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Conflict Minerals and the Law of Pillage

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CONFLICT MINERALS AND THE LAW OF PILLAGE

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International criminal law plays an increasingly large role in transitions from conflict to stability and in the prevention and mitigation of emerging or ongoing conflicts. The modern international criminal tribunals created to address conflicts in the former Yugoslavia, Rwanda, Sierra Leone, Cambodia, and Lebanon all have as at least part of their goal to help the country or region move from violence and repression to peace and stability. To achieve this goal, these tribunals have used their scarce resources to target those thought to be most responsible for the conflict. The modern tribunals have proceeded on the theory that prosecuting the leaders whose decisions and actions drove the conflict would demonstrate to the populace that there was accountability for the harms associated with the conflict and perhaps provide a measure of deterrence for the future.

1 Even with the emergence of prosecution as an important component of transitional justice, scholars have continued to debate how it should fit into the scheme. For an analysis of various components of a transitional justice program, including prosecution, amnesty, truth commissions, and other mechanisms, see Ivan Simonovic, Attitudes and Types of Reaction Toward Past War Crimes and Human Rights Abuses, 29 YALE J. INT’L L. 343 (2004). Simonovic argues that social attitudes toward the abuses of the past and social goals for the future should determine the extent to which prosecution is a part of the transitional justice system. Id. at 350-352. He concludes that at “least the gravest crimes must be met with criminal proceedings.” Id. at 360. For a more skeptical view of the role of prosecution, see, e.g., Miriam J. Aukerman, Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice, 15 HARV. HUM. RTS. J. 39 (2002). Aukerman surveys the growing prominence of prosecution as a part of transitional justice and argues that, because prosecutions “better designed to achieve some goals than others,” it is important to determine the objectives for the justice system before settling on prosecutions as the principal feature. Id. at 44.

2 See, e.g., David Luban, After the Honeymoon: Reflections on the Current State of International Criminal Justice, 11 J. INT’L CRIM. JUST. 505, 509 (2013) (arguing that the “radical goal of [international criminal justice] is a moral transformation of how ordinary men and women regard political violence against civilians”).

3 See, e.g., Carla Del Ponte, Prosecuting the Individuals Bearing the Highest Level of Responsibility, 2 J. INT’L CRIM. JUST. 516, 517 (2004) (describing the criteria by which to determine who bears “the highest level of responsibility” and arguing that targeting these individuals can “enable the rest of the people to face their past, accept the present and move forward”); Payam Akhavan, The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment, 90 AM. J. INT’L L. 501, 507 (1996) (noting that the first prosecutor for the International Criminal Tribunal for Rwanda promised to focus on “those most responsible … for the mass killings”). Regarding deterrence, see Hunjoon Kim & Kathryn Sikkink, Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries, 54 INT’L STUD. Q. 939, 957 (2010) (finding, based on quantitative analysis, “the existence of a deterrence effect in the realm of human rights”
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This general approach faces a growing challenge: how best to hold accountable those who exploit the civilians and resources of a country to enrich themselves or their allies or pay for the war. The crime of pillage is the criminal charge most often used to address this kind of exploitation associated with violent conflict. The modern law of pillage makes it a crime, under the appropriate conditions, to appropriate property during conflict with the intent to deprive the owner of the property, and with the intent to put the property to personal or private use. Although it is not the only tool available to prosecutors to address the exploitation of resources or civilians during conflict, it is the tool most often used. It also increasingly appears inadequate to many scholars and advocates because prosecutors have focused on discrete, often relatively small-scale, episodes of theft. This approach, which I call the episodic theory of pillage, is entirely consistent with existing law but does not adequately address the policy goals of international criminal law to contribute to a transition to stability, particularly in places in which the exploitation of natural resources has been an important part of the conflict.

Critics of the modern law of pillage point to evidence from the Democratic Republic of Congo to argue that the exploitation of resources based on post-conflict prosecutions of human rights violations).

See, e.g., Jean D’Aspremont, Towards and International Law of Brigandage: Interpretative Engineering for the Regulation of Natural Resources Exploitation, 3 ASIAN J. INT’L L. 1, 3-8 (2013) (noting that the humanitarian law prohibition on pillage has been the principal legal mechanism used to address resource exploitation and arguing that it has been inadequate to this point); Ruben Carranza, Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?, 2 INT’L J. TRANSITIONAL JUST. 310, 329 (2008) (arguing that transitional justice mechanisms, including criminal prosecutions, should address economic exploitation during conflict to avoid creating an “impunity gap” that can arise when prosecutors ignore “large-scale corruption and economic crimes”).

For a critical analysis of the utility of the crime of pillage as a mechanism to address the phenomenon of resource exploitation during conflict, see Larissa Van Den Herik & Daniella Dam-De Jong, Revitalizing the Antique War Crime of Pillage: The Potential and Pitfalls of Using International Criminal Law to Address Illegal Resource Exploitation During Armed Conflict, 15 CRIM. L. FORUM 237 (2011). Van den Herik & Dam-De Jong argue that the crime of pillage, although the criminal law doctrine most often used to address resource exploitation, is at best a useful but limited tool that should be used along with other mechanisms. Id. at 272-273.

See Michael A. Lundberg, The Plunder of Natural Resources During war: A War Crime (?), 39 GEO. J. INT’L L. 495, 496 (2007) (arguing that, because conflicts “fueled by resource plunder have left millions dead” and “the lack of prosecution for such crimes … results in a self-perpetuating cycle of violence, exploitation, self-enrichment, and impunity,” it must be prosecuted as a war crime).
and civilians is a significant part of the reason that the conflict occurred in the first place and has played an important role in extending and making more lethal a conflict that has already caused the deaths of at least 5,000,000 non-combatants, with no end in sight. These critics argue that the law as it has been used is inadequate and propose what they call a corporate theory of pillage. They argue that the corporate purchasers of illicit resources are among those most responsible for the length and lethality of the conflict and that they, like others thought to be most responsible for the conflict, should face criminal prosecution. These critics propose that prosecutors should combine the law of pillage with legal theories allowing for the extension of criminal liability to individuals and entities beyond the direct perpetrator to hold corporations responsible.

The problem with the corporate theory is that it risks stretching already thin legal theories beyond their breaking point. One version of the corporate theory would use aiding and abetting liability to target corporations, which would require a showing that corporate purchasers of conflict minerals—even six or seven transactions away from the initial theft—intended that the original theft occur and materially contributed to it. A second version of the corporate theory would change the meaning of

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7 See, e.g., PETER EICHSTAEDT, CONSUMING THE CONGO: WAR AND CONFLICT MINERALS IN THE WORLD’S DEADLIEST PLACE 8 (reporting that “5.4 million ‘excess deaths’ occurred across the Congo from August 1998 to April 2007, deaths above and beyond what normally would have occurred without war”); Jeffrey Gettleman, The World’s Worst War, N.Y. Times, Dec. 15, 2012 (noting that “Congo has become a never-ending nightmare, one of the bloodiest conflicts since World War II, with more than five million dead”).

8 See JAMES G. STEWART, CORPORATE WAR CRIMES: PROSECUTING THE PILLAGE OF NATURAL RESOURCES 9 (2011) (arguing that since “the end of the Cold War, the illegal exploitation of natural resources has emerged as a primary means of financing armed violence” and that prosecutors should target corporations in order to reduce the incidence of pillage).

9 See Michael A. McGregor, Ending Corporate Impunity: How to Really Curb the Pillaging of Natural Resources, 42 CASE WESTERN RES. J. INT’L L. 469, 471 (2009) (arguing that “prosecuting soldiers and political leaders alone will not eliminate the pillaging of natural resources” and that to do so “the international community must hold the corporations, businesses, and industries that fund resource conflicts accountable under international criminal law”).

10 For a description of the conflict minerals supply chain, see JOHN PRENDERGAST & SASHA LEZHNEV, FROM MINE TO MOBILE PHONE (Enough Project Nov. 2009) (describing all of the transactions that typically occur from the time minerals are extracted from mines in Eastern Congo to the time they reach consumers in devices such as mobile phones).

11 See McGregor, supra note 9, at 484-488 (arguing that aiding and abetting liability, or some other form of complicity liability, would be sufficient to tie corporate purchasers to the initial theft).
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one of the essential elements of the crime of pillage—unlawful appropriation—to include not only the theft of property but the receipt of illicitly derived property even if the corporation was unsure as to the origins of the property. 12 Both of these approaches are appealing because they at least address the weakness in the current state of the law of pillage, but neither is a legally satisfactory solution to the problem.

What is missing is a legal theory that comports with existing law and satisfies the policy goals of international criminal law. This Article supplies such a theory, and does so through the lens of the prosecution of Congolese warlord Bosco Ntaganda at the International Criminal Court.13 Ntaganda’s prosecution has the potential to be one of the most important cases in international criminal law in recent years. Operating in Eastern Congo since the early 2000’s and allegedly supported by Rwanda, Ntaganda is alleged to have participated in and led some of the worst atrocities against civilians since the Holocaust.14 His prosecution is important because of the sheer scale of the crimes for which he is charged and because of the harms done to his many victims.15 But it is also important because of its potential to usher in a new approach to addressing the harms associated with the exploitation of natural resources during conflict.

