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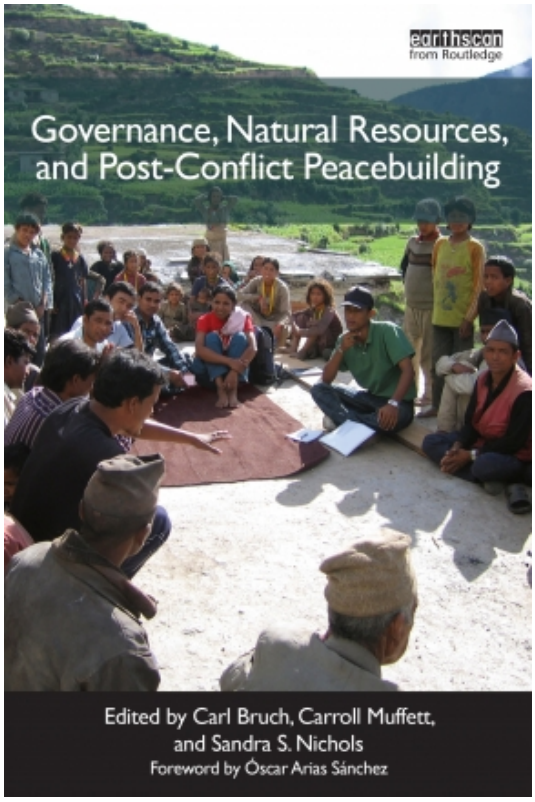

Peace Through Justice: International Tribunals and Accountability for Wartime Environmental Damage

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Peace through justice: International tribunals and accountability for wartime environmental damage

Anne-Cecile Vialle, Carl Bruch, Reinhold Gallmetzer, and Akiva Fishman

Since the 1970s, international law has begun to evolve a set of legal principles designed to prevent environmental damage during armed conflict. These norms generally fall under the categories of international humanitarian law, international human rights law, international environmental law, or international criminal law. The United Nations Environment Programme (UNEP) report *Protection of the Environment during Armed Conflict: An Inventory and Analysis of International Law* exhaustively lists the laws that touch upon treatment of the environment during armed conflict (UNEP 2009).

Although relevant international laws exist, few institutions have been charged with enforcing or adjudicating environmental crimes or damage after conflicts have ended. Tribunals have generally focused on high-profile crimes against humanity, such as genocide, and rarely invoke statutes pertaining to the environment, even when available. This pattern has begun to change recently, however, with a gradual increase in the number of institutions providing civil compensation, imposing criminal penalties, and determining ultimate liability for environmental crimes.

This chapter discusses experiences in which judicial bodies have adjudicated environmental wrongs committed during armed conflict. The discussion is divided into two sections, the first dealing with civil and the second with criminal tribunals. Each section presents examples involving international tribunals first, followed by examples involving national courts. A discussion of the lessons from the tribunals follows each set of examples.

The institutions discussed have adjudicated, arbitrated, or otherwise decided cases between states (the United Nations Compensation Commission and the

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International Court of Justice), between states and nonstate groups (the Permanent Court of Arbitration), between states and individuals (the Special Court for Sierra Leone), and between numerous combinations of actors (the International Criminal Court). In the realm of domestic law, the United States Alien Tort Claims Act and a series of cases in European national courts have focused on individuals and businesses.

Although the institutions discussed rely on international law for their authority, there is a dearth of legal precedent for applying such law in the adjudication of environmental wrongs committed during conflict. This chapter seeks to provide insight into how the use of tribunals to address wartime environmental wrongs can expand in the future.

CIVIL TRIBUNALS

Although not as high profile as criminal cases, civil cases, and the body of case law that is developing around them, are becoming increasingly important as a means of responding to environmental destruction occurring during armed conflict. Civil law is particularly relevant because it makes compensation for environmental harm possible even in the absence of criminal liability, which is applied relatively infrequently. To date, millions of dollars have been awarded to individuals, and billions of dollars have been awarded overall. Although the number of experiences with civil adjudication of wartime environmental wrongs remains limited, as the case law continues to expand and the criteria by which parties are eligible to sue become more established, the number of environmental claims brought before national and international courts will likely increase.

This section examines international special claims tribunals, the International Court of Justice, and the Permanent Court of Arbitration. It also considers regional human rights bodies and domestic experiences with the U.S. Alien Tort Claims Act, before drawing lessons related to civil liability for environmental damage during armed conflict.

Special claims tribunals: United Nations Compensation Commission and Marshall Islands Nuclear Claims Tribunal

In the aftermath of the 1990–1991 Gulf War, the UN Security Council adopted Resolution 687, which held Iraq "liable under international law for any direct loss or damage—including environmental damage and the depletion of natural resources—or injury to foreign governments, nationals and corporations that resulted from Iraq's unlawful invasion and occupation of Kuwait" (UNSC 1991, para. 16). Having established the illegality of Iraq's invasion and occupation of Kuwait, based on violation of article 2(4) of the UN Charter, the Security Council created the United Nations Compensation Commission (UNCC) to assess, value, and determine compensation for wartime damages. Although the UNCC characterized itself mainly as a fact-finding body, it performed crucial judicial functions,

making it a hybrid entity, and the first of its kind to be created by the Security Council.[1]

The UNCC accepted claims on behalf of individuals,[2] corporations, international organizations,[3] and governments. Claims were categorized A through F, depending on the type of claimant and the damages claimed (for example, displacement, serious personal injury or death, environmental damage). Claims relating to environmental damages were categorized as either E or F4 claims, and were processed by respective panels of independent lawyers and technical experts.[4]

E claims, which included claims filed by both public and private sector entities, related to environmental damage in the form of losses to oil reserves.[5] The best known of these—the "fluid loss" claim—was brought by the Kuwait Petroleum Corporation (KPC) against Iraq for revenue lost as a result of the war.[6] Among other things, KPC claimed that well fires and oil spills depleted its reserves, damaging its income base. In addressing this claim, the E1 panel applied the principle "that the remedy should attempt to re-establish the situation that would, in all probability, have existed if the act causing loss had not been committed" (UNCC GC 2000, para. 314). After determining the volume of lost oil due to the conflict, the E1 panel awarded compensation for the lost crude oil and oil products that would have been produced and sold during the period in which production was impaired. The panel valued these assets at their retrospective market price had there been no invasion. However, compensation was awarded only if, during the period of impaired production, the claimant company would have produced at least as much oil as was lost on top of the amount that it actually did produce during that period.

The UNCC's most innovative treatment of environmental damages emerged from the F4 panel's processing of purely environmental claims. For claims

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[1] Earlier conflicts prompted the creation of bodies that issued nonbinding requests and recommendations, whereas the resolution establishing the commission "required establishment of a fund, giv[ing] life to international law calling for compensation and liability for wartime damages" (Low and Hodgkinson 1995, 23).

[2] Individuals could make claims for direct losses only through their government or an international organization.

[3] Although allowed to do so, international organizations chose not to file any claims on behalf of the environment (Boisson de Chazournes 1998).

[4] For analysis of the UNCC's treatment of environmental claims, see Payne and Sand (2011); Cymie R. Payne, "Legal Liability for Environmental Damage: The United Nations Compensation Commission and the 1990–1991 Gulf War," in this book; and Lalanath de Silva, "Reflections on the United Nations Compensation Commission Experience," in this book.

[5] "E" claims were those made by corporations, other private legal entities, and public sector enterprises. All oil sector claims were designated as "E1." For a detailed description of claims categories, see Payne (in this book); see also the UNCC official claims website, at www.uncc.ch/theclaims.htm.

[6] KPC is wholly owned by the state of Kuwait.

arising under "environmental damage and the depletion of natural resources," the UNCC Governing Council made payments available for direct losses resulting from (1) abatement and prevention of environmental damage; (2) reasonable measures already taken, and future measures documented as reasonably necessary to clean and restore the environment; (3) reasonable monitoring and assessment of environmental damage for the purposes of evaluating and abating the harm and restoring the environment; (4) reasonable monitoring of public health, including performing medical screenings, for the purposes of investigating and combating increased health risks attributable to environmental damage; and (5) depletion or damage to natural resources (UNCC GC 1991). Under these criteria, the F4 panel could review claims submitted by governments and international organizations, but not individuals.[7]

Despite the breadth of environmental claims reviewable by the F4 panel, the UNCC took a conservative approach to awarding damages. Wanting to avoid the conception of "victor's justice" that had stymied peacebuilding after the Treaty of Versailles, the UNCC placed a substantial burden of proof on claimants. Although the F4 panel interpreted "environment" broadly, in such a way as to award compensation even for depleted natural resources that lacked commercial value or involved only temporary loss of resource use (UNCC GC 2005), claims for environmental damage and depletion of natural resources were awarded only if claimants could establish direct proof of causation (Sand 2005). Furthermore, in many cases, even where the panel determined that claimants had established proper causation, it declined to award damages where evidence was insufficient to allocate compensation among concurrent causes, where the extent of damage was unclear, or where reasonable compensation could not be determined (Klee 2005, 603). Further still, in some cases where claimant governments had not properly acted to mitigate environmental damage on their own, the panel awarded only a portion of the funds requested, to reflect the possibility that Iraq had not caused all of the damage; this occurred, for example, in the case of uncontrolled livestock grazing (UNCC GC 2004). In other cases, such as the inadequate management of ordnance sites, the panel denied compensation entirely.

The F4 panel was more liberal in cases where environmental damage could be remediated. On the assumption that some efforts to rehabilitate the environment could risk ecological harm, the panel applied a standard for remediation that called for restoration of the environment "to pre-invasion conditions, in terms of its overall ecological functioning" (UNCC GC 2004, para. 41; UNCC GC 2005, para. 43; Klee 2005, 603). In cases where the war had caused irrevocable damage to an ecosystem, such that one or more of its services was permanently impaired, funds could be awarded to provide compensatory ecological services. This marked a progressive break from traditional interpretations of damages

[7] Individuals brought claims before the UNCC through their respective governments, to which compensation was awarded for distribution to the individual claimants (McManus 2006, 436). The UNCC benefitted from the greatest degree of citizen participation in the history of law and warfare mechanisms (McManus 2006, 436).

compensable under *jus in bello*: historically, compensation had been unavailable for purely ecological damage, or for damage to the environment beyond that which affected those who exploited its resources (Low and Hodgkinson 1995).

Permitting claims for environmental health and monitoring studies greatly expanded the range of claims that governments and international organizations could submit. Whereas tribunals had traditionally awarded damages for direct loss of property or human life, the UNCC also allowed governments to file claims for loss of life caused indirectly by environmental harm. This alone was a powerful acknowledgment of the pervasive impacts of environmental destruction—but the UNCC's claims criteria went even further, by accepting claims to recoup research costs for studies to demonstrate either environmental damage or the resulting impacts on human health. Funding monitoring and assessment studies before addressing claims filed under other categories of damages can facilitate the efficient building of cases for later claims, saving time and resources for later fact finding.

The UNCC concluded all claims processing in 2005, and final payments to individuals were made in 2007. In full, governments submitted 168 claims for damage to the environment and depletion of natural resources, amounting to about US$85 billion (roughly 35 percent of the total amount claimed by governments). Of those claims, 109 were awarded a total of US$5.3 billion in compensation—a little over one-third of the UNCC's total award to governments.[8]

The Marshall Islands offer another example of a special claims tribunal. Established by a 1983 agreement signed by the United States and the Marshall Islands, the Marshall Islands Nuclear Claims Tribunal was created in 1988 to award reparations to the citizens of the Marshall Islands for personal injuries resulting from the U.S. nuclear testing program carried out between 1946 and 1958 (Marshall Islands Nuclear Claims Tribunal 2013).[9] The tribunal managed a US$150 million settlement provided by the United States, extending that sum to create a fund generating US$270 million for distribution over fifteen years (Marshall Islands Nuclear Claims Tribunal n.d.). By the end of 2003, the tribunal had awarded more than US$83 million in compensation, and additional compensable claims were being filed on a regular basis. The tribunal also awarded over US$1 billion in property damages, in response to class action suits brought by residents of two atolls used for the testing program (although analyses have raised questions about the calculations of the damage assessment) (Lazzari 2005).

The Marshall Islands Nuclear Claims Tribunal is similar to the UNCC in that it is tasked with determining and awarding reparations not just for medical and property damages, but also for environmental cleanup and rehabilitation. There are two important differences, however. First, the Marshall Islands tribunal was established voluntarily by the parties involved, with the United States

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[8] See Payne, in this book.

[9] Agreement between the Government of the United States and the Government of the Marshall Islands for the Implementation of Section 177 of the Compact of Free Association.

accepting responsibility for compensating affected citizens of the Marshall Islands without going through a process of determining responsibility for damages. Second, the tribunal applies the same standard for remediation that would govern remediation were the Marshall Islands part of the United States. That is, it applies the standards of the U.S. Comprehensive Environmental Response, Compensation, and Liability Act and implementing regulations to determine the level to which contamination must be remediated (Marshall Islands Nuclear Claims Tribunal n.d.).

International Court of Justice

The International Court of Justice (ICJ) is the principal judicial organ of the United Nations,[10] and the only international court with general subject-matter jurisdiction over international legal disputes. All members of the UN Charter are parties to the Statute of the ICJ; requests from nonmember states to become parties to the statute are evaluated on a case-by-case basis by the UN General Assembly and require the recommendation of the UN Security Council. The ICJ may obtain jurisdiction over all cases that the parties refer to it by special agreements, all matters specially provided for in the UN Charter, and matters provided for by treaties.[11] The parties to the ICJ can declare compulsory jurisdiction, by which they confer jurisdiction to the ICJ in advance of any dispute. Moreover, compulsory jurisdiction is reciprocal—that is, it applies "in relation to any other state accepting the same obligation."[12] Under the UN Charter, each UN member state commits to complying with the ICJ decision in any case to which it is a party. If a party fails to perform the obligations due under the ICJ judgment, the other party may have recourse through the Security Council, which makes "recommendations or decide[s] upon measures to be taken to give effect to the judgment," as it deems necessary.[13]

The ICJ created the Chamber for Environmental Matters in 1993 and periodically reconstituted the chamber until 2006 (ICJ n.d.). However, in the chamber's thirteen years of existence, no state ever requested the chamber to adjudicate a case. While in the past decade it has become more common for states to successfully bring to the ICJ claims of transboundary environmental harm,[14] the ICJ has adjudicated very few claims of environmental harm arising

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[10] UN Charter, art. 92. The ICJ was established in June 1945 under article 7(1) of the Charter of the United Nations and began operating in 1946.

[11] Statute of the International Court of Justice, art. 36(1); www.icj-cij.org/documents/?p1=4&p2=2&p3=0.

[12] ICJ Statute, art. 36(2).

[13] UN Charter, art. 94(2). The ICJ can also issue advisory opinions.

