktor Bout*, THE NEW YORKER, (2012),

http://www.newyorker.com/reporting/2012/03/05/120305fa_fact_schmidle; DOUGLAS FARAH & STEPHEN BRAUN, MERCHANT OF DEATH: MONEY, GUNS, PLANES, AND THE MAN WHO MAKES WAR POSSIBLE (2007).

[790] *See* Cess Air's amazing website at http://www.aircess.com/

[791] Bucy, *supra* note 63, at 1151.

[792] James Gobert, *Squaring the Circle: The Relationship between Individual and Organisational Liability*, in EUROPEAN DEVELOPMENTS IN CORPORATE CRIMINAL LIABILITY, *supra* note 57, at 139, 143, ("Another instance where a prosecution of a company's directors and officers may be deemed highly desirable is where the company is merely the vehicle for executing the individual's offence.").

an individual focus is optimal as a generic policy. Either way, only a pragmatic theory of corporate criminal responsibility will be supple enough to mold itself around these variants.

B. Rationales for Corporate Criminal Liability Are Only Sometimes True Internationally

How do the arguments that corporate criminal liability is necessary over and above individual accountability fare in the migration from domestic theory into international criminal law? Part II discussed a host of more general consequentialist rationales for corporate criminal liability, but several additional consequentialist rationales deal with the added value of this concept over individual responsibility. These arguments are myriad, and often expressed in categorical language that may or may not make sense in specific contexts. As things transpire, many of these justifications ring true for international crimes at the hands of corporations within both the extractive and armament sectors, but as the pragmatists warn, this is not a universalizable truth that can be automatically transplanted from the local to the international. Once again, pragmatism is necessary to differentiate aspects of abstract, local, universalized corporate criminal theory that are relevant from those that are overly-general when viewed in context.

A classic argument for corporate criminal liability is that the corporation is better positioned to detect, prevent and remedy crimes perpetrated by corporate agents than the state. In an excellent series of articles, Jennifer Arlen points out the superior incentives generated by holding corporations responsible for policing their own employees, saving law

enforcement agencies the great inefficiency of monitoring from without.[793] International crimes, perpetrated by participants in the weapons sector for example, corroborate this position most intensely. If we hypothesize a case involving the complicity of corporate agents selling weapons to Angolan warlords, as was the case with the famed Merchant of Death Viktor Bout, then the company is infinitely better situated to detect behaviors that satisfy the constitutive elements of the crime than law enforcement agencies some distance from the scene. In good pragmatic tradition, Arlen's theory is vindicated by experimental testing at the coalface.

After the end of the Cold War, Viktor Bout trafficked guns to the most brutal conflicts in the world with reckless abandon.[794] At one point during the Angolan war, for instance a UN Panel of Experts cited Bout as selling weapons to both sides of a brutal conflict that had spanned four decades, killing at least 500,000 civilians.[795] For Bout, this was just the tip of the iceberg in a notorious career that spanned the most troubled regions of the globe. When he was finally brought to justice in the United States for attempting to sell weapons (apparently to be used to shoot down American civilian planes) to FARC in

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[793] *See, e.g.,* Arlen, *supra* note 48. See also Richard Gruner, who sees this type of model as underlying the US Federal Sentencing Guidelines for Organizations: Richard S. Gruner, *Towards an Organizational Jurisprudence: Transforming Corporate Criminal Law through Federal Sentencing Reform*, 36 ARIZ. L. REV. 407, 463 (1994).

[794] For an overview, *see* FARAH & BRAUN, *supra* note 108; for a discussion of Bout's various misadventures in the context of the arms trade generally, *see* FEINSTEIN, *supra* note 16.

[795] For engaging histories of the conflict, including the role of arms vendors and extractive industries, *see* T. HODGES, ANGOLA: THE ANATOMY OF AN OIL STATE (2004); K. MAIER, PROMISES AND LIES (2002).

Colombia,[796] proof of the charges underscored Arlen's point about placing the corporation, not state, at the forefront of internal monitoring. Incredibly, the evidence used in the trial of one of the most talked about arms vendors in the world, alleged to have sold weapons to those responsible for atrocities in the Congo, Sierra Leone, Iraq, Afghanistan and beyond, stemmed from a single sting operation carried out by the FBI in Thailand.

