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Regarding State owned resources, or in the alternative, resources in which the State has the primary or superior interest - would exploitation of such resources constitute pillage as that term is defined in international criminal law? And Would such conduct be a crime against humanity as it is a State owned resource, or a resource in which the State has the primary or superior interest?

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MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR
SPECIAL COURT FOR SIERRA LEONE

ISSUE#6: REGARDING STATE OWNED RESOURCES, OR IN THE ALTERNATIVE, RESOURCES IN WHICH THE STATE HAS THE PRIMARY OR SUPERIOR INTEREST - WOULD EXPLOITATION OF SUCH RESOURCES CONSTITUTE PILLAGE AS THAT TERM IS DEFINED IN INTERNATIONAL CRIMINAL LAW?

AND

WOULD SUCH CONDUCT BE A CRIME AGAINST HUMANITY AS IT IS A STATE OWNED RESOURCE, OR A RESOURCE IN WHICH THE STATE HAS THE PRIMARY OR SUPERIOR INTEREST?

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Fall Semester, 2008

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I. Introduction and Summary of Conclusions

A. Scope

This memorandum analyzes whether exploitation of state owned resources, or in the alternative resources in which the State has the primary or superior interest, would constitute pillage as that term is defined in international criminal law. This memorandum will then consider whether such exploitation is a crime against humanity because it is a State owned resource, or a resource in which the state has the primary or superior interest.

B. Summary of Conclusions

i. Under The 1907 Hague Regulations, an occupying army may seize and requisition strictly State-owned property but pillage is generally prohibited.

The 1907 Hague Regulations was one of the first documents to prohibit pillaging of towns. Under these Regulations, occupying armies could lawfully requisition and seize property and could take property that belonged strictly to the State. However, when performing these actions the occupying army had to operate under the rules of usufruct. They could use the assets of the State's resources only to pay for the occupation. They could not use the assets to wage a war.

ii. The Geneva Conventions and Additional Protocol II prohibit pillage without making a distinction between public and private property.

The Geneva Conventions and Additional Protocol II both prohibit pillage and apply the prohibition to non-international conflicts. Under the "Commentaries" the International Committee of the Red Cross noted that there was no distinction between public and private property. Under the Convention, property that was collectively owned by the citizens was protected from certain actions. This rule was a result of the actions of the German army during World War II.

iii. Under international tribunals, exploiters of State-owned property have been successfully tried and convicted for pillage.

The military tribunals in Nuremberg found, in the *I.G. Farben* case, that spoliation of factories owned by the state of Poland was a violation of the Hague Regulations' prohibition against pillage. This case in particular was against leading businessmen in Germany rather than German government or army officials.

iv. All tribunals use the terms "pillage," "plunder," spoliation," and "exploitation" interchangeably.

Every tribunal has used the terms "pillage," "plunder," "spoliation," and "exploitation" to be synonymous with each other. All could be grouped together as the unlawful misappropriation of property without the owner's consent.

v. Under international law, pillage is viewed as a violation of laws or customs of war and is generally tried in that manner. However, pillaging can be used as a method to carry out persecution, a crime against humanity.

According to the *I. G. Farben* case under the International Military Tribunals in Nuremberg, "[c]rimes against humanity are atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated." Because the nature of pillage is a crime against property, it does not, in and of itself, fall into the same categories that define crimes against humanity. Only as an aspect of persecution against persons based on race, religion, politics, etc., may it relate to crime against humanity.

II. Factual Background

The British High Commissioner to Sierra Leone, Peter Penfold, once observed:

> The tragedy of Sierra Leone is that her people are among the poorest in the world while the country is among the richest. The reasons for this are entirely man-made. Other countries in the world are poor because of natural disasters, few resources, unfertile territory, or bulging populations. Not so in Sierra Leone. God blessed this land with an abundance of resources. Just a relatively few people are responsible for the misery and hardship suffered by so many.[1]

The main driving force behind the '91–'00 civil war was control over State resources, specifically natural resources such as diamonds.[2] Revolutionary United Front ("RUF") soldiers were able to exploit diamond mines to fund their war to the tune of $25,000,000 to $125,000,000 in illegal diamond sales.[3] The type of mining used, artisanal mining, "has led to intense exploitation of the resources by militias and other non regular military forces."[4] Artisanal mining exploits alluvial deposits, those found in river beds, instead of digging new mines.[5]

Shortly after the end of the civil war, Mohammed Deen, the Minister of Mineral resources, noted that the end of the war, and the end to illegal resource exploitation would allow

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[1] Victor A.B. Davies, *Sierra Leone: Ironic Tragedy*, 9 J. African Economies 349 (2000) (quoting Peter Penfold, former British High Commisioner to Sierra Leone) [reproduced in accompanying notebook at Tab 43].

[2] Mungbalemwe Koyame, *United Nations Resolutions and the Struggle to Curb the Illicit Trade in Conflict Diamonds in Sub-Saharan African*, 1 Afr. J. Legal Stud. 80, 86 (2005) [reproduced in accompanying notebook at Tab 37]; See also MANAGING ARMED CONFLICTS IN THE 21ST CENTURY, 25 (Adekeye Adebajo and Chandra Sriram eds., Frank Cass, 2001) [reproduced in accompanying notebook at Tab 31].

[3] Mungbalemwe Koyame, *supra* note 2, at 86 (explaining that most of the value of the diamonds were traded for weapons with countries such as Liberia and Angola) [reproduced in accompanying notebook at Tab 37]; See also THE INFRASTRUCTURE OF PEACE IN AFRICA: ASSESSING THE PEACEBUILDING CAPACITY OF AFRICAN INSTITUTIONS, 9 (Dr. Monica Kathina Juma) (Sept. 2002) (discussing the role exploitation of resources played in strengthening the ties between Charles Taylor and the RUF) [reproduced in accompanying notebook at Tab 46].

[4] See also MICHAEL ROSS, THE POLITICAL ECONOMY OF ARMED CONFLICT: OIL DRUGS AND DIAMONDS: THE VARYING ROLES OF NATURAL RESOURCES IN CIVIL WAR, *available at* http://www.sscnet.ucla.edu/polisci/faculty/ross/OilDrugs.pdf (discussing artisanal mining fueling civil war because it is easier to exploit the resources) [reproduced in accompanying notebook at Tab 32].