[14] See, for example, *Gabcikovo-Nagymaros Project (Hungary v. Slovakia), Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, and *Whaling in the Antarctic (Australia v. Japan)*.

from armed conflict. Two cases—one arising from the conflict in the eastern portion of the Democratic Republic of the Congo (DRC), and the other from the 1999 Kosovo Conflict—illustrate the opportunities and challenges associated with bringing such cases before the ICJ.

Armed Activities on the Territory of the Congo

In 1999, the DRC filed an application before the ICJ, instituting proceedings against Uganda for "acts of armed aggression perpetrated . . . in flagrant violation of the Charter of the United Nations and of the Charter of the Organization of African Unity."[15] The DRC claimed that the Uganda People's Defense Forces (UPDF) had illegally exploited Congolese natural resources and pillaged the DRC's assets and wealth, violating Uganda's international obligations under article 2(4) of the UN Charter (this was the same legal basis that underpinned the UNCC claims), international humanitarian law, and international human rights law. Uganda claimed that it had acted in self-defense. By examining the legality of natural resource exploitation by an occupying power seeking to feed its war efforts, the *Armed Activities* case directly touched on the links between natural resource management and conflict.

The ICJ held that Uganda had failed to comply with "its obligations as an occupying Power in Ituri district to prevent acts of looting, plundering and exploitation of Congolese natural resources."[16] The court also held that that although Uganda did not have a government policy of exploiting the DRC's natural resources during its occupation, there was "ample credible and persuasive evidence to conclude that officers and soldiers of the [UPDF], including the most high-ranking officers, were involved in the looting, plundering and exploitation of the DRC's natural resources and that the military authorities" did not fulfill their duty of diligence since they failed to "take any measures to put an end to these acts."[17] Uganda was therefore found to have violated its obligations as an occupying power under article 43 of the Hague Regulations of 1907. The court emphasized that Uganda was responsible for both the conduct of its army as a whole and the conduct of its individual soldiers and officers in the DRC, even if they were acting contrary to orders or exceeding their authority. Uganda was therefore also found responsible for not preventing or stopping its soldiers and officers from illegally exploiting and trading in natural resources in the territory of Ituri, which it had occupied since 1999.

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[15] Application by DRC; www.icj-cij.org/docket/files/115/7127.pdf?PHPSESSID=736079cd9925dea46dc3a461215e7644, at 5. The DRC also filed complaints against Rwanda and Burundi—but, unlike Uganda, Rwanda and Burundi rejected the court's jurisdiction to hear the case (ICJ 2001).

[16] *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Uganda)*. Judgment, 2005 I.C.J. 168 (Dec. 19) (General List No. 116), para. 250. www.icj-cij.org/docket/files/116/10455.pdf.

[17] *Armed Activities*, paras. 242, 245–246, 249.

The court unanimously held that Uganda must pay reparations to the DRC, in an amount to be agreed upon by the two countries.[18] In the event that the two countries could not agree on the reparations—which had still not occurred, as of April 2015—the court reserved jurisdiction to determine the sum unilaterally.[19] Some observers have argued that Uganda will never pay damages to the DRC, in part because it is almost impossible to enforce the ICJ's compensation ruling, while others suggest that a settlement will take years to negotiate (Wasswa 2007).

While the lack of a specific sum detracts from the concreteness of the decision, it is nonetheless a landmark decision. It establishes Uganda's illegal exploitation of natural resources as a violation of international law and holds Uganda liable—which not only marked the first time that an international tribunal issued a clear ruling addressing conflict resources, but set a precedent for the treatment of conflict resources under international law.

First, in holding Uganda liable for "looting, plundering and [illegal] exploitation of Congolese natural resources," the court opted not to define each offense. It instead treated them, according to one commentator, "as an ensemble of equivalent, interchangeable, or aggregate forms of acquisition" and did not "distinguish[] between the various categories" (Dufresne 2008, 173–174).[20]

Second, the court considered the implications of damage caused by a variety of entities, including the Ugandan military, individual officers and soldiers, the Ugandan government, and third parties that exploited Congolese natural resources. The government was found to be liable even in the absence of a formal policy of exploiting Congolese natural resources, since it failed to "take appropriate measures to prevent the looting, plundering and exploitation of natural resources in the occupied territory . . . [by] private persons in [Ituri] district and not only members of Ugandan military forces."[21] The court's acknowledgment of a disparate group of punishable parties is important for future civil cases involving environmental damage during armed conflict.

Third, by acknowledging that Ugandan activities "resulted in injury to the DRC and to persons on its territory,"[22] the judgment implicitly recognized that Uganda is obliged to pay reparations for harm done, opening the door for the DRC to sue for reparations on behalf of individual citizens who suffered (Zyberi 2011).

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[18] The ICJ also held that the DRC is liable to Uganda for abusing Ugandan diplomats, in violation of the 1961 Vienna Convention on Diplomatic Relations, and similarly left the payment determination to the countries.

[19] In the case documents, the DRC estimated the amount of damages to be between US$6 billion and US$10 billion.

[20] Robert Dufresne also notes that the International Criminal Tribunal for the former Yugoslavia "recognized that 'pillage' is used rather interchangeably with 'plunder' in practice. . . ." (2008, 186; citing *Prosecutor v. Delalic et al*., Case No. IT-96-21-T, Judgment, para. 591 [Nov. 16, 1998]).

[21] *Armed Activities*, para. 242.

[22] *Armed Activities*, para. 259.

Fourth, the court based its decision on international humanitarian law governing armed conflict, rather than on permanent sovereignty over natural resources—a concept derived from public international law that the DRC had argued should govern.[23] The court determined that under the law of occupation (particularly article 42 of the Hague Regulations of 1907), "territory is considered to be occupied when it is actually placed under the authority of the hostile army. . . ."[24] The court expansively interpreted the Hague Regulations as applying to noninternational as well as to international armed conflict. Although the court's analysis addressed the criteria for characterizing a state as an occupying power, it arguably took a broader approach to the context of the *Armed Activities* case. Despite this apparent acknowledgment that the Hague Regulations may apply to noninternational armed conflicts, the question may remain whether occupying hostile armies have the same obligations in noninternational conflicts as in international conflicts.

Future tribunals will have to grapple with other lingering questions as well, such as how to handle exploitation in the absence of an occupying power, and what laws to apply during noninternational armed conflicts. The *Armed Activities* case also did not explore whether trading in conflict resources violates international law, but other cases (discussed below) have begun to answer that question.

Case concerning Legality of Use of Force

In 1999, the government of the Federal Republic of Yugoslavia (FRY) filed an application before the ICJ against ten states that had participated in the North Atlantic Treaty Organization (NATO) campaign against FRY earlier that year.[25] FRY alleged violations of the international obligations to protect the environment and not to use prohibited weapons. In particular, FRY asserted that the NATO states had violated provisions of the Geneva Convention of 1949 and the Additional Protocol I of 1977, which protect civilians and civilian objects in time of war; article 1 of the 1948 Convention Regarding the Regime of Navigation on the Danube; provisions of the International Covenant on Civil and Political Rights and of the International Covenant on Economic, Social and Cultural Rights of 1966; article 9 of the Convention on the Prevention and Punishment of the Crime of Genocide; and article 53(1) of the UN Charter.

In six of these cases, the court cited jurisdictional obstacles that kept them from proceeding on their merits. The court held that Serbia and Montenegro was

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[23] The court did note that "this principle . . . is a principle of customary international law" but it was unclear whether the principle applied in the particular context of the case (*Armed Activities*, para. 172).

[24] *Armed Activities*, para. 172.

[25] These states are Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal, Spain, the United Kingdom, and the United States.

not a member of the UN and therefore not a state party to the ICJ Statute when it filed its application, which violated the conditions set down in article 35(1) of the ICJ Statute.[26] Access to the court was denied—and, as a result, no decision was reached on the merits of the cases.

Although this set of cases ultimately did not address the environmental questions that it raised, it is possible that in the absence of jurisdictional obstacles (in this case, the petitioner state was not a party to the ICJ Statute), the ICJ could provide a forum for settling disputes over environmental damages during armed conflict.[27]

A challenge for the ICJ (and for the Permanent Court of Arbitration, discussed in the next section) is that it generally adjudicates bilateral disputes between two states. In cases such as *Legality of Use of Force*, proceedings are further complicated by the necessity of filing and processing claims separately. Additionally, the only parties with standing before the ICJ are states, and even then the court lacks compulsory jurisdiction. The ICJ is thus a suboptimal venue for adjudicating conflicts involving nonstate entities or multiple states, especially if they refuse to recognize the ICJ's jurisdiction.

Permanent Court of Arbitration

The Permanent Court of Arbitration (PCA) is an intergovernmental organization that was established in 1899 by the Convention for the Pacific Settlement of International Disputes to facilitate arbitration and other forms of dispute resolution between states.[28] With 115 member states, the PCA resolves disputes involving "various combinations of states, state entities, intergovernmental organizations, and private parties" (PCA n.d.). The PCA has resolved territorial, treaty, and human rights disputes between states; commercial and investment disputes; and disputes arising under investment treaties.

The PCA adopted Optional Rules for Arbitration of Disputes Relating to the Environment and/or Natural Resources ("Environmental Arbitration Rules") in 2001 (PCA 2001), and Optional Rules for Conciliation of Disputes Relating to Natural Resources and/or the Environment in 2002 (PCA 2002). The PCA also provides guidance on drafting environmentally related dispute settlement clauses. The Environmental Arbitration Rules provide for the establishment of

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[26] See, for example, *Legality of Use of Force (Serbia and Montenegro v. United Kingdom)*, Preliminary Objections, Judgment, I.C.J. Reports 2004. www.icj-cij.org/docket/files/113/8538.pdf. Serbia and Montenegro were the same country until 2006.

[27] Some FRY citizens filed cases in the European Court of Human Rights against Belgium and the other countries that had participated in the NATO strike. Decision in *Bankovic and others v. Belgium and others*, December 12, 2001. The court held that there was no jurisdictional link between the victims of the act complained of and the states that committed the act, and declared the application inadmissible.

[28] 1899 Convention for the Pacific Settlement of International Disputes, art. 2. The 1899 Convention was revised in 1907 at the second Hague Peace Conference.

(1) a list of arbitrators with specialized environmental expertise and (2) a list of scientific and technical experts who may be appointed as expert witnesses pursuant to the arbitration rules. Parties to a dispute are free to choose arbitrators, conciliators, and expert witnesses from these lists, or from elsewhere.

As the adjudicating body in the territorial dispute between North and South Sudan over the oil-rich Abyei territory, the PCA is as yet the only international tribunal to adjudicate a territorial dispute occurring within a single country.[29] The dispute over the boundaries of the Abyei territory has been a barrier to peace in Sudan for decades.[30] Although the issue did not become contentious until half a century later, its origin lies in a 1905 agreement by southern Sudan to cede the territory to northern Sudan, without clearly delimiting the borders involved. The outbreak of civil war in 1955 raised this issue to the fore, with each side claiming authority over the area. The 1972 Addis Ababa Agreement on the Problem of Southern Sudan, which concluded the first round of the civil war, did not conclusively address the area of dispute. Tensions mounted again after oil was discovered in Abyei, in 1979, largely because the area's inhabitants are culturally South Sudanese. Fighting resumed in 1983.

The first serious attempt to resolve the Abyei dispute was the Abyei Boundaries Commission (ABC), which was established pursuant to the 2004 Abyei Protocol. A panel of experts drew a map of the boundaries based on historical research and oral testimonies, but northern Sudan rejected the findings, which were closely in line with the claims of southern Sudan. In 2008, northern and southern Sudan agreed to refer the dispute to the PCA, to be adjudicated under its Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State.

The tribunal selected to hear the case comprised five arbitrators: two chosen by each party, and a fifth appointed by the PCA secretary-general (the first four arbitrators had been responsible for selecting a fifth, but were unable to reach a consensus). The panel reviewed the ABC Experts' Report and, agreeing with some of its delimitations and shifting others, drew a map of Abyei that was about forty percent of the area determined by the ABC. The decision awarded much of the oil-rich land to northern Sudan, and many of the areas with access to water and grazing land to southern Sudan. With the exception of some tribal leaders, who were unhappy about the loss of portions of their land, the decision was widely accepted, both by northern and southern Sudan and by the international community.

The PCA appears to offer an effective alternative forum for international disputes involving the environment and natural resources, particularly in comparison to the ICJ and regional courts. Additionally, in comparison to the ICJ, where only states can be a party, the PCA provides an effective venue

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[29] In July 2011, Southern Sudan seceded from Sudan and became South Sudan.

[30] For an in-depth analysis of the Abyei case and the factors that limited the success of the PCA's decision, see Salman (2013).

for nonstate actors. Finally, the PCA process allows for multiple stakeholders to come together in one proceeding, instead of requiring an actor to start multiple proceedings.

Regional human rights bodies

While most major international and regional human rights conventions do not recognize an explicit right to a safe, healthy, and clean environment, interpretations of these conventions by regional (and to some extent international) human rights bodies suggest that such a right is an element or precondition of other rights, such as the right to health or life—rights that are recognized by all major human rights instruments.[31] For example, even in the absence of a specific right protecting the environment, the European Court of Human Rights has recognized the right to compensation for environmental harm under the European Convention's protection of the right to life and the right to private life.[32] Other regional courts have similarly recognized connections between the right to a safe or healthy environment and other rights, such as the rights to life, health, information, and family; examples include the African Commission on Human and Peoples' Rights[33] and the Inter-American Court and Commission of Human Rights—particularly with regard to indigenous communities.[34]

While such cases generally have not taken place in the context of armed conflict, the role of human rights bodies—particularly at the regional level—in adjudicating the right to a safe and healthy environment is now well established. Many of the conflicts around core rights—such as the right to property as it

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[31] The International Court of Justice, in the *Gabcikovo-Nagymaros* case, summarized this linkage between the protection of the environment and other rights, identifying the protection of the environment as "a sine qua non for numerous human rights such as the right to health and the right to life itself." *Gabcikovo-Nagymaros Project*, I.C.J. (September 25, 1997), 91–92. www.icj-cij.org/docket/index.php?p1=3&p2=3&k=8d&case=92&code=hs&p3=4.

[32] *Öneryıldız v. Turkey*, European Court of Human Rights (2004), and *Lopez Ostra v. Spain*, European Court of Human Rights (1994).

[33] *Social and Economic Rights Action Center v. Nigeria* (Ogoniland Case), Decision (Right to Life). African Commission on Human and Peoples' Rights, Communication No. 155/96.

[34] *Yanomami v. Brazil*, Inter-American Commission on Human Rights Case No. 7615, Resolution 12/85, March 8, 1985. www.escr-net.org/docs/i/412519 (recognizing the connection between the right to life and the right to environmental quality); Inter-American Commission on Human Rights, Report on the Situation of Human Rights in Ecuador, OEA/Ser.L/V/II.96 doc. 10 rev. 1.; *Saramaka People v. Suriname*, Inter-American Court of Human Rights, Series C No. 172, Judgment of November 28, 2007 (right to property); *Indigenous Community of Yakye Axa v. Paraguay*, Inter-American Court of Human Rights, Series C No. 125, Judgment of June 17, 2005 (right to property), 156; *Maya Indigenous Community of the Toledo District v. Belize*, Inter-American Commission on Human Rights Case No. 12053, Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 (right to property).

relates to indigenous claims on natural resources, or the right to life and environmental safety—may lead to an escalation of violence if not resolved in a timely manner.

