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## ENDING CORPORATE IMPUNITY: HOW TO *REALLY* CURB THE PILLAGING OF NATURAL RESOURCES

*Michael A. McGregor\**

*When delegates were negotiating the creation of the International Criminal Court, there was debate, among other things, as to who would fall under the jurisdiction of the court. Due to time constraints, negotiators settled on a narrow extension of customary international law and limited the court's jurisdiction to "natural persons" only. This settlement has had an unsettling effect when it comes to "resource conflicts." Some corporations, as legal persons, and their officers have been able to pillage the natural resources from war-torn countries with little to no liability under international criminal law. This Note considers one example of pillaging by both officers and corporations in the Democratic Republic of the Congo. After analyzing this example, this Note proposes amending the International Criminal Court's jurisdiction statute to include corporations. Such an amendment will ensure that both officers and corporations are held liable for violations of international criminal law.*

### I. INTRODUCTION

The illicit and illegal exploitation of natural resources is a growing problem that serves to fuel conflict and increasingly involves and harms the security of the civilian population. This has been a hallmark of the conflict in the Democratic Republic of the Congo, but is common to many conflict situations. Individuals and companies take advantage of, maintain and have even initiated armed conflicts in order to plunder destabilized countries to enrich themselves, with devastating consequences for civilian populations.

- Former U.N. Secretary-General Kofi Anan<sup>1</sup>

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\* Executive Notes Editor, Case Western Reserve Journal of International Law. B.A., University of Texas at Tyler (2006); J.D., Case Western Reserve University School of Law (2010). To my parents David and Mary McGregor and Debbie and Mark Wallis, without your continued guidance and patience, I would certainly not be the man that I have grown to be, thank you. To my brothers, sisters, and the rest of my extended family, thank you for the unconditional support throughout the years. Finally, to Tim and Jennifer Underhill, and Joey and Vecky Elliott, you helped push me to reach for new heights and to achieve new dreams during the most trying of times, for that I am eternally grateful. Thank you.

<sup>1</sup> The Secretary-General, *Report of the Secretary General on the Protection of Civilians in Armed Conflict*, ¶ 58, U.N. Doc S/2002/1300 (Nov. 26, 2008).

The Democratic Republic of the Congo (DRC) is cursed with some of the richest natural resource concessions in the world.<sup>2</sup> “[It] is awash with gold, diamonds, and metals such as cassiterite and coltan used to weld small pieces together in electronics.”<sup>3</sup> These resources have fueled one of the bloodiest and deadliest conflicts in the last sixty years.<sup>4</sup> Foreign armies, rebel forces, and the DRC government have all plundered the DRC’s natural resources to further their control over the country’s wealth and people.<sup>5</sup> The conflict is responsible for the loss of more than four million lives and the displacement of even more refugees.<sup>6</sup>

Scholars have detailed the link between natural resources and the exploitation of mineral concessions by soldiers and governments to finance aggressive campaigns against their opponents.<sup>7</sup> Recent literature in this field calls for the International Criminal Court (ICC) to punish the perpetrators of these mass atrocities by charging them with the war crime of pillage under Articles 8(2)(b)(xvi) and 8(2)(e)(v) of the Rome Statute.<sup>8</sup> The perpetrators being targeted include soldiers and political leaders that contribute to the conflicts. However, these calls ignore an important perpetrator of resource-fueled wars. That overlooked group consists of corporations, businesses, and industries that extract, export, and sell the pillaged resources. These

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<sup>2</sup> GLOBAL WITNESS, DIGGING IN CORRUPTION: FRAUD, ABUSE, AND EXPLOITATION IN KATANGA’S COPPER AND COBALT MINES 4 (2006). See also Louise Watt, *Mining For Minerals Fuels Congo Conflict*, S.F. GATE, Nov. 1, 2008, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=n/a/2008/11/01/international/i002928D84.DTL> (“The international value of Congo’s raw materials is demonstrated by a \$9 billion deal between Congo’s state-owned mining company, Gécamines, and a consortium of Chinese companies to extract 10.6 million tons of copper and 626,000 tons of cobalt in return for improving infrastructure.”).

<sup>3</sup> Watt, *supra* note 2.

<sup>4</sup> See The Secretary-General, *Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo*, U.N. Doc. S/2002/1146 (Oct. 16, 2002) [hereinafter *Final Report*]. See also CHRISTOPHER W. MULLINS AND DAWN L. ROTHE, *BLOOD, POWER, AND BEDLAM: VIOLATIONS OF INTERNATIONAL CRIMINAL LAW IN POST-COLONIAL AFRICA* 158–64 (2008).

<sup>5</sup> See Watt, *supra* note 2.

<sup>6</sup> GLOBAL WITNESS, *supra* note 2, at 9.

<sup>7</sup> See generally INTERNATIONAL PEACE ACADEMY, *THE POLITICAL ECONOMY OF ARMED CONFLICT: BEYOND GREED AND GRIEVANCE* (Karen Ballentine & Jake Sherman eds., 2003) (linking the globalization of the natural resource markets to creation of opportunities for armed factions to pursue their agendas in civil wars); THE WORLD BANK, *NATURAL RESOURCES AND VIOLENT CONFLICT: OPTIONS AND ACTIONS* (Ian Bannon & Paul Collier eds. 2003) (examining the links between resource conflicts and rebel financing); PHILIPPE LE BILLON, *FUELLING WAR* (2005) (analyzing how money from resource exploitation more often benefits repressive regimes and rebel groups).

<sup>8</sup> See, e.g., Michael A. Lundberg, Note, *The Plunder of Natural Resources During War: A War Crime (?)*, 39 GEO. J. INT'L L. 495 (2008).

actors help create the market for states and armies to move pillaged resources out of the conflict areas. Additionally, they provide billions of dollars to government and rebel groups who use such funding to conduct their crimes.<sup>9</sup>

While acknowledging that the ICC should pursue resource pillaging as a war crime, this Note argues that prosecuting soldiers and political leaders alone will not eliminate the pillaging of natural resources, as the demand for the minerals and resources will remain. In order to deter resource conflicts, the international community must hold the corporations, businesses, and industries that fund resource conflicts accountable under international criminal law.<sup>10</sup> To facilitate this effort, this Note examines the applicability of the ICC's pillaging statutes to the corporate world.<sup>11</sup>

Part I of this Note explores the history of the Tenke-Fungurume concessions in the DRC. It shines light on actions of corporations that have pillaged valuable resources from the Congolese people.<sup>12</sup> This pillaging has supplied warring factions with the financial means to carry out war crimes and crimes against humanity. Part II provides a synopsis of the ICC's pillaging statute and the elements of pillage. Part III discusses the current criminal liability under the ICC's statute by examining the statute's principal and aider and abettor provisions and applying the provisions to individuals and corporations accused of pillaging natural resources in the DRC. Part III also demonstrates how the ICC could find individual directors and officers liable for their actions while corporations—as legal persons—enjoy an implicit immunity from prosecution. Finally, Part IV recommends that the international community must change the current shortcomings of the ICC's criminal liability statute to refocus on *what* actions are punishable instead of *who* is punishable. This paradigm shift needs to be codified in the ICC's statute by giving the ICC jurisdiction over legal persons as well as natural persons.

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<sup>9</sup> See Watt, *supra* note 2.

<sup>10</sup> This is an age old argument about supply and demand. So long as there is a demand for the precious metals that are only found in small regions of the world, businesses will attempt to sell such materials. While most businesses will take into account the situation on the ground there will always be one or two companies that are willing to turn their eyes away from the conflict so long as they make a profit.

<sup>11</sup> When it comes to elements of the crime, the two subsections dealing with pillage are virtually the same. The only difference is that Article 8(2)(b)(xvi) applies to international conflicts and Article (8)(2)(e)(v) applies to internal conflicts.

<sup>12</sup> The example provided in Part I deals with action in respect to the Tenke-Fungurume concessions. Many of the actions that occurred, including the initial misappropriation by rebel and government forces, occurred in the 1990's and early 2000's and would fall outside of the jurisdiction of the ICC. However, the example provides a useful illustration of the influence of corporations in resource conflicts and can provide helpful insight on how to cure the problem. Furthermore, the focus of this Note is on liability of the corporations and their officers involved in the pillaging of resources. Therefore, this Note will only discuss the initial pillaging by rebel and government forces when necessary to prove accessory liability.

## II. CORPORATE PILLAGING AT THE TENKE-FUNGURUME CONCESSIONS

The Tenke-Fungurume concessions, situated in the Katanga Province of southern DRC, is home to “one of the largest, highest-grade, undeveloped copper/cobalt concessions in the world today.”<sup>13</sup> Once production begins, the annual yield of the mine is estimated to be two-hundred and fifty million pounds of London Grade A copper and eighteen million pounds of cobalt, with the initial project continuing for forty years.<sup>14</sup> Production is slated to begin in 2009.<sup>15</sup>

The history of the Tenke-Fungurume concessions, once operated by the state-owned mining company La Générale des Carrières et des Mines (Gécamines), reveals corporate participation in the pillaging of the DRC’s natural resources. In the early 1990s, under President Mobutu Sese Seko, the Congolese government began privatizing the DRC’s mining industry.<sup>16</sup> In 1994, then Prime Minister Kengo Wa Dondo, a strong ally to President Seko, forced privatizations of the DRC’s mining industry, and compelled Gécamines to release management and mining rights to joint ventures and private companies.<sup>17</sup> In November 1996, Gécamines entered into an agreement with Lundin Holdings S.A. (Lundin Holdings) and obtained a forty-five percent stake in the new Tenke Fungurume Mining Company (TFM), the other fifty-five percent belonging to Lundin Holdings.<sup>18</sup>

At the time of the 1996 contract, total revenue produced by the two concessions after twenty-seven years of operation was estimated at twenty-six billion dollars.<sup>19</sup> Lundin Group, the parent company of Lundin Holdings, negotiated the 1996 contract knowing that negotiators for Gécamines had little to no experience with similar joint ventures and capitalized on that inexperience.<sup>20</sup> Specifically, in his book *No Guts, No Glory*, Lundin Group

<sup>13</sup> Dorothy Kosich, *Freeport-McMoRan Tenke Fungurume Hiring Protest Turns Violent*, MINEWB, Jan. 16, 2008, <http://www.mineweb.co.za/mineweb/view/mineweb/en/page43?oid=44495&sn=Detail> (last visited Sept. 11, 2009).

