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JAMES TSABORA*

Illicit Natural Resource Exploitation by Private Corporate Interests in Africa's Maritime Zones During Armed Conflict

ABSTRACT

In periods of war, African states experience great difficulty in defending maritime zones from criminality because the legal and institutional infrastructure, which guarantees the safety and security of the zones, is often highly compromised. Major maritime commercial corporate interests are exploiting economic opportunities that arise in these compromised coastal states due to war. Some of the most common exploitations of marine resources are illicit fishing, extraction of minerals, and illegal dumping of toxic substances in the territorial waters of maritime states. Such unlawful exploitation is detrimental to Africa's economic integrity and well-being. Corporate accountability for these criminal activities would guarantee a measure of economic integrity and secure a state's economic welfare. Increasing evidence of illicit exploitation in maritime states during periods of conflict necessarily calls for the elaboration of the rights and responsibilities of private maritime corporations in foreign waters under the United Nations Convention of the Law of the Sea, and further highlights a great need for international criminal penalties for such exploitation. This article investigates whether the relevant international legal and institutional frameworks can be relied upon to prevent illegal natural resource exploitation of Africa's maritime zones during periods of armed conflict, and proposes a strategy for criminal sanctions against this conduct.

INTRODUCTION

Valuable African natural resources on land and at sea have been the target of constant exploitation by international commercial corporations, particularly during periods of war. In May of 2013, the Africa Progress Panel¹ published an Africa Progress Report,² which showed that

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1. The Panel consists "of ten distinguished individuals from the private and public sector who advocate for responsibility between African leaders and their international partners to promote shared equitable and sustainable development for Africa. Mr. Kofi Annan, former Secretary-General of the United Nations and Nobel laureate, chairs the APP and is

between 2008 and 2010, Africa lost US\$63.4 billion from illegally earned, transferred, and unrecorded private financial outflows more than it received from foreign investment and aid combined (US\$62.2 billion).³ Following the report, the African Development Bank chief, Donald Kaberuka, emphasized that “Africa is being ripped off” by foreign resource corporations that are “extracting Africa’s mineral resources at huge profit for shareholders with scant reward for local populations.”⁴ It is unclear whether most of the exploitation is through legal or illegal channels,⁵ but a substantial volume of these activities are conducted during war—outside the regulatory capacity of African states.⁶

The Africa Progress Report claims that over the last three decades, high levels of the illegal exploitation of Africa’s natural resources resulted from private commercial actors, whose illicit activities pose huge threats to Africa’s economy.⁷ These threats, it can be argued, are continually present due to the general weaknesses in the international and domestic laws that govern Africa’s maritime zones, hence posing serious questions about whether Africa is sufficiently equipped to minimize further exploitation. Of the relatively few conflicts in Africa’s maritime states, the conflict in Somalia has generated the largest sense of weariness

closely involved in its day-to-day work. . . . The Panel facilitates coalition building at the highest levels to leverage and to broker knowledge, break bottlenecks, and convene decision-makers to influence policy and create change for Africa.” AFRICA PROGRESS PANEL, AFRICA PROGRESS REPORT 2013—EQUITY IN EXTRACTIVES: STEWARDING AFRICA’S NATURAL RESOURCES FOR ALL 2 (2013), available at http://www.africaprogresspanel.org/wp-content/uploads/2013/08/2013_APR_Equity_in_Extractives_25062013_ENG_HR.pdf.

2. “Published every year, the Africa Progress Report is the Africa Progress Panel’s flagship publication. The report draws on the best research and analysis available on Africa and compiles it in a refreshing and provocative manner. Through the report, the Panel recommends a series of policy choices and actions for African policymakers who have primary responsibility for Africa’s progress, as well as international partners and civil society organizations.” *Id.*

3. *Id.* at 66.

4. David Smith, *Africa Ripped Off Big Time by Resource Firms, Says Bank Chief*, THE GUARDIAN (June 18, 2013, 1:03 PM), <http://www.guardian.co.uk/global-development/2013/jun/18/africa-ripped-off-foreign-resource-firms>.

5. For instance, one of the Africa Progress panelists, Strive Masiyiwa (Zimbabwe), commented that some of the concerned companies are guilty of disregarding “ethics and human lives” and that by “cheating the system, they make work harder for honest business.” Press Release, Africa Progress Panel, *Africa’s Natural Resources Could Dramatically Improve the Lives of Millions* (May 10, 2013), available at http://www.africaprogresspanel.org/wp-content/uploads/2013/08/2013_PRESS_RELEASE_Equity_in_Extractives_ENG.pdf.