Domestic legal mechanisms: The U.S. Alien Tort Claims Act

The examples discussed so far represent a significant fraction of the instances in which judicial and quasi-judicial bodies have considered civil damages for harm to the environment that has occurred during armed conflict. In the domestic context, the dearth of court precedents addressing wartime environmental damage is even more severe than in the international context.

Despite domestic courts' limited actions addressing environmental damages during wartime, some domestic statutes could be applied. In the United States, domestic courts have used the Alien Tort Claims Act (ATCA) to find subject-matter jurisdiction and impose civil damages for wrongs committed outside the United States. Legal mechanisms akin to the ATCA are not, however, widespread outside of the United States, and national courts have not generally dealt with this issue through civil law.[35] Still, the ATCA could inform other national legal systems.

The ATCA has been applied with increasing frequency in the last three decades to impose liability for actions committed outside U.S. jurisdiction. While the act has not yet been applied to wrongs committed during armed conflict involving natural resources, a substantial body of precedent may allow courts to hear such claims. Previous judicial decisions have established that the act may be used to exercise jurisdiction over foreign individuals, including heads of state, for environmental wrongs committed abroad, as well as for wrongs committed during wartime. These precedents provide the foundation for imposing civil liability for environmental wrongs committed during armed conflict.

This subsection provides background on the ATCA, and then examines precedents establishing the liability of heads of state, precedents related to wartime actions, and the shifting legal landscape relating to corporations under the ATCA. It concludes by examining the broader legal implications of these cases as they relate to environmental wrongs committed during armed conflict.

Background

Adopted in 1789 by the first U.S. Congress, the ATCA grants U.S. courts jurisdiction "over any civil action by an alien for a tort committed in violation of the law of nations or a treaty of the United States."[36] The ATCA "ensure[s] that the

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[35] Domestic courts in Belgium, France, Spain, and other countries have utilized universal criminal jurisdiction to address serious violations of international law, including cases related to the environment and armed conflict. This is discussed later in the chapter.

[36] 28 U.S. Code sec.1350.

United States would comply with the law of nations and avoid giving foreign nations just cause for war" (Bellia and Clark 2011, 61). The ATCA lay dormant for nearly 200 years until, in *Filartiga v. Peña-Irala*, the U.S. Court of Appeals for the Second Circuit found jurisdiction for the claims of two Paraguayan nationals against a former Paraguayan police officer for acts of torture and murder in violation of international law.[37] The Second Circuit found that "deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties."[38] This decision marked the first time a U.S. federal court held an individual accountable for human rights abuses (CCR 2011). Since the *Filartiga* decision, the ATCA has been increasingly used to hold private individuals and heads of state liable for civil damages for violations of international law.

In *Sosa v. Alvarez–Machain,* however, the U.S. Supreme Court held that the ATCA was purely a jurisdictional grant of authority for a limited category of claims for violation of internationally accepted norms.[39] Thus, only clearly established violations of international law, similar in clarity to those recognized in 1789, can give rise to causes of action under the federal common law. Moreover, an actionable violation of international law must relate to a norm that is specific, universal, and obligatory. In its 2012 decision in *Kiobel v. Royal Dutch Petroleum*, the Supreme Court limited the application of the ATCA, holding that the principles underlying presumption against extraterritoriality constrain U.S. courts from exercising their power to address violations of customary international law occurring in the territory of a foreign sovereign.[40]

Liability of heads of state

Following *Filartiga*, aliens and nationals initially brought ATCA suits against former foreign government officials and heads of state—as individuals—for alleged human rights abuses committed while in power. These cases were often successful, as long as the alleged crimes violated customary international law, which federal courts describe as rules that the international community "universally abide by, or accede to, out of a sense of legal obligation and mutual concern."[41] Relying upon the criteria that actionable offenses must violate an international norm that is specific, universal, and obligatory, courts recognized eight torts as violations of the law of nations: summary execution,[42] genocide,[43]

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37 *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).
38 Ibid.
39 *Sosa v. Alvarez–Machain*, 542 U.S. 692 (2004).
40 *Kiobel v. Royal Dutch Petroleum*, 133 S.Ct. 1659, 1669 (2012): "And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application."
41 *Flores v. S. Peru Cooper Corp*., 414 F.3d.233, 248 (2d Cir. 2003).
42 *In re Estate of Ferdinand Marcos*, 25 F.3d 1467 (9th Cir. 1994).
43 *Kadic v. Karadzic*, 70 F.3d 232 (2d. Cir. 1995).

war crimes,[44] disappearance,[45] arbitrary detention,[46] slave trading,[47] and cruel, inhuman, or degrading punishment.[48]

One such case, *In re Estate of Ferdinand Marcos*, was filed against Ferdinand Marcos, a former president of the Philippines, when he fled to Hawaii, on behalf of individuals who had allegedly been tortured, summarily executed, or disappeared at the hands of military personnel acting under Marcos's authority. The U.S. Court of Appeals for the Ninth Circuit affirmed the lower court judgment against Marcos, rejecting his defenses of immunity under the Foreign Sovereign Immunities Act and the Act of State Doctrine. The Ninth Circuit held that Marcos "was not the state, but the head of the state, bound by the laws that applied to him," and that the acts of torture, execution, and disappearance were clearly acts outside of Marcos's authority as president.[49] The court also disagreed with the defendant's argument that international law does not provide a basis for federal jurisdiction under the ATCA, stating that the district court did not err in founding jurisdiction on a violation of the specific, universal, and obligatory international human rights standard prohibiting torture.

Similarly, in *Kadic v. Karadzic,* Croat and Muslim citizens of Bosnia-Herzegovina filed a class action suit against Radovan Karadzic, former leader of the self-proclaimed Bosnian-Serb Republic of Srpska, for rape, forced prostitution, forced impregnation, torture, and summary execution carried out by Bosnian-Serb military forces under the ultimate command of Karadzic. The Second Circuit Court of Appeals reversed the district court dismissal for lack of subject-matter jurisdiction, holding that a U.S. court may exercise jurisdiction over a nonstate actor accused of committing genocide or war crimes under the ATCA. Citing international agreements—such as Common Article 3 of the Geneva Conventions and the Convention on the Prevention and Punishment of the Crime of Genocide—the court found that, under international law, "Karadzic may be found liable for genocide, war crimes, and crimes against humanity in his private capacity and for other violations in his capacity as a state actor."[50]

In *Doe v. Lumintang,* the ATCA was also invoked against military leaders.[51] Six Timorese torture survivors sued Lieutenant-General Johny Lumintang, a former deputy chief of staff of the Indonesian army, for human rights abuses committed during a 1999 referendum on independence. The U.S. District Court for the District of Columbia found that the "courts have jurisdiction over plaintiffs' claims of torture, summary execution, crimes against humanity and

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44 Ibid.
45 *Forti v. Suarez-Mason*, 694 F.Supp. 707 (N.D. Cal. 1998).
46 *Kadic v. Karadzic*.
47 *Xuncax v. Gramajo*, 886 F.Supp. 162 (D. Mass. 1995).
48 *Doe I v. Unocal Corp*., 963 F.Supp. 880 (C.D. Cal. 1997).
49 *In re Estate of Marcos*, 1472.
50 *Kadic v. Karadzic*, 236. In 2000, the case resulted in a US$4.5 billion judgment against Karadzic (Rohde 2000).
51 *Doe v. Lumintang*, Civil Action No. 00-674 (D.D.C. 2001).

cruel, inhuman and degrading treatment under ATCA." Citing several previous ATCA rulings, the court found that "holding a commander criminally or civilly responsible for crimes committed by subordinates is well established under both international and U.S. domestic law."[52] The district court awarded each plaintiff about US$10 million in 2001, but vacated the judgment in 2004.

Wartime actions

While military leaders have been held liable under the ATCA, efforts to expand the ATCA's scope to include private contractors for violations of international law during wartime actions have been less successful.

For example, private contractors were sued under the ATCA for supplying herbicides to the U.S. military during the Viet Nam War. In *In re Agent Orange Product Liability Litigation*, Vietnamese nationals and the Vietnam Association for Victims of Agent Orange brought suit for damages for the deaths of and injuries to the plaintiffs and the class allegedly caused by exposure to the herbicides.[53] The plaintiffs also sought remediation and return of profits made on sales of the herbicides. They alleged that the defendants, in providing the chemicals to the U.S. Army, violated national and international laws, including the ATCA, the Torture Victim Protection Act, the 1949 Geneva Convention relative to Protection of Civilian Persons in Time of War, the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, customary international law, and the laws of Viet Nam.

The district court dismissed the case, holding that the alleged violations were not of a well-defined and universally accepted rule of international law, and that the claim therefore failed to provide jurisdiction under the ATCA. The Second Circuit affirmed the district court decision. Nevertheless, both courts agreed that "corporations could be liable in a civil action brought under the ATS [Alien Tort Statute] for a violation of international law," and that "aiding and abetting liability was cognizable under [the] statute."[54]

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[52] Among other cases, the district court cited *Paul v. Avril*, 901 F.Supp. 330 (S.D. Dla. 1994), in which the court entered a default judgment against a former military ruler of Haiti for torture committed by soldiers under the defendant's command.

[53] *In re Agent Orange Product Liability Litigation*, 373 F.Supp.2d 7 (E.D.N.Y. 2005), affirmed *Vietnam Ass'n for Victims of Agent Orange v. Dow Chemicals Co*., 517 F. 3d 104 (2d Cir. 2008).

[54] *Vietnam Ass'n for Victims of Agent Orange v. Dow Chemicals Co*., 114. The Vietnam War gave rise to numerous claims for civil damages in U.S. courts from U.S. veterans and Vietnamese citizens due to health problems from exposure to Agent Orange, a herbicide that the U.S. Army used to defoliate Viet Nam's jungle. The defoliant contains dioxin—a byproduct of the manufacturing process and now known to cause skin lesions and altered liver functions in the short term, as well as cancer and impaired bodily functions in the long term. The Agent Orange litigation has involved several phases, from 1979, when the original veterans' class action complaint was filed, through

In *Saleh v. Titan*, approximately 250 Iraqi plaintiffs sued CACI International Incorporated and Titan Corporation (now L-3 Services) under the ATCA for allegedly committing torture and other violations of international law against Iraqi detainees while providing interrogation and translation services at detention facilities in Iraq. In 2007, in *Ibrahim v. Titan Corp.* (which consolidated the *Saleh* case with a similar case), the U.S. District Court for the District of Columbia ruled that CACI and Titan operated under sovereign immunity for performing a common mission "under the direct command and exclusive operational control of the military."[55] The U.S. Court of Appeals for the D.C. Circuit upheld the judgment in 2009. The dissenting judge, however, found that the defendants were subject to civil liability because private contractors are "not within the military's chain of command" (580 F.3d 1, 17 [2009]).

Corporate liability and environmental harm

Many of the ATCA cases seek to hold corporations liable for violations of international law. The cases often had lengthy procedural postures, with district courts dismissing them for various procedural reasons and appellate courts reversing the dismissals and sending the cases back for further consideration.

In *Aguinda v. Texaco*, Ecuadorian citizens alleged property damage and personal injuries from improper oil piping and water disposal practices by a fourth-tier subsidiary of Texaco.[56] The district court granted Texaco's motions to dismiss both complaints on the grounds of *forum non conveniens* (that is, the court is not the proper forum to hear the case).[57] In addition, the district court questioned whether the plaintiffs would be able to demonstrate that Texaco's actions fell under ATCA jurisdiction. On appeal, the Second Circuit affirmed the lower court's decision to dismiss on the grounds of *forum non conveniens*, but

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2009, when the U.S. Supreme Court denied review of the dismissal (based on the government contractor defense) of a third wave of veterans' claims against the companies that had manufactured and sold the chemical. The Supreme Court also denied review of dismissed claims asserted by Vietnamese nationals under the ATCA (the case discussed earlier in the chapter). In 1991, Congress enacted the Agent Orange Act to help veterans obtain disability compensation, which establishes a presumption of exposure to Agent Orange if a veteran can prove certain facts—mainly that he is affected by one of the diseases listed in the act and served in Viet Nam. For a detailed discussion of Agent Orange litigation, see Aiosa and Majkowski (2010), Toohey (2005), and Zierler (2007).

55 *Ibrahim v. Titan Corp.*, 556 F.Supp.2d 1, 5 (D.D.C. 2007).

56 A separate ATCA lawsuit was filed in 1994 by Peruvian citizens living downstream from Texaco's oil activities, for similar allegations of polluting rainforests and rivers.

57 *Aguinda v. Texaco*, 142 F.Supp.2d 534 (S.D.N.Y. 2001). As the number of tribunals with overlapping jurisdiction has increased, the issue of forum shopping has emerged in international law. While an increase in the number of tribunals will likely provide some benefits, such as expediency, there are concerns that it will lead to inconsistent rulings and other negative consequences (Pauwelyn and Salles 2009).

it did not adopt the district court's opinion that the plaintiffs could not state a claim for violations of international law.

In spite of its dismissal, *Aguinda v. Texaco* serves as an important benchmark in international litigation. It was the first case under the ATCA against a transnational corporation for its overseas activities (Drimmer 2007). The case also represents an expansion of the ATCA's applicability by noting that environmental wrongs are part of international law, particularly where they harm human health and communities. Finally, the case was the first ATCA case seeking to establish the interconnectedness between human and environmental rights.

Courts deciding ATCA cases against corporations for alleged environmental and human rights violations often have been reluctant to exercise jurisdiction.[58] Nevertheless, a number of federal courts have upheld corporate liability under the ATCA.[59]

While human and environmental rights violations have not yet resulted in liability for a corporation under the ATCA, simply being named a defendant in such a case can have substantial effects on a company's reputation. Where cases do proceed, they often result in expensive settlements once it becomes apparent that they will not be dismissed on procedural grounds. For example, in *Doe v. Unocal*,[60] Burmese citizens sued Unocal for allegedly abetting human rights violations committed by the Burmese military, which provided security for Unocal's oil pipeline routes. The district court concluded that corporations can be held civilly liable for international human rights violations in foreign countries, but the court dismissed the case on the grounds that Unocal could not be held liable unless the defendants proved that Unocal used the military to commit abuses. However, the U.S. Court of Appeals for the Ninth Circuit reversed and

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[58] For example, *Beanal v. Freeport-McMoran, Inc*., 969 F.Supp. 362 (E.D.La. 1997), affirmed *Beanal v. Freeport-McMoran, Inc*., 197 F.3d 161, 167 (5th Cir. 1999) (ruling that claims can be brought under the ATCA only for "shockingly egregious violations of universally recognized principles of international law" and that "federal courts should exercise extreme caution when adjudicating environmental claims under international law to insure that environmental policies of the United States do not displace environmental policies of other governments."); and *Flores v. Southern Peru Copper*, 414 F.3d 233 (2nd Cir. 2003).