One of the many charges against Ntaganda is that he committed the war crime of pillage; that is, that he took property from others with the intent to deprive the owner of it and to keep it for his personal or private use.16 The charges against him are consistent with recent practice in the

12 See Stewart, supra note 9, at 33 (arguing that “appropriation” should mean “extraction of natural resources directly from the owner as well as purchasing resources illegally acquired during war”).
13 See Decision on the Prosecutor’s Application under Article 58 at 9-26, Prosecutor v. Bosco Ntaganda, No. ICC-01/04-02/06 (Pre-Trial Chamber II, International Criminal Court, July 13, 2012) (in decision granting prosecutor’s request for an arrest warrant, describing charges against Ntaganda including murder, attacking the civilian population, rape and sexual slavery, pillage, and enlisting, conscripting, and using children under the age of 15 in combat) [hereinafter Arrest Warrant Decision 2012].
14 See, e.g., Jeffrey Gettleman, Wanted Congolese Rebel Leader Turns Himself in to U.S. Embassy, N.Y. TIMES, March 18, 2013 (reporting that “Mr. Ntaganda was one of the worst of Congo’s brutal rebel leaders” according to prosecutors and others).
15 For a summary of some of the crimes for which Ntaganda is charged, see WHO IS BOSCO NTAGANDA: LYCHPIN TO SECURITY OR INTERNATIONAL WAR CRIMINAL? (Enough Project, April 2012). According to advocates, Ntaganda has participated in campaigns of mass rapes, led massacres of civilians, recruited child soldiers, and enriched himself by stealing Congo’s natural resources.
16 See Decision on the Prosecutor’s Application under Article 58 at 21, Prosecutor v. Bosco Ntaganda, No. ICC-01/04-02/06 (Pre-Trial Chamber II, International Criminal Court, July 13, 2012) (describing charge of “Pillaging Constituting War Crimes” against
international criminal tribunals in that they rely on an episodic theory of the pillage. For example, Ntaganda’s arrest warrant alleges that he committed the war crime of pillage during two clusters of attacks, the first on two villages in Eastern Congo over a five-day period in November 2002 and the second in a two-week series of attacks on several small villages in the same region in February and March 2003.\textsuperscript{17} According to reports at the time, these attacks were brutal and resulted in enormous harm to civilians.\textsuperscript{18} Prosecution for these attacks is thus entirely justified under the law and, given the harms to the victims, perfectly appropriate. But it is not sufficient.

A full accounting of the harms done in the wars in Eastern Congo should not be limited to the harms inflicted on the civilian population in a series of isolated episodes, as horrific as they were. The full story of the wars in Eastern Congo and any prosecution arising from those wars must include criminal liability for the looting of the country’s mineral wealth by the various warring factions and the exploitation of the civilian population living there. Ntaganda has played a prominent role in this and has caused or contributed to the suffering of thousands of people. The pillage charge is just one in a long list of alleged war crimes and crimes against humanity for which Ntaganda has been arrested, but if prosecutors pursue the pillage charge using the theory I propose, there is an opportunity to both hold Ntaganda fully accountable for his crimes and to have a disruptive effect on others involved in the minerals wars in Eastern Congo.

I argue that the prosecution should not limit itself to the use of an episodic theory of pillage. Instead, prosecutors should additionally charge Ntaganda with the crime of pillage using what I will call a systematic theory of the case. On this theory, Ntaganda could be prosecuted for his role in the violence associated with the widespread theft of Congo’s mineral wealth. For years Ntaganda and others fought over mines in Eastern Congo and used the mines as the source of funds for their militias. The harms from this

\textsuperscript{17} See Decision on the Prosecutor’s Application under Article 58 at 25, Prosecutor v. Bosco Ntaganda, No. ICC-01/04-02/06 (Pre-Trial Chamber II, International Criminal Court, July 13, 2012) (describing pillage charges against Ntaganda as based on incidents “during the attacks of Mongbwalu and Sayo, between 18 and 23 November 2002, and of Lipri, Bambu, Kobu, and surrounding villages, between 17 February and 2 March 2003”).

\textsuperscript{18} See, e.g., HUMAN RIGHTS WATCH, THE CURSE OF GOLD 27-30 (2005) (describing “massacre” of civilians at Mongbwalu and “massacre” of civilians at Kobu, Lipri, and Bambu ). The Human Rights Watch report, based on interviews with eye witnesses and survivors, details the extent of human suffering and describes the murders infants, children, and women and indicates that the death toll was in the hundreds.
activity were felt by civilians across the region, but these harms are nowhere to be found in the charges against Ntaganda. The systematic theory of pillage is a way to reach this activity.

To make this case, I make three principal claims. First, I argue that my proposed systematic theory of pillage is consistent with the current definition of the crime of pillage and the crime’s historical meaning. Second, I argue that using this theory would more fully capture the harms done by Ntaganda and other defendants charged based on the Congo wars. The harms done by large-scale appropriation of national resources in the context of armed conflict are different than the harms done when villages are attacked and individual civilians are deprived of their homes and personal property. To be clear, I do not argue that one kind of harm is more or less important or profound than the other. Instead I argue that the harms are different and that both should lead to prosecution. My final claim is that prosecuting Ntaganda under a systematic theory of pillage would have other benefits that would reduce harm in the region. It would provide a vehicle by which to assemble evidence of the full web of actors involved in the illegal mineral trade, which might be relevant to future prosecutions or in other legal actions against other participants. In addition, the fact that this evidence was assembled and presented in the International Criminal Court might itself have a deterrent effect on others in the trade either because they fear harm to their reputations or because they fear prosecution themselves.

This Article proceeds in three parts. In Part I, I analyze the law of pillage and show that the systematic theory of the crime is consistent with both its history and with contemporary practice. In Part II, propose the systematic theory and show that it better achieves the policy goals of international criminal law than does the episodic theory, and that it better comports with existing law than does the corporate theory. In Part III, I first describe the recent history of the Congo wars, with special attention to Ntaganda’s activity and the role of minerals in the conflict. I then apply the systematic theory to the publicly-available information about Ntaganda’s activities in Congo to show that prosecuting him under this theory is plausible on the facts and consistent with the normative objectives of international criminal law. I conclude Part III by responding to potential objections to my approach and showing how it might be extended to reach other, as-yet uncharged criminal conduct that is similar in nature to the exploitation of natural resources.

I. THE LAW OF PILLAGE
In its modern form, the crime of pillage is generally defined as the unlawful appropriation of property during armed conflict.\footnote{Jean-Marie Henckaerts & Louise Doswald-Beck, Customary International Humanitarian Law 185 (2009) (noting that “the prohibition of pillage is a specific application of the general principle of law prohibiting theft” and includes the appropriation of private property by combatants during conflict).} In the International Criminal Court and the modern international criminal tribunals, it is the elements of the crime that give it its specific legal form. Under the Rome Statute of the International Criminal Court to convict a defendant of pillage, the prosecution must prove that “(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; [and] (3) the appropriation was without the consent of the owner.”\footnote{International Criminal Court, Elements of Crimes, Article 8 (2) (b) (xvi) (War Crime of Pillaging) [hereinafter ICC Elements of Crimes]. In the ICC and other tribunals, the situation is slightly more complicated than that because pillage must be proven as a war crime. See Rome Statute of the International Criminal Court, Art. 8 (b) (xvi) & (e) (v) (outlawing pillaging as a violation of the laws or customs of war). This means that there are two additional elements, common to all war crimes, that must be proved: that the conduct took place in connection with an international or non-international armed conflict and that the perpetrator was aware of the facts showing that an armed conflict existed. See ICC Elements of Crimes, Article 8 (2) (b) (xvi). For my purposes, it is the substantive elements of pillage itself, not those common to all war crimes, that are relevant.} The statutes of the three most prominent modern international criminal tribunals list pillage as a possible crime and do so in similar, albeit not identical, ways.\footnote{For example, in the ICTY, prosecutors were required to prove that a defendant had unlawfully appropriated property “belonging to a particular population.” Judgment, Prosecutor v. Blaskic, Case No. IT95-14-T, pp. 78-79, para. 234 (March 3, 2000). Because pillage was prosecuted as a war crime, prosecutors were required the general elements of war crimes. In addition to those elements, prosecutors were also required to prove that the facts of the crime were sufficiently serious to warrant prosecution in an international tribunal. See Judgment, Prosecutor v. Delalic & Delic, Case No. IT-96-21-T, P. 394, para. 1154 (Nov. 16, 1998). This additional factor is not relevant to my argument. In Sierra Leone, prosecutors were required to prove that the defendants had appropriated property without the owner’s consent and that they intended to deprive the owner of the property and put it to personal or private use. See Brima, et al., Trial Judgment at 233, para. 755. The Trial Chamber listed the elements as follows: “(1) The perpetrator appropriated property; (2) The appropriation was without the consent of the owner; [and] (3) The perpetrator intended to deprive the owner of the property.”} The statute for the International

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\item[19] See Jean-Marie Henckaerts & Louise Doswald-Beck, Customary International Humanitarian Law 185 (2009) (noting that “the prohibition of pillage is a specific application of the general principle of law prohibiting theft” and includes the appropriate of private property by combatants during conflict).
\item[20] International Criminal Court, Elements of Crimes, Article 8 (2) (b) (xvi) (War Crime of Pillaging) [hereinafter ICC Elements of Crimes]. In the ICC and other tribunals, the situation is slightly more complicated than that because pillage must be proven as a war crime. See Rome Statute of the International Criminal Court, Art. 8 (b) (xvi) & (e) (v) (outlawing pillaging as a violation of the laws or customs of war). This means that there are two additional elements, common to all war crimes, that must be proved: that the conduct took place in connection with an international or non-international armed conflict and that the perpetrator was aware of the facts showing that an armed conflict existed. See ICC Elements of Crimes, Article 8 (2) (b) (xvi). For my purposes, it is the substantive elements of pillage itself, not those common to all war crimes, that are relevant.
\item[21] For example, in the ICTY, prosecutors were required to prove that a defendant had unlawfully appropriated property “belonging to a particular population.” Judgment, Prosecutor v. Blaskic, Case No. IT95-14-T, pp. 78-79, para. 234 (March 3, 2000). Because pillage was prosecuted as a war crime, prosecutors were required the general elements of war crimes. In addition to those elements, prosecutors were also required to prove that the facts of the crime were sufficiently serious to warrant prosecution in an international tribunal. See Judgment, Prosecutor v. Delalic & Delic, Case No. IT-96-21-T, P. 394, para. 1154 (Nov. 16, 1998). This additional factor is not relevant to my argument. In Sierra Leone, prosecutors were required to prove that the defendants had appropriated property without the owner’s consent and that they intended to deprive the owner of the property and put it to personal or private use. See Brima, et al., Trial Judgment at 233, para. 755. The Trial Chamber listed the elements as follows: “(1) The perpetrator appropriated property; (2) The appropriation was without the consent of the owner; [and] (3) The perpetrator intended to deprive the owner of the property.”
\item[22] Statute of the International Criminal Tribunal for the Former Yugoslavia, Art. 3(e).
\item[23] Statute of the ICTY, Art. 2(d) (prohibiting “extensive destruction and appropriation...
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Criminal Tribunal for Rwanda (ICTR) permits the prosecution of pillage as a violation of the Geneva Conventions. The Special Court for Sierra Leone (SCSL) also permits the prosecution of pillage as a violation of the Geneva Conventions.