6. See Laurence Juma, ‘Shadow Networks’ and Conflict Resolution in the Great Lakes Region of Africa 16:1 AFRICAN SECURITY REVIEW 2, 5 (2007); Michael Renner, *The Anatomy of Resource Wars* 162 WORLDWATCH PAPER 1, 10 (2002).

7. See Kofi Annan, *Foreword* to AFRICA PROGRESS PANEL *supra* note 1, at 7.

ness within the international community. A copious amount of literature now exists on this and scrutinizes the political crisis in Somalia from various perspectives, including state failure, maritime piracy, illegal fishing, and other humanitarian angles.⁸ One of the recurring themes from such literature is that private maritime corporations have shown an increased readiness to engage in illegal economic activity around Somalia by taking advantage of the prevailing political instability.⁹ This illegal economic behavior includes illegal fishing and illegal dumping of toxic substances in the waters around Somalia.¹⁰ Somalia's conflict generally illustrates the illicit natural resource exploitation activities that have occurred in Africa's conflict areas in the last two decades. In other parts of the continent, illicit resource exploitation during conflict has not only ended with the plundering or looting of existing natural resources by state actors, but has also included the predatory and illicit profit-seeking economic activities of individual persons, criminal networks, and entities in conflict states.¹¹ Illegal corporate and commercial activities by indigenous and multinational private corporations have taken forms such as illegal joint venture schemes,¹² sub-contracting in exchange for mineral resources,¹³ racketeering activities,¹⁴ smuggling and trafficking of mineral

8. For a large body of literature of this kind, see PIRACY STUDIES, *Academic Literature*, <http://piracy-studies.org/literature> (last visited Jan. 3, 2014).

9. Raneer Khooshie Lal Panjabi, *The Pirates of Somalia: Opportunistic Predators or Environmental Prey?*, 34 WM. & MARY ENVTL. L. & POL'Y REV. 377, 377–381 (2010).

10. Stig Jarle Hansen, *Debunking the Piracy Myth: How Illegal Fishing Really Interacts with Piracy in East Africa*, 156:6 RUSI J 26, 30 (2012).

11. It should be stated that there has not been a universally accepted definition of the term “illegal natural resource exploitation.” The definition adopted by the United Nations Security Council-appointed Panel of Experts on the Illegal Exploitation of Natural Resources and other Wealth of the Congo was fiercely contested by politicians and scholars alike. See U.N. Panel of Experts on the Illegal Exploitation of Natural Resources and other Wealth of the Congo, ¶14, U.N. Doc. S2001/357 (Apr. 12, 2001), available at <http://www.un.org/news/dh/latest/drcongo.htm>. See also François Grignon, *Economic Agendas in the Congolese Peace Process*, in DEMOCRATIC REPUBLIC OF CONGO: ECONOMIC DIMENSIONS OF WAR AND PEACE, 74–85 (2006).

12. Juma, *supra* note 6, at 5.

13. See PHILLIPPE LE BILLON, WARS OF PLUNDER: CONFLICTS, PROFITS AND THE POLITICS OF RESOURCES 151–57 (2012) (discussing the use of private military companies to secure natural resource rich areas in return for payment in form of mineral resources). See also INSTITUTE FOR SECURITY STUDIES AFRICA, PEACE, PROFIT OR PLUNDER: THE PRIVATISATION OF SECURITY IN WAR-TORN AFRICAN SOCIETIES 7 (Jakkie Cilliers & Peggy Mason eds., 1999), available at <http://www.issafrica.org/publications/books/01-jan-1999-peace-profit-or-plunder-the-privatisation-of-security-in-war-torn-african-societies-j-cilliers-p-mason-eds>.

14. Philippe Le Billon, *Getting it Done: Instruments of Enforcement*, in NATURAL RESOURCES AND VIOLENT CONFLICT: OPTIONS AND ACTIONS 215, 215–17 (Ian Bannon & Paul Collier, eds., World Bank 2003).

resources from conflict states to industrialized countries,¹⁵ and the international exchange of natural resources smuggled from conflict states through covert methods.¹⁶ Therefore, there is little doubt that more effective international and domestic regulatory frameworks must be established and implemented in order to stop this general phenomenon.