[59] See *Sinaltrainal v. Coca-Cola Co*., 578 F.3d 1252 (11th Cir. 2009) ("corporate defendants are subject to liability under the [ATCA] and may be liable for violations of the law of nations"); *Romero v. Drummond Co., Inc*., 552 F.3d 1303 (11th Cir. 2008) (ATCA "grants jurisdiction from complaints of torture against corporate defendants"); *Doe v. Exxon Mobil Corp*., No. 09–cv-7125 (D.C. Cir. July 8, 2011) (Indonesian villagers alleged that security forces hired by Exxon Mobil and others to guard a natural gas facility committed murder, torture, sexual assault, battery, false imprisonment and other torts); *Flomo v. Firestone Natural Rubber Company*, 643 F.3d 1013 (7th Cir. 2011) (affirming the Southern District of Indiana's dismissal of the claims for utilizing hazardous child labor on rubber plantation but finding that a corporation may be subject to liability under the ATCA); *Sarei v. Rio Tinto*, PLC, 671 F.3d 736 (9th Cir. 2011) (corporations aiding and abetting violations may give rise to an ATCA claim).

[60] *Doe v. Unocal*, 110 F.Supp.2d 1294 (C.D. Cal. 2000).

held that the plaintiffs needed only to demonstrate that Unocal knowingly assisted the military in perpetrating abuses. Under this standard, the court found sufficient evidence to go to trial, and the case was remanded to the district court. The case was settled out of court in 2005 for an undisclosed sum.

As another example, in *Wiwa v. Royal Dutch Petroleum*, Royal Dutch Shell was sued under the ATCA for its alleged involvement in the executions of Ken Saro-Wiwa and other Nigerian citizens who were protesting the harmful impacts of oil development and Shell's failure to provide benefits to communities in the Niger Delta.[61] A district court dismissed the case in 1998, on the ground of *forum non conveniens,* but the Second Circuit reversed in 2000, remanding the case back to the district court. In 2002, the district court denied motions to dismiss, finding that Shell's actions constituted participation in crimes against humanity, summary execution, and other violations of international law.[62] Royal Dutch Shell agreed to pay a US$15.5 million settlement in 2009 (AP 2009).

In *Kiobel v. Royal Dutch Petroleum,* however, the Second Circuit reversed its stance on corporate liability,[63] holding that corporations are immune from civil liability under the ATCA because corporate liability is not a rule of customary international law. The court found that most major international treaties apply only to individual persons and not to juridical persons such as corporations, and that most countries do not impose civil liability on corporations. In the Supreme Court's affirmation of the Second Circuit decision,[64] the five-justice majority concurring opinion mentioned that ATCA claims must be assessed on the basis of the extent to which they "touch and concern" the United States, and that if the "mere corporate presence" of a foreign multinational is the only connection to the United States, that is insufficient to allow an ATCA claim to proceed.[65]

Although the Supreme Court in *Kiobel* did not specifically rule on the corporate liability question under the ATCA, its application of the presumption against extraterritoriality implicitly acknowledged the possibility of corporate liability by discussing "mere corporate presence" (Simons 2013; Wuerth 2013; Young 2015). Additionally, the ATCA has been recognized as granting subject-matter jurisdiction in domestic courts. Thus, by deciding *Kiobel* on the issue of presumption against extraterritoriality, the Supreme Court seems to have determined that it had the subject-matter jurisdiction for ATCA claims regarding corporate liability (Simons 2013).

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61 *Wiwa v. Royal Dutch Petroleum*, 266 F.3d 99 (2nd Cir. 2000).

62 *Wiwa v. Royal Dutch Petroleum*, 2002 WL 319887 (S.D.N.Y. 2002).

63 *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111 (2nd Cir. 2010). In Kiobel, residents of Nigeria claimed that Dutch, British, and Nigerian corporations aided and abetted the Nigerian government in committing violations of customary international law. The plaintiffs sought damages under the ATCA.

64 *Kiobel v. Royal Dutch Petroleum*, 133 S.Ct. 1659 (2013).

65 Ibid., 1669.

The ultimate effect of *Kiobel* on corporate liability under the ATCA remains uncertain.

Conclusions regarding the ATCA

Until *Kiobel*, the ATCA had been increasingly used as a cause of action in U.S. federal courts to seek civil damages for human rights abuses committed abroad. Among the approximately 100 ATCA cases brought since 1980, jurisdiction under the ATCA has typically been limited to violations of international law that are specific, universal, and obligatory. This standard has limited the scope of the act from principles generally recognized under international law to principles that are individually recognized by judges interpreting the "law of nations" under the ATCA.

Based on previous court decisions, the ATCA can be used to hold private and state actors (including former heads of state, military officers, and perhaps corporations) liable for violations of international law related to environmental damages from armed conflict. The *Kiobel* decision has significantly narrowed the scope of corporate liability under the ATCA, however, unless the facts of a claim are strong enough to overcome the "touch and concern" requirements laid out in *Kiobel*.

The ATCA has provided a clear pathway in U.S. federal courts to hear and award damages for violations of international law, such as genocide, war crimes, and crimes against humanity. Although a clear standard for the level of environmental harm actionable under the ATCA has not yet been articulated, the ATCA may be able to address environmental harms resulting from large-scale development projects, particularly when they are connected to human rights abuses or criminal activities (such as pillage or the looting of natural resources) (Hunter, Salzman, and Zaelke 2011).

Compensatory and punitive damages have been awarded in numerous ATCA cases, but few plaintiffs have collected on the judgments. Since many defendants do not hold U.S. assets, enforcement of these judgments has been problematic. Even so, a moral victory is vindication, and often of substantial value to the plaintiffs.

Lessons related to civil liability

The cases discussed so far demonstrate that tribunals can serve as an appropriate avenue for settling disputes about wartime environmental harm, providing opportunities for recovery and fostering peacebuilding.

As seen in *Legality of Use of Force*, the ICJ is an effective venue for adjudicating disputes only between states that agree to accept the court's jurisdiction. Where states do accept the court's jurisdiction, the court has issued notable decisions. Indeed, the ICJ's decision in *Armed Activities on the Territory of the Congo* recognizes the following: plunder by an occupying power is illegal; a wide range of parties, ranging from individual officers to national governments,

have a duty of vigilance for preventing such acts from occurring; and reparations are due for plundering natural resources during armed conflict.

Other international bodies, such as the PCA, offer advantages, especially with respect to nonstate parties. For example, the PCA's treatment of the Abyei territorial dispute demonstrates how an international body may be able to resolve a dispute between two parties within one state and between a state and a nonstate actor.

Whereas international law may be capable of awarding compensation for wartime damage to the environment, the experience with Agent Orange litigation in the United States suggests that national laws are often insufficient to require abatement and cleanup. The district court that heard *In re Agent Orange Product Liability Litigation* dismissed the claims of the Vietnamese citizens on the ground that they were alleging a violation of a rule of international law that was too loosely defined and not universally accepted, and thus failed to meet the criteria for invoking the ATCA. The government-contractor defense and the fact that Agent Orange was used expressly to protect American soldiers, and not as an offensive weapon, was also problematic. Thus, environmental claims may be particularly challenging in situations of national security and self-defense.

The UNCC experience highlights some of the constraints that confront international tribunals in adjudicating civil cases, and offers insight into how their ability to address environmental wrongs committed during wartime might be improved. One challenge that the UNCC faced was an insecure revenue stream, because of the commission's reliance on funds seized from Iraq's oil sanctions. While its mandate to operate "without consent from the sanctioned party"[66] afforded the UNCC substantial independence in issuing fines, Iraq's reluctance to cooperate in the early stages caused serious funding problems.[67] Rather than being at the mercy of sanctioned nations with reason to be uncooperative, it may behoove other international judiciary bodies to secure permanent—or at least stable—funding from other sources (McManus 2006).

Tribunals must also decide on the extent of participation: a high degree of participation enhances transparency and the perceived legitimacy of the decision-making process, but a lower degree of participation increases efficiency and helps avoid opportunities for undue influence on the part of either claimants or defendants. The rules of procedure that the UNCC adopted for claims processing initially provided limited opportunities for participation by both Iraq and the claimants, but these opportunities increased over time.[68]

The examples offered so far show that there is no commonly accepted definition of "environmental damage"; future tribunals will have to clarify the

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[66] McManus (2006), 433–434.

[67] At one point, Iraqi noncompliance restricted the flow of cash for compensation to US$21 million of the US$6 billion that the fund had been expected to receive (McManus 2006).

[68] See Lalanath de Silva, in this book.

range of damage that is compensable. The environmental damages that were compensated by the UNCC were in many respects broad, but substantial scrutiny was applied in reviewing the legitimacy of claims. In contrast, the Marshall Islands Nuclear Claims Tribunal supposedly addressed all environmental claims but lacked sufficient funds to make the requisite awards, so was unable to effectively address all the environmental damages; it also applied less strict scrutiny in the review of the claims than the UNCC had. Finally, U.S. domestic courts in ATCA cases have considered claims for environmental damage only when they constituted violations of international law (per ATCA requirements)—a standard that, in practice, has been met only when linked to gross violations of human rights.

Tribunals should consider tempering a broad definition of environmental damage with a requirement for strict evidentiary standards. The UNCC's conservative approach in this respect was beneficial: by requiring a great deal of evidence, it was able to maintain a strong perception of legitimacy. At the same time, however, the approach was also troublesome for a number of reasons. From the perspective of the environment or those affected by environmental harms, the fact that multiple forces contributed to environmental damage does not matter, and does not justify inaction. The concept of joint and several liability addresses this issue by allowing the judiciary to pursue any one of multiple parties that are liable for damages. Nor should lack of clarity about the extent of damages be a reason to deny all compensation; at least partial payment should be awarded for damages that can be shown with certainty. Since compensation may be denied where the value of what was lost cannot be stated quantitatively, thorough valuation studies to provide quantitative information on damages are critical.

Tribunals should not attempt to speed up the time it takes to award damages by shortening the window for filing environmental claims. Environmental damage inflicted during times of conflict, such as that seen during the 1990–1991 Gulf War, is likely to have broad impacts that cannot be fully understood within a short period of time after the conclusion of hostilities (McManus 2006). An extended filing deadline ensures that parties affected only in the long term are compensated, along with those who suffer from more immediate effects.

The ultimate effect of the UNCC approach was that in many cases where there was no question that Iraq had acted wrongly and that its actions had had negative impacts, no damages were awarded. Rather than following this morally flawed precedent, future tribunals should instead look to the bulk of international legal precedent and award damages where direct causation can be established. At the same time, aggrieved parties cannot rely on moral damages and must be prepared to support their claims with sufficient evidence to quantify the impacts.

Taken together, the examples offered so far demonstrate a wide range of bilateral and multilateral disputes over wartime impacts to the environment that can be addressed by civil tribunals. The UNCC effectively processed and awarded claims brought by governments, companies, and individuals against a government; the *Armed Activities* case highlights the ICJ's jurisdiction to adjudicate between

states (while addressing actions by a state's military and members of the military); the PCA successfully resolved a territorial dispute between a state and a nonstate political actor; and the ATCA has been applied in U.S. law against foreign heads of state, military officers, and other individuals.

CRIMINAL TRIBUNALS

The history of responsibility for wartime damage to natural resources and the environment goes back to World War I and the Treaty of Versailles, which required Germany to compensate civilian property losses.[69] The Reparation Commission determined that the cost of replanting damaged orchards, plantations, and vineyards—and the decreases in land value after the replanting—was recoverable under the treaty, though the value of the lost use over the duration of the war was excluded from what farmers could recover.[70] In this case, only agricultural resources of economic significance were compensated, while other damages to natural resources were not (Westing 1981).

Following World War II, tribunals considered environmental harms in a more expansive manner, and even attached criminal liability to actions. During the Nuremberg trials, prosecutors charged several German generals with war crimes for scorched-earth tactics and pillaging. However, the U.S. Military Tribunal at Nuremberg found reasonable General Lothar Rendulic's belief that the scorched-earth tactics he ordered were necessary, and declared him not guilty.[71] The International Military Tribunal charged several German leaders with war crimes based on wanton destruction and appropriation of civilian property and resources.[72] The tribunal convicted Alfred Jodl on this count; but because of Arthur Seyss-Inquart's opposition to and prevention of scorched-earth tactics and Albert Speer's sabotage of the program "at considerable personal risk," it found codefendants Seyss-Inquart and Speer not guilty of this charge.[73] Even though the tribunals acquitted some defendants for criminal liability for environmental harms, the trials set the modern precedent that scorched-earth tactics, pillage, and other environmentally destructive practices constitute war crimes, and are punishable.

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[69] Treaty of Peace between the Allied Powers and Germany, June 28, 1919, pt. VIII, sec. I, art. 232.

[70] *American-Hawaiian Steamship Co. (United States v. Germany)*. National Commission Case, Sept. 30, 1926, Reports of International Arbitral Awards, vol. VII, 28.

[71] *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, pt. XI (1949), 1297. www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-XI.pdf.

[72] *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany*, pt. 1 (1950), 42–43. www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf.

[73] *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany*, pt. 22 (1950), 517. www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-XXII.pdf.

The post–World War II criminal prosecutions dealing with environmental issues were not limited to scorched-earth warfare. In an important precedent for cases related to conflict resources, the International Military Tribunal for the Far East (IMTFE) charged Japan with crimes against the peace for wartime production of and trafficking in opium. Before the war, Japan had ratified and implemented two conventions that limited the production, distribution, and export of opium.[74] Prosecutors alleged that Japan had (1) pursued a policy of encouraging production and importation of opium and other narcotics; (2) provided large sums of money to implement this policy; (3) used the revenue from the trafficking of opium and other narcotics to finance wars of aggression; and (4) used opium as a military weapon to break the morale of the Chinese people and to destroy their will to fight (Boister 2011).

The government officials and military officers who were charged argued that the violation of drug conventions did not meet the definition of "war crimes" as defined by the Potsdam Proclamation (which set the terms for Japanese surrender). Prosecutors countered that the violations of these international agreements were the means by which unlawful wars were perpetrated. Ultimately, the defense relied on three main arguments: (1) the "Government monopoly [w]as sanctioned by the Geneva treaty in 1925"; (2) there was no provable link from opium trafficking to the leaders of Japan; and (3) the evidence of drug trafficking in China provided no basis for a conviction of crimes against the peace because it did not illustrate an intention to dominate (Boister 2011, 332).