A. Development of the Legal Prohibition on Pillage

The phenomenon of theft and looting has been a part of war since the earliest recorded history and has been subject to prohibition or limitation under law and norms for almost as long. Fighting forces and occupying armies have long punished their enemies or supplied themselves by stealing from the local population. Ultimately, however, the practice of pillage began to be subject to regulation and ultimately prohibition, beginning most

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Prosecuting Pillage prominently with the Lieber Code during the U.S. Civil War. The Lieber Code is one of the most important foundations of the contemporary laws of war, and was written by the German scholar Francis Lieber as a set of instructions for the Army of the United States in 1863. The Lieber Code prohibited “all pillage or sacking, even after taking a place by main force.” The Lieber Code, which became the part of the foundation of much of the law of war in the century after it was promulgated, was created to be a set of “instructions [to] direct[] the conduct of the Union forces during” the Civil War. The goal of this early codification was therefore practical: to guide commanders and minimize the impact of conflict on the civilian population. Importantly, the Lieber Code prohibited “pillaging or sacking, even after taking a place by main force.” This is significant because it shows that even in its nascent form, the first attempt to legally prohibit pillage emphasized that it could occur after or apart from the fighting necessary to

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28 See RICHARD SHELLY HARTIGAN, LIEBER’S CODE AND THE LAW OF WAR 1 (1983) (the Lieber Code was promulgated as an order from President Lincoln to the Union Army). Pillage was prohibited under the Lieber Code. See Lieber Code, Sec 2, Art. 44.

29 It is difficult to overstate the influence of the Lieber Code on the development of the laws of war. It was the “blueprint for similar international efforts … and has been widely praised as a humanitarian milestone for implementing the rule of law in an actual war.” Chris af Jochnick & Roger Normand, The Legitimation of Violence: A Critical History of the Laws of War, 35 HARV. INT’L L.J. 49, 65 (1994).

30 See Hartigan, supra note 28, at 1-2 (noting that the Lieber Code was promulgated as “General Orders, no. 100” as the “benchmark for the conduct of” the Union Army “toward an enemy army and population”).

31 Lieber Code, Sec 2, Art. 44. The prohibition on pillage comes in the context of a broader prohibition on “wanton violence.” The full article reads as follows:

All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, even after taking a place by main force, all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense. A soldier, officer or private, in the act of committing such violence, and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior.

It is impossible to determine precisely the definition that Lieber assigned to the word pillage. Dictionaries of that era defined pillage as plundering. See NOAH WEBSTER & JOHN WALKER, A DICTIONARY OF THE ENGLISH LANGUAGE: ABRIDGED FROM THE AMERICAN DICTIONARY 290 (1850) (defining pillage as “act of plundering”); see also JOSEPH E. WORCESTER, A COMPREHENSIVE DICTIONARY OF THE ENGLISH LANGUAGE 331 (1860). The word plunder meant to take “by open force” or “to rob.” WEBSTER & WALKER, at 290.


33 Lieber Code, Sec 2, Art. 44.
take or defend a particular location.

After the Lieber Code the international community continued to attempt to develop binding rules to govern the conduct of war. The two principal treaties on the laws of war—the Hague Convention of 1907 and the Geneva Conventions of 1949—both prohibited the crime of pillage. The Hague Regulations prohibit the “pillage of a town or place, even when taken by assault” during war, and separately prohibit pillage when discussing the obligations of military officials over the territory of a hostile state. The Fourth Geneva Convention of 1949 similarly prohibits pillage. Taken together, these foundational sources of modern international criminal law show that the prohibition on the crime of pillage has long been part of international criminal law.

B. Two Modern Theories of the Crime of Pillage

In the post-Nuremberg era, the law and policy of pillage prosecutions have centered on two main theories of prosecution, with occasional mentions of a third possible theory. In practice, contemporary international criminal tribunals have relied on what I will call an episodic theory of pillage. On this theory, pillage is a crime committed by an individual or small group of individuals who steal money or relatively small, movable property. For example, in cases from the former Yugoslavia, pillage prosecutions have targeted individual soldiers who stole jewelry from detainees or civilians. In cases from Rwanda, pillage targeted thefts of personal property from individual members of the Tutsi population. In Sierra Leone, the only pillage convictions were for stealing livestock, money, or other personal goods from individuals or businesses run by civilians. Absent from these cases is any attempt to address more broad-based or systematic theft, even when there facts to support such a charge.

36 Id. at 322 (Hague Regulations, Art. 47).
37 Id. at 652 (Fourth Geneva Convention, Art. 33).
1. Episodic

The phenomenon of pillage has been present in all of the conflicts that have given rise to modern international criminal tribunals, including the war in the former Yugoslavia, the genocide in Rwanda, and the wars in West Africa that gave rise to the Special Court for Sierra Leone. In all of them, prosecutors have relied on an episodic theory of pillage, which is perhaps unsurprising given the nature of pillage cases. The move from viewing theft and violence by soldiers as a perquisite of service or an understandable nuisance to a prosecutable crime represents a significant step in the evolution of international criminal law. In the modern international tribunals, there have been several prosecutions for pillage or similar crimes, but all of them have used the episodic theory and have focused on discrete events rather than systems of exploitation or theft.

There is much to commend the episodic theory, and I do not argue that it should be abandoned. Indeed, the episodic approach allows for the prosecution of undeniably bad acts and avoids the evidentiary and legal challenges that would come if prosecutors pursued a corporate theory. Nonetheless, this approach is insufficient to address the full scope of the harms done in modern wars. A review of the cases from the modern tribunals reveals several factors that are roughly similar in the pillage prosecutions and go a long way toward explaining why prosecutors have relied on this theory to the exclusion of others. These factors include the nature of the property taken, the process of the incident or incidents of the theft, the ownership of the property taken, and the connection between the property taken and the broader fighting. It is important to note that these factors are purely descriptive; that is, they are largely accurate as descriptions of the facts of cases from modern tribunals, but the factors are not required by law or, so far as is apparent from the court records, reflective of a deliberate strategy to shape the law.

First, in all of the modern cases, the nature of the property taken was personal property—goods and chattels—or money. Importantly, the

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38 For a complete inventory of every case involving pillage, see Stewart, supra note 9, at Annex 1, pp. 96-124 (2011). Stewart catalogues every decision from an international criminal tribunal and many from domestic courts that were based on incidents that occurred during conflict.

39 See, e.g., Van Den Herik & Dam-De Jong, supra note 5, at 264-269 (describing cases from modern international criminal tribunals alleging the crime of pillage).

40 See WAYNE R. LAFAVE, CRIMINAL LAW 982 (5th ed. 2010) (noting that at “common law, larceny was limited to misappropriations of goods and chattels—i.e., tangible personal property”).
property taken was not exploitable natural resources or other real property. For example, in Prosecutor v. Brima, et al., from the Special Court for Sierra Leone, three defendants were convicted of the war crime of pillage. The factual basis for these convictions involved the forceful appropriation of goods such as “palm wine,” television, radios and other goods, and a “gold plated wrist watch.” In a separate case, the pillage counts alleged the forceful appropriation of similar goods, plus some more substantial goods such as a “baling machine and some … furniture,” and “bags of money.” What unites these cases is that in none of them was the property involved an exploitable natural resource or anything similar. Instead, all involve property taken from individuals or businesses and whose utility would be immediately apparent to those taking it.

Second, the property was taken by a simple process requiring no substantial infrastructure or expertise. Instead, the process was much like a simple robbery: thieves used force to take property and then carried it away themselves. For example, in Delalic & Delic from the ICTY, the property was confiscated from individuals as they were forced into

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41 See Judgment, Prosecutor v. Brima, et al., Case No. SCSL-04-16-T, Trial Chamber II (SCSL June 20, 2007). In the Special Court for Sierra Leone, only those defendants who bore the most responsibility for the violence in Sierra Leone were tried. See Statute of the Special Court for Sierra Leone, Art. 1, para. 1 (providing that the Special Court shall “have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law”). This resulted in a total of four major cases, one against each of the three principal warring factions, plus one against former Liberian president Charles Taylor.

42 Because there were only four major cases, each case included wide-ranging factual allegations against multiple defendants. In Brima, et al., the allegations underlying the Pillage count spanned five separate geographic areas and occurred over approximately 20 months. See Brima, et al., Trial Judgment at 394, para. 1395. The factual allegations noted above are representative of those in the case.

43 Brima, et al., Trial Judgment at 397, para. 1413.

44 Brima, et al., Trial Judgment at 399, para. 1426.

45 Brima, et al., Trial Judgment at 399, para. 1426.


47 Taylor Trial Judgment at 669, para. 1890.

48 Second Amended Indictment, Prosecutor v. Blaskic, et al., Case No. IT-95-14-T, Trial Chamber (ICTY April 25, 1997).

49 Blaskic, et al., Second Amended Indictment at 5, para. 6.3.

detention camps. Brima, from Sierra Leone, is another instructive example. There the defendants stole the property from its owners using violence and threats of violence. In some instances the defendants went from house to house in small villages and took whatever valuables they could carry from people living in the villages. In other instances they robbed banks or businesses and took the valuables they could find. Importantly, in none of the cases did the process of confiscation involve more than simply removing the property from its owner using violence or threats.