It is in view of the situation depicted above that one could argue that war in African coastal countries attracts powerful international corporations in search of lucrative opportunities to make profit out of chaos.¹⁷ Thus war and chaos can no longer be regarded as deterrents to “business.”¹⁸ Instead, war in resource rich African states has created opportunities for corporations to engage in “resource theft” and other forms of illegal natural resource exploitation. This exploitation exacerbates the plight of African maritime states because these economic and commercial activities bring further instability to conflict states and diminish their chances for quick economic recovery.¹⁹ According to one writer, corporations have enormous power to mask their illicit activities and pursue profit maximization at all costs, while simultaneously ignoring the human consequences of their actions in war-torn states.²⁰ In terms of international law, however, and as further expanded upon in later parts of this article, these exploitations flagrantly violate the territorial integrity and political sovereignty of affected maritime states and contribute in many ways to illicit war economies.²¹

Illicit fishing and toxic dumping in Somalia is thus indicative of the growing trend of illegal resource exploitation activities in Africa’s conflict zones by private corporate actors and other commercial interests

15. For examples regarding the illegal export of illegally exploited natural resources from conflict zones to industrialized states in Europe, North America, and Asia, see *Panel of Experts on the Illegal Exploitation of Natural Resources and other Wealth of the Congo* (U.N. Doc S/2001/357 (April 12, 2001), U.N. Doc S/2002/565 (May 22, 2002), U.N. Doc S/2002/1072 (Nov 13, 2001), UN Doc S/2002/1146 (Oct 16, 2002) and U.N. Doc S/2003/1027 (Oct 28, 2003).

16. See Stephen Jackson, *Making a Killing: Criminality and Coping in the Kivu War Economy*, 29:93 REV. OF AFR. POLITICAL ECON. 517, 519–20 (2002) (discussing the nature of some of these activities); see also TIM RAEYMAEKERS, INTERNATIONAL PEACE INFORMATION SERVICE, NETWORK WAR: AN INTRODUCTION TO CONGO’S PRIVATISED WAR ECONOMY 35 (2002).

17. RAEYMAEKERS, *supra* note 16, at 35.

18. IMMANUEL KANT, TOWARD PERPETUAL PEACE: A PHILOSOPHICAL SKETCH, *reprinted in TOWARD PERPETUAL PEACE AND OTHER WRITINGS ON POLITICS, PEACE, AND HISTORY* 92 (Pauline Kleingeld ed., David L. Colclasure trans., Yale University Press 2006) (“It is the *spirit of trade*, which cannot co-exist with war. . . .”) (emphasis added).

19. See generally Panjabi, *supra* note 9.

20. Beth Stephens, *The Amoralty of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT’L L. 45, 46 (2002).

21. See Tulio Treves, *Piracy, Law of the Sea, and Use of Force: Developments Off the Coast of Somalia*, 20 EUR. J. INT’L L. 399, 405 (2009).

that are directly and indirectly linked to ongoing wars or parties to such wars.²² The prevalence of economic agendas in these conflicts leads scholars to suggest the existence of a “dialectic nexus” between war and illegitimate commerce in Africa’s conflict zones.²³ There are abundant examples of illegal economic activity taking place during armed conflict not only in Somalia, but also in the Ivory Coast,²⁴ the Democratic Republic of Congo,²⁵ Sierra Leone,²⁶ and Central African Republic.²⁷ Most of this illegal natural resource exploitation activity is likely to occur in three maritime zones: the Territorial Zone, the Continental Shelf, and the Exclusive Economic Zone, each of which are governed by the United Nations Convention on the Law of the Sea.²⁸

22. Mats Berdal & David M. Malone, *Introduction to GREED AND GRIEVANCE: ECONOMIC AGENDAS IN CIVIL WARS 1* (Mats Berdal & David M. Malone eds., 2000) (highlighting the incidental connection between armed conflicts and natural resource exploitation in Africa); MICHEL T. KLAIRE, *RESOURCE WARS: THE NEW LANDSCAPE OF GLOBAL CONFLICT 190* (2002) (describing the increasing primacy of natural resource exploitation agendas in African wars); NICO SHRIJVER, *DEVELOPMENT WITHOUT DESTRUCTION: THE UN AND GLOBAL RESOURCE MANAGEMENT 159–185* (2010) (discussing the increasing importance within the United Nations of the connection between natural resource exploitation and armed conflict in Africa).

23. See Jackson, *supra* note 16, at 528 (using the term “economiz[ation] of conflict”). See also Thomas Renner, *The Anatomy of Resource Wars 162* WORLDWATCH PAPER (October 2002) at 5, 7–9 (stating that the contemporary landscape of conflicts, particularly in Africa, thrives around contests based on control or exploitation of existing natural resources, and not ideological differences); see also MICHAEL WALLACE NEST, FRANCOIS GRIGNON & EMIZET F. KISANGANI, *THE DEMOCRATIC REPUBLIC OF CONGO: ECONOMIC DIMENSIONS OF WAR AND PEACE 1* (2006); see also KLAIRE, *supra* note 22, at 190; Ingrid Samset, *Conflict of Interests or Interests in Conflict? Diamonds & War in the DRC, 93/94 REV. AFR. POL. ECON. 463, 467–69* (2002).