The majority sided with the prosecution, finding that (1) there was a link between drugs and the invasion of Manchuria; (2) Japanese servicemen were heavily involved in the opium business; and (3) the Japanese puppet state, Manchukuo, was meant to carry on a worldwide drug trafficking operation.[75] Although the majority simply found a conspiracy to wage a war of aggression, and did not consider whether the prosecution had proved the charges relating to violations of treaties, the legacy of the opium decision in the tribunal is that a crime against peace can include the use of a conflict commodity (such as narcotics) to generate revenue to fight a war (Boister 2011).

A number of more recent cases, in both international tribunals and national courts, demonstrate the applicability of criminal law to wartime environmental damage. The remainder of this section explores this issue in more detail: first by exploring the distinction between environmental damage and conflict resources,

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[74] These were the 1912 International Opium Convention (providing for the control of production and distribution of opium, limitations on its export, and obliging state parties to take measures to control the manufacture and traffic of opium) and the 1931 Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs (dedicated to the limitation of licit production of narcotic drugs so as to prevent diversion into illicit traffic).

[75] *United States et al. v Sadao Araki et al*. In Pritchard and Zaide (2002).

then by examining how the International Criminal Court, ad hoc tribunals, and regional and national courts have addressed crimes of environmental destruction and conflict resources.

Distinguishing between environmental damage and conflict resources

Wartime criminal acts negatively affecting the environment generally fall into two categories: direct environmental damage and conflict resource exploitation. A key difference between these two categories is the fate of the natural resource. In the former, the natural resource is destroyed or damaged; in the latter, it is appropriated for use by a combatant.

Although the famous sowing of Carthage with salt may not have happened, the story is an enduring image of "total" or "scorched-earth" warfare (Ridley 1986). The long-term effects of scorched-earth tactics remain visible beyond the loss of life, and are crippling in their own way (Machlis and Hanson 2008).

There is no formal UN definition of the term *conflict resources*. Global Witness defines conflict resources as playing a central role in the "commission of serious violations of human rights, violations of international humanitarian law or violations amounting to crimes under international law" (Global Witness n.d.).[76]

Most conflict resources are internationally traded commodities, ranging from diamonds and gold to timber, cacao, bananas, and opium and other illegal or illicit drugs. Assessing the illegality of the provenance or sale of conflict resources under international law is complex. Commonly, the resources were extracted illegally, such as through pillaging and theft (Ross 2004). Alternatively, the resource itself could be illegal, as with opium and other drugs (although national and international laws may treat certain drugs differently). In cases where the Security Council has established embargoes or other sanctions against a country engaged in a conflict, or that address a particular conflict resource, the purchase and sale of that resource would violate international law. Adding to the complexity, individuals and employees of foreign companies who fuel the conflict by financing armed groups committing crimes might be punished as accomplices or for other reasons, under international or national laws (Stewart 2011). Individuals may also be prosecuted as proxies for corporate liability, which is unavailable in many cases. For example, under the Rome Statute, the International Criminal Court has jurisdiction only over natural persons.

Combatants have exploited conflict resources in a variety of documented ways. During the Liberian and Sierra Leonean civil wars, Liberia's president

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[76] The full definition is "Conflict resources are natural resources whose systematic exploitation and trade in a context of conflict contribute to, benefit from or result in the commission of serious violations of human rights, violations of international humanitarian law or violations amounting to crimes under international law."

(and, since 2012, a convicted war criminal) Charles Taylor sold diamonds and illegally harvested timber to multinational corporations and used the revenue to purchase weapons, pay his soldiers, and support war criminals in neighboring countries (Ross 2004; SCSL 2012). In Angola, the National Union for the Total Independence of Angola (UNITA) traded ivory and teak for weapons and other military support (Sayagues 1999). In Côte d'Ivoire, the Forces Nouvelles taxed local cocoa production to fund its military campaign (Global Witness 2007).

While liability for pillage is explicit in many international statutes and agreements, and in the laws of many countries (Stewart 2011), trade in conflict resources is both common and lucrative. Gems, agricultural products, fossil fuels, minerals, and other natural resources have helped to finance at least seventeen civil conflicts in the post-Cold War era (Ross 2004). For example, the cocoa tax provided the Forces Nouvelles with about US$30 million in annual revenue (Global Witness 2007). In the 1990s in Cambodia, the Khmer Rouge earned between US$10 million and US$20 million per month through its engagement in the logging industry (Talbott 1998). By controlling a significant percentage of Sierra Leone's and Angola's diamond mines, respectively, the Revolutionary United Front (RUF) secured between US$25 million and US$125 million per year in the late 1990s, and UNITA had earned more than US$5 billion by 2000 (UNSC 2000; Lynch 2000).

The International Criminal Court

International criminal law is a relatively young discipline within international law. While the war crimes trials following World War II demonstrated a role for this area of law in post-conflict efforts to seek justice and deter future crimes, the international criminal justice system was dormant for a long period after the close of these adjudications. The situation changed dramatically in the 1990s—when, in quick succession, the UN established the ad hoc International Criminal Tribunal for the former Yugoslavia and the ad hoc International Criminal Tribunal for Rwanda. Panels and courts with a mixture of national and international elements were then created for Bosnia and Herzegovina, Timor-Leste, Kosovo, Sierra Leone, Cambodia, and Lebanon.

Although the ad hoc UN tribunals were given jurisdiction *ratione materiae* (subject-matter jurisdiction) over crimes established in international customary and treaty law, the provisions of international law that are most widely considered to prohibit substantial damage to the environment in times of armed conflict (namely, articles 35 and 55 of Additional Protocol I to the Geneva Convention) did not play a meaningful role in these proceedings.[77] Nor was environmental

[77] Article 35(3) prohibits "employ[ing] methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment." Article 55(2) provides that "attacks against the natural environment by way of reprisals are prohibited."

damage charged before these ad hoc tribunals under any other heading, though related crimes were prosecuted. As a result, the tribunals in this period did not examine whether violations of environment-related provisions of the Geneva Convention gave rise to individual criminal responsibility. This series of ad hoc international criminal tribunals evidenced a need for a permanent institution to manage such cases. The International Criminal Court provides such an institution.

Criminal prosecution before the International Criminal Court for wartime environmental damage

In 1998, countries adopted the Rome Statute, establishing the International Criminal Court (ICC). In 2002, the Rome Statute entered into force and the ICC started operations; the first case was brought in 2009.[78] Based in The Hague, Netherlands, the ICC is not part of the UN system and receives its funding from member parties and voluntary contributions.

The Rome Statute defines the crimes for which the ICC may determine liability (and punishment) for atrocities committed in armed conflict contexts. Crimes under the Rome Statute are divided into three primary categories: genocide, crimes against humanity, and war crimes. Environmental damage committed during wartime falls into two broad categories: damage to the environment inflicted during armed conflict, and illegal exploitation of conflict resources during hostilities. The ICC has jurisdiction to adjudicate guilt and determine punishment in both instances.

Only one provision of the Rome Statute directly addresses environmental damage. Article 8(2)(b)(iv) provides that it is a war crime to "intentionally [launch] an attack in the knowledge that such attack w[ould] cause . . . widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated."[79] The proportionality requirement regarding "concrete and direct overall military advantage" is inherent to all ICC cases in determining the legality of any military activity undertaken in the context of an armed conflict (ICC 2011).

Several other factors establish a high burden of proof for prosecutors that restricts the application of this clause. First, article 8(2)(d)-(e) provides that the crimes listed under the war crimes section are punishable only if they are committed

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[78] As of April 2015, 123 countries were parties to the Rome Statute (UNTC n.d.). The United States, Israel, and Sudan have submitted statements that they do not intend to become parties to the treaty and are not bound by the law despite having signed. Neither China nor India has signed or ratified the Rome Statute.

[79] The terms of this provision are derived, to a large extent, from articles 51(5)(b) and 85(3)(b), as well as articles 35(3) and 55(1) of Additional Protocol I of 1977 to the 1949 Geneva Conventions.

in the context of an international armed conflict. Thus, for the environmental war crimes provision to apply, it must be established (1) that an armed conflict existed;[80] (2) that the conduct took place in the context of, and was associated with, an international armed conflict;[81] (3) that the armed conflict was international in character;[82] and (4) that the perpetrator was aware of the factual circumstances that established the existence of an armed conflict (ICC 2011).[83]

In addition to those criteria, the specific elements of the environmental damage clause, Article 8(2)(b)(iv), must be established: (1) that the perpetrator launched an attack; (2) that the attack was such that it would cause widespread, long-term, and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated; and (3i) that the perpetrator knew that the attack would cause widespread, long-term, and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.[84]

Article 8(2)(b)(iv) requires proof that that the damage to the environment caused by the attack is "widespread," "long-term," and "severe." These three requirements have to be established cumulatively, but the Rome Statute does not define them. As of April 2015, no charges pursued by the ICC prosecutor deal with violations of this provision.[85]

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[80] An armed conflict exists "whenever there is resort to armed forces between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State." *Prosecutor v. Tadić*, 1995, United Nations International Criminal Tribunal for the Former Yugoslavia, IT-94-1-AR72, Decision on the defence motion for interlocutory appeal on jurisdiction, October 2, para. 70.

[81] In linking the offenses to the armed conflict, it is not necessary to establish that actual combat activities occurred in the area where the crimes are alleged to have occurred. Rather, "[i]t is sufficient that the alleged crimes were *closely related* to the hostilities occurring in other parts of the territories controlled by the parties to the conflict" (emphasis added). *Prosecutor v. Tadić*, 1995, para. 70.

[82] An armed conflict is international in nature if it takes place between two or more states. In addition, an internal (or noninternational) armed conflict may become international if (1) another state intervenes in that conflict through its troops or (2) some of the participants in the internal armed conflict act on behalf of that other state. *Prosecutor v. Tadić*, 1995, para. 84.

[83] There is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or noninternational. There is also no requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or noninternational. There is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict that is implicit in the terms "took place in the context of and was associated with" (ICC 2011).

[84] This knowledge element requires that the perpetrator make the value judgement as described therein. An evaluation of the value judgement must be based on the requisite information available to the perpetrator at the time (ICC 2011).

[85] The Annex to the Convention on the prohibition of military or any hostile use of environmental modification techniques of December 10, 1976, proposes a definition

When article 8(2)(b)(iv) is not invoked by prosecutors, the environment is not one of the values explicitly protected. However, the Rome Statute provides other opportunities to prosecute acts of environmental destruction that constitute a material element of other war crimes (article 8), crimes against humanity (article 7), or genocide (article 6). Acts of environmental destruction may lead to death or serious injury, or may deprive people of their livelihoods and force them to relocate. Where crimes within the jurisdiction of the ICC are committed by means of the destruction of the environment, perpetrators can face prosecution in the ICC for those acts.

The destruction of the environment itself may constitute a material element of the crime. For instance, the burning of a forest may constitute the basis for the crime of destruction of property not justified by military necessity—which, under articles 8(2)(a)(iv) and 8(2)(e)(xii), respectively, is a war crime in both an international armed conflict and a noninternational armed conflict.

Moreover, the consequences of the destruction of the natural environment—in contrast to the destruction itself—may constitute one or more of the material elements of a crime. When crimes such as murder, serious injury, or displacement of civilians are committed by means of environmental destruction, the underlying acts of environmental destruction become prosecutable under various provisions of the Rome Statute (Weinstein 2005). For instance, in the context of ethnic cleansing, combatants often destroy a village's fields, cattle, essential food sources, or water supplies to cause a mass exodus of inhabitants. Under article 7(1)(d) of the Rome Statute, the destruction of those essential resources might constitute a crime against humanity—namely, deportation or forcible transfer of population.

Under both of these scenarios, the environment is not the intended protected value of the cited provisions—but the protected values, such as the lives of noncombatants, are directly affected by the destruction of the environment. From a prosecutorial perspective, it is immaterial that the provision invoked for criminal prosecution is not labeled as the protection of the natural environment. The important point is that any acts that achieve a certain result are deemed criminal and thus prosecutable. Moreover, the impact of prosecutions of such conduct can act as a deterrent, preventing future crimes of environmental destruction.

Which clause of the Rome Statute is invoked to address acts of environmental destruction depends heavily on the circumstances. In the case of international conflicts, prosecutable acts of environmental destruction can fall under the scope of various war crimes under article 8(2),[86] such as destroying civilian property

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of these terms. In that context, "widespread" encompasses an area on the scale of several hundred square kilometers; "long-lasting" refers to a period lasting for months, or approximately a season; and "severe" involves serious or significant disruption or harm to human life, natural and economic resources, or other assets.

[86] For each crime, the contextual requirements under articles 8(2)(a) or 8(2)(b) must be established (ICC 2011).

not justified by military necessity;[87] intentionally directing attacks against civilian objects that are not military objectives;[88] disproportionate damage to civilian objects;[89] employing poisonous gases and similar liquids, materials, or devices;[90] pillaging a town or place, especially when natural resources are involved;[91] and cutting off civilian access to essential resources, like food, as a tactic of war.[92]

While there is comparatively less international law governing noninternational armed conflict,[93] the Rome Statute bases ICC jurisdiction in this context on the Geneva Convention's universal humanitarian values. In the case of noninternational armed conflict, the following provisions of the Rome Statute could be invoked to prosecute environmentally destructive acts as war crimes:[94] committing violence to life and person, including murder of all kinds, mutilation, cruel treatment, and torture;[95] ordering the displacement of a civilian population for any reasons related to the conflict, except as civilian security or military imperatives demand;[96] destroying the property of an adversary unless required by the necessity of the conflict;[97] and engaging in pillage involving natural resources.[98] Where pillaged natural resources are used to finance armed conflict, the crime of pillage in both international and noninternational armed conflicts is important from environmental, humanitarian, and security perspectives (Stewart 2011; Radics and Bruch 2015).

Crimes against humanity—enumerated in article 7 of the Rome Statute—committed in both international and noninternational conflicts are subject to adjudication by the ICC. Although article 7 provides fewer obvious connections to environmental destruction, the crimes of murder,[99] forcible deportation,[100] and persecution,[101] among others, could be invoked to address environmentally destructive acts knowingly committed as part of a widespread or systematic attack directed against a civilian population.