Third, the ownership of the property was clear: individuals or businesses who had possession of the property when it was taken from them. Ownership was neither contested, as might be the case with minerals taken from a mine in contested territory, nor unclear, as might be the case with timber removed from a forest whose owner was not known or not established under the law. In the Sierra Leone cases, the property was appropriated directly from the affected villagers: it was their livestock, palm wine, or personal belongings that the fighting forces took, with no doubt as to who owned the property. In cases from the former Yugoslavia, the property was either confiscated directly from its owners when they were forced into detention camps or taken from their homes.

Fourth, and perhaps most difficult to describe with precision, is the connection between the theft and the broader fighting. In cases from the modern tribunals, the acts of pillage supported the broader fighting, but there is little evidence that they were the principal reason for the fighting or that the fighting would have been impossible to sustain without the revenue produced by the theft. Put slightly differently, prosecutors proceeded on the theory that the thefts helped the fighters, but did not supply the primary reason for the conflict or the principal livelihood of the fighters. Delalic and other cases from the ICTY demonstrate the most simple connection. In those cases the property taken amounted to a supplement to the income of individual fighters, not part of a larger strategy to fund the war effort, and certainly not the motivation for the fighting itself. Brima, from Sierra Leone, is a slightly more complicated example but still supportive of the general point. In that case the fighters committed the thefts as part of what

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51 Judgment, Brima et al., at pp. 396-400, paras. 1410-1429.
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was called by those involved “Operation Pay Yourself.” This was a
generalized permission granted to low-level fighters by their commanders to
take whatever they wished from civilians as a way to fund their own
survival. There was some evidence that some of the proceeds from the
thefts were channeled up the chain of command, but most of the thefts
principally benefitted those who actually did the stealing.

2. Corporate

Scholars and advocates have promoted the corporate theory of
pillage largely because many of the most destructive modern wars have
some connection to resource wealth and the episodic theory has been an
inadequate tool to address the evident harms. In the conflicts in Angola,
the Democratic Republic of Congo, East Timor, Liberia, and Sierra Leone,
resource wealth has been associated with the conflict. In light of what
they take to be evidence of a connection between the conflict and resource
wealth, scholars and advocates have proposed an expansion of the crime
of pillage to include the corporations who purchase minerals or other
commodities stolen during the conflict. Those arguing in favor of the
corporate theory of liability rely on a mixture of policy justifications for the
theory: that prosecution will reduce the likelihood of conflict, make it less
destructive, and punish culpable wrongdoers who currently escape
punishment.

54 Judgment, Brima et al., at p. 394, para. 1398. See also James Rupert, “Diamond
the effects of “Operation Pay Yourself” on the civilian population).
55 Judgment, Brima et al., at p. 394, para. 1398.
56 For example, some of the vehicles commandeered and some of the money stolen
from banks apparently went to commanders rather than those who actually stole the
property.
GEOPOLITICS 1, 9 (2004) (describing the relationship between exploitable natural resources
and violent conflicts over the past 25 years).
58 See Stewart, supra note 9, at 9 (noting the pervasive nature of pillage in modern
wars and indicating the conflicts in which it is most prominent).
59 See, e.g., Paivi Lujala, 47 J. PEACE RES. 15, 15 (2010) (surveying the literature and
concluding that states “rich in natural resources appear to be engaged in armed civil
conflict more often than resource-poor countries”). Paivi also notes that there is substantial
scholarly disagreement about why, and the extent to which, this may be true. Id. That
debate is beyond the scope of my article, except to note that I do not argue that
prosecutions will, of themselves, reduce or eliminate conflict. My focus is on whether the
theory of liability used by prosecutors in the modern tribunals fits the available evidence
and the policy goals of international criminal law.
60 Most scholars and advocates take some version of this position, expressed perhaps
most succinctly by Van Den Herik & Dam-De Jong, who wrote that the U.N. policy
In many modern wars, there is some exploitable resource that can be used to finance the fighting, albeit sometimes this requires a somewhat circuitous route. For example, in the Democratic Republic of Congo, factions have fought bloody battles to gain or hold control of mines from which they obtain coltan, gold, tantalum, titanium, and other valuable minerals. These minerals are typically sold to local intermediaries, transported across land borders to Uganda or Rwanda, sold again, then transported to smelters (and sold again) where they are mixed with other minerals derived from legitimate sources, then sold again to component manufacturers, whose products are sold again to corporations that use the components in consumer electronics such as mobile phones or tablet computers. 

To advocates of the corporate theory of pillage, corporate purchasers of illicit resources are the essential links in the entire supply chain: without the knowledge that they would make valuable use of the illicit resources, there would be no market for the resources the conflict would lose its most important source of financing, and would therefore be smaller, shorter, and less lethal. On this account, prosecuting corporations

reflects “the different ways in which natural resources and armed conflict can be interlinked: natural resources can be the incentives for war or they can furnish the warring parties with finances necessary to continue the war.” Van Den Herik & Dam-De Jong, supra note 5, at 239. Implicit in this view is the idea that resources can prolong, and thereby make more destructive, conflicts. To be sure, the effect of resources could, in theory be different. See, e.g., Le Billon, supra note 57, at 9 (arguing that, under the right conditions, the presence of natural resources might make a conflict less destructive because resources could give one side to the conflict a decisive advantage, allowing it to end the conflict quickly). See also Stewart, supra note 9, at 10 (arguing that “the deterrent effect created by even a single case [against a corporation] is likely to transform conflict financing in a large number of ongoing conflicts”).


See generally Prendergast & Lezhnev, supra note 10 (describing in detail the process by which illicit raw minerals are extracted, sold, and eventually used in consumer electronic devices).

See McGregor, supra note 9, at 470-471 (arguing that “corporations, businesses, and industries … help create the market for states and armies to move pillage resources out
would deter other corporations from engaging in similar behavior and would also deter those actually stealing the minerals.

Second, those in favor of the corporate theory argue that because natural resources finance modern wars, any effective criminal law response to modern wars must include accountability for the theft of resources and the use of their revenue to prosecute the war. On this theory, corporate purchasers of illicit resources are wrongdoers and should be prosecuted alongside other wrongdoers even if doing so does not materially deter others. Part of this argument is based on the notion that corporate purchasers are aware or should be aware of the source of their raw materials. 64

Those advocating the corporate approach to prosecuting the crime of pillage rely typically rely on one of two legal theories. The first uses conventional legal theories to extend liability to those who purchase stolen natural resources. On this model, the crime of pillage has the basic elements—unlawful appropriation, intent to deprive, and lack of consent by the rightful owner—plus the additional elements necessary for aiding and abetting liability. 65 Thus, because the corporate theory has the policy objective of expanding criminal liability to include defendants who were not themselves directly involved in the illegal appropriation, the theory runs into the legal problem of how to connect these people or entities to the original theft. The corporate purchaser is criminally liable only if the corporation materially contributed to the crime and intended that the original crime be committed. 66

The second theory does not rely on aiding and abetting liability. Instead, this theory seeks to expand the definition of the term “unlawful appropriation” to include goods taken directly (as in the episodic theory) of the conflict areas [and] provide billions of dollars to governments and rebel groups who use such funding to conduct their crimes”).

64 This idea is part of a much larger debate, the full contours of which are beyond the scope of this Article. For a more complete consideration of the kinds of information that corporations have and should have on their origins of the materials they use, see generally Christiana Ochoa & Patrick J. Keenan, Regulating Information Flows, Regulating Conflict: An Analysis of United States Conflict Minerals Legislation, 3 GOETTINGEN J. INT’L L. 129 (2011).

65 See McGregor, supra note 9, at 484-490 (describing the elements of aiding and abetting liability and applying it to corporations).

66 See McGregor, supra note 9, at 489 (arguing that corporations could be liable for the crime of pillage if prosecutors could show that the corporation “intended that the crimes be committed or that” the corporation “was reckless as to the commission of the crime(s)”)

and goods acquired indirectly, meaning the acquisition of goods illegally acquired during war.\textsuperscript{67} This strand of the corporate theory would analogize those who purchase conflict commodities like those who receive stolen property and use the purchase to satisfy the element of “unlawful appropriation”).\textsuperscript{68} This model, as with the aiding and abetting model, has some support in the law. There are a handful of cases from post-World War II trials in which individuals who purchased property that had been looted were convicted of crimes. Nonetheless, this approach has not been used in any of the modern international criminal tribunals. In addition, there would be substantial evidentiary difficulties if a prosecutor attempted to demonstrate beyond a reasonable doubt that any particular manufacturer of electronic goods used minerals that were derived from a conflict area, and that, at the time the corporation purchased them, it knew that they were stolen.

II. PROPOSING A SYSTEMATIC THEORY OF THE CRIME OF PILLAGE

The traditional methods used by prosecutors to prosecute pillage are not a good fit with the reality of modern resource wars. The episodic theory is underinclusive because it only captures those incidents of pillage that are small-scale and involve what amounts to simple theft. This not to suggest that these incidents are not important or that the theory should be abandoned; it is to suggest that they are only a subset of those incidents which could, under existing law, be prosecuted as pillage. The corporate theory is casts a wider net and has the potential to capture more illicit behavior than the episodic theory, but it has so far proven unpalatable to prosecutors, most likely due to the difficulty in proving that corporate purchasers of illicit goods intended for the original crimes to be committed or encouraged or facilitated their commission.

A systematic theory of the crime of pillage would retain the basic elements of the crime, but would require a different approach and the consideration of different evidence. Under the systematic theory, prosecutors could target those in control of a system of exploitation whose features met the standard elements of the crime of pillage. Thus the crime

\textsuperscript{67} See Stewart, \textit{supra} note 9, at 33 (arguing that the law would support the redefinition of the term “appropriation” to include “purchasing resources illegally acquired during war”).