[5] CHRISTOPHER W. MULLINS AND DAWN L. ROTHE, BLOOD, POWER, *AND* BEDLAM: VIOLATIONS OF INTERNATIONAL CRIMINAL LAW IN POST-COLONIAL AFRICA, 160 (Peter Lang Publishing 2008) [reproduced in accompanying notebook at Tab 29].

the country to recover its diamond mines and spend money directly on the people of Sierra Leone, social services, and development of rural areas.[6] "With [control of mineral mines], it was possible for [the rebels] to bankroll their war machinery, destroy more than 3,000 communities, kill over 75,000 people, dislocate/displace [nearly 2.5] million inhabitants . . . brutally hack-off the limbs of more than 2000 innocent civilians and forcefully abduct about 10,000 children."[7] During the civil war, it was more than just natural resources that were exploited, but they do represent State-owned resources, or in the alternative, resources in which the State had primary interest and therefore are the driving example used in this memo.

III. Legal Analysis

This memo will show that individuals from occupying forces, rebel groups, and sovereign governments can be guilty of pillaging state-owned resources or, in the alternative, resources that the state has a primary or superior interest. The only difference would be what principles to apply under which case. First, this memo will provide a careful understanding of the documents that prohibit pillaging as a violation of the laws and customs of war (war crimes) is essential because the documents detail the rights and responsibilities of different parties during a time of war. Second, this memo will examine what pillaging is and how exploitation of resources, whether state-owned or those in which the state has a primary interest, fits in to the model

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[6] Mungbalemwe Koyame, *supra* note 2, at 88-89 [reproduced in accompanying notebook at Tab 37]; See also RICHARD SNYDER, DOES LOOTABLE WEALTH BREED DISORDER? A POLITICAL ECONOMY OF EXTRACTION FRAMEWORK, 5 (July 2004) (linking the natural resources in Sierra Leone to a stable government before the civil war) [reproduced in accompanying notebook at Tab 45].

[7] ABU A. BRIMA, DEVELOPMENT DIAMONDS-SIERRA LEONE: ENVIRONMENT, DEVELOPMENT AND SUSTAINABLE PEACE: FINDING PATHS TO ENVIRONMENTAL PEACEMAKING, 2 (2004), *available at* http://www.wilsoncenter.org/events/docs/Abu%20Brima.pdf [reproduced in accompanying notebook at Tab 47].

established by the legal documents. This will be done by an analysis of the elements of pillage and then how they have been applied in international jurisprudence under the International Military Tribunal in Nuremberg, the International Criminal Tribunal for the Former Yugoslavia, and the International Court of Justice. Finally, this memo will show that pillage, in and of itself, cannot be charged as a crime against humanity but as a war crime.

A. Instruments prohibiting pillaging as a violation of the laws and customs of war.

i. The 1907 Hague Regulations

The first prohibition of pillage was put into effect during the American civil war with the Lieber Code.[8] Forty years later the international community prohibited pillaging through the 1907 Hague Regulations (Hague IV).[9] However, in both documents, certain property can be lawfully appropriated by an occupying state. Article 53 of Hague IV state:

> An army of occupation can only take possession of cash, funds, and realizable securities which are *strictly the property of the State*, depots of arms, means of transport, stores and supplies, and, generally, all movable property *belonging to the State* which may be used for military operations. All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms, and, generally, all kinds of munitions of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made.[10]

Article 55 lays out the relationship owed by an occupying power as merely an "administrator and usufructuary" of the hostile States' property by protecting the capital that

[8] See e.g., Lieber Code of 1863, Correspondance, Orders, Reports, and Returns of the Union Authorities From Jan. 1 to Dec. 31, 1863, Art. 44, O.R. Ser. III, Vol. III., *available at* http://www.civilwarhome.com/liebercode.htm [reproduced in accompanying notebook at Tab 1].
[9] The Hague Conference of 1907, Hague IV: Laws and Customs of War on Land [hereinafter Hague IV], Art. 28, Art. 47, Oct. 18, 1907, *available at* http://avalon.law.yale.edu/20th_century/hague04.asp [reproduced in accompanying notebook at Tab 2].
[10] *Id*.

belongs to the state"[11] The laws of usufruct actually trace back to Roman days and allow an occupying army to utilize enemy property and benefit from it. However, these rights do not allow the occupying army to appropriate property, nor do they allow the occupying force to act wastefully or negligently in the management of the property.[12] Additionally, Article 43 clarifies that the occupying power must restore public order while respecting the current laws in force in the country.[13] Article 52 further states, "[r]equisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation" and limits those requisitions to only what the country can reasonably bear."[14]

For a more comprehensive understanding of the use of property by an occupying army, it is very important to understand the basic elements of the laws of occupation. In dealing with property, the above articles of Hague IV and the articles in the Geneva Conventions discussed below come in to effect only when a territory is under the control of an occupying force and that force can exercise its authority in the territory.[15] Moreover, the occupying army is only exercising a *de facto* authority over the occupied state; it does not gain territorial sovereignty over the occupied territory.[16] Taking Hague IV and the Geneva Conventions together, one can conclude that when it comes to state owned resources an occupying army may manage the structure of the occupied State but has a duty not to exploit the country's resources primarily for the gains of the occupier. Properties under these types of occupations are divided into different

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[11] *Id*.
[12] Maurice Voyame, *The Use of Hydrocarbon Resources under Belligerent Occupation: Question of the Iraqi Oil*, http://jha.ac/articles/a132.htm#_ednref17 [reproduced in accompanying notebook at Tab 44].
[13] Hague IV, *supra* note 9, at Art. 43 [reproduced in accompanying notebook at Tab 2].
[14] *Id*. at Art. 52.
[15] *Id*. at Art. 42.
[16] *Id*. at Art. 43; Brice Clagett and O. Thomas Johnson Jr., *May Israel as a Belligerent Occupant Lawfully Exploit Previously Unexploited Oil Resources of the Gulf of Suez?*, 72 Am. J. Int'l L. 558, 559-60 (1978) [reproduced in accompyaning notebook at Tab 38].

categories: private property[17] and public property,[18] which generally includes State property.[19] Further, properties in each of those categories can then be classified as movable property and immovable property.[20]

1. Private Property

Article 46 of Hague IV protects private property from being confiscated with limited exceptions.[21] Article 52 states "[r]equisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country…" and Art. 53 states that "all kinds of munitions of war, may be seized, even if they belong to private individuals."[22]

Thus, under Hague IV, requisition of private movable property is permitted so long as it is for support of the military forces of the occupying army and it does not exceed the level of what a country can reasonably be expected to produce. On the other hand, there are no exceptions under Hague IV that allows for the requisition or appropriation of private immovable property as such. Thus selling, appropriating, and taking of private immovable properties is prohibited. As this is not the focus of this memo, no more time will be spent on private property.