Finally, acts of environmental destruction committed with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group are punishable as genocide crimes under article 6 of the Rome Statute. These crimes

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87 Article 8(2)(a)(iv).
88 Article 8(2)(b)(ii).
89 Article 8(2)(b)(iv).
90 Articles 8(2)(b)(xvii), (xviii).
91 Article 8(2)(b)(xvi).
92 Article 8(2)(b)(xxv).
93 The drafters of the Rome Statute were careful to distinguish sporadic acts of violence from armed conflicts.
94 For each crime, the contextual requirements under articles 8(2)(c) or 8(2)(e) must be established (ICC 2011).
95 Article 8(2)(c)(i).
96 Article 8(2)(e)(viii).
97 Article 8(2)(e)(xii).
98 Article 8(2)(e)(v).
99 Article 7(1)(a).
100 Article 7(1)(d).
101 Article 7(1)(h).

include killing members of the targeted group;[102] causing serious bodily or mental harm to members of that group;[103] or deliberately inflicting, on that group, conditions of life calculated to bring about its physical destruction in whole or in part.[104]

ICC case against Omar al Bashir

In July 2008, the Office of the Prosecutor of the International Criminal Court requested an arrest warrant against Omar Al Bashir, the president of Sudan, charging him with genocide under article 6(c) of the Rome Statute, as well as other violations under articles 7 and 8. Later that year, Sudan sent the UN a statement declaring that its signature to the Rome Statute had no binding legal effect, so prosecution proceeded without Sudanese cooperation.[105]

The genocide allegation stated that Al Bashir was responsible for deliberately inflicting conditions of life calculated to bring about the physical destruction of the Fur, Masalit, and Zaghawa ethnic groups. To support the charge, the prosecutor cited several incidents in which the Sudanese government had deliberately damaged the environment where these three Darfuri ethnic groups lived: "Militia/Janjaweed and the Armed Forces repeatedly destroyed, polluted or poisoned these wells so as to deprive the villagers of water needed for survival. In a number of cases, water installations were bombed."[106] As evidence of specific intent, the prosecutor highlighted Sudan's hostile desert environment and the difficulty of surviving outside of a community or without access to water—conditions faced by the Fur, Masalit, and Zaghawa victims.

In their decision on whether to issue the warrant, the majority of judges of the ICC Pre-Trial Chamber dismissed the genocide charges, which the prosecutors had linked to the destruction of water resources.[107] They reasoned that ethnic cleansing and genocide were distinct practices, and that because they forced members of the ethnic groups in question to move, the alleged actions more closely resembled persecutory intent than genocide. In addressing the attacks on resources in the crimes against humanity section of the decision, the majority also noted that "[a]lthough there are reasonable grounds to believe that [government of Sudan] forces at times contaminated the wells and water pumps of the towns and villages primarily inhabited by members of the Fur, Masalit

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[102] Article 6(a).
[103] Article 6(b).
[104] Article 6(c).
[105] *Situation in Darfur, The Sudan*. Decision on the prosecutor's request for a finding of non-compliance against the Republic of the Sudan. ICC-02/05-01/09. Mar. 9, 2015. www.icc-cpi.int/iccdocs/doc/doc1919142.pdf.
[106] *Situation in Darfur, The Sudan*. Public redacted version of the prosecutor's application under article 58. ICC-02/05-157-AnxA. July 14, 2008. para. 176. www.icc-cpi.int/iccdocs/doc/doc559999.pdf.
[107] *Prosecutor v. Omar Al Bashir*. Decision on the prosecution's application for a warrant of arrest against Omar Hassan Ahmad Al Bashir. ICC-02/05-01/09-3. March 4, 2009. www.icc-cpi.int/iccdocs/doc/doc639096.pdf.

and Zaghawa groups that they attacked, there are no reasonable grounds to believe that such a contamination was a core feature of their attacks"; this view was held, in part, because the areas were sufficiently habitable for resettlement by other tribes.[108]

In a dissenting opinion regarding the genocide charge, Judge Anita Ušacka stated that the prosecution's allegation "must be analysed in the context of Darfur's harsh terrain, in which water and food sources are naturally scarce, and shelter is of utmost importance."[109] Judge Ušacka found that the "widespread destruction of water sources" and the destruction of shelter demonstrated that the targeted groups' "means of survival were systematically destroyed."[110] She concluded that "there are reasonable grounds to believe that member[s] of the 'African tribes'[111] were subjected to conditions calculated to bring about the destruction of the group."[112]

The prosecutor appealed the decision not to charge Al Bashir with genocide, arguing that the standard of proof required by the Pre-Trial Chamber was too demanding at the arrest warrant stage. The ICC Appeals Chamber ordered a new ruling on the claim, agreeing that an erroneous standard of proof had been used.[113] In July 2010, a new warrant was issued for Al Bashir's arrest, which included the genocide charges (ICC 2010). As of 2015, Al Bashir was still president of Sudan, and has not appeared before the court.

The case brought against Al Bashir demonstrates the potential application of the Rome Statute to the prosecution of wartime environmental crimes in the context of genocide. It also established a precedent for linking the knowing destruction of natural resources, where there is intent to deprive an ethnic group of its means to survive, with genocide.

Using the Rome Statute in national courts to prosecute acts destroying the natural environment

The deterrent impact of the ICC is limited by the stated prosecutorial policy of focusing investigations and prosecutions on persons bearing the greatest

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[108] *Prosecutor v. Omar Al Bashir*, para. 93.

[109] *Prosecutor v. Omar Al Bashir*. Separate and partly dissenting opinion of Judge Anita Ušacka. ICC-02/05-01/09-03. para. 98. www.icc-cpi.int/iccdocs/doc/doc 639096.pdf.

[110] *Prosecutor v. Omar Al Bashir*. Opinion of Judge Ušacka, para. 99.

[111] "Various pieces of evidence presented by the Prosecution suggest that these populations are perceived and targeted as a unitary—though diverse—entity of 'African tribes', even though neither the perceived entity nor the Fur, Masalit or Zaghawa are, in fact, racially distinct from the perceived 'Arab' tribes." *Prosecutor v. Omar Al Bashir*, opinion of Judge Ušacka, para. 27.

[112] *Prosecutor v. Omar Al Bashir*. Opinion of Judge Ušacka, para. 102.

[113] *Prosecutor v. Omar Hassan Ahmad Al Bashir*. Judgment on the appeal of the prosecutor against the "Decision on the prosecution's application for a warrant of arrest against Omar Hassan Ahmad Al Bashir." ICC-02/05-01/09-OA. www.icc-cpi.int/iccdocs/doc/doc817795.pdf.

responsibility for the most serious crimes within the ICC's jurisdiction (ICC 2003a, 2012). This may create an impunity gap, allowing persons responsible for the destruction of the natural environment during armed conflict to escape prosecution. To ensure that such acts do not go unpunished, individual states that are parties to the treaty have a responsibility to investigate and prosecute such crimes domestically. The Rome Statute articulates the principle of complementarity, whereby national authorities have primary responsibility for preventing and punishing atrocities within their own jurisdiction (ICC 2006a).

In adopting the Rome Statute, the ratifying states expressed their determination to punish the perpetrators of the crimes in question. Moreover, the statute reaffirms the duty of every state party to take action to end impunity for such crimes by exercising criminal jurisdiction over those responsible for international crimes,[114] and by enhancing international cooperation to punish perpetrators of such crimes.[115] These duties apply to all crimes within the jurisdiction of the ICC, including environmental damage crimes (article 8(2)(b)(iv)) and any other crimes committed through the destruction of the natural environment.

State parties that have incorporated the Rome Statute into their national legislation may prosecute acts of the destruction of the natural environment falling within their jurisdiction as war crimes, crimes against humanity, or genocide, provided that these acts can be linked to the contextual elements of the crimes in question. In addition, even if state parties do not have specialized war crimes legislation, they may use their domestic criminal laws to prosecute acts of environmental destruction. National legal systems are often better equipped than the Rome Statute to directly address acts of destruction of the natural environment, especially when their statutes attach criminal penalties to acts that occur in the context of conflicts.

Criminal prosecution in the ICC for exploitation of conflict resources

The ICC can play an important role in the global fight against impunity for persons fuelling international war crimes through the illegal extraction and trade of conflict resources.[116] Under the Rome Statute, persons financing armed groups through the illegal exploitation of natural resources may be held criminally liable for crimes committed by armed groups in a few ways. First, article 25(3)(c) provides that persons who assist in the commission of listed crimes, including

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[114] Rome Statute, preamble, paras. 4 and 6.

[115] Rome Statute, preamble, para. 4. The Appeals Chamber of the ICC confirmed that "the Statute strikes a balance between safeguarding the primacy of domestic proceedings vis-à-vis the International Criminal Court on the one hand, and the goal of the Rome Statute to 'put an end to impunity' on the other hand." *Prosecutor v. Katanga et al.*, ICC-01/04-01/07-1497, September 25, 2009, para. 85.

[116] References in this chapter to activities intended to finance armed groups are limited to activities that are in violation of international or domestic legislation.

those who provide the means for the crime's commission, are criminally responsible as aiders and abettors.[117] Second, those financing armed groups through the illegal exploitation of resources may be held responsible for jointly committing or contributing to the commission of pillage under articles 25(3)(a) or 25(3)(d).[118]

In 2003, in the context of discussing the conflict in the DRC, Luis Moreno-Ocampo—the ICC prosecutor at the time—acknowledged the possibility of an expanded ICC role in addressing conflict resources. Affirming the "general concern that the atrocities allegedly committed in [the DRC] may be fuelled by the exploitation of natural resources," Moreno-Ocampo stated that "investigation of the financial aspects of the alleged atrocities will be crucial to prevent future crimes and for the prosecution of crimes already committed" (ICC 2003b). He further announced that "the Office of the Prosecutor will work together with national investigators and prosecutors in order to determine the contribution, if any, that . . . businesses are making to the commission of the crimes in the DRC" (ICC 2003c).

The ICC may contribute to fighting impunity for crimes related to conflict resources in two ways: first, by prosecuting cases that fall within its jurisdiction; and second, by supporting national proceedings. Moreno-Ocampo identified both options as strategic priorities. In September 2008, he announced the launch of a third investigation in the DRC, focusing on crimes committed in the Kivu provinces (ICC 2009a). The UN Group of Experts on the DRC had reported that various armed groups were funded through the illegal exploitation and sale of natural resources (UNSC 2008). Moreno-Ocampo asserted that "the mandate of the ICC is to go up . . . the chain of command to those most responsible, to those who ordered *and financed* the violence" occurring in the Kivu provinces (Moreno-Ocampo 2009, 9; ICC 2009b, para. 14; emphasis added). Moreover, he considered directing part of the investigation toward "a case [against] high officials having financed and organized militia[s] in the DRC" (Moreno-Ocampo 2007, 3).

Under the Rome Statute, persons financing armed groups through the illegal exploitation of natural resources may be held responsible for crimes committed by the armed groups under various forms of liability. A direct form of liability could be found by applying article 8(2)(a)(iv), which makes illegal any appropriation not justified by military necessity. James G. Stewart argues that "a literal interpretation of the ICC Elements of Crimes supports [the] reasoning" that "[t]he term 'appropriate' also includes indirect appropriation from an intermediary by purchasing stolen property" (Stewart 2011, para. 44). Applying this interpretation would make the purchase of the stolen property a war crime in itself, and not merely aiding and abetting.

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[117] This provision could be applied to the illegal appropriation by an armed group of the natural resources belonging to the state.

[118] The Rome Statute provisions covering pillage are articles 8(2)(b)(xvi) and 8(2)(d)(v).

Accessory liability does provide an important means of imposing liability on buyers purchasing pillaged natural resources. Under article 25(3)(b), individuals may be held responsible for contributing to a crime perpetrated by others by ordering, soliciting, or inducing that crime. Article 25(3)(d) expands individual liability by rendering illegal any contribution to a crime as long as the defendants are proven to have acted with either the intention of furthering the criminal purposes of the combatants, or with the knowledge that the group they were supporting intended to commit crimes. Article 25(3)(c) of the Rome Statute explicitly assigns criminal responsibility for aiding and abetting crimes, prohibiting activities "providing the means for . . . [the] commission" of crimes, which includes the financial support that makes crimes possible. As the liability structure is aimed at natural persons, corporations purchasing conflict resources presumably would not face prosecution.

Using the Rome Statute to prosecute conflict resource crimes before national criminal courts

Since the ICC focuses on prosecuting perpetrators with the greatest culpability, the Office of the Prosecutor (OTP) has committed to encouraging and supporting national prosecutions for other less serious or less direct contributions to war crimes (ICC 2003a, 2006a). Indeed, the OTP asserts that national courts are better placed to prosecute offenders for all but the most serious offenses (ICC 2009c, 2012).[119]

Although advocates have so far faced difficulties in persuading prosecutors that the ICC is the appropriate venue for prosecuting crimes related to conflict resources, the OTP is supportive of, and is taking measures to improve, domestic prosecution. The OTP intends to create a reciprocal sharing of information gathered in the course of investigations (with certain caveats) and to assist national authorities in fulfilling their responsibilities to investigate and prosecute crimes under the Rome Statute (Moreno-Ocampo 2007; ICC 2009c, 2012). Effective prosecution at the national level would reduce the impunity gap for persons responsible for these crimes, in spite of the limited reach of international prosecutions (Jallow 2010; ICC 2009b, 2012; Bensouda 2009).

To promote a coordinated approach with national authorities, the OTP plans to strengthen the Law Enforcement Network (LEN), which comprises national law enforcement agencies and other specialized organizations and institutions (ICC 2009b, 2012). The LEN supports the investigation and prosecution of crimes through (1) information sharing; (2) legal, technical, and operational assistance in support of investigative and prosecutorial activities; and (3) training (ICC 2009a).

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[119] The complementarity rule compelled Great Britain to try British soldiers for war crimes that they had allegedly committed during their deployment to Iraq (Stewart 2011).

Conclusions regarding the ICC

The ICC has the potential to be an important means of holding people accountable for wartime environmental damage and exploitation of conflict resources. So far, however, this potential has yet to be realized: no case has addressed article 8(2)(a)(vi), the environmental damage provision; nor has the ICC appeared to be sympathetic to cases related to environmental destruction. The initial judgment regarding the genocide charges in the Al Bashir case, which were linked to the destruction of wells, appeared to downplay the extent to which people's lives—a value protected by the Rome Statute—depend on water. Although the dissent explicitly countered this view, and the charges were reinstituted on appeal, the failure of this connection to sway the majority in the first case suggests that a particularly strong showing by prosecutors might be required to render the court receptive to connecting environmental harms to Rome Statute crimes.

By contrast, the pillage provision has been invoked frequently,[120] although criminal liability has so far been limited to those charged with other crimes that had more serious impacts on human life.[121] This pattern reflects a broader trend: over the years, the prosecutor has made many statements about investigating revenue streams that fund war crimes and charging the responsible parties; since those statements were made, however, entry into this area has taken a back seat to charging, prosecuting, and punishing those who perpetrate more direct harms on people.

In the face of limited prosecutorial resources, the ICC has consistently emphasized the role of national bodies in enforcing the Rome Statute and national laws penalizing war crimes. To the extent that the ICC is likely to address environmental crimes associated with armed conflict, it seems likely to focus on a narrow set of circumstances: (1) where the violations directly and clearly harm human life, a value protected by the Rome Statute; and (2) where environment-related harms can be added to a laundry list of crimes undertaken by a perpetrator who already faces more serious crimes. Accordingly, national courts may be the best option for prosecuting environmental wrongs arising during armed conflict.

Ad hoc tribunals

In international criminal law, ad hoc tribunals are adjudicatory bodies created to prosecute international humanitarian crimes linked to specific conflicts. The Nuremburg Trials and the IMTFE were early examples.