\textsuperscript{68} The common definition of receiving stolen property is the “the receiving of stolen property knowing that it is stolen.” WAYNE R. LAFAVE, CRIMINAL LAW 1035 (5th ed. 2010). The knowledge that the property is stolen at the time it is received is an essential element of the crime. \textit{Id.} at 1043.
would require proof that the defendant (1) appropriated property without the owner’s consent; (2) intended to deprive the owner of that property; (3) intended to put the property to personal or private use; and (4) committed these acts in the context of an armed conflict.  

Under the systematic theory, prosecutors would be required to show that the defendant controlled the system or instrumentality by which he appropriated the property, such as by proving that he or his troops controlled the mine from which the resources were extracted. Importantly, the act of appropriation might take place over time and be done by underlings or employees, such as laborers working in a mine controlled by the defendant. This would represent a departure from the episodic theory because it would allow for thefts that take a long time, such as from illegal mining, and that require labor to be accomplished. Prosecutors could show that the defendant intended to deprive the owner of the property by showing that he sold or otherwise made use of the property and kept the proceeds for himself. Finally, prosecutors could show that the defendant intended to put the property to personal or private use by showing that he exported and sold the minerals, for example, and used the revenue to purchase weapons, pay his troops, or enrich himself.

In the end, the systematic theory is not a complex new theory and does not require re-definition of accepted terms or legal theories. Instead, it requires a different orientation, a recognition that substantial theft can occur slowly, through a system that has some of the elements of a legitimate business but which is controlled by a combatant and relies on stealing property and keeping the proceeds.

A. The Systematic Theory Better Fits the Targeted Activity Than Does the Corporate Theory

One of the challenges inherent in any system of criminal law is to link the alleged wrongdoer with his or her crime. I argue that the systematic theory does a better job of linking the accused to the harms for which he is to be held criminally liable than do any of the corporate theories. For most prosecutors concerned with securing a conviction for the appropriate crime, the challenge is principally evidentiary: is there sufficient evidence to connect the accused with the crime? For scholars and policymakers, the

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69 These elements are, of course, taken from the International Criminal Court’s definition of the crime of pillage. See ICC Elements of Crimes, Article 8 (2) (b) (xvi) (War Crime of Pillaging). For my purposes, I assume that the actions took place during an armed conflict and I do not address that issue.
goal has been to connect the person with the harms he caused. In modern international criminal law, this has mostly taken the form of doctrines of indirect or vicarious liability. Indeed, one of the strongest recent trends in international criminal law has been to loosen the required connection between wrongdoer and harm. This has included relaxing the standards for commanders to be liable for the actions of those under their command under the doctrine of command responsibility, broader forms of joint criminal enterprise liability in which defendants are held criminally liable for harms committed by others even when the defendant did not commit the crime or share the direct perpetrator’s intent.\footnote{For a thoughtful analysis of this trend, see Allison Marston Danner & Jenny S. Martinez, \textit{Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law}, 93 CAL. L. REV. 75 (2005). Danner and Martinez trace the development and extension of the doctrines of joint criminal enterprise and command responsibility, two liability doctrines used to hold individuals criminally liable for crimes committed by groups of individuals. \textit{See id.} at 79 (arguing that the doctrines “go to the core of what international criminal trials seek to achieve: the attribution and calibration of individual responsibility for mass atrocities”). Danner and Martinez note these doctrines represent a trend that brings with it an inherent tension: it “ensures that individuals like [the defendant] could be convicted where direct proof of participation in particular crimes was lacking,” while loosening the requirement that “individuals … only be punished for their individual choices to engage in wrongdoing.” \textit{Id.} at 134.}

The most prominent corporate theories of pillage would continue the loosening of this connection by holding corporations criminally accountable for pillage. The aiding and abetting theory would do so by permitting a conviction when the defendant corporation’s contribution to the unlawful appropriation was to provide funds to a party four or five transactions removed from the direct perpetrator. The second theory would do so by redefining “unlawful appropriation” to mean the acquisition of goods that were illegally acquired by another party in the supply chain, thereby permitting a conviction when the defendant corporation did nothing more than purchase goods that were stolen at some point. To this point, prosecutors at the modern international criminal tribunals have not accepted either variant of the corporate theory perhaps because of the difficulty in drawing a clear line between the initial harm and the corporation’s purchase of the stolen goods far down the supply chain.

The systematic theory avoids this problem. It maintains a tighter connection between the accused and the harm than do any of the corporate theories. Under the systematic theory, the accused is necessarily someone who has a readily traceable connection to the initial wrongdoing. With the
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corporate theory, prosecutors would be required to trace backward from the corporate purchaser to the initial wrongdoer. Prosecutors would confront the same problem that others have when attempting the same thing: there are multiple points on the supply chain when illicit goods are combined with goods derived legally. The systematic theory would begin at the other end of the supply chain and following illegally derived resources as far as possible down the supply chain. Put slightly differently, it is easier to link the original thief who sells off goods to subsequent purchasers than it is to link subsequent purchasers back to the original crime when the goods are sold, re-sold, and mixed with other similar goods.

In the context of a prosecution of Bosco Ntaganda, this would mean that prosecutors would be required to link him to the original theft, then follow his involvement as far as practicable. As to the original appropriation, the prosecution would be required to show that he or his troops controlled the mines from which the resources were extracted, that they controlled the initial transport and sales of the resources to comptoirs, and that they controlled the illegal export of the resources to Rwanda. Based on the evidence assembled by the U.N. Group of Experts, it appears at least plausible that the prosecution could present convincing evidence as to each of these elements. At every step in this process, there would be a close link between Ntaganda and the harms for which he was to be held accountable.

B. The Systematic Theory Better Achieves the Policy Objectives of International Criminal Law Than Does the Episodic Theory

The law of pillage, as with every aspect of international criminal law, has two policy objectives, one specific and one general. The specific objective of any criminal prohibition is to address the particular conduct and harm that is prohibited. For example, with respect to pillage the specific policy goal might be to ensure that soldiers do not abuse civilians and their property during war or that soldiers do not use war to enrich themselves at the expense of the civilian population. To this point I have argued that the systematic theory of pillage would accomplish the same specific policy objectives as the episodic theory relied on by prosecutors in modern tribunals. The general policy objectives might be stated somewhat differently and require further explanation.

International criminal law has long been closely connected to international humanitarian law. The laws of war imposed penalties on soldiers and officers (and occasionally closely-affiliated civilians) who
violated humanitarian law. There were many purposes of humanitarian law, of course, but one of the principal objectives was to reduce the effect of war on civilians by imposing a set of rules on combatants.\textsuperscript{71} These rules described the kinds of violence combatants were permitted to use, specified the legitimate targets of violence, and provided rules of conduct for those engaged in fighting. Humanitarian law provided a tool for commanders to use to ensure that their troops complied with their presumably-lawful orders or to discipline soldiers or officers who did not.\textsuperscript{72} Humanitarian law gave great deference to the actions of commanders and assumed that soldiers fought on behalf of a legitimate sovereign and were under the discipline and control of a commander who complied with the law. These historical purposes—to ensure good order and discipline of troops as a way of minimizing the impact of fighting on civilians—remain important policy objectives and justifications for modern international criminal law, but the list of policy objectives has grown considerably.

The tasks assigned to modern international criminal law are much more complex than merely providing a tool for commanders to keep troops under control and protect civilians. Perhaps most importantly, all of the modern international criminal tribunals have been viewed as part of transition strategy to take a country or a region from violence and war to a more hopeful future. This has meant a shift in focus, away from looking at international criminal law from the perspective of commanders who needed to keep their troops in line and know what they were permitted to do in combat, to looking at the law from the perspective of civilians and others affected by the violence.\textsuperscript{73}

Because the criminal law response to a war is now viewed as a key part of a country’s transition from violence to stability, prosecutions of


\textsuperscript{72} See William H. Parks, \textit{Command Responsibility for War Crimes}, 62 Mit. L. REV. 1, 2 (1973) (arguing that the development of rules of criminal responsibility for commanders helped to cause commanders to exercise greater control and oversight).

\textsuperscript{73} One reason for this shift has been the effect of human rights law, with its focus on individuals, on humanitarian law. For a full discussion of this issue, see generally Theodor Meron, \textit{The Humanization of Humanitarian Law}, 94 AM J. INT’L L. 239 (2000). Meron argues that humanitarian law is being changed by the importation of human rights norms, with their focus on protecting all individuals, including combatants.
wrongdoers are now expected to assist in the transition in a number of ways, two of which bear mention here. The first is that modern prosecutions are increasingly expected to provide an accurate and complete accounting of the harms done during the fighting. To exaggerate only slightly, criminal cases are now expected to create a kind of compelled historical archive of the harms done during the war. To accomplish this goal, cases must necessarily go beyond a narrow focus on the actions of individual, low-level combatants and consider more systematic harms if they are to provide an accounting of the effect of the war on civilians and on the country.

The second is that cases must account for a wider variety of harms, particularly those harms that were previously ignored or addressed only tangentially. The most prominent example of this involve an increase in prosecutions for crimes of sexual violence. In the modern international criminal tribunals there has been an expansion in the variety and number of crimes of sexual violence, moving from prosecuting rape to a more

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75 See Regina E. Rauxloh, *Negotiated History: The Historical Record in International Criminal Law and Plea Bargaining*, 10 INT’L CRIM L. REV. 739, 740 (2010) (arguing “to establish as accurate as possible a historical record of the roots and the development of the violence is one of the main functions of all international criminal courts”).

76 See, e.g., Carranza, *supra* note 4, at 319-320 (arguing that transitional justice mechanisms must address economic exploitation in order to provide a full accounting of the harms of the conflict or the former regime). It is important to note here that criminal trials cannot, on their own, provide such a record. For an analysis of the interplay between criminal prosecutions and truth commissions as mechanisms to provide a full accounting of the conflict and its harms, see generally Lisa J. Laplante, *Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes*, 49 VA. J. INT’L L. 915 (2009). Laplante argues that grants of immunity, often thought to be necessary to ensure cooperation with a truth commission, may no longer be permissible under international criminal law. Id. at 981-982.