2. Public Property

Article 53 of Hague IV states in relevant part, "[a]n army of occupation can only take possession of cash, funds, and realizable securities which are *strictly* the property of the State, depots of arms, means of transport, stores and supplies, and, generally, *all movable property*

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[17] See Hague IV, *supra* note 9, at Art. 46 [reproduced in accompanying notebook at Tab 2].
[18] *Id*. at Art. 55.
[19] Brice Clagett and O. Thomas Johnson Jr., *supra* note 16, at 562 [reproduced in accompyaning notebook at Tab 38].
[20] Harold Dichter, *The Legal Status of Israel's Water Policies in the Occupied Territories*, 35 Harv. Int'l L.J. 565, 574 (1994) [reproduced in accompanying notebook at Tab 39].
[21] Hague IV, *supra* note 9, at Art. 46 [reproduced in accompanying notebook at Tab 2].
[22] *Id*. at Art. 52, Art. 53.

belonging to the State which may be used for military operations."[23] The definition of public property given in the first half of Article 53 is extremely broad even when applied to the second part of the sentence "property . . . which may be used for military operations." The argument obviously is that almost any and all property can be used in some way for military operations. However, leading academics suggest that in reading The Hague Regulations in their entirety, and looking at prior jurisprudence in international law, the definition of movable property actually becomes more restricted.

Immovable property is governed by Article 55 which imports on to the occupying army the role of administrator and usufructuary of State immovable property and requires the occupying state to govern the property "in accordance with the rules of usufruct."[24] In describing the occupying state as merely as an "administrator and usufructuary" The Hague Regulations establish the belief that the occupier does not become the lawful sovereign and cannot, therefore, destroy or exploit public immovable property because at some point that property will return to the occupied state.[25] Consequently, whether an occupier commits pillage or acts in accordance with international law depends largely, but not solely, on whether the occupier acts within the rules of usufruct.

Following this line of thought, logically, means that an occupying force has no right to dispose of, sell, or destroy public immovable property.[26] Many academics, therefore, argue on this basis that the right to impede the economic activity of the State by forms such as

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[23] *Id*. at Art. 53.
[24] *Id*. at Art. 55.
[25] The term exploit as defined by Black's Law Dictionary is "the act of taking unjust advantage of another for one's own benefit;" the exact behaviour prohibited by Hague IV. Black's Law Dictionary, 619 (8th ed. 2004).
[26] Maurice Voyame, *supra* note 12 [reproduced in accompanying notebook at Tab 44].

exploitation, seizures, and appropriations is legally limited to what is necessary for protecting the inhabitants of the occupied state and meeting the security and military needs for the occupation.[27]

One example that may be helpful to illustrate the application of Hague IV relates to State-owned natural resources. Natural resources can take the form of both movable and immovable public property. As movable public property, natural resources, such as diamonds, that have already been extracted can arguably fit into the category of realizable securities which are subject to the argument of *munitions de guerre*, items that can be directly and immediately used for military purposes.[28] On the other hand, a natural resource that is not extracted, or sitting *in situ*, is considered immovable property since it would take further extraction or processing before the value or use could be realized.[29] This example utilizes a narrow interpretation of *munitions de guerre* but that narrow reading has some backing from international scholars.[30]

Under the rules of usufruct, an occupier would be able to extract such resources but only to benefit the State or cover expenses of the occupation. The second phrase in Article 55 states that an occupying force must "safeguard the capital of these properties, and administer them in accordance with the rules of usufruct." Exploiting and selling off extracted diamonds, a non-renewable source, and using the proceeds to continue or further expand military operations would be considered pillage because the rules of usufruct do not allow the occupying force to dispose or sell public immovable property. Such sale violates Article 55. There has been some argument

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[27] *Id*. (The military and security needs of the occupying force do not include offensive military action).
[28] *Id*.
[29] See *Case N.V. De Bataafsche Petroleum Maatschappli & others vs. The War Damage Commission; Court of Appeal*, Singapore, April 13, 1956, reprinted in: 51 Am. J. Int'l L. 802, 808 (19570 [reproduced in accompanying notebook at Tab 40].
[30] Elihu Lauterpacht, *The Hague Regulations and the Seizure of Munitions de Guerre*, 32 Brit. Y.B. Int'l L. 218 (1955-56) [reproduced in accompanying notebook at Tab 41].

that exploitation of these immovable natural resources, by an occupier, is legal when it would go to the benefit of the occupied territory; but that argument has been discredited[31]

Occupying forces do have a responsibility to provide for the well-being of the population in the occupied territory.[32] Under current United Nations Resolutions, this responsibility precludes the exporting and exploitation of natural resources.[33] People under occupation retain their sovereignty over their resources.[34] Therefore, natural resources can be used by occupiers only to the amount necessary to meet the obligation. [35]

ii. The 1949 Geneva Conventions and Additional Protocol[36]

Hague IV was the first major international document to prohibit the act of pillage, but its shortfall is that it only applied to conflicts of an international nature. Similarly, the Geneva

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[31] See *Israel: Ministry of Foreign Affaires Memorandum of Law,On the right to Develop New Oil Fields in Sinai and the Gulf of Suez,* in: 17 Int'l Legal Materials 432, 433 (1978) [reproduced in accompanying notebook at Tab 42].
[32] See U.N. G.A. Res. 2145, at ¶ 3, U.N. GAOR, 21st Sess. (Oct. 27, 1996), available at http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/004/48/IMG/NR000448.pdf?OpenElement [reproduced in accompanying notebook at Tab 12].
[33] U.N. G.A. Res. 33/40, U.N. GAOR, 33rd Sess. (Dec. 13, 1978) [reproduced at accompanying notebook at Tab 16].
[34] See U.N. GA Res. 1803, U.N. GAOR 17th Sess. (Dec. 14 1962), *available at* http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/193/11/PDF/NR019311.pdf?OpenElement [reproduced in accompanying notebook at Tab 13]; U.N. GA Res. 3016, U.N. GAOR 27th Sess. § 1 (Dec. 18, 1972), *available at* http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/270/46/IMG/NR027046.pdf?OpenElement [reproduced in accompanying notebook at Tab 14]; U.N. GA Res. 3175, U.N. GAOR 28th Sess. § 1 (Dec. 17, 1973), *available at* http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/282/47/IMG/NR028247.pdf?OpenElement [reproduced in accompanying notebook at Tab 15].
[35] Maurice Voyame, *supra* note 12 [reproduced in accompanying notebook at Tab].
[36] These Conventions define what war crimes can be prosecuted under the Special Court for Sierra Leone. *See* Statute of the Special Court for Sierra Leone [hereinafter Sierra Leone Statute] (2000), available at http://www.sc-sl.org/Documents/scsl-statute.html [reproduced in accompanying notebook at Tab 9].