<sup>14</sup> Lundin Mining, Tenke Fungurume Copper/Cobalt Deposit: DRC, <http://www.lundinmining.com/s/TenkeFungurume.asp> (last visited Sept. 11, 2009); Freeport-McMoran Copper & Gold: Tenke Fungurume, <http://www.fcx.com/operations/AfricaTenke.htm> (last visited Sept. 11, 2009) [hereinafter Freeport-McMoran].

<sup>15</sup> Freeport-McMoran, *supra* note 14.

<sup>16</sup> RAF CUSTERS & SARA NORDBRAND, IPIS, RISKY BUSINESS: THE LUNDIN GROUP’S INVOLVEMENT IN THE TENKE FUNGURUME MINING PROJECT IN THE DEMOCRATIC REPUBLIC OF CONGO 12 (2008), available at <http://www.ipisresearch.be/natural-resources.php> (last visited Sept. 11, 2009) (report compiled by Swedish and Dutch non-governmental organizations investigating Swedish business connections with the Tenke-Fungurume concession).

<sup>17</sup> *Id.* at 14.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 17.

<sup>20</sup> *Id.* at 16.

founder Adolf Lundin confessed that in order to get the deal, he offered President Seko a future campaign contribution and paid fifteen DRC negotiators one-thousand dollars each to show up and vote for the contract.<sup>21</sup>

In 1997, an uprising forced President Seko from power.<sup>22</sup> The leader of the rebel movement, Laurent-Désiré Kabila, became President.<sup>23</sup> Lundin Holdings quickly confirmed the Gécamines contract with Kabila's government and paid an initial fee.<sup>24</sup> However, the confirmation of the Gécamines contract with Kabila's government was not Lundin Holding's first encounter with Kabila. Evidence demonstrates that Lundin Holdings established a relationship with the *Alliance des Forces Démocratiques de Libération* (AFDL), Kabila's rebel army, prior to the AFDL's ascension to power.<sup>25</sup> These contacts were made despite international condemnation of the slaughtering of civilians and other crimes against humanity and war crimes by members of the AFDL, members of the *Forces Armées Zairoises* (FAZ) that supported President Seko, and members of the *Forces Armées Rwandaises* (ex-FAR).<sup>26</sup>

Corruption also characterized the Gécamines contract's confirmation. Later reports established that up to half of the initial fifty million dollar payment Lundin Holdings made to Kabila's government funneled into a private company, Comiex, Inc., which was partially owned by President Kabila.<sup>27</sup>

Operations at the mines never commenced and in 1999 Lundin Holdings declared a *force majeure* under the contract provisions.<sup>28</sup> That

<sup>21</sup> *Id.* at 17 (citing ROBERT ERIKSSON, ADOLF H LUNDIN: MED OLJA I ÅDRORNA OCH GULD I BLICK (2003)).

<sup>22</sup> CENTRAL INTELLIGENCE AGENCY, THE WORLD FACT BOOK 2008, at 138 (2008).

<sup>23</sup> *Id.*

<sup>24</sup> CUSTERS & NORDBRAND, *supra* note 16, at 19.

<sup>25</sup> *Id.* at 20. This relationship started before the rebel army had taken over the Katanga province.

<sup>26</sup> See, e.g., AMNESTY INTERNATIONAL, DEMOCRATIC REPUBLIC OF CONGO: DEADLY ALLIANCES IN CONGOLESE FORESTS (Dec. 3, 1997), available at [http://repository.forcedmigration.org/show\\_metadata.jsp?pid=fmo:3975](http://repository.forcedmigration.org/show_metadata.jsp?pid=fmo:3975).

<sup>27</sup> CUSTERS & NORDBRAND, *supra* note 16, at 4.

<sup>28</sup> *Id.* at 22. The report found that:

The actual war was not a reason to declare *Force Majeure*, as that part of Katanga did not directly suffer from war operations. TFM and Tenke Mining Corp. based its declaration of Force Majeure on two presidential decrees, issued a month earlier, which contained security measures for the whole of the territory. There were, however, troops at TFM's concession during the war. They were part of the larger army contingents that the DR Congo's President Laurent-Désiré Kabila held in reserve behind the front line in the Katanga province. They stayed in the mining village, where Lundin's private security personnel once were housed and they left the camp in ruins. *Id.*

declaration was later widely discredited as meritless.<sup>29</sup> Further, despite the alleged *force majeure* still occurring, Lundin Holdings actively sought out industrial partners for the concessions.<sup>30</sup> In 2000, the 1996 deal between Lundin Holdings and Gécamines once again came under international scrutiny. In a U.N. sponsored report, a Panel of Experts determined that Lundin, along with eighty-four other companies, had violated the Organization for Economic Co-operation and Development (OECD) Guidelines for Multinational Corporations in relation to Lundin's mining activities.<sup>31</sup> The DRC's Lutundula Commission, created under the transition government to review over sixty mining contracts, called for a renegotiation or nullification of the Lundin Holdings/Gécamines contracts citing fraud, bribery, deception, and possible illegal profiteering during the contract process.<sup>32</sup>

In 2002, Phelps Dodge, a major U.S. corporation, exercised an option where it acquired a seventy percent stake in Lundin Holdings.<sup>33</sup> Prior to exercising the option, Phelps Dodge demanded the contract with Gécamines be re-negotiated, dropping the production output from one-hundred thousand tonnes of copper and eight-thousand, six-hundred tonnes of cobalt annually to thirty thousand tonnes of copper and two-thousand, eight-hundred tonnes of cobalt annually, as well as reducing the initial fee from two-hundred, fifty million dollars to fifty million dollars.<sup>34</sup> Phelps Dodge and Gécamines renegotiated the Lundin Holdings/Gécamines contract and the parties split the ownership of the Tenke Fungurume concessions with Phelps Dodge owning a 54.7% stake, Lundin Corp. owning 24.75%, and Gécamines owning 17.5%.<sup>35</sup> Freeport-McMoran, another U.S. corporation,

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 23.

<sup>31</sup> See *Final Report*, *supra* note 4, at Annex III; *The OECD Guidelines for Multinational Corporations*, 21 (rev. 2000), available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf> [hereinafter *OECD Guidelines*] (In addressing bribery, the report states: “[E]nterprises should not, directly or indirectly, offer, promise, give, or demand a bribe or other undue advantage to obtain or retain business or other improper advantage. Nor should enterprises be solicited or expected to render a bribe or other undue advantage.”).

<sup>32</sup> CUSTERS & NORDBRAND, *supra* note 16, at 21; Press Release, Human Rights Watch, DR Congo: End Illegal Exploitation of Natural Resources (Feb. 19, 2006), <http://www.hrw.org/en/news/2006/02/19/dr-congo-end-illegal-exploitation-natural-resources> (last visited Sept. 11, 2009).

<sup>33</sup> CUSTERS & NORDBRAND, *supra* note 16, at 24–25.

<sup>34</sup> *Id.* at 24 (The reduction of the initial fee meant from \$250 million to \$50 million meant that the \$50 million paid in 1997 was all that was paid for the concessions).

<sup>35</sup> *Id.* at 28.

bought out Phelps Dodge in 2006 for \$25.9 billion, creating the world's largest copper-trading firm.<sup>36</sup>

The negotiations for the new deal took place behind closed doors between representatives from Lundin, Phelps Dodge, the DRC Ministry of Planning, and the Governor of Banque Centrale.<sup>37</sup> An influential U.S. Embassy officer, Melissa Sanderson, was also present via video conference.<sup>38</sup> Gécamines objected to the new terms without the contract first going through its Board of Directors, but those objections were ignored as Vice President Jean-Pierre Bemba received approval from the Council of Ministers (the DRC's parliament) on July 19, 2005.<sup>39</sup> Notably, the parties approved the contracts before a scheduled September 2005 audit funded by the World Bank. The audit went forward and discovered many faults with a large portion of contracts signed from the start of the civil war in 1996.<sup>40</sup> Specifically, the audit noted "[t]he dimension of the assets to be transferred to the companies by virtue of the contracts exceeds the norms of rational and highest use of the mineral assets."<sup>41</sup> It also noted that the contract process "was so flawed" with lack of transparency that the DRC "may not have received the full value of the mines."<sup>42</sup>

Construction at the Tenke Fungurume concessions commenced in 2006, with mining production set to commence in 2009. Since the construction required the relocation of some fifty-thousand indigenous people from

<sup>36</sup> Press Release, Freeport-McMoRan Copper & Gold to Acquire Phelps Dodge, Creating the World's Largest Publicly Traded Copper Company (Nov. 19, 2006), <http://www.fcx.com/news/2006/111906.pdf> (last visited Sept. 11, 2009).