24. See Rep. of the Group of Experts submitted pursuant to paragraph 7 of Security Council Resolution 1584 (2004), ¶ 54, U.N. Doc. S/2005/699 (Nov. 7, 2005). See also *Trafigura Found Guilty of Exporting Toxic Waste*, BBC (July 23, 2010), <http://www.bbc.co.uk/news/world-africa-10735255> (discussing illegal dumping of toxic waste).

25. See generally Reps. of the U.N. Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the DRC, S/2001/357 (April 12, 2001), S/2002/565 (May 22, 2002), S/2002/1072 (Nov 13, 2001), S/2002/1146 (Oct. 16, 2002) and S/2003/1027 (Oct. 28, 2003).

26. The Special Court of Sierra Leone indicted Charles Taylor for various war crimes and crimes against humanity, including using financial and military means in order to obtain illegal access to Sierra Leone’s mineral resources. See generally *Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-2003-01-PT, Indictment* (Spec. Court Sierra Leone May 29, 2007), <http://www.sc-sl.org/LinkClick.aspx?fileticket=afhF3nXfC%2bY%3d&tabid=159>.

27. See International Crisis Group, *Dangerous Little Stones: Diamonds in the Central African Republic*, (Dec. 16, 2000), <http://www.crisisgroup.org/en/regions/africa/central-africa/central-african-republic/167-dangerous-little-stones-diamonds-in-the-central-african-republic.aspx>. See also *Central African Republic Rebels Take Diamond Mine*, BBC NEWS (Dec. 18, 2012), <http://www.bbc.co.uk/news/world-africa-20775788>.

28. See *infra* Part I.

This article examines the legal rights and responsibilities of maritime states and other states within these zones, and investigates whether the relevant international legal and institutional frameworks can be relied upon to prevent illegal natural resource exploitation of Africa's maritime zones during periods of armed conflict. Part I discusses the United Nations Convention on the Law of the Sea, which outlines the rights of states in specific maritime zones. Part II provides a brief case study of political instability and consequent criminal activity in Somalia as a prime example of the ineffectiveness of applicable international law and explores the international community's lack of response to such exploitation. Part III scrutinizes the current legal framework by assessing its ability to criminalize illicit natural resources exploitation, and details the efforts by leaders in Africa to combat this criminal activity. The article concludes that the illicit exploitation of African natural resources should constitute a war crime under international criminal law, and that the current efforts by leaders in Africa are a strong step toward combating this exploitation.

I. APPLICABLE INTERNATIONAL LAW: THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

The United Nations Convention on the Law of the Sea ("UNCLOS") regulates economic activity in maritime zones.²⁹ In general terms, UNCLOS is important in controlling economic activity in three problematic maritime zones: the Territorial Waters, the Exclusive Economic Zones, and the Continental Shelf. Within the framework of UNCLOS, states are required to preserve these zones or claim extended portions of them. One of the motivations for this is that these zones yield critical natural resources such as coral sponges, oysters, pearl shell, bottom fish, and prawn, and also contain minerals such as gold, copper, zinc, coal, oil, and manganese nodules.³⁰ Technological advances have enhanced corporations' capability to exploit these minerals, which have been considered impossible to extract for the past 40 years.³¹ The progressive depletion of land-based resources has triggered a shift to extrac-

29. United Nations Convention on the Law of the Sea, Dec. 10 1982, 1833 U.N.T.S. 397, available at http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm [hereinafter UNCLOS].

30. Barry B. Omo Ikirodah, *The Legal Regime of the Continental Shelf, its Economic Importance and the Vast Natural Resources of a Coastal State*, 23 J. ENERGY & NAT. RESOURCES L. 15, 16-18 (2005).

31. See HELMUT TUERK, REFLECTIONS ON THE CONTEMPORARY LAW OF THE SEA 12 (2012).

tion of oceanic reserves, particularly in the continental shelf.³² Provisions of UNCLOS offer less comprehensive, and generally ineffective, responses to illegal exploitation of natural resources in zones where maritime states are caught in conflict and are unable to address criminal activity under domestic law.