Convention Relative to the Protection of Civilian Persons in Time of War, 1949 (Geneva IV)[37] had also been seen as only applying to international conflicts. This school of thought, however, was changed with the creation and signing of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).[38] Common Article III and Protocol II apply to "all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance."[39] Sierra Leone ratified the Geneva Convention in October of 1965[40] and Protocol II in October of 1986.[41]

First, Geneva IV, Article 33 states in part, "[p]illage is prohibited."[42] In their Commentaries on the Conventions Articles, the International Red Cross notes:

> This prohibition is general in scope. It concerns not only pillage through individual acts without the consent of the military authorities, but also organized pillage, the effects of which are recounted in the histories of former wars, when the booty allocated to each soldier was considered as part of his pay. Paragraph 2 of Article 33 is extremely concise and clear; *it leaves no loophole*. The High Contracting Parties prohibit the ordering as well as the authorization of pillage. They pledge themselves furthermore to prevent or, if it has commenced, to stop individual pillage. Consequently, they must take all the necessary legislative steps.

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[37] Convention Relative to the Protection of Civilian Persons in Time of War [hereinafter Geneva IV], Aug. 12, 1949, 973 U.N.T.S. 288, *available at* http://www.icrc.org/ihl.nsf/FULL/380?OpenDocument [reproduced in accompanying notebook at Tab 4]

[38] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts [hereinafter Protocol II], June 8, 1977, *available at* http://www.icrc.org/ihl.nsf/FULL/475?OpenDocument [reproduced in accompanying notebook at Tab 6].

[39] Geneva IV, *supra* note 37, at Art. 2 [reproduced in accompanying notebook at Tab 4]; Protocol II, *supra* note 38, at Art. 1 [reproduced in accompanying notebook at Tab 6].

[40] Signatories to Geneva Convention, http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P [reproduced in accompanying notebook at Tab 51].

[41] Signatories to Additional Protocol II, http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=475&ps=P [reproduced in accompanying notebook at Tab 53].

[42] Geneva IV, *supra* note 37, at Art. 33 [reproduced in accompanying notebook at Tab 4].

> The prohibition of pillage is applicable to the territory of a Party to the conflict as well as to occupied territories. It guarantees all types of property, whether they belong to private persons or to communities *or the State*. On the other hand, it leaves intact the right of requisition or seizure.[43]

Regarding requisitions, the first half of Article 55 of Geneva IV states, "[t]he Occupying Power may not requisition foodstuffs, articles or medical supplies available in the occupied territory, except for use by the occupation forces and administration personnel, and then only if the requirements of the civilian population have been taken into account."[44] The second half of Article 55 then establishes that fair value must be paid for any items requisitioned.[45] The ICRC Commentaries state:

> Conditions: The occupying authorities not only have the right to requisition the services of the inhabitants of the occupied territory but also to make requisitions in kind. The decision to do so is a unilateral one and must be considered as being a form of expropriation, a form of requisitioning, which, like the requisitioning of services, was already recognized by Article 52 of the Hague Regulations.
>
> The Hague text referred only to the needs of the army of occupation, but the Geneva Convention also includes those of the "administration personnel"; at all events the Occupying Power's rights are clearly defined. It may not requisition supplies for use by its own population. On the other hand it may still obtain surplus food and provisions by means other than requisitioning, in order to supply occupied areas where food and medical supplies are inadequate.
>
> As a general rule, the Occupying Power must take the "requirements of the civilian population" into account. By this stipulation the Convention endorses a rule already set forth in the Hague Regulations, according to which requisitions "shall be in proportion to the resources of the country."
>
> Payment: The second sentence of the paragraph lays down that fair value is to be paid for any requisitioned goods. That idea was already recognized in international law. It was expressed in Article 52 of the Hague Regulations, but the experience of two world wars showed that it was necessary to reaffirm it. The reservation in regard to the "provision of other international Conventions" was adopted in order to avoid any danger of the provision conflicting with the Hague Regulations or any revised version which might be adopted.
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> . . . .

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[43] International Committee of the Red Cross, Commentaries on Geneva Conventions, *found at* http://www.icrc.org/ihl.nsf/COM/380-600038?OpenDocument (emphasis added)(footnotes omitted) [reproduced in accompanying notebook at Tab 49].
[44] Geneva IV, *supra* note 37, at Art. 55 [reproduced in accompanying notebook at Tab 4].
[45] *Id*.

> It should be noted lastly that Article 147 describes the "extensive appropriation of property, not justified by military necessity" as a grave breach of the Convention. That wording covers the case of requisitioning on an excessive scale.[46]

Article 64 of Geneva IV also states, "[t]he penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention."[47]

Reading Article 33 and Article 64 together, the protection of property rights in force before the occupation would mean regulating the exploitation of State owned resources during the occupation.[48] This would mean limiting the exploitation of State-owned resources.[49] Any argument that these protections apply only to protected civilians is moot when examined under the alternative focus of this memo, property in which the State has a primary interest. The concept that the State is the primary owner, or where it has a superior interest, assumes that there are other owners or agents with interest in the property. In looking at what property could be seized, Hague IV stated that only "strictly the property of the state" was eligible, and even that property must be usable in military operations. The Geneva Conventions do not distinguish between public and private property when prohibiting pillage. Under the Geneva

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[46] International Committee of the Red Cross, Commentaries on Geneve Conventions, *found at* http://www.icrc.org/ihl.nsf/COM/380-600062?OpenDocument (footnotes omitted) [reproduced in accompanying notebook at Tab 50].
[47] Geneva IV, *supra* note 37, at Art. 55 [reproduced in accompanying notebook at Tab 4].
[48] Assuming that prior to the civil war, Sierra Leone already had in force laws dealing with property rights.
[49] Indigenous spoliation is defined as illegal acts of depredation committed for private ends by constitutionally responsible rulers. The term misappropriation is one of the terms to describe both indigenous spoliation and pillage. Spoliation and pillage have been used interchangeably under international criminal law. See NDIVA KOFELE-KALE, INTERNATIONAL LAW OF RESPONSIBILITY FOR ECONOMIC CRIMES, (Kluwer Law International 1995) [reproduced in accompanying notebook at Tab 30].

Conventions, unlike the Hague Regulations, property that is protected from pillaging is not distinguished by private or public characteristics; pillage is simply prohibited in all cases.[50]

Further, Article 48 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) states, "[i]n order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."[51] Additionally, Article 52 states that military objectives are "limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."[52]

Protocol II also codifies the prohibition of pillage in Article 4(2) (g)[53] and goes further by prohibiting the threat to commit pillage in 4(2) (h)[54]. Protocol II applies the Geneva Conventions to non-international conflicts and to dissident armed forces that exercise control over parts of a State's territories that allows it to carry out concerted military actions.[55]

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[50] *See* fn 44 and accompanying text; Geneva IV, *supra* note 37, at Art. 33 [reproduced in accompanying notebook at Tab 4].
[51] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts [hereinafter Protocol I], Art. 48, June 8, 1977, *available at* http://www.icrc.org/ihl.nsf/FULL/470?OpenDocument [reproduced in accompanying notebook at Tab 5].
[52] *Id*. at Art. 52.
[53] Protocol II, *supra* note 38, at Art. 4 [reproduced in accompanying notebook at Tab 6].
[54] *Id*.
[55] *Id*. at Art. 1; See also, Carl E. Bruch, *All's Not Fair in (Civil) War: Criminal Liability For Environmental Damage in Internal Armed Conflict*, 25 Vt. L. Rev. 695, 724 (2001) (discussing how under the Rwandan Tribunal the prohibition of pillage has been applied to internal conflicts) [reproduced in accompanying notebook at Tab 36].