<sup>37</sup> CUSTERS & NORDBRAND, *supra* note 16, at 26.

<sup>38</sup> See Dan Rather Reports, All Mine (Sept. 23, 2008), available at [http://www.hd.net/transcript.html?air\\_master\\_id=A5476](http://www.hd.net/transcript.html?air_master_id=A5476). Melissa Sanderson's presence at the meeting is cited as a strong point of controversy for many people. At the time, Sanderson was the Political Officer at the U.S. Embassy in Kinshasa. In an interview with Dan Rather, Peter Rosenblum, a law professor at Columbia University, spoke about the influence Sanderson held within the DRC alleging:

She's certainly well connected . . . when it comes to the government circles in the Congo. She had access to everyone from top to bottom. I've been in meetings with the Minister while she's called. She's got people's phone numbers. She's got people's addresses. She's in their offices. She's calling. She's present.

Three months after convincing President Kabila to sign off on the new deal, Sanderson took a job at Freeport-McMoran as Vice President of Government Relations. Rosenblum also noted that the Congolese viewed Sanderson's efforts out of the U.S. Embassy as tacit approval of the deal by the U.S. government.

*Id.*

<sup>39</sup> CUSTERS & NORDBRAND, *supra* note 16, at 27.

<sup>40</sup> *Id.* at 25.

<sup>41</sup> *Id.* at 28.

<sup>42</sup> Dan Rather Reports, *supra* note 38.

their ancestral land, Freeport-McMoran promised the villagers it would build houses for the displaced.<sup>43</sup> Yet more than nine months after the relocations had begun, villagers were still living in either canvas tents or out in the open air and the new land was not cultivatable.<sup>44</sup> Furthermore, the resettled villagers have reported clashes with other indigenous inhabitants over the land.<sup>45</sup> A spokesman for Freeport-McMoran tried to reconcile this by noting that the “temporary tents [Freeport-McMoran] has donated are considered an improvement to the traditional structures.”<sup>46</sup>

The amended contract thereafter became the subject of intense scrutiny. In January 2007, under the permanent government of Prime Minister Antoine Gizenga, the DRC government established another Review Commission.<sup>47</sup> Under the Commission’s initial review, the Gécamines contract was not on the list of contracts to be reviewed but was eventually added.<sup>48</sup> It is unclear what prompted the addition of the Gécamines contract to the review. Eventually, a leaked transcript of the review revealed that the Commission placed the Tenke contracts under the “less viable” category and suggested that the contracts be renegotiated due to unforeseen irregularities beyond what they had initially imagined.<sup>49</sup> Even with these findings, President Kabila has already given assurances to Freeport-McMoran that the contract would not be renegotiated.<sup>50</sup>

An analysis of the situation involving the Tenke-Fungurume concession demonstrates that Lundin Holdings and Freeport-McMoran were involved in the pillaging of the DRC’s natural resources, as far as pillaging is defined under the ICC statute.<sup>51</sup> This is because both companies, at one point in time, appropriated the property for their own personal use, either by seizing the physical or financial assets of the concessions.<sup>52</sup> Both companies

<sup>43</sup> *Id.*

<sup>44</sup> CUSTERS & NORDBRAND, *supra* note 16, at 35–43.

<sup>45</sup> *Id.* at 43 (quoting one villager as stating “We now have a conflict with the autochthonous (sic) people [the original inhabitants] over the use of the only well. They don’t want us to take our water from this pit and they have taken the bucket to make this message clear.”).

<sup>46</sup> Interviews with local inhabitants dispute this claim. *See, e.g.*, Dan Rather Reports, *supra* note 38.

<sup>47</sup> CUSTERS & NORDBRAND, *supra* note 16, at 44 (citing Minister of Mines of the D.R. Congo, *Arrêté Portant Mise Sur Pied de la Commission Ministérielle Chargée de la Révisitation des Contrats Miniers. Arrêté Ministerial* [Ministerial Decree on Setting Up of the Ministerial Committee of the Revisitation of the Mining Contracts], Doc. No. 2745/Cab.Min/Mines/01, (Apr. 20, 2007)).

<sup>48</sup> CUSTERS & NORDBRAND, *supra* note 16, at 45.

<sup>49</sup> *Id.* at 46–47 (There were three categories: viable, less viable, and non-viable. The Commission did not list any of the reviewed contracts under the viable category).

<sup>50</sup> *Id.* at 46.

<sup>51</sup> *See infra* Part III.

<sup>52</sup> *Id.*

appropriated the property without consent because the corruption and bribery of state officials nullified any actual consent.<sup>53</sup> Finally, the appropriation took place during—and was associated with—an armed conflict.<sup>54</sup>

### III. PILLAGING

Pillaging is “all forms of unlawful appropriation of property in armed conflict for which individual criminal responsibility attaches under international law” and it is synonymous with the terms exploitation, pillage, and plunder.<sup>55</sup> The actions of Lundin Holdings and Freeport-McMoran in taking the Tenke-Fungurume concession amount to the crime of pillage because it was an unlawful appropriation during and within the context of an armed conflict.

The Rome Statute established the ICC’s jurisdiction over genocide, crimes against humanity, and war crimes.<sup>56</sup> Drafters of the Rome Statute felt the need to “provide greater certainty and clarity concerning the content of each crime” and commissioned a preparatory commission to draft the Elements of War Crimes.<sup>57</sup> The Elements of War Crimes listed five elements of pillage as: (1) the perpetrator appropriated certain property; (2) the perpetrator intended to deprive the owner of the property and intended 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

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Prosecutor v. Kordić & Čerkez*, IT-95-14/2-T, ¶ 352 (Feb. 26, 2001) (citing *Prosecutor v. Delalić*, IT-96-21-T, Judgment, ¶ 591 (Nov. 16, 1998)). *See also* 10 UNITED NATIONS WAR CRIMES COMM’N, LAW REPORTS ON TRIALS OF WAR CRIMINALS, TRIAL OF CARL KRAUCH AND TWENTY-TWO OTHERS 1, 44 (1949) [hereinafter I.G. Farben Trial]. The declaration stated that spoliation:

[H]as taken every sort of form, from open looting to the most cunningly camouflaged financial penetration, and it has extended to every sort of property—from works of art to stocks of commodities, from bullion and banknotes to stocks and shares in business and financial undertakings. But the object is always the same—to seize everything of value that can be put to the aggressors' profit and then to bring the whole economy of the subjugated countries under control so that they must enslave to enrich and strengthen their oppressors.

*Id.* *See also* Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, art. 2(1)(b) (1943), available at <http://avalon.law.yale.edu/imt/imt10.asp> (last visited Sept. 11, 2009); BLACK’S LAW DICTIONARY 1185 (8th ed. 2004).

<sup>56</sup> Rome Statute of the International Criminal Court art. 5(1), July 17, 1998, 2187 U.N.T.S. 90, 92 [hereinafter ICC Statute]. *See also* KNUT DÖRMANN, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: SOURCES AND COMMENTARY 1–2 (2003).

<sup>57</sup> *Id.* at 2–3.

was associated with—an international armed conflict; and (5) the perpetrator was aware of factual circumstances that established the existence of an armed conflict.<sup>58</sup>

#### *A. Appropriation of Certain Property by the Perpetrator*

Under the first element, the property protected by the ban on appropriation “is not limited to civilian property as suggested by several delegations [to the Rome Treaty].”<sup>59</sup> Although the term “appropriation” is not defined under the Rome Statute or in the Elements of War Crimes, it is generally seen as the “exercise of control over property; a taking of possession.”<sup>60</sup> Regarding natural resources, a perpetrator may take control of the property through means such as extracting, exporting, and selling the natural resources. There does not have to be any definite transfer of title in the property.<sup>61</sup> Further, control over property can be done in a legal fashion (e.g., the purchase of stock in a company), but, accompanied with the other elements, it is pillage.<sup>62</sup>

#### *B. The Perpetrator Intended to Deprive the Owner of Property for Personal Use*

Under the second element, the perpetrator must have intended to deprive the owner of the property and to appropriate it for private or personal use.<sup>63</sup> The second element therefore breaks into two inquiries: (1) the perpetrator intended to deprive the owner; and (2) the property was appropriated for private or personal use. The act of “depriv[ing] the owner” is not defined under the ICC Statute but generally means “an act of taking away.”<sup>64</sup> Additionally, the terms “private” and “personal” are not defined but should be construed “broad[ly] enough to include cases where property is given to third persons and not only used by the perpetrator.”<sup>65</sup>

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<sup>58</sup> *Id.* at 272.

<sup>59</sup> *Id.* at 273.

<sup>60</sup> BLACK’S LAW DICTIONARY, *supra* note 55, at 110.

<sup>61</sup> DÖRMANN, *supra* note 56, at 273.

<sup>62</sup> See 10 UNITED NATIONS WAR CRIMES COMM’N, LAW REPORTS ON TRIALS OF WAR CRIMINALS, TRIAL OF ALFRIED FELIX ALWYN KRUPP VON BOHLEN UND HALBACH AND ELEVEN OTHERS 69, 73 (1949); I.G. Farben Trial, *supra* note 55, at 50 (holding that defendants were found guilty of spoliation (pillaging) of Polish companies even though they had actually purchased the stocks of the companies legally. The courts analysis hinged on the action taking place within the context of a conflict and the purchases being done under duress thereby negating consent).