77 Indeed, those who argue in favor of trials as historical records also worry about the use of plea bargaining because of its tendency to impoverish the historical record. See Rauxloh, *supra* note 75, at 766 (concluding, based on review of plea bargains at modern tribunals, that “[p]lea bargaining is an ambiguous tool that can both further and hinder” the development of a complete record).

78 See, e.g., Nora V. Demleitner, *Forced Prostitution: Naming an International Offense*, 18 FORDHAM INT’L L. J. 163 (1994) (tracing the history of efforts to define “forced prostitution” as a distinct crime and the difficulty of overcoming “the reluctance of the international community to call the practice … by its name,” and noting the emerging trend toward labeling crimes with specific, appropriate names).
nuanced, and harm-specific, taxonomy of crimes including forced marriage, sexual violence, rape, and others. The purpose of all of this is to link as closely as possible the harms to the crime and to ensure that wrongdoers are convicted of crimes that fully and accurately describe the harms they caused. Importantly, the harms caused by stealing a state’s natural resources have not yet been considered in a similar way.

Consider the law of pillage in this context. In the modern tribunals, all of the cases have targeted episodes of pillaging. These involve exactly the kinds of low-level soldiers who were traditionally the targets of humanitarian law. Compiling a record of these crimes, useful as it is, is not nearly sufficient to develop a comprehensive or fair-minded accounting of the harms caused by the war. For example, the pillage cases from the Special Court for Sierra Leone tell the story of “Operation Pay Yourself,” when commanders gave permission to their troops to appropriate valuable goods from civilians in lieu of payment or proper rations. This is an important part of the story of the war, but it is far from complete.

In contrast, imagine what a pillage prosecution would have looked like if prosecutors had used the systematic theory in its case against former Liberian president Charles Taylor. Taylor was convicted of a variety of crimes by the SCsL, including pillage based on his responsibility for the actions of his troops during “Operation Pay Yourself.” Taylor was not convicted of or charged with any crimes regarding his role in systematically pillaging Sierra Leone’s timber and other natural resources. There is substantial evidence that Taylor orchestrated and was deeply involved in the unlawful appropriation of timber, diamonds, and other resources, and that the revenue derived from the sales of these illegally-appropriated resources funded the war for many years. If one of the modern policy objectives of criminal law proceedings is to provide an accurate historical record of the harms of the war, to ignore years of illegal appropriations of millions of dollars of the state’s resources and their role in fueling the conflict is to fail at this objective. In addition, if one of the modern policy objectives is to fully account for the harms caused by, then the proceedings were again inadequate.

79 See, e.g., Valerie Oosterveld, Sexual Slavery and the International Criminal Court: Advancing International Law, 25 Mich. J. Int’l L. 605, 608 (2004) (arguing that including the crime of “sexual slavery” in addition to other, somewhat similar crimes such as “enforced prostitution” was “a more correct way to describe certain harms” than would have been the case had the crimes been lumped together).

80 Taylor Trial Judgement, pp. 2475-2478.
III. APPLYING THE SYSTEMATIC THEORY TO THE CONGO WARS

The definition and elements of the crime of pillage allow for the prosecution of a broad range of illicit activity. Indeed, the ICTY specifically noted that “the prohibition against the unjustified appropriation of public and private enemy property is general in scope, and extends both to acts of looting committed by individual soldiers for their private gain, and to the organized seizure of property undertaken within the framework of a systematic economic exploitation of occupied territory.”81 Despite the flexibility of the law, prosecutors have used almost exclusively the episodic theory of prosecution. That is, prosecutors have pursued cases based upon a narrower range of facts than the law would permit. Because my objective is to argue that the systematic theory of prosecution is possible under existing law, I take as a given the formal list of elements of pillage used by the modern tribunals. I argue that it has been the theory of prosecution, not the substantive elements of the crime, that has been the greatest limitation on the kinds of cases pursued by modern international criminal tribunals and the ICC.

According to advocates and scholars, one effect of this has been to leave uncharged and unpunished a range of illicit behavior that is central to modern resource wars and could be, according to them, the subject of a legitimate prosecution. These scholars have argued that prosecutors should pursue that they call a corporate theory of pillage. They argue that the conventional approach—that which I call the episodic theory—to prosecuting the crime of pillage does not fit well with modern resource-based wars. For example, in the wars in West Africa in the 1990s, revenue from diamonds and timber substantially contributed to the conflict. In the wars in the Democratic Republic of Congo, the fighting has largely been over control of mines producing gold and various metals used in electronic devices. In contrast to the personal property or money stolen in other conflicts, the timber or minerals had no immediate value to the fighting forces; they could not eat it, fight with it, or directly exchange it for weapons or other tools for fighting. Because the episodic theory of pillage does not allow for prosecution of those who benefit from the stolen property, scholars and policy advocates have increasingly called for a theory of pillage that would encompass the purchasers of the property stolen in the conflict. Their objective is to reduce the incidence of the crime of pillage by developing a legal theory that will ensure that “corporations face

accountability for the pillaging of natural resources.”

In this Part I show that it is possible to come closer to meeting the policy goals that the episodic theory does and to hew closer to existing law than does the corporate theory. I first describe the recent history of the Congo wars and then situate Bosco Ntaganda as a significant participant in those wars. I then apply the theory to Ntaganda based on evidence assembled by U.N. investigators and advocacy groups.

A. The Recent History of the Congo Wars

Any history of the many overlapping conflicts in the Democratic Republic of Congo is likely to be both incomplete and complicated. This is true because “the Congo war contains wars within wars. There was not one Congo war, or even two, but at least forty or fifty different, interlocking wars.” The conflicts began because of a toxic mix of woeful governance, ethnic competition, foreign intervention, and simple bad luck. With respect to the alleged crimes of Bosco Ntaganda, the story begins in 1994. In April 1994, there was a genocide against the Tutsi population of Rwanda in which approximately 750,000 people were killed in 100 days. The genocide only ended when the RPA swept into Rwanda from its strongholds in Uganda and overthrew the Hutu Power government of Rwanda. When the genocide ended, hundreds of thousands of ethnic Hutus fled from Rwanda into Eastern Congo to avoid the anticipated reprisals now that there was a Tutsi-dominated government and a viable Tutsi-led army in the country. Once in Eastern Congo, many of those Hutus responsible for the genocide began to regroup and launch attacks against Rwanda. For this and other reasons, Rwanda sent its own troops into Eastern Congo to pursue the genocidaires and sponsored various Congolese fighting forces as proxies in the region.

At the same time, discontent with the regime of Mobutu Sese Seko, the president of what was then Zaire and later the Democratic Republic of Congo, was boiling over. His support for rebel groups that opposed neighboring governments had angered enough of his neighbors that when Paul Kagame, the head of the Rwandan Patriotic Front and commander of

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82 McGregor, supra note 9, at 497.
84 STEARNS, supra note 83, at 50-54 (2011). See also id. at 113 (“the Rwandan genocide and the exodus of the genocidaires and refugees to Zaire were the immediate causes of the Congo war [and] the decay of Mobutu’s state and army provided the equally important context”).
the RPA, began to rally support to oust Mobutu, he found no shortage of takers. In September 1996, led by Kagame and dominated by Rwanda and including forces from Angola, Burundi, and Uganda, a coalition of forces began what has become known as the First Congo War. It resulted in the installation of Laurent Desire Kabila as president of the newly-rechristened Democratic Republic of Congo in May 1997 after the Rwandan-led forces marched a thousand miles across Congo’s vast forests and savannahs in a matter of months.\textsuperscript{85} The Second Congo War began less than two years later, when Rwanda, Uganda, and Burundi supported a Congolese rebel group in an attempt to oust their erstwhile ally, Laurent Kabila. By January 2001, Laurent Kabila had been assassininated and his son Joseph Kabila was the new president of Congo.

As armies from foreign states marched across Congo and back, installing and then assassinating Laurent Kabila, militias loyal to these armies continued to operate in Eastern Congo, mainly in the provinces of Ituri, North Kivu, and South Kivu. In this area lived Congolese citizens with Rwandan ancestry who identified themselves as Tutsis.\textsuperscript{86} For years, Tutsis in Congo faced discrimination, including being denied citizenship cards even if they were born in Congo. After the Rwandan genocide and the influx of Rwandan Hutus into the region—a group that contained thousands of genocidaires alongside innocent people fleeing the violence in Rwanda—the Tutsi-led government of Rwanda began to look for ways to protect Tutsis living in Congo and strike against the Hutu refugees still living there. As the conflict continued and those directing it began to look for ways to pay for their forces, they looked to Congo’s mineral riches. If “the first invasion of the Congo in September 1996 had everything to do with security and geopolitical concerns and only little to do with business,”\textsuperscript{87} when “the second war started in August 1998, it was clear that there had been a shift in motivation.”\textsuperscript{88} The motive was now to profit from Congo’s vast mineral deposits. This is not to suggest that there were no political or security issues; Rwanda was still attempting to stamp out a Hutu-led insurgency based in Eastern Congo.\textsuperscript{89} But the violence in Eastern Congo for much of the past decade has been the result of the fight for control of mineral revenue fueled by a mix of ideology, ethnic politics, and personal competition.