Overall the Geneva Conventions and Additional Protocols were enacted to protect the victims of both international and non-international conflicts. In prohibiting pillage, the Conventions do not distinguish between public and private property. The Commentaries seem to suggest that this was done with a purpose to prohibit pillage completely and limit occupying forces, which include foreign armies or indigenous rebels, to an administrative role over the State.

B. Exploitation Of Resources As Pillage

In analyzing what constitutes pillage and how exploitation of State-owned resources fits into the paradigm, one must start with the basic elements.[56] To evaluate the current trend in defining the elements of pillage the Rome Statute of the International Criminal Court[57] is the best place to start.[58]

i. Pillage Under the International Criminal Court

Pillage was codified under the Rome Statute in Articles 8(2) (b) (xvi) and 8(2) (e) (v) – Pillaging a town or place, even when taken by assault.[59] There is no substantive difference in the elements of each section, the former accounts for international armed conflicts and the latter for

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[56] *See also* Aaron Ezekiel, *The Application of International Criminal Law to Resource Exploitation: Ituri, Democratic Republic of the Congo*, 47 Nat. Resources J. 225, 238-239 (2007) (for a discussion on why exploitation of natural resources is considered pillaging under the ICC statuate) [reproduced in accompanying notebook at Tab 35]

[57] Rome Statute of the International Criminal Court [hereinafter ICC Statute], A/CONF.183/9, 8(2) (b) (xvi), 8(2) (e) (v) (July 17, 1998), *available at* http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf [reproduced in accompanying notebook at Tab 10].

[58] The statute of the International Criminal Court is good gauge of the *opinio juris* of States of where international criminal law and international humanitarian law is thought to be and how elements should be applied. It should be noted that the elements of pillage have been the same under the SCSL, IMT, ICTY, and the ICJ. *See* Prosecutor v. Norman, Fofana, Kondewa, Case No. SCSL 04-14-A, Judgment, ¶ 403 (June 10, 2004) [reproduced in accompanying notebook at Tab 22].

[59] ICC Statute, *supra* note 57 [reproduced in accompanying notebook at Tab 10].

non-international conflicts, except that "there are no specific rules of international humanitarian law *allowing* requisitions, contributions, seizure or taking of war booty in a non-international armed conflict."[60] Knut Dormann, Legal Advisor at the Legal Division of the International Committee of the Red Cross, identifies the elements of pillage as:

> (1) The perpetrator appropriated certain property;
> (2) The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use;
> (3) The appropriation was without consent of the owner;
> (4) The conduct took place in the context of and was associated with an international armed conflict; and
> (5) The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.[61]

It should be noted that under the Rome Statute, the distinction of private and public property has been discarded, like in the Geneva Conventions. However, the Preparatory Commission for the International Criminal Court (PrepCom), in a footnote to element two, observed that "appropriations justified by military necessity cannot constitute the crime of pillaging."[62]

An understanding of each element of pillage, and how it is applicable to State-owned resources, or resources in which a state has the primary or superior interest, is essential. Further discussion of how these elements have been used under international tribunals will come in Section C (ii). Here, Dormanns five elements will be explored.

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[60] KNUT DORMANN, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: SOURCES AND COMMENTARY, 464-5 (Cambridge University Press 2003) (emphasis added) [reproduced in accompanying notebook at Tab 27].
[61] *Id*. at 272 (It should be noted that under Art. 8(2)(e)(v) the fourth element is changed to state "the conduct took place in the context of and was associated with an armed conflict not of an international character") [reproduced in accompanying notebook at Tab].
[62] International Criminal Court, Elements of Crime [hereinafter Elements of Crime], ICC-ASP/1/3(part II-B), fn.61 (2002), *available at* http://www.icc-cpi.int/library/about/officialjournal/Element_of_Crimes_English.pdf [reproduced in accompanying notebook at Tab 48].

1. The perpetrator appropriated certain property.

"[T]he property protected is not limited to civilian property as suggested by several delegations [to the Rome Treaty]."[63] Although the term appropriation is not defined under the Statute or in the Elements of War Crimes, it is generally seen as the "exercise of control over property; a taking of possession."[64] For State-owned resources, this means that a perpetrator may take control of the property through means such as extracting, exporting, and selling the resources (all actions that could lead to exploitation). There does not have to be any definite transfer of title.[65]

2. The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use (not including military necessity).

There are two elements that must be proven here: a) the perpetrator intended to deprive the owner; and b) the property was appropriated for private or personal use. The act of "depriv[ing] the owner," is also not defined under the ICC Statute, but generally means "an act of taking away."[66] When considered with the definitions of exploitation and spoliation, it becomes clear that the perpetrator is unjustly taking benefit of the property away from its owner.

In drafting the Rome Statutes, several delegations argued that pillage should have been defined as "appropriation or seizure of property not justified by military necessity," which essentially would have created a third element under this section.[67] The Preparatory Commission, however, decided against this being an element to be proven by inserting it as a

[63] KNUT DORMANN, *supra* note 60, at 273 [reproduced in accompanying notebook at Tab 27].
[64] Black's Law Dictionary 110 (8th ed. 2004).
[65] KNUT DORMANN, *supra* note 60, at 273 [reproduced in accompanying notebook at Tab 27].
[66] Black's Law Dictionary 473 (8th ed. 2004).
[67] KNUT DORMANN, *supra* note 60, at 272 [reproduced in accompanying notebook at Tab 27].

footnote to the second element.[68] Dormann notes three issues that would have arisen under that type of language had it been passed. First, the approach would not distinguish pillage from other statutes already on the books.[69] Second, "an element referring to military necessity would introduce an extra element and create the result of permitting an evaluation; (sic) where as an absolute prohibition exists."[70] And finally, "a reference to military necessity would criminalize (sic) the taking of military equipment when no necessity could be shown for this, whereas international humanitarian law allows the taking of war booty without the need for justification."[71] The second element used the terms "private" and "personal" "in order to be broad enough to include cases where property is given to third persons and not only used by the perpetrator."[72]