<sup>63</sup> Not including military necessity.

<sup>64</sup> BLACK’S LAW DICTIONARY, *supra* note 55, at 473.

<sup>65</sup> DÖRMANN, *supra* note 56, at 273.

An argument exists that there is a third inquiry in the second element. This inquiry addresses whether the property was taken as a military necessity.<sup>66</sup> However, the Preparatory Commission decided against making this inquiry part of the second element and instead inserted it as a footnote.<sup>67</sup> The ICRC Elements of War Crimes notes that several delegations wanted “pillage” defined as the appropriation or seizure of property not justified by military necessity.<sup>68</sup> However, this definition has three weaknesses. First, the approach would not distinguish pillage from other statutes already on the books.<sup>69</sup> Second, “an element referring to military necessity would introduce an extra element and create the result of permitting an evaluation, whereas an absolute prohibition [against pillaging already] exists.”<sup>70</sup> Finally, “a reference to military necessity would criminalize the taking of military equipment when no necessity could be shown for this, whereas international humanitarian law allows the taking of war booty without the need for justification.”<sup>71</sup>

### C. *The Appropriation Lacked Consent*

Under the third element, the appropriation must be without the consent of the owner. Consent is another term not specifically defined under the ICC Statute for pillage, but the ICC Elements of Crime notes “[i]t is understood that ‘genuine consent’ does not include consent obtained through deception.”<sup>72</sup> Further, under the “War Crime of Rape” heading, the Elements of Crime states, “[i]t is understood that a person may be incapable of giving

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<sup>66</sup> See Lundberg, *supra* note 8, at 510.

<sup>67</sup> DÖRMANN, *supra* note 56, at 272–73.

<sup>68</sup> *Id.* at 272 (quoting ICC Elements of Crime, art. 8(2)(b)(xvi) n.47 (2002), available at [http://www2.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B-68E5F9082543/0/Element\\_of\\_Crimes\\_English.pdf](http://www2.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B-68E5F9082543/0/Element_of_Crimes_English.pdf)).

<sup>69</sup> DÖRMANN, *supra* note 56, at 272 (“[T]his approach would have created difficulties in distinguishing the crime of pillaging from the crimes defined under art. 8(2)(b)(xiii) [destroying or seizing the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of war] and art. 8(2)(a)(iv) [extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 273 (The ICRC also comments that “it appears to be generally accepted now that even war booty must be handed over to the authorities, i.e. cannot be taken for *private or personal use*”).

<sup>72</sup> Lundberg, *supra* note 8, at 510 (citing ICC Elements of Crime, *supra* note 68, art. 7(1)(g)-5 n.20).

genuine consent if affected by natural, induced or age-related incapacity.<sup>73</sup> Consent under the pillaging statute should follow the same definitions.<sup>74</sup>

*D. The Appropriation Occurred in the Context of—and Was Associated with—an Armed Conflict and the Perpetrator Was Aware of the Armed Conflict*

The fourth element inquires whether the conduct took place in the context of—and was associated with—an armed conflict, and the fifth element analyzes whether the perpetrator was aware of factual circumstances that established the existence of an armed conflict. These final two factors are generally grouped together. For example, the ICC Elements of Crime states:

There is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non-international; [i]n that context there is no requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or non-international; [t]here is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict that is implicit in the terms 'took place in the context of and was associated with.<sup>75</sup>

In sum, it is not a requisite that a perpetrator evaluates the legal merits of whether two groups are in the midst of an armed conflict or whether the conflict can be termed international or intra-national. An awareness of the facts that creates those characteristics is enough to establish that the appropriation occurred in the context of—and was associated with—an armed conflict.

#### IV. CRIMINAL LIABILITY

There are two ways to commit a crime: one can actually commit the offence charged or one can aid and abet the perpetrator.<sup>76</sup> Similarly, there

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<sup>73</sup> Lundberg, *supra* note 8, at 510 (citing ICC Elements of Crime, *supra* note 68, art. 8(2)(b)(xxii)-1 n.51).

<sup>74</sup> The element of consent produces a problem when corporations contract with rebels, state, or local officials to extract the minerals as in the current example. However, it is generally held that parties cannot assent to a contract (give consent) when there is fraud in the inducement (like this case) or the parties were under duress, coercion, or intimidation. See generally MICHAEL BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW: THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 153 (3rd ed. 2005) (citing American, English, German, French, and Italian treatises).

<sup>75</sup> Lundberg, *supra* note 8, at 510 (citing ICC Elements of Crime, *supra* note 68, art. 8).

<sup>76</sup> See, e.g., Control Council Law No. 10, *supra* note 55 (establishing criminal liability for an individual who was "an accessory to the crime, took a consenting part therein, was con-

are three variances to complicity under which one is liable for aiding and abetting: direct complicity, indirect complicity, and silent complicity.<sup>77</sup> Direct complicity is the active giving of criminal assistance and is the easiest to spot and attach criminal liability. Under “giving of criminal assistance,” the perpetrator does not need to intend to do harm; having the knowledge that the foreseeable harmful effects could occur suffices.<sup>78</sup> Further, accomplices are complicit in a crime even when no principal has been convicted of the original crime or when the identity of the principal is not known; the accomplice does not even need to desire for the crime to occur.<sup>79</sup> “As a result, anyone who *knowing* of another’s criminal purpose, voluntarily aids him or her in it, can be convicted of complicity even though he regretted the outcome of the offence.”<sup>80</sup>

Indirect complicity is any action that has a substantial effect on the crime, even though the defendant may have had no direct role.<sup>81</sup> For example, indirect complicity has been found for knowingly contributing money to the Nazi regime, notwithstanding the fact that the defendant had no control over the Nazi’s organization.<sup>82</sup> Silent complicity, however, is generally found from omissions alone. “The notion of silent complicity reflects the expectation on [defendants] that they raise systematic or continuous human rights abuses with the appropriate authorities. [I]t reflects the growing acceptance . . . that there is something culpable about failing to exercise influence in such circumstances.”<sup>83</sup>

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nected with plans or enterprises involving its commission, or was a member of any organization or group connected with the commission of any such crime”); Statute of the International Criminal Tribunal for the former Yugoslavia art. 7(1), May 25, 1993, 32 I.L.M. 1192; Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 995, art. 6(1), U.N. Doc. S/RES/955 (Nov. 8, 1994).

<sup>77</sup> Andrew Clapham & Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses*, 24 HASTINGS INT’L & COMP. L. REV. 339, 341 (2001).

<sup>78</sup> *Id.* at 342.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* (quoting Prosecutor v. Akayesu, Judgment, ICTR-96-4-T, ¶ 539 (Sept. 2, 1998)) (emphasis added).

<sup>81</sup> See generally 1 UNITED NATIONS WAR CRIMES COMM’N, LAW REPORTS ON TRIALS OF WAR CRIMINALS, TRIAL OF BRUNO TESCH AND TWO OTHERS 93 (1947) [hereinafter Zyklon B Trials].

<sup>82</sup> 9 UNITED NATIONS WAR CRIMES COMM’N, LAW REPORTS ON TRIALS OF WAR CRIMINALS TRIAL OF FRIEDRICH FLICK, (1947) [hereinafter Flick Trial] (The NMT even acknowledged that it was unthinkable that the defendant would be willing to be a party to the mass atrocities committed by the Nazi regime).

<sup>83</sup> Clapham, *supra* note 77, at 347. See also Prosecutor v. Akayesu, Judgment, ICTR-96-4-T, ¶ 477, 548 (Sept. 2, 1998).

The Nuremberg Tribunals clearly affirmed the concepts of criminal responsibility for war crimes following World War II.<sup>84</sup> Following this precedent and other precedent from international tribunals and the International Law Commission, Article 25 of the Rome Statute outlines the ICC's jurisdiction over criminals.<sup>85</sup> The ICC can exercise jurisdiction over natural persons who commit a crime under the jurisdiction of the court, either individually or jointly, if they order, solicit, or induce the commission of a crime and that crime is attempted or actually occurs.<sup>86</sup> Additionally, jurisdiction can be exercised over people that aid, abet, or otherwise assist in the commission or attempted commission of a crime, including providing the means for its commission, or by contributing to a group acting with a common purpose.<sup>87</sup> Since the statute only recognizes "natural persons," corporations are free to operate in the midst of international and intra-national conflicts and free to aid and abet the pillaging of natural resources.

The Rome Statute does not recognize corporations as natural persons.<sup>88</sup> However, the Rome Statute follows the lead of the Nuremberg trials and provides the ICC with jurisdiction over the individual directors and officers who lead corporations to commit or aid in the commission of war crimes, genocide, or crimes against humanity.<sup>89</sup> Applying the precedents of Nuremberg—and those of later tribunals—to the Tenke-Fungurume concessions, it is possible to hold officers of Lundin Holdings and Freeport-McMoran liable for the pillaging of natural resources in the DRC. But currently the Rome Statute enables corporations to avoid criminal responsibility for aiding and abetting pillaging, and is therefore inadequate.

Since individual criminal liability is firmly established, Part A will briefly discuss the criminal liability of corporate directors and officers be-

<sup>84</sup> UNITED NATIONS WAR CRIMES COMM'N, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 192-93 (1948) (The International Military Tribunal Charter "presupposes the existence of a system of international law under which individuals are responsible to the community of nations for violations of rules of international criminal law."). *See also* Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, G.A. Res. 95(I), U.N. Doc. A/64/Add.1, at 188 (1946) [hereinafter U.N. Resolution] (affirming the principles set out in the Nuremberg trials).