After the lull in international criminal prosecutions following World War II, conflicts in the 1990s led the UN to establish several conflict-specific

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[120] See, for example, ICC n.d.a, n.d.c., n.d.d., and n.d.e.

[121] As of November 1, 2013, all of the defendants charged by the ICC with pillage also faced other international crimes.

international tribunals. The first was the International Criminal Tribunal for the former Yugoslavia, created in 1993 (ICTY n.d.a.). Shortly thereafter, the Security Council created the International Criminal Tribunal for Rwanda (ICTR n.d.). And in 2002, the United Nations established the Special Court for Sierra Leone (SCSL n.d.).

Although these tribunals are conflict specific, their governing statutes are similar to the Rome Statute; as a result, the role of the environment in cases before these tribunals is similar to that seen in the ICC. However, the local context of these tribunals can affect the relevance of the two main environmental harms seen during war: environmental destruction and conflict resource exploitation. The next two subsections discuss how ad hoc tribunals—namely, the Special Court for Sierra Leone and the International Court for the former Yugoslavia—considered the illegal exploitation of conflict resources and the deliberate environmental damage caused by pillaging and warfare as part of the legal bases for international war crimes.

Special Court for Sierra Leone

The Special Court for Sierra Leone (SCSL) was created by the UN in an agreement with the government of Sierra Leone following the end of the civil war between the government and the RUF.[122] It is unusual in that it is located in the country where the crimes occurred.[123] Exploitation of conflict diamonds played a substantial role in Sierra Leone's civil war (Kawamoto 2012). Cases before the SCSL provide important examples of UN ad hoc tribunal approaches to wartime environmental harms from the illegal exploitation of natural resources.

Conflict resources played a central role in the commission of the crimes in question in *Prosecutor v. Sesay et al*.–commonly known as the "RUF case." The SCSL prosecutor charged five former RUF leaders with eighteen counts of war crimes, crimes against humanity, and serious violations of international humanitarian law.[124] The charges claimed that the five had committed these crimes by participating in a joint criminal enterprise to "take power and control of the territory of Sierra Leone, including the diamond mining areas."[125] Article 6 of the SCSL Statute assigns individual criminal responsibility to all persons who "planned, instigated, ordered, committed or otherwise aided and abetted in the

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[122] UN Security Council, Statute of the Special Court for Sierra Leone, January 16, 2002. www.refworld.org/docid/3dda29f94.html.

[123] The Khmer Rouge Tribunal—formally, the Extraordinary Chambers in the Courts of Cambodia—is another ad hoc tribunal located in the country where the crimes took place. The ICTY is located in the Netherlands, and the ICTR is in Tanzania, with its appeals chamber in the Netherlands.

[124] The leaders charged were Foday Saybana Sankoh, Sam Bockarie, Issa Hassan Sesay, Morris Kallon, and Augustine Gbao. *Prosecutor v. Sesay, Kallon, and Gbao*. Judgment, Case No. SCSL-04-15-T-1234, March 2, 2009.

[125] *Prosecutor v. Sesay, Kallon, and Gbao*, Judgment, para. 1977.

planning, preparation or execution of a crime," and the prosecutors based their charges on the actions of both the defendants and those they commanded.

The prosecution dropped the charges against Foday Saybana Sankoh and Sam Bockarie when they died, but proceedings continued against Sesay, Kallon, and Gbao. On March 2, 2009, having concluded that Sesay, Kallon, and Gbao shared a joint criminal enterprise and significantly contributed to the crimes that were committed in pursuit of that enterprise, the trial chamber convicted the three remaining defendants.[126] The court also found the defendants guilty of enslavement and terrorism for having forced hundreds of civilians to mine diamonds for the RUF, under threat of death from armed combatants stationed at the mines. (Many civilian miners were killed indiscriminately at or around the mining sites.) Finally, the court noted that looting had been a widespread and systematic feature of the RUF operations; for example, under "Operation Pay Yourself," RUF soldiers were authorized to loot indiscriminately.[127] The looting and diamond mining exposed clear links between natural resource mismanagement and the armed conflict, and the court judged responsibility for the crimes to lie with the leadership.

In separate hearings, the SCSL charged Charles Taylor, then the president of Liberia, with eleven counts of war crimes, crimes against humanity, and other serious violations of international humanitarian law, including pillage, for his role in Sierra Leone's civil war.[128] Taylor's prosecution is notable because he was not a leader of any combatant groups in Sierra Leone; indeed, his defense relied heavily on this fact, claiming that the vast resources of his native Liberia made it unnecessary to participate in pillaging Sierra Leone.

The Taylor case has several elements in common with other international criminal cases explored in this chapter. Although the Geneva Conventions state that the definition of pillage includes both public and private property, the pillage charges before the SCSL were limited to property owned by civilians. A central part of the prosecutor's case alleged that Taylor's crimes, including actions undertaken in conjunction with former RUF leaders, were motivated by the goal of acquiring Sierra Leone's diamonds and other mineral wealth. The prosecutor highlighted Taylor's close collaboration with former RUF leaders who had been convicted on charges of pillage in the RUF Case.[129]

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[126] Sesay was found guilty for, among other things, his engagement in and planning of diamond mining; Kallon was found guilty for his personal engagement in the forced labor at the diamond-mining sites; and Gbao was found guilty for his role as ideology trainer for the RUF fighters. *Prosecutor v. Sesay, Kallon, and Gbao*, Judgment.

[127] Ibid., para. 2071.

[128] *Prosecutor v. Charles Ghankay Taylor*. Judgment, May 18, 2012. Case No. SCSL-03-01-T-1283. These charges only cover crimes occurring in Sierra Leone.

[129] *Prosecutor v. Charles Ghankay Taylor*. Indictment, Special Court for Sierra Leone, Case No. SCSL-03-01, para. 20 (Mar. 3, 2003) ("To obtain access to the mineral wealth of the Republic of Sierra Leone, in particular the diamond wealth of Sierra Leone, and to destabilize the State, the ACCUSED provided financial support, military

While the trial chamber did not agree with the prosecutor's assertion that Taylor's motive was to create a joint criminal enterprise with the RUF for the purpose of acquiring diamonds, the trial chamber found Taylor guilty on all eleven counts of war crimes and crimes against humanity, and imposed a fifty-year sentence.[130] The SCSL appeals chamber unanimously affirmed Taylor's conviction on all eleven counts and affirmed the sentence.[131] Taylor was the first head of state to be convicted of war crimes since the Nuremberg trials (SCSL 2013).

Taylor's conviction is an important international precedent for punishing those "who facilitate atrocities" (AP 2013), in particular because of his position as the head of state of another country, and consequent apparent separation from the conflict. Taylor's heavy involvement in Liberia's conflicts did not preclude his active role in Sierra Leone's conflict—indeed, it underscores the fact that his links to crimes committed in Sierra Leone are more attenuated than if he had been a formal member of the RUF's upper echelon. Charles Taylor was not a combatant in Sierra Leone, but he did provide weapons and tools to the RUF for the purpose of committing crimes against civilians, and he did so in exchange for natural resources and other materials stolen from Sierra Leoneans. Natural resource exploitation plays a large role in war profiteering, and the successful application of the aiding-and-abetting liabilities present in the SCSL Statute (and the Rome Statute) to the case of Charles Taylor could deter others who might trade in conflict resources, including those who would act through deputies.

The *Prosecutor v. Sesay et al*. and *Prosecutor v. Taylor* cases are significant for future tribunals addressing conflict resources. The cases demonstrate that individuals who plan, order, or otherwise aid in pillage and related activities can be held criminally liable. The court struggled, however, to formulate a charge for exploiting natural resources during armed conflict. While the prosecutor perceived the role of diamonds in motivating and facilitating the crimes captured by the other charges, he did not take the next step and define the exploitation of conflict resources as pillage or some other war crime, crime against humanity, or serious violation of international humanitarian law. Notably, however, the prosecutor did seek to use other avenues to prosecute actions related to conflict resources, including charging the former RUF leaders with enslavement and terrorism (resulting in successful convictions in the RUF Case) and arguing that

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training, personnel, arms, ammunition and other support and encouragement to the RUF. . . ."). See also para. 23 ("The RUF and the AFRC shared a common plan, purpose or design [joint criminal enterprise] which was to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas. The natural resources of Sierra Leone, in particular the diamonds, were to be provided to persons outside Sierra Leone in return for assistance in carrying out the joint criminal enterprise").

130 *Prosecutor v. Charles Ghankay Taylor*, Judgment.

131 *Prosecutor v. Charles Ghankay Taylor*. Judgment in the Appeals Chamber, Case No. SCSL-03-01-A. Disposition, September 26, 2013.

conflict resources served to motivate the joint criminal enterprise in which Taylor was engaged.

Some factors temper the optimism regarding the deterrent effect of the SCSL decisions. First, the SCSL was created only to deal with the aftermath of one conflict: the RUF rebellion and civil war. Despite the fact that the Rome Statute includes the same statutory language, an ICC judgment in this case might have come out differently. Moreover, Taylor's provision of weapons to the RUF is a stronger connection to the crimes committed (with those weapons) than the purchase of pillaged commodities. Someone who exclusively provides financial support might be more insulated from prosecution, particularly given the limited resources that are often available to prosecutors.

International Criminal Tribunal for the former Yugoslavia

The statute governing the International Criminal Tribunal for the former Yugoslavia (ICTY) includes the same basic crimes and follows the same basic structure as the SCSL and the Rome Statute, differentiating between crimes of war, genocide, and crimes against humanity (ICTY n.d.a.). In the 1990s, political and economic turmoil contributed to ethnic conflict among the six constituent republics of Yugoslavia and the weakening of central government control (ICTY n.d.b.). Like other tribunals in the UN and ICC systems, the ICTY considered environmental damage primarily in the context of pillage.

Environmental damage did play a small role in the investigation of potential war criminals, although it ultimately fell outside the scope of most prosecutions. The committee established by the prosecutor to investigate NATO's 1999 bombing campaign in the Balkans examined the environmental impacts and recommended that no further investigation was needed (ICTY 2000). The ICTY governing statute includes crimes based on Additional Protocol I of the Geneva Conventions, and the committee determined that the environmental impacts of the bombings (in particular, the release of pollutants from destroyed installations) did not meet the threshold of article 35(3) of Additional Protocol I, which prohibits "widespread, long-term and severe" environmental damage during armed conflict. One of the factors complicating the ability of the committee to perceive environmental damages caused by the bombings were hot spots of environmental damage that predated the conflict.

In the cases before the ICTY that structured pillage charges around the misappropriation of natural resources, the resources were conceptualized as property rather than as natural resources per se. For example, Tihofil Blaškić, an officer of the Croatian Defense Council, was sentenced to nine years in prison for, among other things, ordering, planning, instigating, or aiding and abetting in the planning, preparation, or execution of the systematic and wanton destruction of livestock.[132] Naser Orić, an officer in the Srebrenica Potocari Territorial

[132] *Prosecutor v. Tihomir Blaškić*. Statement of the trial chamber at the judgment hearing. IT-95-14. March 3, 2000. www.icty.org/x/cases/blaskic/tjug/en/000303_summary_en.pdf.

Defence Headquarters, was acquitted of plundering cattle and other property due to a lack of evidence.[133]

While it did not address environmental destruction and conflict resources to the extent that the SCSL did, the ICTY did consider such issues, and in doing so highlighted a particular challenge in bringing environmental damage charges. Preexisting environmental damage is common, and it can confound efforts to assess the environmental impacts of conflict. As a result, it can be difficult to show that a given situation meets the criteria for environmental destruction ("widespread, long-term, and severe") required to bring charges under the Rome Statute.

Lessons from the pillage cases

Two important conclusions can be drawn from the pillage cases. First, looting and pillaging of natural resources, such as diamonds, are not only punishable but are war crimes. Second, individuals who "planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime of pillage" can be held individually responsible for these crimes. These findings have far-reaching consequences, as they demonstrate that high-level officials and external private sector actors who may have supported, supervised, or gained from pillage can be held individually criminally responsible despite not having physically committed the crime.

The fact that the SCSL prosecution did not charge the former RUF leaders with illegal natural resource exploitation, and the omission of natural resources from President Taylor's charge of pillage highlight the continuing ambiguity—and perhaps a measure if discomfort—surrounding the prosecution of natural resource-related charges in international criminal tribunals. Instead of pursuing charges directly related to natural resource crimes, the prosecutor argued that natural resources motivated the joint criminal enterprise in which Taylor engaged, and charged the former RUF leaders with the more traditional crimes of enslavement and terrorism. This ambiguity may help explain why the crimes of misappropriation tried under the ICTY were characterized as crimes involving property rather that natural resources.

Regional and national courts

Given the ICC's limited resources and the inherently focused nature of ad hoc tribunals, prosecution of international crimes relating to armed conflict and the environment falls largely on regional and national courts. Many countries are already well equipped to prosecute such crimes. Although the Rome Statute and the controlling statutes of UN ad hoc tribunals are limited to individual criminal liability, the regimes of other jurisdictions are often more comprehensive and able to address corporate violators. Many national jurisdictions assign criminal

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[133] *Prosecutor v. Naser Oric*. Judgment summary. IT-03-68. June 30, 2006. www.icty.org/x/cases/oric/tjug/en/060630_Oric_summary_en.pdf.

liability to both natural persons (individuals) and legal persons (such as companies) for their involvement in a crime (Stessens 1994). Moreover, criminal codes in many countries include provisions that penalize acts of assistance to criminal organizations, racketeering, money laundering, financing of terrorist organizations, or other acts that harm people and the environment and support armed groups in conflict zones.

In addition to a country's domestic criminal codes, ratified international treaties provide an additional basis for prosecuting acts of support to armed groups in conflict zones. For example, national legislation and courts can enforce embargoes and sanctions imposed by the Security Council, pursuant to chapter VII of the UN Charter, particularly to prevent and punish trade in conflict resources. Security Council sanctions appear to be well implemented in the criminal legislation of many jurisdictions in the European Union, as well as in Australia, Canada, and the United States, leading to precedent-setting cases on conflict resources. Additionally, national and regional courts have significantly more flexibility to address environmental destruction and conflict resource exploitation where environmental preservation per se is the protected value of the controlling statutes.

This section examines criminal cases from the European Union, the Netherlands, Belgium, and Switzerland. While some cases are initiated by prosecutors, a growing number have been initiated by nongovernmental organizations. The section concludes with a brief consideration of the lessons of regional and national prosecution.