3. The appropriation was without the consent of the owner.

Consent is another term not specifically defined under the ICC Statute for pillage, but when looking at other sections of the Statute, under article 7(1)(g)(5), Enforced Sterilization, the ICC Elements of Crime notes "[i]t is understood that 'genuine consent' does not include consent obtained through deception."[73] Further, under 8(2) (b) (xxii) (1), Rape, "[i]t is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity."[74] The prior ad hoc tribunals have limited consent to be a free choice by the victim. Any coercion or deception by the perpetrator nullifies victims consent because once the victim is coerced or deceived they are no longer making a decision where they know, or are able to

[68] *Id*. at 272-3.
[69] *Id*. at 272.
[70] *Id*.
[71] *Id*. (The ICRC also comments that "it appears to be generally accepted now that even war booty must be handed over to the authorities, i.e. cannot be taken for *private or personal use*).
[72] *Id*. at 273.
[73] Elements of Crime, *supra* note 62, at fn 20 [reproduced in accompanying notebook at Tab 48].
[74] *Id*. at fn 51.

exercise, their full range of rights associated with the consent. When considering these protections to willing consent, other actions such as duress of the victim and threat of violence should also be considered as actions that prohibit a victims "willing consent."

4. The conduct took place in the context of and was associated with an armed conflict.

Under this element, the pillaging must have been associated with the armed conflict. This element, along with the fifth element, establishes the *mens rea* needed to commit pillaging. The ICTY has used the term 'wilful' meaning "a form of intent which includes recklessness but excludes ordinary negligence. The prosecutor at the ICTY went on further to state "'[w]ilful' means a positive intent to do something, which can be inferred if the consequences were foreseeable, while 'recklessness' means willful neglect that reaches the level of gross criminal negligence."[75]

5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Under this element, the Statutes do not require the perpetrator to perform a legal evaluation of the existence of an armed conflict. "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'.[76]

ii. Treatment of Pillaging of State Resources in International Tribunal Cases

In describing the scope of the prohibition of pillage, the Trial Chambers for the ICTY in the *Delalic* case stated:

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[75] KNUT DORMANN, *supra* note 60, at 280, fn. 24 *citing* Prosecutor's Pre-trial Brief, *The Prosecutor v. Milan Simic and Others*, IT-95-9-PT, p. 35 [reproduced in accompanying notebook at Tab 27].
[76] Elements of Crime, *supra* note 62, at 14 [reproduced in accompanying notebook at Tab 48].

> [I]t is to be observed that the prohibition against the unjustified appropriation of public and private enemy property is general in scope, and extends both to acts of looting committed by individual soldiers for their private gain, and to the organized seizure of property undertaken within the framework of a systematic economic exploitation of occupied territory.[77]

Several cases under the ad hoc criminal tribunals illustrate what kinds of actions are prohibited when dealing with pillage. From exploitation of business factories to exploitation of natural resources, the international tribunals have firmly placed the activity of exploitation of resources under the prohibition of pillaging.

1. United States Nuremberg Military Tribunals (NMT)

Article 6(b) of the Charter of the International Military Tribunal (IMT) in Nuremberg held accountable those perpetrators that committed "plunder of public or private property."[78] Although the defendants at Nuremberg were prosecuted based on the 1907 Hague Regulations, which largely focused on pillaging of private property, it is still helpful to analyze the cases that dealt with exploitation of property to compare with current situations. As stated above the Statute of the Special Court for Sierra Leone is based on the Geneva Conventions which prohibit all pillaging of both public and private property.[79]

The Nuremberg tribunals prosecuted several businessmen and government leaders for the pillage, spoliation, and exploitation of occupied territory. In the *I G. Farben Case*[80] case, several leading business men of the I.G. Farben Industry were convicted of plundering both private and

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[77] Prosecutor v. Mucic, et al., Case No. IT-96-21-T, Judgment, ¶ 590 (November 16, 1998) (The charge of plunder in this case was dismissed because the appropriations did not create grave consequences for the victims) [reproduced in accompanying notebook at Tab 17].
[78] Charter of the International Military Tribunal (Nuremberg Military Tribunals), *available at* http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm [reproduced in accompanying notebook at Tab 7].
[79] Sierra Leone Statute, *supra* note 36 [reproduced in accompanying notebook at Tab 9].
[80] United Nations War Crimes Commission, Law Reports on Trials of War Crimes *Trial of Carl Krauch and Twenty-Two Others* [hereinafter *I.G. Farben Trial*], Vol. X, p. 1 (1949) [reproduced in accompanying notebook at Tab 24].

public property.[81] Following the invasion of Poland, the Farben Directorate sent the Reich Ministries of Economics a letter detailing the need to use the stocks of Polish companies in the interest of the German economy.[82] Farben was then named trustee over the companies listed in the letter and "Farben-recommended employees [were named] provisional managers."[83] Farben then acquired each of the companies instead of exercising leases as originally proposed.[84] Equipment from several of the plants were then dismantled and sent back to Germany.[85]

> The Tribunal, speaking about the usage of certain words in the Indictment, first held: "[r]egarding terminology, the Hague Regulations do not specifically employ the term 'spoliation,' but we do not consider this matter to be one of any legal significance. As employed in the Indictment, the term is used interchangeably with the words 'plunder' and 'exploitation.' It may therefore be properly considered that the term 'spoliation,' which has been admittedly adopted as a term of convenience by the Prosecution, applies to the widespread and systematized acts of dispossession and acquisition of property in violation of the rights of the owners which took place in territories under the belligerent occupation or control of Nazi Germany during World War II. We consider that 'spoliation' is synonymous with the word 'plunder' as employed in Control Council Law No. 10, and that it embraces offences against property in violation of the laws and customs of war of the general type charged in the Indictment. In that sense we will adopt and employ the term spoliation in this opinion as descriptive of the offences referred to.[86]

Using as evidence the Declaration by United Nations on Forced Dispossession of Property in Enemy-Controlled Territory (London Declaration),[87] the United States Nuremberg Military

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[81] *Id*.
[82] *Id*. at 19.
[83] *Id*.
[84] *Id*. at 20.
[85] *Id*.
[86] *Id*. at 44 (1949); *See also* Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, II (b) (1943), *available at* http://avalon.law.yale.edu/imt/imt10.asp [reproduced in accompanying notebook at Tab 3].
[87] Declaration by United Nations on Forced Dispossession of Property in Enemy-Controlled Territory, A.T.S. 1 (London Jan. 5, 1943), *available at* http://www.austlii.edu.au/au/other/dfat/treaties/1943/1.html (The Declaration stated that spoliation "has taken every sort of form, from open looting to the most cunningly camouflaged financial penetration, and it has extended to every sort of property-from works of art to stocks of

Tribunals (NMT) sustained the argument that the actions of Farben violated existing international law.[88] The NMT went on further to state, "It was in violation of rights of private property, protected by the Laws and Customs of War, and in the instance involving public property, the permanent acquisition was in violation of that provision of the Hague Regulations which limits the occupying power to a mere usufruct of real estate."[89]

It is imperative to note that the London Declaration did not specify between private and public property, nor did it state that the bullion, banknotes, and stocks, all seizable under the Hague Regulations,[90] were any different from other property. The NMT conceded that the declaration had no legal consequences but found it persuasive in determining where the international prohibition stood.