<sup>85</sup> ICC Statute, *supra* note 56, art. 25.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* ("Such contribution shall be intentional and shall either: (i) [b]e made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) [b]e made in the knowledge of the intention of the group to commit the crime.").

<sup>88</sup> *See infra* Part IV(B).

<sup>89</sup> ICC Statute, *supra* note 56; I.G. Farben Trial, *supra* note 55 (convicting I.G. Farben executives involved in constructing slave-labor factory at Auschwitz); Flick Trial, *supra* note 82 (convicting executives of complicity because of the financial support given to the SS and other organizations).

fore Part B fully discusses corporate liability under the Rome Statute's current grant of jurisdiction.

#### *A. Individual Criminal Liability*

##### 1. The perpetrator

"[Individuals] whose conduct is directly covered by the definition of the crime and who acts with the requisite *mens rea* 'commits a crime as an individual' in terms of Article 25(3)(a) . . . and is clearly liable as a principal under international criminal law."<sup>90</sup> If several people act together in committing a crime under international law, each one is individually responsible for the crime.<sup>91</sup> By applying this theory of liability to the elements of pillage, the directors and officers of Lundin and Freeport-McMoran can be tried as principal actors in pillaging because the directors and officers (1) appropriated the Tenke-Fungurume concessions; (2) deprived the owner of benefits; (3) lacked consent to make the appropriation; and (4) were aware of the conflict occurring in the DRC.

First, when the directors of Lundin first took part in the Tenke-Fungurume concessions, they appropriated the concessions by taking control of them. They took control not only of the financial benefits in acquiring the concession rights away from Gécamines, but also by exercising physical control of the mine.<sup>92</sup> Exercising this control satisfies the first element that the perpetrator appropriated certain property. Both parts of the second element can also be met. The directors, by choosing not to start production, deprived the owner of the benefits that could have existed. There is evidence that the directors were waiting, and did wait, for the price of copper and cobalt to rise before selling the mine, thus using the mine for their own personal use.<sup>93</sup> Third, the appropriation was without consent because the bribery and deception used to obtain the approval for the purchase of the mines nullifies the willingness of the consent.<sup>94</sup> Finally, with regard to the last two elements, it would be hard for the directors of Lundin Holdings to

<sup>90</sup> Gerhard Werle, *Individual Criminal Responsibility in Article 25 ICC Statute*, 5 J. INT'L CRIM. JUST. 953, 958 (2007).

<sup>91</sup> *Id.* ("[E]very co-perpetrator is responsible for the acts of all the other co-perpetrators, which means that every co-perpetrator is responsible for the whole crime committed within the framework of the common plan.").

<sup>92</sup> See *supra* text accompanying note 18. Remember, one can acquire property through appropriate legal means, but if that acquisition is accompanied by the requisite criminal intent to commit the war crime of pillaging, then it is a crime.

<sup>93</sup> See *supra* text accompanying notes 28–30 (by declaring a *force majeure*, Lundin guaranteed that no one would receive profits from the mine as no production would take place under the clause).

<sup>94</sup> See *supra* text accompanying note 22.

argue that they were unaware of the conflict going on in the DRC. This is shown by the contacts made with the AFDL before the AFDL had signed the final contract as Lundin Holdings was unsure of who exactly would be in control of the country.<sup>95</sup>

As for the directors and officers of Freeport-McMoran, one could look to the closed-door meeting where no representatives of Gécamines were present and Freeport-McMoran walked out with a sweetheart deal as evidence of pillage.<sup>96</sup> Gécamines lost almost twenty-five percent of its control over the Tenke Fungurume concessions. Both the physical property and the monetary value of the concessions were appropriated by Freeport-McMoran, Freeport-McMoran's directors intended to deprive Gécamines of the property for their own personal use, the appropriations occurred without the consent of Gécamines, and it is arguable that the appropriations were in connection with an armed conflict.

## 2. The complicit accomplice

Directors and officers may also be charged with aiding and abetting in the commission of war crimes.<sup>97</sup> In 1950, the International Law Commission ratified this theory based on the principles derived at Nuremberg: "Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law."<sup>98</sup>

The International Criminal Tribunal for the former Yugoslavia (ICTY) has what is widely believed to be the best interpretation of the requisite *actus reus* and *mens rea* needed to attach liability for aiding and abetting.<sup>99</sup> In *Prosecutor v. Furundžija*, the ICTY held that the *actus reus* for aiding and abetting "requires practical assistance, encouragement, or moral support, which has a substantial effect on the perpetration of the crime."<sup>100</sup> Under the *mens rea* requirement, the court held that "mere knowledge that [the defendant's] actions assist the perpetrator in the commission of the crime is sufficient to constitute *mens rea* in aiding and abetting the crime."<sup>101</sup> Furthermore, the court found that:

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<sup>95</sup> See *supra* text accompanying notes 25–27.

<sup>96</sup> See *supra* text accompanying notes 37–43.

<sup>97</sup> See *Prosecutor v. Tadić*, IT-94-1-T, Judgment, ¶ 679 (May 7, 1997) ("[P]articipation in the commission of the crime does not require an actual physical presence or physical assistance appears to have been well accepted at the Nürnberg war crimes trials . . .").

<sup>98</sup> U.N. Resolution, *supra* note 84.

<sup>99</sup> *Prosecutor v. Furundžija*, IT-95-17/1-T, Judgment (Dec. 10, 1998).

<sup>100</sup> *Id.* ¶ 235.

<sup>101</sup> *Id.* ¶ 236.

[I]t is not necessary for an aider and abettor to meet all the requirements of *mens rea* for a principal perpetrator. In particular, it is not necessary that he shares and identifies with the principal's criminal will and purpose, provided that his own conduct was with knowledge. *That conduct may in itself be perfectly lawful*; it becomes criminal only when combined with the principal's unlawful conduct.<sup>102</sup>

Since determining the requisite *mens rea* of an aider and abettor is generally the more controversial analysis, the *Furundžija* court questioned whether to apply a purpose test or knowledge test.<sup>103</sup> Under a purpose test, the defendant has to share the *mens rea* of the principal.<sup>104</sup> Under a knowledge test, it is sufficient that the defendant knew crimes were being committed with his assistance to establish *mens rea*.<sup>105</sup>

After its analysis, the *Furundžija* court expressly dismissed the purpose test:

The [ ] analysis leads the Trial Chamber to the conclusion that it is not necessary for the accomplice to share the *mens rea* of the perpetrator, in the sense of positive intention to commit the crime. Instead, the clear requirement in the vast majority of the cases is for the accomplice to have know-

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<sup>102</sup> *Id.* ¶ 243 (emphasis added).

<sup>103</sup> *Id.* ¶¶ 236–44 (analyzing historical and international legal documents such as the International Law Commission's Draft Code on Crimes and Offences Against Mankind and the Rome Statute creating the ICC).

<sup>104</sup> See generally United States v. von Weizsaecker (The Ministries Case), reprinted in 14 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, 308, 622 (1949). The case stated:

The real question is, is it a crime to make a loan, knowing or having good reason to believe that the borrower will us[e] the funds in financing enterprises which are employed in using labor in violation of either national or international law? . . . Loans or sales of commodities to be used in an unlawful enterprise may well be condemned from a moral standpoint and reflect no credit on the part of the lender or seller . . . but the transaction can hardly be said to be a crime.

*Id.*

<sup>105</sup> See generally Prosecutor v. Furundžija, IT-95-17/1-T, Judgment, ¶ 238 (Dec. 10, 1998), citing Zyklon B Trials, *supra* note 81 ("[T]he prosecution did not attempt to prove that the accused acted with the intention of assisting the killing of the internees. It was accepted that their purpose was to sell insecticide to the SS (for profit, that is a lawful goal pursued by lawful means). The charge as accepted by the court was that they knew what the buyer in fact intended to do with the product they were supplying."). See also *Furundžija*, IT-95-17/1-T, ¶ 218 (quoting Trial of Otto Ohlendorf and Others (Einsatzgruppen), 4 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 (1949)) ("The defendant knew that executions were taking place. He admitted that the procedure which determined the so-called guilt of a person which resulted in him being condemned to death was 'too summary'. But, there is no evidence that he ever did anything about it. As the second highest ranking officer in the Kommando, his views could have been heard in complaint or protest against what he now says was a too summary procedure, but he chose to let the injustice go uncorrected.").

ledge that his actions will assist the perpetrator in the commission of the crime. This is particularly apparent from all the cases in which persons were convicted for having driven victims and perpetrators to the site of an execution. In those cases the prosecution did not prove that the driver drove for the purpose of assisting in the killing, that is, with an intention to kill. It was the knowledge of the criminal purpose of the executioners that rendered the driver liable as an aider and abettor. Consequently, if it were not proven that a driver would reasonably have known that the purpose of the trip was an unlawful execution, he would be acquitted.

Moreover, it is not necessary that the aider and abettor should know the precise crime that was intended and which in the event was committed. If 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 abettor.

Knowledge is also the requirement in the International Law Commission Draft Code, which may well reflect the requirement of *mens rea* in customary international law. This is the standard adopted by this Tribunal in the *Tadić Judgement*, although sometimes somewhat misleadingly expressed as "intent".