\textsuperscript{85} Id. at 122-124.
\textsuperscript{86} Id. at 65.
\textsuperscript{87} Id. at 8.
\textsuperscript{88} Id. at 297.
\textsuperscript{89} Id.
B. The Role of Bosco Ntaganda

Bosco Ntaganda has been a central player in these conflicts since before the Rwandan genocide. Ntaganda is an ethnic Tutsi who was born in Rwanda and grew up in Eastern Congo, from where he would later participate in and preside over some of the worst atrocities against civilians since the Holocaust. Ntaganda got his start in the military as member of the Rwandan Patriotic Army the early 1990s, when the RPA was based in Uganda and was the fighting force associated with the Rwandan Patriotic Front. When Paul Kagame led the RPA and others across Congo to displace Mobutu and install Laurent Kabila as president, Ntaganda fought alongside him. After that conflict, Ntaganda has been based in Eastern Congo and Rwanda and has been involved in fighting there, largely fueled by ethnic competition and conflict over resources. By 2002, Ntaganda was the chief of military operations in Ituri province for the FLPC, the military wing of the UPC, one of Congo’s rebel groups. In Ituri, Ntaganda forcibly recruited child soldiers, presided over campaigns of mass rapes and murders, and came to control much of the mineral exploitation in the region.\footnote{See DR Congo: Suspected War Criminal Wanted, Human Rights Watch (Apr. 30, 2008), at \url{http://www.hrw.org/news/2008/04/29/dr-congo-suspected-war-criminal-wanted}.}

In 2006 the International Criminal Court issued a warrant for his arrest, alleging that Ntaganda forcibly conscripted children and used them as fighters in a series of attacks against the Lendu population in 2002 and 2003.\footnote{WHO IS BOSCO NTAGANDA, supra note 15.} In 2012 the ICC issued a second arrest warrant for Ntaganda, this time charging him with a range of war crimes and crimes against humanity, including murder, rape and sexual slavery, persecution, and attacking the civilian population.\footnote{Warrant of Arrest, Prosecutor v. Bosco Ntaganda, August 22, 2006, at p.4, No. ICC-01/04-02/06.} In addition, Ntaganda was charged with the war crime of pillaging.

In the 2012 arrest warrant, Ntaganda was charged with pillage using the episodic theory of prosecution. Prosecutors alleged that Ntaganda’s forces pillaged and burned several villages in towns during a series of violent attacks in November 2002 and February and March 2003. Neither the prosecution nor the judges provide the specifics regarding the events at issue,\footnote{Arrest Warrant Decision 2012.} but the allegations do specify the places and dates of the attacks.\footnote{The prosecution’s Application for a Warrant of Arrest and the evidentiary
Based on a report from Human Rights Watch, it appears that the allegations relate to massacres at Mongbwalu in November 2002. In that operation, Ntaganda’s forces sought to take control of a strategically important town of Mongbwalu. Mongbwalu was a gold-mining town controlled by an ethnic group that Ntaganda and his forces opposed. Over the course of six days, Ntaganda’s forces massacred inhabitants of Mongbwalu and the nearby town of Sayo, raped women and girls, and stole the belongings of local people. Similarly, Ntaganda is charged with pillaging for a series of attacks in another cluster of villages during February and March 2003. All of the current charges against Ntaganda stem from these individual episodes. As violent and destructive as they were, they fit squarely into the episodic theory of pillage: the property taken was personal goods, the process by which it was taken was simple theft, and those taking it kept it for themselves or gave it to their commanders.

By relying on the episodic theory of pillage, the current charges leave unaddressed a substantial amount of harm and criminal activity that fits squarely into the legal definition of pillage if prosecutors were to use a systematic theory. For example, nothing in the ICC’S current charges against Ntaganda seeks to hold him accountable for pillaging that occurred after his forces took control of Mongbwalu and the surrounding territory. There is substantial evidence that Ntaganda’s forces were attacking those villages as a way to gain access to the gold mines there. Once they had control of the mines, Ntaganda’s forces continued to unlawfully appropriate property—the resources from the mines—and put it to personal or private use. Indeed, in case at the ICC involving another defendant from Congo—one of Ntaganda’s former commanders—a witness testified that because there “was lots of money and gold mining … we had to stay in Mongbwalu

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supplements contained in its Annexes were filed under seal and only heavily redacted versions are publicly available.

95 Arrest Warrant Decision 2012, at 25, paras 58 & 59.
96 The Arrest Warrant decision alleges that Ntaganda’s forces “systematically pillag[ed] and burn[ed] non-Hema villages during the attacks of Mongbwalu and Sayo, between 18 and 23 November 2002.” Arrest Warrant Decision 2012 at p. 25, para. 58. Human Rights Watch reports that Commander “Bosco Taganda” was one of the commanders of this operation. THE CURSE OF GOLD, supra note 18, at 27-30. “Bosco Taganda” is one of the names by which Ntaganda is known.
97 THE CURSE OF GOLD, supra note 18, at 27-29.
98 The town is referred to as “Sayo” in the Arrest Warrant Decision and “Saio” in the Human Rights Watch report.
By relying exclusively on the episodic theory of pillage, the ICC seeks to hold Ntaganda accountable for his crimes during the fight for lucrative mining sites, but does not hold him accountable for the considerable theft and human suffering that occurred there after his forces captured the mines. To do this, the ICC would need to use a systematic theory.

C. Applying the Systematic Theory to Bosco Ntaganda

In the other regions in which Bosco Ntaganda and his troops operated, the harms visited upon civilians were not limited to those that occurred during the battles for particular villages. Those events were often bloody and are the bases of the charges against Ntaganda, but they are not the full set of the harms he and his troops caused. Those battles were fought for many reasons, one of which was to gain control of the territory so that Ntaganda and his troops, and their backers, could exploit the gold and other mineral resources in the region, and so they could extract revenue from civilians living there.

In this Part, I first describe the process by which natural resources are exploited in Congo. Identifying the steps in this often-illicit supply chain is important because it shows the extent of Ntaganda’s involvement and specifies where in the supply chain he was involved. Recall that for my purposes I accept the traditional definition and elements of the crime of pillage: the perpetrator appropriated property, he intended to deprive the owner of the property, he intended to use it for personal or private purposes, and the owner did not consent to the appropriation. Next, relying mainly on evidence assembled by the United Nations Group of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo and reports from advocacy groups, I outline Ntaganda’s role in the conflict over resources in Congo, including his

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101 Id.
102 Because Ntaganda was the commander of his troops, the ICC alleges that he is personally responsible for their actions, including the crime of pillage, as if he committed all of the acts himself. The assignment of individual criminal responsibility to commanders for the actions of their troops is a conventional theory of liability and, for my purposes, I assume that the ICC’s reliance on this theory is sound. This means that under both the ICC’s episodic theory and my systematic theory, it is not necessary to prove that Ntaganda personally appropriated property or any of the other elements. Instead, it is sufficient to show that troops for which he was responsible engaged in those activities. See Arrest Warrant Decision 2012 at 26-33 (concluding that the prosecution has alleged sufficient facts to establish that Ntaganda is individually criminally responsible for the crimes alleged).
systematic pillage of gold and other natural resources in Eastern Congo.

The minerals trade in Eastern Congo involves a chain of transactions that move minerals from isolated mines in Ituri or the Kivus all the way to consumer electronics companies that make products sold in the U.S., Europe, and Japan. The trade begins in the mines, where laborers extract minerals from the ground largely by hand or using crude tools. From the mines, minerals are taken by buyer-transporters to trading houses, which begin to process the minerals for export. From these trading houses, the minerals are sold to comptoirs, which export them to Congo’s neighbors, including Rwanda, Uganda, and Burundi. From there, the minerals are exported again—to East or Central Asia or Europe—and sold to refiners, who process minerals into metals for sale on the international market. These metals are then sold to component manufacturers, who sell their products to consumer electronics companies (or their suppliers) for use in cell phones and other electronics.

To establish the crime of pillage on a systematic theory, prosecutors would begin with the same basic elements as would be necessary under the episodic theory: unlawful appropriation, intent to deprive and lack of consent, and putting the stolen goods to personal or private use. Under the systematic theory, the evidence to establish each of these elements would necessarily be different than the evidence typically presented under the episodic theory. Under the systematic theory, to show that the defendant unlawfully appropriated the natural resources, it would be necessary for prosecutors to show that the defendant controlled the mines and that he or persons under his direction or control removed minerals or gold from the mines. Put slightly differently, prosecutors would be required to show that he controlled mining operations at the mine site. Next prosecutors would be required to show that the defendant had the intent to deprive the rightful owner of those goods. This could be done by showing that the defendant sold the goods or facilitated their illegal export. Finally, prosecutors would be required to show that the defendant intended to use the goods for personal or private purposes. This could be done by showing that the defendant used the revenue from the sale of the resources to pay the members of his militia, to purchase weapons, or for his own personal enrichment.

In the context of the minerals supply chain, Ntaganda’s role has

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103 This material is taken from Prendergast & Leznev, supra note 10, which documents the entire process in detail.
typically been in the first three steps: mining, transport, and export. The available evidence shows that he and his forces have fought bloody battles for control of the territory on which mines are located, controlled the operation of the mines, often by force, they extracted resources from the mines, transported it to the border and then into Rwanda, and sold it there. In the remainder of this section, I present the evidence of Ntaganda’s activities in three separate mining sites. For each of them there is evidence that his forces fought battles to control the sites, that they operated the mines (or compelled or hired others to do so), that they extracted resources from the mines and exported them to Rwanda using routes Ntaganda controlled. To be sure, these sites do not represent the totality of the possible charges against Ntaganda’s for the crime of pillage. Instead they show that the charge is plausible and would be supported by substantial evidence.