A. The Territorial Waters

UNCLOS requires states to restrict their operations to a territorial zone not exceeding 12 nautical miles from the land (defined as the low watermark along the coast) into the sea.³³ The sovereignty of the coastal state extends into these waters, the airspace above, and the seabed and subsoil beneath.³⁴ Furthermore, in accordance with UNCLOS, the coastal state's laws and regulations apply in the territorial zone.³⁵ Thus, the laws of African maritime states should prevail in issues of natural resource management and exploitation. At the same time, however, according to UNCLOS, the laws of these states must yield to applicable international rules in territorial zones.³⁶ Thus, ships and aircraft of all states have the right of "innocent passage" through the territorial sea and the sea's airspace.³⁷

Article 19 of UNCLOS defines "innocent passage" to mean passage that "is not prejudicial to the peace, good order or security of the coastal State," and that such passage shall take place in conformity with UNCLOS and "other rules of international law."³⁸ Among activities which do not constitute innocent passage are: (1) the loading or unloading of any commodity, currency, or person contrary to customs, fiscal, immigration, or sanitary laws and regulations of the coastal State;³⁹ (2) acts of willful and serious pollution contrary to UNCLOS;⁴⁰ and (3) any fishing operations.⁴¹ These rules explicitly recognize the illegality of fish-

32. Geoffrey P. Glasby, *Lessons Learned from Deep-Sea Mining*, SCIENCE MAGAZINE, July 28, 2000, at 551, 551–53, available at <http://www.sciencemag.org/content/289/5479/551>.

33. See UNCLOS, *supra* note 29, at art. 3 (providing that the breadth of a state's territorial sea should be up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention); *Id.* at art. 4 (providing for the outer limit of the territorial sea to be the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea).

34. See UNCLOS, *supra* note 29, at art. 2.

35. *Id.* at art. 21, ¶ 1.

36. *Id.* at art. 2, ¶ 3.

37. See *id.* at arts. 17, 38.

38. UNCLOS, *supra* note 29, at art. 19, ¶ 1.

39. *Id.* at art. 19, ¶ 2(g).

40. *Id.* at art. 19, ¶ 2(h).

41. *Id.* at art. 19, ¶ 2(i).

ing activities and the dumping of wastes by foreign ships. The UNCLOS prohibition of surveys⁴² and other acts that are unrelated to the passage of ships⁴³ suggests that other natural resource extraction activities are specifically prohibited.

B. The Exclusive Economic Zone

African maritime states exercise limited rights over the Exclusive Economic Zone ("EEZ"), an area defined to represent the area "beyond and adjacent to the territorial sea,"⁴⁴ which extends a maximum of 200 nautical miles from the baselines of the territorial zones.⁴⁵ UNCLOS provides that a coastal state has exclusive rights to explore, exploit, conserve, and manage living and non-living natural resources above the seabed, on the seabed, and in the subsoil, as well as rights to "other economic exploitation and exploration of the zone, such as production of energy from water, currents, and winds."⁴⁶ The coastal state may also pass laws and regulations in conformity with UNCLOS to regulate these activities in the EEZ.⁴⁷ Such laws and regulations empower the coastal state "to take such measures, including boarding, inspection, arrest, and judicial proceedings as may be necessary to ensure compliance."⁴⁸ With respect to the EEZ, however, other states enjoy "the freedoms . . . of navigation and over-flight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention."⁴⁹ Despite an element of shared, albeit limited use of the EEZ, the UNCLOS prohibition of natural resource exploitation activity by other states is clear.

C. The Continental Shelf

UNCLOS regulates the continental shelf of maritime states in such manner as to avoid and prevent disputes that arise from competing claims to the shelf by different states.⁵⁰ The continental shelf represents the seabed and subsoil of the submarine areas beyond each state's terri-

42. *Id.*

43. *Id.* at art. 19, ¶ 2(l).

44. UNCLOS, *supra* note 29, at art. 55.

45. *Id.* at art. 57.

46. *Id.* at art. 56, ¶ 1.

47. *See id.* at art. 73.

48. *Id.* at art. 73, ¶ 1.

49. UNCLOS, *supra* note 29, at art. 58.

50. *See* UNCLOS, *supra* note 29, at art. 25. *See generally* TUEBK, *supra* note 26.

torial zone.⁵¹ UNCLOS defines the shelf as the seabed and submarine areas that extend beyond the natural prolongation of land to the outer edge of the continental margin, or, where the outer edge of the continental margin does not extend up to that distance, a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.⁵² In the continental shelf, the coastal state has “exclusive sovereign rights” to explore and exploit natural resources.⁵³ If the coastal state is unable to carry out the exploration and exploitation, another state may exercise these rights *only* by obtaining the consent of the coastal state.⁵⁴

Having explored the nature of legal rights exercisable by states in the identified maritime zones, it is critical to identify the major obstacles likely to be encountered by African states in enforcing international legal rights using the applicable international institutional framework.