One exception to this requirement of knowledge is the *Rohde* case, which appears to require no *mens rea* at all. However, this case is based on English law and procedure under the Royal Warrant. Furthermore, it is out of line with the other British cases, which do require knowledge. At the other end of the scale is the appeal court decision in the *Hechingen Deportation* case, which required that the accomplice share the *mens rea* of the perpetrator. However, the high standard proposed by this case is not reflected in the other cases.

In sum, the Trial Chamber holds the legal ingredients of aiding and abetting in international criminal law to be the following: the *actus reus* consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime. The *mens rea* required is the knowledge that these acts assist the commission of the offence. This notion of aiding and abetting is to be distinguished from the notion of common design, where the *actus reus* consists of participation in a joint criminal enterprise and the *mens rea* required is intent to participate.<sup>106</sup>

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<sup>106</sup> See *Prosecutor v. Furundžija*, IT-95-17/1-T, Judgment, ¶¶ 245–49 (Dec. 10, 1998). Though this Note is only focused on the pillaging of natural resources, it should be noted that according to this interpretation, corporations and its officers could be held liable for every single war crime that is committed against the civilians in the DRC. The court's broad statement "If 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 abettor" would open up liability for the raping of women and children, the use of child soldiers, the wanton destruction of public and private property, etc.

In upholding this standard, international tribunals have “held defendants liable for aiding and abetting where [the defendants] knowingly carr[ied] out acts comprising practical assistance, encouragement or moral support to the principal.”<sup>107</sup> The International Criminal Tribunal for Rwanda (ICTR) has found that aiding and abetting are disjunctive, and one only needs to prove one type of participation to be found guilty.<sup>108</sup>

Therefore, under customary international law, the three elements required to find liability for aiding and abetting are: (1) the occurrence of a war crime or a crime against humanity; (2) an accomplice’s material contribution to such crime(s); and (3) evidence that the accomplice had intent that the crime would be committed or was reckless as to its commission.<sup>109</sup> It is important to note that under the first element the principal offender “need not be charged or convicted for the liability of the accomplice to be established.”<sup>110</sup> In regard to the second element, ICTY case law requires that contributions from accomplices “must meet a qualitative and quantitative threshold.”<sup>111</sup> The tribunal requires the assistance to be substantial enough such that the “act most probably would not have occurred in the same way had not someone acted in the role that the accused in fact assumed.”<sup>112</sup> Under the third element, the ICTY has noted that “there is a requirement of intent, which of course involves awareness of the act of participation coupled with a conscious decision to participate by planning, instigating, ordering, committing, or otherwise aiding and abetting in the commission of a crime.”<sup>113</sup> Knowledge can be constructively inferred by a court if the surrounding events are so overwhelming that it would be impossible to not know of the events, and the accomplice continued their participation in the enterprise.<sup>114</sup>

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<sup>107</sup> Prosecutor v. Blagojević and Jokić, IT-02-60, Judgment, ¶ 726 (Jan. 17, 2005). *See also* Prosecutor v. Akayesu, Judgment, ICTR-96-4-T, ¶ 484 (Sept. 2, 1998) (holding that aiding means giving support to the perpetrator, while abetting means facilitating the commission of the crime by being sympathetic to the perpetrator). *See, e.g.*, Prosecutor v. Kayishema & Ruzindana, ICTR-95-1-T, Judgment, ¶ 197 (May 21, 1999).

<sup>108</sup> *Id.*

<sup>109</sup> William A. Schabas, *Enforcing International Humanitarian Law: Catching the Accomplices*, 42 INT’L REV. RED CROSS 439 (2001), reprinted in *WAR CRIMES AND HUMAN RIGHTS: ESSAYS ON THE DEATH PENALTY, JUSTICE, AND ACCOUNTABILITY* 495, 501 (2008).

<sup>110</sup> Schabas, *supra* note 109, at 501.

<sup>111</sup> *Id.* at 502.

<sup>112</sup> *Id.* (citing Prosecutor v. Tadić, IT-94-1-T, Judgment, ¶ 679 (May 7, 1997)). It should be noted, however, that the drafters of the ICC chose not to include the text “substantial” in Article 25 which may signal that aiding and abetting liability should not have to reach that high of a threshold. *See* Schabas, *supra* note 109, at 502.

<sup>113</sup> Schabas, *supra* note 109, at 503 (citing *Tadić*, IT-94-1-T, ¶ 674).

<sup>114</sup> *See* *Tadić*, IT-94-1-T, ¶ 674.

Unfortunately, drafters of the Rome Statute used wording that has confused some as to whether a knowledge test or a purpose test applies. Under Article 25(3) of the Rome Statute, a defendant is liable if he or she, “[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.”<sup>115</sup> This purpose standard goes against what the ICTY/ICTR had determined was the proper interpretation.<sup>116</sup> There is no record as to why the drafters of the statutes reversed course on the test, but it is a decision that reversed the trend in customary international law and may have taken away a valuable tool from prosecutors at the ICC.<sup>117</sup>

However, because there is no “legislative” history deciphering why the drafters of the Rome Statute used the phrase “[f]or the purpose of facilitating,” or what elements make up purpose, the ICC would need to look at customary international law interpretations on aiding and abetting crimes. The ICC should consider the cases such as *Furundžija*<sup>118</sup> and the *Zyklon B* case<sup>119</sup> to determine that knowledge of a crime’s commission is sufficient under international criminal law to attach liability for aiding and abetting. To hold otherwise would have two disturbing effects: (1) the doctrine of aiding and abetting liability would basically disappear and all violations would need to meet the tougher requirements for joint criminal enterprise (i.e., finding common purposes); and (2) defendants that fund but do not physically involve themselves in devastating wars would enjoy an implicit immunity from international criminal law. In *Prosecutor v. Tadić*, the ICTY held:

Although only some members of [a] group may physically perpetrate [a] criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less—or indeed no different—from that of those actually carrying out the acts in question.<sup>120</sup>

If the ICC recognizes that the knowledge test is the proper test for determining the culpability of an aider and abettor, then the officers and directors of Lundin Holdings are liable for aiding and abetting the AFDL in

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<sup>115</sup> ICC Statute, *supra* note 56, art. 25(3)(c) (emphasis added).

<sup>116</sup> See *supra* notes 98–105 and accompanying text.

<sup>117</sup> See Per Saland, *International Criminal Law Principles*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 189, 198–200 (Roy S. Lee ed., 1999).

<sup>118</sup> See *Prosecutor v. Furundžija*, IT-95-17/1-T, Judgment (Dec. 10, 1998).

<sup>119</sup> See *Zyklon B Trials*, *supra* note 81.

<sup>120</sup> *Prosecutor v. Tadić*, IT-94-1-T, Judgment, ¶ 191 (May 7, 1997).

the pillaging the Tenke-Fungurume concessions because (1) a war crime occurred; (2) Lundin Holdings made a material contribution to the crime; and (3) Lundin Holdings intended or was reckless as to the crime's commission.

The first step of proving that the directors of Lundin Holdings aided and abetted the AFDL is to prove that a war crime had in fact occurred; the AFDL's pillage of the Katanga province would be sufficient. The AFDL appropriated property throughout the DRC, especially in the Katanga province that includes the Tenke-Fungurume concessions.<sup>121</sup> The intent of the AFDL was to deprive the use of the resources from the current government of President Seko and to sell off the concessions for their own financial gain.<sup>122</sup> The appropriation of the mine was without the consent of the owner, as it was taken by force.<sup>123</sup> Additionally, the conduct took place in the context of an international conflict, and the AFDL knew the circumstances establishing the existence of the conflict.<sup>124</sup>

The second step to prove Lundin Holdings directors' accomplice liability is that there was a material act on the part of Lundin Holdings that contributed to the perpetration of the crime. Lundin Holdings had established contacts with the AFDL in early 1997, before it took control of the DRC.<sup>125</sup> Within days or weeks of the AFDL gaining power, the two sides finalized a deal that sent twenty-five million dollars to a company owned by then AFDL leader Laurent Kabil.<sup>126</sup> A U.N. report noted that, *inter alia*, this deal allowed for not only the continuation of the war, but also the continuation of the pillaging of minerals out of the DRC.<sup>127</sup>

The third and final step to demonstrate Lundin Holdings directors' accomplice liability is to show that Lundin Holdings intended that the crimes be committed or that Lundin Holdings was reckless as to the commission of the crime(s). Directors of Lundin Holdings knowingly entered into contacts with the AFDL prior to when the AFDL had control over the

<sup>121</sup> See *supra* text accompanying note 25. The Katanga province was one of the top priorities for the AFDL to control as it was rich in mineral resources. See CUSTERS & NORDBRAND, *supra* note 16, at 21.

<sup>122</sup> See UNITED NATIONS SECURITY COUNCIL, REPORT OF THE PANEL OF EXPERTS ON THE ILLEGAL EXPLOITATION OF NATURAL RESOURCES AND OTHER FORMS OF WEALTH OF THE DEMOCRATIC REPUBLIC OF THE CONGO, U.N. Doc. S/2001/357, ¶ 26 (Apr. 12, 2001) [hereinafter U.N. REPORT].

<sup>123</sup> See CUSTERS & NORDBRAND, *supra* note 16, at 20.

<sup>124</sup> The AFDL would not be able to effectively argue this element as they were the aggressors in the conflict.

<sup>125</sup> CUSTERS & NORDBRAND, *supra* note 16, at 20–21.

<sup>126</sup> *Id.* at 20.

<sup>127</sup> See U.N. REPORT, *supra* note 122, ¶ 212 (finding one link between the exploitation of resources and continuation of the war was “the will of private citizens and businesses who endeavour to sustain the war for political, financial or other gains”).