If the trial based on this one fabricated commercial transaction grossly understated Bout's true responsibility, it helped highlight basic evidentiary problems. Whether perceived or real, the evidential constraints for law enforcement agencies in cases like this are undoubtedly greater than for implicated corporations. Stepping back from the specific example of Bout to consider investigative hurdles prosecutors will face in bringing charges against corporations for international crimes, the challenges might seem daunting: access to crime sites for representatives of foreign law enforcement agencies in, by definition, the most insecure reaches of the planet; an ability to secure forensic evidence that ties corporations (say weapons vendors) to international offenses (say massacres); the cost of bringing witnesses half way across the world to testify in foreign trials, difficulties with mutual legal assistance and extradition from Third World states; and important cultural differences in the way events are experienced, then communicated.

To some extent, global justice must inevitably grapple with all these difficulties regardless, but structuring corporate criminal liability in such a way that companies bear much of this burden seems both efficient and prudent. Given the scale of the problem, the

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[796] *Supra* note 108.

inadequacy of traditional responses and the direct access corporations enjoy to information about their employees, it makes sense to demand that they police transactions by individual employees that may lead to massacres or involve the illegal exploitation of conflict commodities. And yet, at the same time, we should again guard against the tendency to see this explanation as a panacea—Bout's company fully supported his nefarious project and was no more capable of monitoring or restraining the man than Western powers, the United Nations, human rights advocates or Hollywood.[797] So constructing corporate criminal liability to incentivize internal discipline makes sense in many, but not all, instances.

What of the problem of fungible corporate employees? When there is sufficient pressure from within a corporation (or market) to violate legal proscriptions, individual criminal responsibility offers weak deterrent value, since corporations will find some employee willing to undertake their criminal enterprise. As I have argued elsewhere, this problematic represents the leitmotif for all international crimes—very few atrocities are so dependent on the acts of any one individual that we can say with confidence that they would certainly *not* have transpired absent any one accused's individual agency.[798] Most atrocities depend on a collective apparatus—usually a state, military group, political party or criminal organization—meaning that international criminal justice has some considerable experience struggling with that thankless task of isolating individual

[797] The Hollywood movie *Lord of War* (Lions Gate Films, 2005), starring Nicolas Cage, was loosely based on Viktor Bout. Bout is rumored to have personally assisted in its production.

[798] James G. Stewart, *Overdetermined Atrocities*, 10 J. INT. CRIM. JUST. 1189-218 (2012). {{It's out; found details online; pls confirm.—}}

responsibility from within collective structures. Perhaps it offers lessons to corporate criminal theory?

Consider the responsibility of individual board members of companies that enabled apartheid in South Africa. In addressing the painful history of Western commercial influence on apartheid, the South African Truth and Reconciliation Commission concluded that '[c]ertain businesses were involved in helping to design and implement apartheid policies. Other businesses benefited from cooperating with the security structures of the former state.'[799] Many of these actions constituted complicity in or direct perpetration of crimes, but allocating responsibility to individual board members raises complex normative problems—if a company's board passed a motion to assist apartheid crimes by a bare minimum (i.e., 8 votes to 7 in a board composed of 15 members) then each board member who cast an affirmative vote *did* make a difference to the downstream consequences, but in any other voting configuration, the company would have acted as it did regardless of any individual vote.

In response to these problems, many of the best scholars in international criminal justice call for collective responsibility. As George Fletcher has argued, "the liberal bias toward individual criminal responsibility obscures basic truths about the crimes that now constitute the core of international criminal law. [They] are deeds that by their very nature

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[799] *Institutional Hearing: Business and Labor, Principles Arising out of Business Sector Hearings,* THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA, Vol 4, Ch 2, ¶ 161 (1998), http://www.justice.gov.za/trc/report/finalreport/Volume%204.pdf; N. CLARK, MANUFACTURING APARTHEID: STATE CORPORATIONS IN SOUTH AFRICA (1994).).{{IN TRYING TO FIGURE HOW THE INSTITUTIONAL HEARING CITE SHOULD LOOK, I FOUND IT ONLINE, SO MAY AS WELL INCLUDE THE URL, OK?—}}

are committed by groups and typically against individuals as members of groups."[800] To return to the argument in corporate criminal theory, a turn toward the collective entity may not only allow us to bypass these cumbersome problems in blaming corporate officers, it may also generate a degree of deterrence for collective entities that is hard to bring home to individuals, who know full well that someone else will perpetrate the crime even if they personally defect. And yet, we are reminded of the contingencies that will affect the legitimacy of this course in concrete cases.