II. OBSTACLES TO PROGRESS

For the past three decades, the efficacy of international law enforcement and the success of institutional mechanisms established to address particular transnational problems in Africa have depended in very large part on the support of Western states and organizations.⁵⁵ This support ranges from financial, technical skills assistance, human and technological resource support, and even moral support.⁵⁶ This is quite surprising since African governments have shown a desire, at least on paper, to have an approach that advocates for African solutions to African problems,⁵⁷ and consequently seem prepared to fully support established institutions aimed at addressing particular problematic issues during both war and peace. Indeed, in confronting the scourge of war and its problematic aspects on the continent, African states, through the African Union, constantly feel that they have a deeper role to play in

51. UNCLOS, *supra* note 29, at art. 76, ¶ 1.

52. *Id.*

53. *Id.* at art. 77, ¶ 1.

54. *Id.* at art. 77, ¶ 2.

55. See Max du Plessis & Lee Stone, *A Court not Found?*, 7 AFR. HUM. RTS. L.J. 522, 533 (2007).

56. See NICO SHRIJVER, DEVELOPMENT WITHOUT DESTRUCTION: THE UN AND GLOBAL RESOURCE MANAGEMENT 159–85 (2010).

57. See UNSC S/PV.4317 and S/PV.4318, where African states fiercely debated and argued for this approach during a session of the Security Council. This Security Council session was conducted at the height of the illicit natural resource exploitation crisis of the Congo wars between 2001 and 2003.

shaping African politics and determining Africa's relations with international institutions.⁵⁸

The most disturbing concern arising from overreliance on support from Western states is that such states are less eager to lend support and offer assistance where the transnational problems are traceable to entities domiciled in the Western states.⁵⁹ Thus, where corporations domiciled in Western states are implicated in illicit transnational criminality, those Western host states have been slow to take decisive action that would benefit African states.⁶⁰ Without action from those host states, the implicated corporations would most likely continue with their illicit natural resource exploitation activities, and affected African states would be unable to combat such criminality due to the state of war and institutional collapse. The crisis in Somalia provides a prime case study and necessitates a discussion.

A. Case Study: Exploitation of Conflict in Somalia

Somalia has not enjoyed absolute peace in the past three decades, with hostile political conditions giving rise to the notorious problem of piracy on the East African coast.⁶¹ Piracy has exacerbated the dire political conditions in Somalia; a state that has experienced intermittent bursts of civil conflict and a general lack of any single or dominant political elite since 1991.⁶² Various warlords continually forced Somalia into anarchy and violence by exercising informal forms of political power over several provinces, towns, and cities.⁶³ The lack of a governing political authority perpetuated a power vacuum, and the right to fill the void was viciously

58. See Max du Plessis, *The International Criminal Court that Africa Wants*, 2–5, INST. FOR SEC. SERVICES 2010, available at <http://www.issafrica.org/uploads/Mono172.pdf>.

59. See U.N. Secretary-General, Letter dated Oct. 15, 2002 from the Secretary-General addressed to the President of the Security Council, ¶ 141, U.N. Doc. S/2002/1146 (Oct. 16, 2002).

60. *Id.*

61. See Panjabi, *supra* note 9, at 377–491 (2010).

62. Alison K. Eggers, *When is a State a State? The Case for Recognition of Somaliland*, 30 B.C. INT'L & COMP. L. REV. 211, 211–22 (2007).

63. See *Somali Warlords Form Unity Council*, BBC NEWS (Mar. 22, 2001), <http://news.bbc.co.uk/2/hi/africa/1235434.stm>. These warlords do not operate as well organized political and militarized groups, making them difficult to trace, identify, or study individually. They are rather random, incongruent, and sometimes temporary militia groups that disband as soon as they achieve a particular political or military objective. Further, they do not constitute themselves into recognizable political elements in Somalia, and are notorious for refusing to come into the open and participate in the major currents that define Somalia's political landscape. See also *Somalia's Warlords: Feeding on a Failed State*, GLOBAL POLICY FORUM (Jan. 21, 2004), <http://www.globalpolicy.org/component/content/article/173/30467.html>.

contested by warlords and sectorial militias.⁶⁴ By the turn of the century, the consequent demise of judicial, administrative, and security infrastructure had virtually crippled Somalia's administrative system, leaving Somalia unable to fight the criminals feeding off of the prevailing political instability.⁶⁵