Katanga province, which housed the Tenke-Fungurume concessions. Surely, the AFDL had to know of the possible lucrative contracts available if it took control of the mines, and then, after gaining control, Lundin Holdings transferred twenty-five million dollars to AFDL leader Kabila's company.<sup>128</sup> Furthermore, under the theory of constructive intent, Lundin Holdings was at least reckless to what was happening with the donations it gave to the AFDL.<sup>129</sup>

Since the directors and officers are liable under accomplice liability, once they are punished then justice would normally be considered served.<sup>130</sup> However, by only focusing on the liability of directors and officers, the international community is allowing corporations to walk away with billions of dollars in profits. The ability to keep profits obtained from the pillaging of natural resources does nothing to deter future pillaging by other corporations.

#### *B. Corporate Liability Under the Current ICC Statute*

A shortfall of the Rome Statute is that it makes no jurisdictional grant over corporations. Consequently, even if the directors and officers are all held liable and found guilty, the DRC is still left with no recourse to regain the pillaged resources. Professor William Schabas, Director of the Irish Centre for Human Rights and former member of the Sierra Leone Truth and Reconciliation Commission, sums up the impunity of corporations:

[T]o date, private sector actors, such as transnational corporations, have been highly invisible in armed conflict, fueling war and atrocity, yet operating deep within the shadows and often from remote and privileged environments. At best, they are conceptualized as secondary participants in international crimes, in a world where impunity, amnesty and immunity ensure that even the central architects of systematic human rights violations are still about as likely to be held accountable as they are to be struck by lightning.<sup>131</sup>

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<sup>128</sup> See *supra* note 27 and accompanying text.

<sup>129</sup> See generally Mauthausen Concentration Camp Trial (Trial of Hans Alfuldisch and Six Others), in 11 UNITED NATIONS WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS: THE DACHAU CONCENTRATION CAMP TRIAL, TRIAL OF MARTIN GOTTFRIED WEISS AND THIRTY-NINE OTHERS 15 (1949). See also Prosecutor v. Tadić, IT-94-1-T, Judgment, ¶ 676 (May 7, 1997).

<sup>130</sup> See generally Zyklon B Trials, *supra* note 81; Flick Trial, *supra* note 82; I.G. Farben Trial, *supra* note 55.

<sup>131</sup> William A. Schabas, *War Economies, Economic Actors and International Criminal Law*, reprinted in WAR CRIMES AND HUMAN RIGHTS, *supra* note 109, at 511, 512.

To further complicate prosecution of these “private sector actors,” the ICC’s statute only gives the court jurisdiction over “natural persons.”<sup>132</sup> “Natural persons” are human beings that are subject to physical laws, and corporations fall under a category that is considered “legal persons.”<sup>133</sup> Corporations, as legal persons, can own property, sue and be sued in civil courts, be the defendant in domestic criminal cases, and exercise other attributes belonging to a natural person. However, the prevailing international norm is not to view corporations as criminal defendants. In *Prosecutor v. Akayesu*, the ICTR explained:

[C]omplicity is borrowed criminality (criminalité d'emprunt). In other words, the accomplice borrows the criminality of the principal perpetrator. By borrowed criminality, it should be understood that the physical act which constitutes the act of complicity does not have its own inherent criminality, but rather it borrows the criminality of the act committed by the principal perpetrator of the criminal enterprise. Thus, the conduct of the accomplice emerges as a crime when the crime has been consummated by the principal perpetrator. The accomplice has not committed an autonomous crime, but has merely facilitated the criminal enterprise committed by another.<sup>134</sup>

This school of thought has allowed corporations to act with impunity under international law. One U.S. judge has noted, “[v]iewing aiding and abetting in this way, as a theory of identifying who was involved in an offense committed by another rather than as an offense in itself, also helps to explain why a private actor may be held responsible for aiding and abetting the violation of a norm.”<sup>135</sup>

However, the emerging trend under current international law with regards to criminal liability of corporations is much different. At the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders of 1985, the General Assembly held that “[d]ue consideration should be given by Member States to making criminally responsible not only those persons who have acted on behalf of an institution, corporation or enterprise, or who are in a policy-making or executive capacity, but also the institution, corporation or enterprise itself, by devising appropriate measures that could prevent or sanction the furtherance of criminal activi-

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<sup>132</sup> ICC Statute, *supra* note 56, art. 25(1).

<sup>133</sup> Schabas, *supra* note 131, at 517 (many domestic countries do not prosecute corporations in criminal proceedings and therefore including it in the ICC’s jurisdiction was unrealistic at the time).

<sup>134</sup> *Prosecutor v. Akayesu*, Judgment, ICTR-96-4-T, ¶ 528 (Sept. 2, 1998).

<sup>135</sup> *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 281 (2d Cir. 2007) (Katzmann, J., concurring) (emphasis added).

ties.”<sup>136</sup> Similarly, the Council of Europe ratified the Convention on the Protection of the Environment Through Criminal Law which stated “[e]ach Party shall adopt such appropriate measures as may be necessary to enable it to impose criminal or administrative sanctions or measures on legal persons on whose behalf an offence . . . has been committed by their organs or by members thereof or by another representative.”<sup>137</sup> Other treaties and conventions also call for criminal sanctions against corporations where possible, including the 1997 OECD Convention on Bribery of Foreign Public Officials,<sup>138</sup> the 1999 U.N. Convention on Financing of Terrorism,<sup>139</sup> and the 2000 U.N. Convention on Transnational Organized Crime.<sup>140</sup>

Even with these progressions in corporate liability, the drafters of the Rome Statute were unable to come to a consensus as to whether corporations would fall under the ICC’s jurisdiction.<sup>141</sup> The French were the main driving force for inclusion, considering it imperative when implementing restitution and compensation.<sup>142</sup> Nevertheless, several countries, such as Switzerland, Russia, and Japan, were strongly opposed to subjecting corporations to criminal liability.<sup>143</sup> They argued that the addition of entities to the jurisdiction of the ICC “would have had far-reaching consequences for the question of complementarity” since they did not already “provide for the criminal responsibility of legal entities” in their own countries.<sup>144</sup> Due to time restrictions, the latter argument won out and entities were not included in the ICC’s jurisdiction.<sup>145</sup>

The ICC’s inability to punish corporations with criminal sanctions leaves victims of pillaging to either (1) try to renegotiate the contracts so

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<sup>136</sup> UNITED NATIONS, SEVENTH UNITED NATIONS CONGRESS ON THE PREVENTION OF CRIME AND THE TREATMENT OF OFFENDERS, GUIDING PRINCIPLES FOR CRIME PREVENTION AND CRIMINAL JUSTICE IN THE CONTEXT OF DEVELOPMENT AND A NEW INTERNATIONAL ECONOMIC ORDER (ANNEX), U.N. Doc. A/CONF.121/19 (Apr. 15, 1985).

<sup>137</sup> Convention on the Protection of the Environment Through Criminal Law, Doc. No. ETS 172 (Nov. 4, 1998).

<sup>138</sup> Convention on Combating Bribery of Foreign Public Officials in International Business Transactions art. 2, Nov. 21, 1997, OECD Doc. DAFFE/IME/BR(97)20, *available at* [http://www.olis.oecd.org/olis/1997/doc.nsf/LinkTo/daffe-ime-br\(97\)20](http://www.olis.oecd.org/olis/1997/doc.nsf/LinkTo/daffe-ime-br(97)20) (last visited Sept. 11, 2009).

<sup>139</sup> G.A. Res. 54/109, U.N. Doc. A/RES/54/109 (Feb. 25, 2000).

<sup>140</sup> Convention Against Transnational Organized Crime art. 10, G.A. Res. 55/25, U.N. Doc. A/RES/55/25 (Jan. 8, 2001).

<sup>141</sup> See Saland, *supra* note 117, at 199.

<sup>142</sup> E. VAN SLIEDREGT, THE CRIMINAL RESPONSIBILITY OF INDIVIDUALS FOR VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW 66 (2003) (noting that “the French were also the driving force behind the acceptance of the concept of criminal organizations in Nuremberg.”).

<sup>143</sup> Saland, *supra* note 117.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

that the corporations do not exploit the resources without providing fair benefit to the DRC; or (2) sue the corporation in the corporation's home state. However, both options fail in addressing the need to deter corporations from assisting in pillage.

The first option of renegotiating the contracts fails for several reasons. First, corporations such as Freeport-McMoran have publicly stated that they refuse to renegotiate what they see as binding contracts.<sup>146</sup> Further, even if the contract is rescinded, it does not necessarily deter future behavior by other corporations.

The second option of suing the corporation in its home state is also inadequate. Citizens of the DRC may have a claim under a statute like the Alien Tort Claims Act (ATCA) or similar statutes in other countries. "[H]uman rights activist have made significant progress in promoting their agendas with instruments such as the [ATCA]. However, efforts to apply a kind of universal jurisdiction before civil courts have faced considerable legal obstacles in many legal systems, the common law doctrine of *forum non conveniens* being perhaps the most important of them."<sup>147</sup> The indigenous people of the DRC are ill-informed of the functioning of their own court systems, much less that of a foreign nation. Depending on activist groups to file lawsuits is not an adequate response to pillaging because many activist groups are understaffed or underfunded. Additionally, the defendant corporation might be in a state where there is no available remedy.<sup>148</sup> Finally, the outcome of the case would largely depend on the country where the case is brought. If the country is one where aggressive business practices are accepted and/or encouraged, courts will be far less likely to rule against the corporation.