This brings us to one of the most often cited justifications for corporate criminal liability. For very many criminal theorists, corporate criminal liability can act as a kind of "convenient surrogate" that at least achieves some accountability when "we cannot identify the real [individual] decision-maker."[801] This thesis also has wide currency politically; in calling on all European states to promulgate corporate criminal law within their criminal codes, the European Union openly pointed to "the difficulty, due to the often complex management structure in an enterprise, of identifying the individuals responsible for the commission of an offence."[802] In simplistic terms, corporate criminal liability is essential in

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[800] George P. Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt,* 111 YALE L.J. 1499, 1514 (2001) For other excellent discussions, *see* Mark A. Drumbl, *Collective Responsibility and Postconflict Justice*, *in* ACCOUNTABILITY FOR COLLECTIVE WRONGDOING 23–60 (Tracy Isaacs & Richard Vernon eds., 2011).

[801]Coffee, *supra* note 80, at 229; *Developments in the Law—Corporate Crime*, *supra* note 96, at 1371 ("Where it is difficult or impossible to determine which individuals are responsible for illegal activity, liability can only be imposed on the corporation."). *See* also Mark Pieth & Radha Ivory, *Emergence and Convergence: Corporate Criminal Liability Principles in Overview*, in CORPORATE CRIMINAL LIABILITY, *supra* note 51, at 3, 4–5.

[802] Council of Europe Recommendation, *supra* note 3, at 1.

order to prevent the corporate veil from acting as a protective cloak that defeats normal forms of criminal accountability.[803] Once again, this important insight is unlikely to be anywhere near a categorical truth.

Trawling through evidence that supports just some of these international cases, it quickly becomes clear that the present stage of development is prior to even the earliest phases of corporate criminal liability domestically. We live in a world where there is perfect impunity for international crimes perpetrated by corporate actors and their agents, broken momentarily after WWII and in one or two sporadic instances in the past decade. Understandably, businesses and their employees have become utterly complacent. To cite one example, the chairman of one important multinational described company conduct in a warring African state in the 1980s in terms that may well amount to a more or less verbatim confession to the war crime of pillage—and this in the company's annual report. If evidence against prominent corporate individuals is hard to come by in many domestic contexts, the same is not self-evident internationally.

This insight again underscores why we should hesitate to take even the most erudite theoretical explanations for corporate criminal liability as gospel truth for every manifestation of the phenomenon they describe, since some received wisdoms are incompatible with the realities of specific corporate crimes. Instead, the task may be to develop a much more sophisticated set of factors that are relevant in seeking justice for

[803]Fisse & Braithwaite, *supra* note 66, at 494 (citing "enforcement overload; opacity of internal lines of corporate accountability; expendability of individuals within organisations; corporate separation of those responsible for the commission of past offences from those responsible for the prevention of future offences; and corporate safe-harboring of individual suspects").

corporate wrongdoing, and to identify many of the variables we have taken for granted until now. At the level of responsibility, however, there may be ground for viewing the company and its employees as co-perpetrators of international crimes. If one regards the corporation as a repository of a particular ethos that can support the allocation of criminal blame, the argument that this corporate ethos is frequently complicit in the individual officer's crime is compelling.[804] As always, however, the pragmatists' reminder that so much depends on context is a helpful check on our desire for all-encompassing theories, which always miss the mark somewhere in the real world.

VI. Conclusion: A Problem More Complex

This article has presented a criticism of the literature addressing the identity of corporate criminal liability, offering reflections from the far peripheries of the subject. To be clear, much of the theory of corporate criminal liability is highly illuminating in plotting factors for consideration, even if it frequently arrives at conclusions that do not square with all variations of the phenomena they describe. This arises because much of the literature has adopted parochial concepts of corporate criminal law, categorical positions that are not sensitive to the complexities of reality, and philosophical positions that downplay the intensity of transnational commercial ventures as part of an increasingly globalized marketplace. If cases from international criminal justice help expose this reality, they may

[804]Gobert, *supra* note 111, at 146.

have some role in generating new holistic theories that better account for the problem of corporate misconduct in its full sense. These theories must move from absolute overstatement to reveal more of the hidden variables, understand the applicable laws as best possible, and develop conceptual factors that favor one path over the next on a provisional not fixed basis. Until we inhabit a more orderly global society where opportunities for corporate accountability are drastically improved, a pragmatic theory of this sort is inescapable.