In the later case of *A. Krupp*, the NMT found six of twelve industrialists guilty of exploiting, as principals or as accessories, by "a deliberate design and policy, territories occupied by German armed forces in a ruthless way, far beyond the needs of the army of occupation and in disregard of the needs of the local economy."[91] In applying the Hague Regulations, the NMT further reasoned:

> [I]f, as a result of war action, a belligerent occupies territory of the adversary, he does not, thereby, acquire the right to dispose of property in that territory, except according to the strict rules laid down in the Regulations. The economy of the belligerently occupied territory is to be kept intact, except for the

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commodities, from bullion and banknotes to stocks and shares in business and financial undertakings. But the object is always the same-to seize everything of-value that can be put to the aggressors' profit and then to bring the whole economy of the subjugated countries under control so that they must enslave to enrich and strengthen their oppressors.") [reproduced in accompanying notebook at Tab 11].

[88] *I.G. Farben Trial*, *supra* note 80, at 45 [reproduced in accompanying notebook at Tab 24].

[89] *Id*. at 50.

[90] Hague IV, *supra* note 9, at Art. 53 [reproduced in accompanying notebook at Tab 2].

[91] United Nations War Crimes Commission, Law Reports on Trials of War Crimes *Trial of Alfried Felix Alwyn Krupp Von Bohlen Und Halbach and Eleven Others (A. Krupp)*, Vol. X, p. 69, 73 (1949) [reproduced in accompanying notebook at Tab 25].

> carefully defined permissions given to the occupying authority – permissions which all refer to the army of occupation. Just as the inhabitants of the occupied territory must not be forced to help the enemy in waging the war against their own country or their own country's allies, so must the economic assets of the occupied territory not be used in such a manner.[92]

These arguments may give insight in to why the Geneva Conventions prohibit pillage generally instead of specifying different rules for public and private property.

2. International Criminal Tribunal for the former Yugoslavia

Cases on pillage under the International Criminal Tribunal for the former Yugoslavia (ICTY) have largely focused on situations involving pillaging property from towns and prison camps. In its Statute, the ICTY claims power to prosecute individuals for the "plunder of public and private property."[93] In *Blaskic*, the court carefully defined plunder as "the unlawful, extensive and wanton appropriation of property belonging to a particular population, whether it is the property of private individuals or of state or "quasi-state" public collectives."[94] In *Mucic*, the ICTY stated:

> [T]he Trial Chamber must take as its point of departure the basic fact that international humanitarian law not only proscribes certain conduct harmful to the human person, but also contains rules aimed at protecting property rights in times of armed conflict. Thus, whereas historically enemy property was subject to arbitrary appropriation during war, international law today imposes strict limitations on the measures, which a party to an armed conflict may lawfully take in relation to the private and public property of an opposing party.[95]

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[92] *Id*. at 134.
[93] Statute of the International Criminal Tribunal for the Former Yugoslavia, Art 3(e) (1993) *available at* http://www.icls.de/dokumente/icty_statut.pdf [reproduced in accompanying notebook at Tab 8].
[94] Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgment, ¶ 234 (March 3, 2000) (footnotes omitted) [reproduced in accompanying notebook at Tab 19]; *See also* Prosecutor v. Jelsic, Case No. IT-95-10, Judgment, ¶ 48 (Dec. 14, 1999) ("Plunder is defined as the fraudulent appropriation of public or private funds belonging to the enemy or the opposing party perpetrated during an armed conflict and related thereto.") [reproduced in the accompanying notebook at Tab 21].
[95] Prosecutor v. Mucic, *supra* note 77, at ¶587 [reproduced in accompanying notebook at Tab 17].

The court also noted that in order for a charge to be "serious" under the ICTY's statutes the charge must meet two elements. "First, the alleged offence must be one which constitutes a breach of a rule protecting important values. Secondly, it must also be one which involves grave consequences for the victim."[96] The *Mucic* Trial Chamber eventually ruled that while the prohibition of plunder is an important value, the monetary value of the property taken did not cause grave consequences for the victim.[97]

3. International Court of Justice

The 2005 International Court of Justice decision between in the Democratic Republic of the Congo and Uganda also solidifies the prohibition of pillage.[98] This civil case, although only about the natural resource exploitation committed by Uganda and its troops, provides the most current view of both the international prohibition on pillage and the obligations of an occupying force. However, Robert Dufresne, a research analyst with the Library of Parliament of Canada, notes that the case "does not tackle similar resource exploitation by non-state actors and non-occupying states, leaving this issue in need of clarification."[99]

In *DRC v. Uganda*, the ICJ held Uganda liable for the members of its military exploitation of natural resources by members of its military while occupying parts of the DRC.[100]

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[96] *Id*. at ¶ 1154.
[97] *Id*.
[98] Armed Activities on the Territory of the Congo,Democratic Republic of the Congo v. Uganda [hereinafter DRC Case], 2005 I.C.J. 116 (December 19) [reproduced in accompanying notebook at Tab 23].
[99] Robert Dufresne, *Reflections and Extrapolations on the ICJ's Approach to Illegal Resource Exploitation in the Armed Activities Case*, 40 N.Y.U. J. Int'l L. & Pol. 171 (2008) [reproduced in accompanying notebook at Tab 34].
[100] DRC Case, *supra* note 98, at ¶ 180 (stating "[t]he Court notes that Uganda at all times has responsibility for all actions and omissions of its own military forces in the territory of the DRC in breach of its obligations under the rules of international human rights law and international

Speaking of events that would draw this liability, the Court stated, "whenever members of the UPDF [the Ugandan military] were involved in the looting, plundering and exploitation of natural resources in the territory of the DRC, they acted in violation of the *jus in bello*, which prohibits the commission of such acts by a foreign army in the territory where it is present. The Court notes in this regard that both Article 47 of Hague IV and Article 33 of Geneva IV prohibit pillage."[101]

The ICJ cited a lack of evidence to hold that there was a "governmental policy of Uganda directed at the exploitation of natural resources of the DRC or that Uganda's military intervention was carried out in order to obtain access to Congolese resources." [102] There was, however, "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."[103] Further, credible evidence suggested that civilian businessmen used Ugandan military aircraft to export resources from the DRC.[104] Liability of Uganda was based on Article 43 of the Hague IV, holding that Uganda, as an occupying force, failed to protect territory under its control.[105]