## V. SOLUTIONS FOR CORPORATE CRIMINAL LIABILITY

The international community must hold corporations liable for their crimes, and a two-step process is needed to achieve punishment. First, there must be a paradigm shift in the way the international community recognizes corporations and corporate criminal activity. Achieving this shift will enable the international community to amend the ICC's jurisdiction statute to recognize corporations as entities that are liable for genocide, crimes against humanity, and war crimes.

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<sup>146</sup> Dan Rather Reports, *supra* note 38.

<sup>147</sup> Schabas, *supra* note 109, at 509.

<sup>148</sup> The Lundin Group at the time was incorporated in Bermuda. See *Final Report*, *supra* note 4, Annex III.

#### A. *The Paradigm Shift*

The main argument against the inclusion of corporations under the jurisdiction of the ICC centers on the historic classification of the corporation as a “legal person” and not a “natural person.”<sup>149</sup> This argument, however, places emphasis on the wrong classification. The emphasis should be placed solely on the act committed.

[I]t should be clear that just as the forest is not itself a full-fledged biological entity, so the corporation is not a full-fledged person. [Corporations] do[ ] act in some sense of that term, but its acts are vicarious ones, and its personhood is thus greatly restricted. But . . . this agency is not restricted to such an extent that moral appraisal of this action is ruled out. There are actions of the corporation which can be morally blameworthy even though the corporation’s agency status is much more restricted than full-fledged moral agents.<sup>150</sup>

Edwin H. Sutherland, an influential criminologist, noted that “[a]n unlawful act is not defined as criminal by the fact that it is punished but by the fact that it is punishable.”<sup>151</sup> Whether an act is punishable, then, merely comes down to a political decision subject to ethical and political influences. Sutherland goes on to note how it was the upper-class people, generally those running the corporations, that influenced the current legal definitions that people now feel required to follow:

White collar criminals [along with corporations] are relatively immune because of the class bias of the courts and the power of their class to influence the implementation and administration of the law. This class bias affects not merely present-day courts, but also, to a much greater degree, affected the earlier courts which established the precedents and rules of procedure of the present-day courts. Consequently, it is justifiable to interpret the actual or potential failures in conviction in the light of known facts regarding the pressures brought to bear on the agencies which deal with offenders.<sup>152</sup>

Refocusing on the criminal act itself will shift the paradigm and allow the international community to hold corporations accountable for facil-

<sup>149</sup> See Ronald C. Slye, *Corporations, Veils, and International Criminal Liability*, 33 BROOKLYN J. INT'L LAW 955 (2008) (providing a complete analysis of the arguments raised against corporate liability).

<sup>150</sup> Larry May, *Vicarious Agency and Corporate Responsibility*, 43 PHIL. STUD. 69, 74 (1983).

<sup>151</sup> EDWIN H. SUTHERLAND, *WHITE COLLAR CRIME* 35 (1949).

<sup>152</sup> Edwin H. Sutherland, *White Collar Criminality*, 5 AMER. SOC. REV. 1 (1940), reprinted in *WHITE-COLLAR CRIMINAL: THE OFFENDER IN BUSINESS AND THE PROFESSIONS* 40, 46 (Gilbert Geis ed., 1968). See also EDWIN SCHUR, *THE POLITICS OF DEVIANCE* 183 (1980).

tating pillage. Indeed, the trend in international law of personifying corporations shows that this paradigm shift is acceptable. Analyzing “soft” law agreements pertinent to corporations yields insight as to how the international community already personifies corporations as having the rights and obligations of a natural person.<sup>153</sup> For example, the preamble of the Universal Declaration of Human Rights declares “every individual and *every organ of society* . . . shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance.”<sup>154</sup> Other non-binding international organizations, such as the OECD,<sup>155</sup> the International Labour Organization,<sup>156</sup> and the Copenhagen Declaration for Social Development<sup>157</sup> also personify corporations as having legal obligations akin to human beings. Given the personification of corporations as natural persons in these soft law agreements and international organizations, the international community is ready for a paradigm shift.

By shifting the paradigm from “who” commits crime to “what” actions are punishable, the international community can enforce criminal sanctions against corporations. Punishment for crimes, such as pillaging,

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<sup>153</sup> See David. Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT'L. L. 931, 947 (2004). See also Truth and Reconciliation Comm'n of South Africa, Report, ch. 2 (1998), available at [http://www.info.gov.za/otherdocs/2003/trc/2\\_5.pdf](http://www.info.gov.za/otherdocs/2003/trc/2_5.pdf) (describing the Commission's rejection of claims by business leaders of innocence based on their non-state status).

<sup>154</sup> *Universal Declaration of Human Rights*, G.A. Res. 217(A)(III), pmb., U.N. GAOR, 3rd Sess., U.N. Doc. A/810 (Dec. 8, 1948) (emphasis added).

<sup>155</sup> *OECD Guidelines*, *supra* note 31, at 39 (recognizing the role corporations play in human rights).

<sup>156</sup> International Labour Organization, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (rev. Nov. 2000), 83 ILO OFF. BULL. (ser. A), No. 3 (2000), available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---emp\\_ent/documents/publication/wcms\\_094386.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/documents/publication/wcms_094386.pdf) (last visited Sept. 11, 2009) (“All the parties concerned by this Declaration should respect the sovereign rights of States, obey the national laws and regulations, give due consideration to local practices and respect relevant international standards. They should respect the Universal Declaration of Human Rights and the corresponding International Covenants adopted by the General Assembly of the United Nations.”).

<sup>157</sup> See World Summit for Social Development, Copenhagen Declaration on Social Development, ¶ 26(j), U.N. Doc. A/CONF.166/9 (1995) (“Promote universal respect for, and observance and protection of, all human rights and fundamental freedoms for all, including the right to development; promote the effective exercise of rights and the discharge of responsibilities at all levels of society; promote equality and equity between women and men; protect the rights of children and youth; and promote the strengthening of social integration and civil society.”).

could take on many forms from penalties that would go to compensation of the victims to sanctions on the corporations.<sup>158</sup>

*B. Amendment of the ICC Statute*

Article 121(1) of the Rome Statute allows parties to make proposed amendments for the ICC seven years after the entry into force of the treaty; July 1, 2009 was the seven year mark to propose amendments.<sup>159</sup> Therefore, this Note recommends that the international community amend Article 25(1) so that it reads:

The Court shall have jurisdiction over natural and legal persons pursuant to this Statute.

Making this amendment will ensure that the ICC has jurisdiction over corporations, businesses, and industries that commit or assist in the perpetration of crimes such as pillaging.

There are two separate theories for imposing corporate criminal liability: identification and imputation.<sup>160</sup> The claim under identification is that the acts of certain individuals should be inferred as the actual acts of the corporation.<sup>161</sup> This establishes direct liability of the corporation. Of course, the ICC or international community would have to curtail this liability to include only those individuals who have a responsibility to represent the company to ensure that a whole corporation could not incur criminal liability based on the actions of a single actor.<sup>162</sup>

The theory of imputation is also known as vicarious liability. Under imputation, the corporation becomes liable for the acts of its employees. The relationship between the employee and the corporation is very important since the employee must act within the scope of his or her employment to impute criminal liability to the corporation.<sup>163</sup> Imputation is a much broader theory, as well as less accepted, than identification, since imputation is much harder to reconcile with criminal law's concept of personal

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<sup>158</sup> Sanctions on a corporation can be applied much like terms of probation are placed on people.

<sup>159</sup> ICC Statute, *supra* note 56, art. 121.

<sup>160</sup> Both theories would in some form eventually affect the shareholder and the value of the corporation. The effect of criminal liability should merely be one of the factors that stock buyers consider when purchasing stock. This in turn should provide more oversight in the actions of the corporation.

<sup>161</sup> James Elkins, *Corporations and the Criminal Law: An Uneasy Alliance*, 65 KY. L.J. 73 (1976).

<sup>162</sup> A useful example of a statute incorporating the identification theory is found in the U.S. Model Penal Code. See MODEL PENAL CODE § 2.07(4) (1962).

<sup>163</sup> See, e.g., *id.*

guilt.<sup>164</sup> Since the theory of imputation is more limited, establishing corporate liability through identification may be the better approach and more acceptable to dissenting countries.

## VI. CONCLUSION

Businesses have long operated in countries that are in the midst of international conflicts or civil wars. The overwhelming majority of businesses have done so while conforming to international legal standards and respecting human rights. However, corporations exist that violate international law. For example, these corporations may resort to bribery and corruption to win government contracts and then force indigenous people off their land and pillage their natural resources, much like what happened with the Lundin Group.

The pillaging of natural resources is a significant problem that plagues countries like the DRC. Soldiers and political leaders commit these actions, but corporations and other entities are also responsible. Historically, the international community created international criminal tribunals to punish soldiers, political leaders, and directors and officers of corporations engaged in pillaging, but the corporations, as entities themselves, have escaped liability for their crimes.

The pillaging of natural resources will not stop until corporations face accountability for the pillaging of natural resources. Doing this requires the ICC to go after corporations for their direct, indirect, and silent complicity in pillaging. The legal system to pursue these corporations already exists under the ICC, but the international community must first amend the Rome Statute's jurisdictional grant to cover corporations as well as "natural persons."

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<sup>164</sup> See generally Elkins, *supra* note 161, at 73 (discussing in further detail the difference between identification and imputation).