In 2004, Somalia's Transitional Federal Government was established⁶⁶—primarily through the efforts of Kenya and other states in the region—as a transitional, inclusive political arrangement formed for the purpose of working toward permanent government, political stability, and peace. The Transitional Federal Government attempted to plug the power vacuum and bring a semblance of order, but in reality failed to bring “government” to Somalia.⁶⁷ By 2012, when Somalia elected President Hassan Mammud Sheikh to power, political developments had not succeeded in creating any single and effective state administrative system in Somalia, and political administration was still shared among local warlords, militias, Islamic militants, Ethiopian authorities, and African Union authorities.⁶⁸ The lack of effective security, combined with the lack of an administrative apparatus with national authority and jurisdiction, played into the hands of criminal gangs and organized crime from within Somalia and other parts of Africa and Europe.⁶⁹ Subsequently, it was claimed that a consequence of collapsed security infrastructure and ineffective administration was the rise in illicit activities by both foreign

64. See Eggers, *supra* note 62, at 211–22.

65. See generally U.N. Security Council, *Report of the Secretary-General on Somalia*, Dec. 30 2010, U.N. Doc. S/2010/675, available at <http://www.unhcr.org/refworld/docid/4e2ebcf42.html> (detailing the fragile political situation in Somalia in 2010 and further painting a gloomy picture on the security, humanitarian, and human rights situation in Somalia).

66. STEPHANIE HANSON & EBEN KAPLAN, *SOMALIA'S TRANSITIONAL GOVERNMENT* (Council on Foreign Relations 2008), available at <http://www.cfr.org/somalia/somalias-transitional-government/p12475>. See also International Expert Group on Piracy off the Somali Coast, *Piracy off the Somali Coast (Workshop Commissioned by the Special Representative of the Secretary General of the UN to Somalia Ambassador Ahmedou Ould-Abdallah) Final Report: Assessment and Recommendations*, 11 Nairobi (Nov. 21, 2008), available at http://www.imcsnet.org/imcs/docs/somalia_piracy_intl_experts_report_consolidated.pdf.

67. Int'l Expert Group on Piracy off the Somali Coast, *supra* note 66, at 11. See also Bilyana Tsvetkova, *Securitizing Piracy off the Coast of Somalia*, 3.1 CENT. EUROPEAN J. INT'L SEC. STUDIES 44, 47 (2009) available at http://www.cejss.org/sites/default/files/Tsvetkova-Piracy_in_Somalia.pdf (last visited Oct. 8, 2013).

68. See *Somali Election of Hassan Sheikh a 'Great Step'*, BBC NEWS (Sep. 11, 2012), <http://www.bbc.co.uk/news/world-africa-19557884>.

69. HANSON & KAPLAN, *supra* note 66; see also Kathryn Westcott, *'Pirate' Death Puts Spotlight on 'Guns for Hire'*, BBC NEWS (Sept. 21, 2013), <http://news.bbc.co.uk/2/hi/africa/8585967.stm> (suggesting the possible hiring of private security corporations by commercial ships that used international sea lanes near the East coast).

and domestic actors in Somali waters.⁷⁰ One writer succinctly captured the relationship between collapsed government, piracy, and illegal natural resource exploitation:

Somalia provides an important case study of the nexus between environmental devastation and consequent criminal actions against international targets. Although the piracy is entirely criminal and totally unjustifiable, it is understandable, given the political and economic background. Somalia also provides a case study of brazen violations of international law, both by the Somalis and by foreigners, who have taken advantage of the absence of effective government, to wreak environmental havoc on the weakened nation. Although the Somali pirates can be termed “predators,” it must be appreciated that their country has suffered at the hands of predators from many nations who have polluted their waters with toxic and even nuclear waste and looted their oceans of fish.⁷¹

Somalia’s background provides a clear illustration of the relationship between political instability and maritime crime. Political instability weakens institutional response mechanisms and diverts national crime-fighting resources to other critical commitments. This reality is well-appreciated by criminal networks that profit from small arms dealing, piracy, money laundering, and related corrupt behavior.⁷² Studies of ‘resource wars’ in Africa have shown that corporations wishing to exploit natural resources rely on these criminal networks to maximize their illicit activities in conflict-torn states.⁷³ With little security and legal infrastructure in maritime states, home states in which the corporations are registered have a duty to scrutinize illicit activities and expose corporations to criminal sanctions. However, as will be illustrated below, their response mechanisms and other associated international responses to corporate exploitation of Africa’s resources have been far from satisfactory.

70. Najad Abdullahi, ‘Toxic waste’ Behind Somali Piracy, ALJAZEERA (Oct. 2, 2013), <http://www.aljazeera.com/news/africa/2008/10/2008109174223218644.html>.