The case leaves some uncertainty about exploitation of natural resources. In its findings, the court references Uganda's liability for "looting, plundering, and resource exploitation."[106] One may argue that in citing all three areas of misappropriation, the Court is saying that looting, plundering, and exploitation are separate activities and therefore,

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humanitarian law which are relevant and applicable in the specific situation) [reproduced in accompanying notebook at Tab 23].
[101] *Id*. at ¶ 245.
[102] *Id*. at ¶ 242.
[103] *Id*.
[104] *Id*. at ¶ 238.
[105] *Id*. at ¶ 250.
[106] *Id*. at ¶ 250.

exploitation does not mean pillaging. But that argument fails to consider the Court's analysis when combining the three categories as violations of *jus in bello* under both the Hague IV and Geneva IV and its Additional Protocol.[107]

C. Pillage as a Crime Against Humanity

The second question focus for this memo is whether pillaging of State-owned resources, or in the alternative, resources in which the State has a primary or superior interest, can be charged as a crime against humanity. In analyzing this question, both the Nuremberg Tribunals and the ICTY have both weighed in. The ICTY, in the *Kordic* case, stated:

> If the ultimate aim of persecution is the "removal of those persons from the society in which they live alongside the perpetrators, or eventually even from humanity itself", the widespread or systematic, discriminatory, destruction of individuals' homes and means of livelihood would surely result in such a removal from society. In the context of an overall campaign of persecution, rendering a people homeless and with no means of economic support may be the method used to "coerce, intimidate, terrorise and forcibly transfer … civilians from their homes and villages." Thus, when the cumulative effect of such property destruction is the removal of civilians from their homes on discriminatory grounds, the "wanton and extensive destruction and/or plundering of Bosnian Muslim civilian dwellings, buildings, businesses, and civilian personal property and livestock" may constitute the crime of persecution.[108]

Under the *Tadic* case, the elements of persecution are "(1) the occurrence of a discriminatory act or omission; (2) a discriminatory basis for that act or omission on one of the

[107] For a further analysis of this argument See Robert Dufresne, *supra* note 99 [reproduced in accompanying notebook at Tab 34].
[108] Prosecutor v. Kordic, Case No. IT-95-14/2-T, Judgment, ¶ 205 (Feb. 26, 2001) [reproduced in accompanying notebook at Tab 18]; *See also* TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL : PROCEEDINGS VOLUMES , Vol. 22, pg. 526 (Convicting Hermann Goering of persecution by means of economic exploitation the IMT stated "Goering persecuted the Jews, particularly after the November 1938 riots, and not only in Germany, . . . but in the conquered territories as well. His own utterances then and his testimony now shows this interest was primarily economic-how to get their property and how to force them out of the economic life of Europe.") [reproduced in accompanying notebook at Tab 26].

listed grounds, specifically race, religion or politics; and (3) the intent to cause, and a resulting infringement of an individual's enjoyment of a basic or fundamental right."[109]

However, when dealing with the charge of pillage alone as a crime against humanity, the NMT in the *I. G. Farben* case noted that crimes against humanity were listed as "[a]trocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated."[110] Quoting *U.S.A. v. Flick, et al.*, the NMT noted:

> The 'atrocities and offenses' listed therein, 'murder, extermination,' et cetera, are all offenses against the person. Property is not mentioned. Under the doctrine of *ejusdem generis* the catch-all words 'other persecutions' must be deemed to include only such as affect the life and liberty of the oppressed peoples. Compulsory taking of industrial property, however reprehensible, is not in that category. It may be added that the presence in this section of the words 'against any civilian population,' recently led Tribunal III to 'hold that crimes against humanity as defined in Control Council Law No. 10 must be strictly construed to exclude isolated cases of atrocity or persecution whether committed by private individuals or by governmental authority.' (U. S. A. v. Altstoetter et al, decided 4 December 1947.) The transactions before us, if otherwise within the contemplation of Law 10 as crimes against humanity would be excluded by this holding.[111]

From these cases, it can be concluded that pillage can be charged as a crime against humanity only if it is used to support the charge of persecution. Pillage, by itself, is purely a property based crime in international humanitarian law and could not, therefore, be categorized as a crime against humanity.

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[109] Prosecutor v. Tadic, Case No. IT-94-1, Judgment, ¶ 715 (May 7, 1997) [reproduced in the accompanying notebook at Tab 20].
[110] *I.G. Farben Trial*, *supra* note 80 at 41. [reproduced in accompanying notebook at Tab 24]; *Compare to* WAR CRIMES IN INTERNATIONAL LAW 1, 1 (Yoram Dinstein & Mala Tabory eds., Martinus Nijhoff Publishing 1996) (defining war crimes as "violations of the laws or customs of war. Such violations shall include, but not be limited to , . . . plunder of public or private property") [reproduced in accompanying notebook at Tab 28].
[111] *I.G. Farben Trial*, *supra* note 80, at 41-42 [reproduced in accompanying notebook at Tab 24].

IV. Conclusions

In dealing with the first question, whether exploitation of State-owned resources is pillage, this memo has shown that when dealing with State-owned resources there are tight restrictions that limit what an occupying army may do. Under Hague IV and Geneva IV occupying forces are considered merely administrators and are governed by the laws of usufruct. Additional Protocol II of 1977 further expands these restrictions to non-international conflicts and applies them not only to the occupied territories, but to all the territories within the conflict. The Geneva Conventions and the Additional Protocol, further in protect victims of the conflict by refusing to distinguish between public and private property.

This protection was also codified in the Rome Statute of the International Criminal Court because the Preparatory Commission specifically rejected the notion put forth by some delegates that a distinction between the two types of property should be made. Rome Statute of the International Criminal Court is also strongly viewed as a good gauge of the *opinio juris* of States on the standing of international criminal law. Ad hoc Tribunals have also held that the exploitation of State-owned resources is a violation of the laws of war.[112]

If, contrary to the above authorities, a court were to find that prohibition of pillage did not apply to strictly State-owned property, the alternative question of exploitation of resources in which the state has a primary interest could surely be shown to violate pillage statutes. Inherent in the question is the assumption that outside of the State, there are other owners (interests) in the resources. If those other owners' property was appropriated without their consent by a perpetrator who intended to use it for their own gain, then that would be pillage.[113]

[112] See *supra* fns 76 – 106 and accompanying text.
[113] See *supra* fns 36 – 55 and accompanying text.

The final question of whether pillage can be charged as a crime against humanity depends solely on how the case is brought. If the case is brought where pillage is a method of persecution then it can be tried as a crime against humanity. However, pillage alone is purely a property based crime which does not fit into the same person-based categories listed under crimes against humanity and would therefore only be a war crime.