104 Throughout the section, I discuss evidence assembled by the UN Group of Experts and other organizations about Ntaganda’s role in the illegal exploitation of resources in Congo. Throughout the period of Ntaganda’s activity in the wars in Eastern Congo, he has been a part of a number of militia groups and armies. He served in the Rwandan Patriotic Army at the time of the genocide in Rwanda in 1994. After the genocide he operated principally in Eastern Congo as part of FLPC, a militia affiliated with one of Congo’s political organizations, the Union of Congolese Patriots. In 2006, after refusing an offer to be integrated into the Congolese army, he joined the CNDP, a militia based in North Kivu and run by his close ally, Gen. Laurent Nkunda. In March 2009, the CNDP was merged into the Congolese army, known by its French acronym as the FARDC. Even as Ntaganda became a general in the Congolese army, however, Ntaganda’s former CNDP units remained largely intact, albeit within the FARDC, and in control of some of Congo’s most lucrative mining areas. See Group of Experts on the Democratic Republic of Congo, Final Report, at 83, Box 2, U.N. Doc. S/2011/738 (Dec. 2, 2011) (noting that “Ntaganda has now integrated all of ‘his’ troops into” the Congolese army, mostly into a regiment commanded by a colonel “widely known to be an Ntaganda loyalist”) [Hereinafter Report of Group of Experts December 2011]; see also Group of Experts on the Democratic Republic of Congo, Final Report, at 45-49, U.N. Doc. S/2009/603 (Nov. 25, 2009) (describing the de facto “non-integration” of Ntaganda’s forces into the Congolese army despite its nominal integration into the official army) [Hereinafter Report of Group of Experts November 2009]. In May 2012, Ntaganda left the Congolese army to help create M23, a new and violent militia. See Gettleman, Wanted Congolese Rebel Leader Turns Himself, supra note 14 (reporting that Ntaganda and other Tutsi officers in the Congolese army had rebelled and created M23). In this new role, Ntaganda remained in control of lucrative mining areas. Although Ntaganda’s allegiances seemed to shift over time, according to all available evidence he has remained loyal to Rwanda and his activities on behalf of whatever group he was part of appear to have benefitted parties in Rwanda. In my discussion of the evidence, I do not designate the army or militia on whose behalf Ntaganda nominally worked at any particular time. Instead, I indicate his role in the illegal appropriation of property and the uses to which he put that property. Whether as a soldier or a militia commander, at no point was Ntaganda’s appropriation of Congo’s natural resources lawful.
a. Control of Mining Operations

In 2011, Ntaganda’s forces controlled the strategic mining town of Numbi, including the Mungwe and Fungamwaka mines. The Mungwe mine produced manganese and the Fungamwaka mine produced tin ore, among other things. Ntaganda sent his soldiers to the mine along with a civilian mine manager and ordered the diggers working there to resume production. Ntaganda’s forces remained in the area to ensure that the mines continued to produce. Resources extracted from the mines were transported under the watch of Ntaganda’s soldiers to comptoirs and eventually for export.

At the same time, Ntaganda’s forces controlled the Nyabibwe mine. Ntaganda’s role in this mine site was principally through one of his underlings, Colonel Saddam Ringo. Col. Ringo’s troops controlled the mine site and directed the mining operations through civilians.

Ntaganda’s forces also controlled most of the mining operations in Masisi in 2011, including a cluster of mines near Rubaya that produced coltan. Ntaganda’s forces prevented the owners of the mines from even gaining access to their mines, and compelled diggers to work in the mines. Most of the revenue from the resources went to Ntaganda, and the minerals were transported and exported using Ntaganda’s networks.

b. Export and Sale.

Ntaganda is easily able to facilitate the export of illegally-derived natural resources from Congo to Rwanda, and then on to the international market. In the time period at issue, Ntaganda owned a home in the Congolese town of Goma, which sat on the border with Rwanda. Ntaganda’s compound is on a street that sits directly on the border where

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106 Id. at p. 150, para. 599 (finding that “Ntaganda controls the Mungwe and Fungamwaka mines … through the Great Lakes Mining Company”).
107 Id. at p. 115, para. 444.
108 Id. at p. 115, para. 444.
109 Id. at p. 150, para. 599. Ntaganda received the revenue from these operations. Id. at 150, para. 599.
110 Id. at p. 119-120, para. 465.
111 Id. at p. 119-120, para. 465.
112 Id. at p. 113-114, para. 439.
113 Id. at p. 114, paras. 439-440.
114 Id. at p. 114, para. 439.
Prosecuting Pillage

“the two countries [are] separated by a 5-metre wide neutral zone.”

Indeed, according the UN investigators, the “entire area between the two official border crossings in Goma is controlled exclusively by soldiers loyal to Ntaganda.”

In addition to using this area to move troops into and out of Congo from Rwanda, and to permit the movement into Rwanda of persons whose travel is restricted by UN sanctions, Ntaganda uses this area for smuggling minerals from Congo to Rwanda. Ntaganda’s forces drive trucks loaded with illegal Congolese minerals into the neutral zone from the Congo side of the border, unload the minerals and carry them across the border, then re-load them onto trucks on the Rwanda side of the border. According to UN investigators, “there are two or three smuggling operations per week, each of which involves about 2 to 5 tons of material [from which] Ntaganda makes about $15,00 per week.”

Ntaganda’s forces exploited and sold Congo’s natural resources for their own personal or private use. There is evidence that the revenue from the resources went to three primary uses. First, Ntaganda and his forces used the revenue to purchase weapons for their militias in Uganda and Rwanda. Second, Ntaganda’s forces used resource revenue to pay for their own operations, including buying the loyalty of other militias and their commanders and paying their foot soldiers. Finally, Ntaganda personally enriched himself from the sale of Congo’s resources, becoming wealthy enough on a soldier’s salary to acquire a large ranch with hundreds of cattle, own hotels and other businesses, and buy and sell gold.

IV. CONCLUSION

In this Part, I address two issues. First, I respond to a possible objection to a systematic theory of pillage. In almost every case in the international criminal tribunals, defendants have raised the objection that one or more of the charges against them violated the legality principle, the requirement that the charged criminal activity must have been defined as criminal at time it was committed and that those who committed it were subject to criminal prosecution. Even though the crime of pillage is an old one, because my

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115 Id. at p. 123, para. 485.
116 Id. at p. 123, para. 485.
117 Id. at p. 149, para. 597.
118 Id. at p. 123-124, para. 485.
119 Id. at p. 124, para. 486.
120 See, e.g., GLOBAL WITNESS, COMING CLEAN: HOW SUPPLY CHAIN CONTROLS CAN STOP CONGO’S MINERALS TRADE FUELING CONFLICT 25 (May 2012) (describing the use of resource revenue to fund Ntaganda’s latest insurrection).
approach would be new, it is important to address this objection. Second, I discuss a possible extension of the systematic theory to address an additional set of harms that have been present in cases from the modern tribunals but have not, so far, been the subject of prosecution. I show that it would be possible to use the systematic theory to address the problem of illegal taxation and exploitation of civilians by treating it as a systematic form of pillage and prosecuting those who, like Bosco Ntaganda, institute, direct, and benefit from the systematized theft of property from civilians during times of conflict.

A likely objection to any new theory of prosecution, including an systematic theory of pillage, is that it would violate the legality principle, also known as the principle of *nullen crimen sine lege*: no crime without law. At its most basic, this principle means that unless the allegedly criminal activity was defined as a crime and those who engaged in it were subject to individual prosecution at the time the acts occurred, prosecution is not permissible. This principle has been applied in all of the modern international criminal tribunals and is included in the statute of the ICC. In practice it means that unless the activity for which prosecution is sought was clearly defined as criminal when it occurred, no prosecution is possible. Because of the long history of the prosecution of the crime of pillage, this objection poses no absolute bar to a pillage prosecution under the systematic theory that I propose. Indeed, the existence of the legality principle is one of the reasons to prefer the systematic theory over the corporate theory. Recall that there are two slightly different versions of the corporate theory: aiding and abetting liability and redefining “appropriation” to mean receiving stolen property in addition to stealing it. Each approach would require a redefinition or of an established legal principle or term. To be clear, I do not argue that this objection is insurmountable. Instead my approach avoids the problem entirely by relying on established meanings and concepts.

In addition to the illegal exploitation of natural resources, it also would be possible to charge Ntaganda with pillage for other activities not directly related to the theft of natural resources. The strongest charges would like be with respect to Ntaganda’s practice of taxing economic activity in the territory his forces controlled and keeping the revenue for himself. This practice is done using a system that parallels the resource exploitation system and would satisfy the elements of pillage: the illegal appropriation

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122 See Lundberg, *supra* note 6, at 513-519 (based on a thorough review of treaties and cases, arguing that the *nullen crimen sine lege* principle does not operate as a bar to prosecuting individuals or corporations for the pillage of natural resources).
of property, the intent to deprive its owner of it, and the intent to put the property to personal or private use. According to UN investigators, Ntaganda “derive[d] large revenues from the taxation of several activities in Masisi,” an area under his control.\textsuperscript{123} UN investigators found that Ntaganda’s forces levied taxes on timber and charcoal illegally extracted from the forests near Tebero and Bwiza.\textsuperscript{124} In addition, Ntaganda’s forces took over the collection of local taxes in a number of villages in Masisi and kept a portion of the revenue for themselves.\textsuperscript{125} Ntaganda and his forces did this even when they did not even nominally represent or work for the government of Congo. In addition, the revenue raised from these activities went not to the Congolese treasury but to Ntaganda and his militia. As with the exploitation of resources, violence, or the credible threat of violence, is necessary to create and sustain the system.

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International criminal prosecutions are rightfully considered to be an essential, albeit not sufficient, part of a transition from a past of violence, repression, and exploitation to a future of stability and relative peace. I have proposed an approach to the prosecution of the crime of pillage that relies on the conventional elements of the crime but uses them to address activity that has, so far, largely escaped criminal liability.


\textsuperscript{124} \textit{Id.} at p. 140, paras. 556-557.

\textsuperscript{125} \textit{Id.} at p. 85, para. 307. \textit{See also} Group of Experts on the Democratic Republic of Congo, Interim Report, p.29, Box 4, U.N. Doc. S/2012/348, (describing how Ntaganda’s forces derived revenue “of at least $90,000 per month … from taxes on trucks transporting charcoal, $30,000 per month from taxes on trucks transporting food items and $20,000 per month on trucks transporting makala” (a type of charcoal)).