European Union: Leonid Minin v. Commission of the European Communities

The Court of Justice of the European Union (CJEU) hears cases at the trial court level (the General Court) and the appellate level (the European Court of Justice, or ECJ) (CJEU n.d.).[134] The CJEU adjudicates cases governed by the treaties to which its members are signatories and by EU legislation. Article 21(2)(c) of the EU Treaty defines one of the objectives of EU foreign policy as preserving peace and maintaining international security, an objective that arguably includes efforts to address conflict resources. EU regulations promulgated to stem the flow of conflict resources have been the basis for punishing individuals.[135]

The CJEU was the forum in which war profiteer Leonid Minin—a man whose profiteering was so prolific that his life became the basis for the Hollywood film *Lord of War*—challenged one of the EU regulations (Potter 2011). The rule, adopted by the Commission of the European Communities, had its origins in UN

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[134] An additional court, the Civil Service Tribunal, adjudicates disputes between the EU and its staff.

[135] Treaty on the European Union. 1992. Consolidated version. OJ C 326, 26.10.2012. http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012M/TXT.

Security Council Resolution 788, which imposed sanctions on Liberia.[136] The sanctions were reviewed as hostilities diminished—but in 2001, Liberia's role in other conflicts in the region led the Security Council to charge member states with maintaining the sanctions. The UN identified the associates of Liberia's then-president, Charles Taylor, as a particular threat to regional stability.

In 2000, while the sanctions were in place, Italian authorities arrested Minin on an arms-trafficking charge. Despite having been in possession of documents detailing his involvement in arms trafficking in Liberia, Minin was acquitted, owing to Italy's lack of jurisdiction.

Minin's company, Exotic Tropical Timber Enterprises, imported logs and timber products from Liberia. In Security Council Resolution 1532, passed in 2004, it was listed as one of Taylor's main financial backers. The resolution sought to cut off support to Taylor by freezing his bank accounts and those of his associates. To implement the resolution, the Commission of the European Communities adopted European Community (EC) Regulation 872/2004, which mandates the freezing of bank accounts in the EU.[137] Because the Security Council had listed him as a known associate of Taylor's, Minin was named in the annex to this law.

Minin filed suit in the CJEU challenging the regulation, arguing that the power to adopt rules concerning property ownership belonged only to member states, not to the EC. He further pleaded that, because of the extraterritorial nature of the regulation, his fundamental rights had been breached. He initially sought nullification of the regulation, but ultimately pursued the removal of his name from the list of those whose assets were required to be frozen.

In its decision, the court held that the regulation promulgated by the EC was lawful.[138] The court further held that the EC is competent—and indeed compelled by articles 60, 301, and 308 of the EU Treaty—to adopt measures enforcing Security Council sanctions and to otherwise fulfill obligations under the UN Charter, even if those measures directly affect individuals. Reiterating the appropriateness of the sanctions against Liberia and Charles Taylor, the court ruled that the validity of the regulation and the power of the EC to affect property rights precluded any claim that member states possessed this power exclusively. The principle of subsidiarity—which holds that decisions should be made at the lowest possible level, and is a guiding principle of the EU—favored the EC in this case.

With regard to Minin's second argument—the breach of Minin's fundamental rights—the court split its findings into two parts. The CJEU determined that since

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[136] *Leonid Minin v. Commission of the European Communities*. Judgment of the Court of First Instance [Second Chamber], January 31, 2007, Case No. T-362/04 [2007] E.C.R. II-002003.

[137] The party to the case is the Commission of the European Communities. The body's current name is the European Commission.

[138] *Leonid Minin v. Commission of the European Communities*, Judgment.

international law is supreme in this case, Minin's plea must be rejected. Furthermore, even though Liberia is outside the jurisdiction of the EC, the bank accounts located in EU did fall under its jurisdiction.

As demonstrated by the initial attempts to charge Minin, national courts can lack the jurisdiction to deal with an international criminal enterprise, which indicated the need for a body with more expansive jurisdiction. Because of the international character of Minin's company (and his multiple passports), the court determined that the actions to freeze his assets were better realized by a regional body than by a national court.

Minin highlights the power of governmental and intergovernmental bodies to regulate the markets that make trafficking in conflict resources profitable. Eliminating the ability of Taylor's backers to trade with him appears to have had a substantial impact: by cutting off support from their European backers, the EC halted financing for Liberian armed groups, demonstrating the critical role of conflict resources in the continuation of conflict. Even so, these efforts did not completely isolate Taylor: Minin's resources were frozen in early 2004, but Taylor continued to trade in conflict resources well into that year.

Minin also affirms that decisions of the Security Council and its sanctions committee have supremacy over European law, and that the court cannot call such decisions into question. It also holds that the EC is competent to take measures facilitating the direct implementation of UN decisions, particularly sanctions, that bind both individuals and entities. Furthermore, in view of its foreign policy and pursuant to articles 60 and 301 of the EU Treaty, the EC can take action in relation to third countries if doing so will preserve peace and maintain international security. Incorporating UN decisions into EC regulations in such circumstances creates a deterrent that can help to diminish trade in conflict resources.

The most important lesson to be learned is that multiple jurisdictions and actions are needed to stem the flow of conflict resources, and more broadly to end impunity for war crimes. Attempting to prevent war crimes by cutting off a warlord's trading partners has an important role, but it is only one component in a complex system of international justice.

The Netherlands: The Guus Van Kouwenhoven case and the Trafigura case

National courts can also play a major role in enforcing international criminal law as it applies to natural resources and the environment during armed conflict. The Dutch case against Guus Van Kouwenhoven is an example of domestic criminal prosecution for illegal exploitation of natural resources. More notably, in this case, a citizen was prosecuted before a court of his country of citizenship for an alleged crime against the environment that occurred during armed conflict and was committed in another country.

Van Kouwenhoven is a Dutch national whose company, Oriental Timber Company (OTC), was identified by the UN as having provided logistical and financial support to Taylor's war efforts in Liberia and Sierra Leone (Trial Watch 2015). Taylor initially traded diamonds to buy weapons and fuel his war, but after a 1999 Security Council embargo on diamonds from Liberia and Sierra Leone,[139] he shifted to selling timber (Global Witness 2001). OTC and Van Kouwenhoven were suspected of having used revenues from the exploitation of Liberia's forests to organize arms deals with Taylor's regime, flouting both the UN Security Council arms embargo against Liberia and a Dutch embargo created to implement the Security Council sanctions. Dutch prosecutors charged Van Kouwenhoven with violating the embargoes and for having been involved in war crimes committed in Liberia by the militias financed by his purchase of conflict resources.

In a 2006 judgment, the Dutch court of first instance in The Hague found Van Kouwenhoven guilty of violating the weapons embargo but acquitted him of the war crimes charges.[140] He was sentenced to eight years in prison. Both the defense and the prosecution appealed the judgment. On March 10, 2008, the court of appeal acquitted Van Kouwenhoven of all charges, on the grounds of witness unreliability and lack of evidence.[141] Prosecutors appealed this acquittal to the Dutch supreme court, arguing that the appeals judges had improperly dismissed a request to hear from two key witnesses (Trial Watch 2015). On April 20, 2010, the supreme court overturned the court of appeal's decision, and referred the case back to the court of appeal for reconsideration (HJP 2010).

Although it was not directly related to a conflict, the Trafigura case offers another example of a Dutch court prosecuting an international environmental crime. In 2006, Trafigura, a multinational oil and metals trading company based in the Netherlands, chartered a vessel to transport oil products (Polgreen and Simons 2006). When the vessel attempted to transfer waste to Amsterdam Port Services (APS), APS found an abnormal smell coming from the material, and found that the waste was unusually polluted. After APS refused to take the waste, Trafigura transported the waste to Côte d'Ivoire, where waste disposal was much less costly than it would have been at a qualified hazardous waste disposal facility in the Netherlands. Ultimately, 500 tons of waste were dumped in residential areas of Abidjan, Côte d'Ivoire, allegedly resulting in the deaths of seventeen people and injuries to more than 30,000 (Jesse and Verschuuren 2011).

To avoid concerns about extraterritorial application of Dutch law, the Dutch court took a national approach, limiting the crimes before the court to what the

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[139] UNSC (1999).

[140] *The Public Prosecutor v. Van Kouwenhoven* (Neth.) HR 7, June 2006, NJ 2011, 576 m. nt. A.H. Klip.

[141] *Guus Kouwenhoven Case*, Judgment Court of Appeal in The Hague, Cause-list No. 22-004337-06, Public Prosecutor's Office No. 09-750001-05 (June 7, 2006), Judgment March 10, 2008.

corporation had done in the Netherlands and avoiding the consequences of the waste having been dumped in Côte d'Ivoire. Criminal and civil cases against Trafigura were also pursued in Côte d'Ivoire and in the United Kingdom, but the Dutch court's approach illustrates how a court can pursue partial justice: addressing wrongful actions that occurred within its boundaries while also refusing to hear claims related to actions that occurred outside the nation (Jesse and Verschuuren 2011).

Belgium: The Samih Ossaily and Aziz Nassour case

Belgian prosecutors charged Samih Ossaily and Aziz Nassour with numerous offenses under Belgian criminal law relating to smuggling diamonds out of Sierra Leone and illicit weapons into Liberia, in contravention of Security Council embargoes. In addition to trade embargo violations, they were charged with laundering the proceeds of their alleged crimes. According to the indictment, the accused, who maintained close relations with Charles Taylor, engaged in an arms-for-diamonds swap with RUF in Sierra Leone.

On December 6, 2004, the court in Antwerp convicted Nassour on eight counts and Ossaily on four counts of criminal offenses under Belgian law: money laundering, arms trafficking, dealing in conflict diamonds (worth more than US$80 million), and belonging to a criminal organization (UN 2006). Nassour and Ossaily received jail terms of six and three years, respectively, in the first criminal conviction in the world for violating a UN Security Council embargo on international trade in conflict diamonds (Nieuwsblad 2004).

France: The Dalhoff, Larsen and Horneman case

In 2009, environmental groups and a Liberian activist filed a complaint with the public prosecutor at a Nantes court against Dalhoff, Larsen and Horneman (DLH), a French timber company.[142] They asserted that DLH had engaged in the crime of *recel*, which is "the handling of and profiting from goods obtained illegally" (Global Witness 2009; Roberts 2009). The complainants alleged that DLH had continued to purchase Liberian timber despite compelling evidence of the following: (1) the timber was both illegal and environmentally destructive; (2) the timber trade was funding arms purchases, and was therefore in violation of a Security Council embargo; and (3) the arms were being used to commit human rights abuses (Global Witness 2009). The complainants further alleged that the timber purchased by DLH was harvested in violation of Liberian law and by companies that did not have a legal right to operate, and that proceeds from these transactions constituted significant funding for Taylor's campaign of violence in Liberia (Roberts 2009).

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[142] In France and many other civil law countries, private prosecutions differ from civil suits and are controlled by criminal laws.

While the possibility of private prosecution in domestic courts represents an additional opportunity to punish people and companies engaged in illegal trade in conflict resources, it has yet to be successful. The prosecutor's office in Nantes dismissed the case in 2013 (Global Witness 2014). In March 2014, the complainants sought to prosecute the case in Montpellier.

Switzerland: Investigation of Argor-Heraeus

The Swiss government has started a criminal investigation into Argor-Heraeus, one of the world's leading gold refineries (BBC 2013),[143] alleging that Argor-Heraeus had acquired gold pillaged from eastern DRC in 2004 and 2005—first by illegally imported it into Uganda, and then by importing it into Switzerland, where Argor-Heraeus refined it. A report by a UN group of experts examining the pillage of gold and other natural resources in eastern DRC had recommended sanctions against Argor-Heraeus (UNSC 2006), but Security Council sanctions were not imposed—reportedly due to pressure by Swiss diplomats (BBC 2013).

By focusing on the pillage aspect of the company's acquisition of gold from the DRC, this case adopts an approach that differs from that of other cases. Most national and regional cases regarding illegal trade in conflict resources have focused on violations of Security Council embargoes, rather than on the acquisition of stolen goods. Thus, the Swiss government's approach more closely resembles the approach taken in the ICC. The investigation was ongoing as of the writing of this chapter.

Lessons from prosecutions in regional and national courts

National and regional courts have an expanding role in addressing conflict resources, including enforcement of Security Council embargoes on trade in specific conflict resources, but they face jurisdictional issues and evidentiary burdens for crimes largely based outside their jurisdiction.

The Van Kouwenhoven, DLH, Ossaily and Nassour, and Argor-Heraeus cases represent important steps by the national judicial systems of four countries to end the impunity of trade in conflict resources, even though those countries were not directly affected by the conflicts in question. More profoundly, these cases demonstrate the role of national court systems in bringing the perpetrators of environmental crimes to justice—even when such crimes are committed in foreign countries.

Regional and national prosecutions complement ICC prosecutions. As noted earlier, limited prosecutorial resources lead the ICC to focus on those individuals who bear the greatest responsibility for international crimes within its jurisdiction. In many instances, national and regional courts are not able to prosecute

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[143] Like the DLH case, the Argor-Heraeus criminal investigation was initiated by a nongovernmental organization (BBC 2013).

those most responsible. In many cases, national courts have often been weakened by the conflict, and may lack the ability or credibility to offer a fair and impartial trial. Other countries often lack jurisdiction over crimes committed entirely within the boundaries of another country, or they may lack the political will to open their courts to prosecution of such crimes.

Conflict resources and pillage are closely linked, but trade in a specific conflict resource is often not illegal. Prosecutions tend to focus on the role of pillage in the extraction of a conflict resource—particularly on its illegality and the associated human rights violations.

CONCLUSION

The number of judicial bodies deciding cases involving conflict-related environmental destruction and illegal trade in conflict resources has grown dramatically in recent years, yielding a steadily expanding body of relevant institutions and case law. These judicial bodies include a wide range of institutions—from permanent international courts to ad hoc international courts, regional courts, national courts, and arbitral bodies adjudicating cases against countries, individuals (particularly military and political leaders), and corporations. In some instances, actions are limited to those brought by states and state representatives; others are initiated by individuals or nongovernmental organizations. In their judgments, the courts rely on a combination of international, regional, and national law, ranging from criminal law and international humanitarian law to human rights law, torts, and environmental law. Thus, the cases yield a combination of civil and criminal penalties.

In civil cases, international and national experience has proven that there are sufficient legal bases to award damages for wartime environmental wrongs. However, the dearth of precedents and the ambiguity of key definitions present ongoing barriers to effective compensation for environmental destruction.

In criminal cases, it is clear that wartime environmental crimes are punishable when linked to more traditional crimes, such as murder, enslavement, and forced displacement. However, prosecuting bodies continue to shy away from environmental bases for claims against the accused. Moreover, the limited resources of international criminal tribunals and the narrow definitions of crimes under the controlling statutes of these tribunals reinforce the ongoing need for national courts.

Work still remains to be done. The international community needs to build prosecutorial capacity to bring environment-related cases. Legal scholars, countries, and international institutions need to refine definitions and causes of action. Additionally, there need to be further exchanges between the various judicial bodies regarding their approaches, experiences, and lessons. Nevertheless, the past twenty-five years have seen promising growth in international recognition of the need to address environmental wartime wrongs. One case at a time, these measures have started to close the impunity gap for such wrongs.

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