71. Panjabi, *supra* note 9, at 377, 382.

72. RAEYEMAEKERS, *supra* note 16, at 7–8.

73. Laurence Juma, *The War in Congo: Transnational Conflict Networks and the Failure of Internationalism*, 10 GONZ. J. INT’L L. 97, 102–03 (2006) (discussing the role of transnational conflict networks and multinational corporations); see also RAEYEMAEKERS, *supra* note 16.

B. Lack of International Accountability

Most of the private corporations involved in the exploitation of African natural resources are registered in European states,⁷⁴ and, in comparison to African states, the legal systems of these states have more effective regulatory mechanisms to prevent illegal economic activities in their own local waters. Illicit fishing, dumping, smuggling, illegal trafficking, and violation of control and monitoring systems in European maritime states are extremely rare because such countries are likely to adopt, use, and implement sophisticated technology and stringent policing strategies to combat maritime criminality.

The greatest obstacle to preventing the maritime exploitation of African resources is the reluctance of European and North American governments to impose a stricter regulatory framework on corporations that are involved in illicit dumping and illegal fishing in the waters of politically unstable African countries. Complaints by conflict-torn states that illegally exploited natural resources are entering the developed world's markets generate insufficient alarm to the international community.⁷⁵ This lack of international alarm is considerably problematic because multinational corporations that are headquartered in developed countries are most often implicated in the illegal exploitation and trafficking of natural resources from conflict states.⁷⁶

74. See Rep. of the U.N. Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the DRC, Part IV S/2002/1072 (listing mostly EU states). See also JEROEN CUVELIER & TIM RAEYMAEKERS, INTERNATIONAL PEACE INFORMATION SERVICE, SUPPORTING THE WAR ECONOMY IN DRC: EUROPEAN COMPANIES AND THE COLTAN TRADE, (Jan. 2002) (relating to multinational corporations implicated in illicit activities during the Congo conflict).

75. See SEC Adopts Rule for Disclosing Use of Conflict Minerals, U.S. SECURITIES AND EXCHANGE COMMISSION (Jun. 3, 2013), <http://www.sec.gov/news/press/2012/2012-163.htm> (In 2010, the United States responded by including Section 1502 in its Dodd-Frank Act, which targets U.S. registered companies importing mineral resources from Congo. The section was inserted due to concerns that the exploitation and trading of conflict minerals imported by these companies was being carried out by armed groups and directly helped to finance the conflict in the Democratic Republic of the Congo region, while further contributing to an emergency humanitarian crisis.).

76. See Corporate Social Responsibility: Movements and Footprints of Canadian Mining and Exploration Firms in the Developing World, 10 CENTRE FOR THE STUDY OF RESOURCE CONFLICT (Oct. 30, 2012) http://www.miningwatch.ca/sites/miningwatch.ca/files/CSR_Movements_and_Footprints.pdf (observing in figure 6 that Canadian mining companies, for instance, were responsible for committing 60 percent of "infractions" associated with community conflict in areas they operate such as Congo). See also CUVELIER & RAEYMAEKERS, *supra* note 74, at 25 (on the complicity of European companies); see also Marcel Colla & Georges Dallemagne, La Commission D'Enquête "Grand Lacs," *Commission d'enquête parlementaire chargée d'enquêter sur l'exploitation et le commerce légaux et illégaux de richesses naturelles dans la région des Grands Lacs au vu de la situation conflictuelle actuelle et de*

An example of this occurred in Congo, where European states were reluctant to scrutinize the transnational activities of the multinational corporations that were exploiting Congo's natural resources during conflict from 2000 to 2005.⁷⁷ The developed world feared that more intrusive regulation in Africa's conflict zones would obstruct trade,⁷⁸ and that the use of import controls, monitoring, and policing were not the responsibility of individual states, but of the European Union.⁷⁹ Other states claimed that the European Union was the only authority that could enforce declarations affecting trade flows in ways that would not affect legitimate trade.⁸⁰ Most of the European Union states deflected attention to the private sector, claiming that the burden was on corporations to ensure they did not exacerbate the war through unethical transactions in Congo.⁸¹

The response of developed states suggests they cannot be relied upon to impose restrictive measures against their own corporations or to scrutinize corporate activity in African conflict states. It can be argued that in view of the stronger technical institutions, investigative agencies, and crime fighting infrastructure in Europe and North America, it is an easier task for those countries to investigate corporations involved in trade and trafficking of mineral resources from Congo and other African states than for conflict-torn states to investigate the complicated involvement of multinational corporations in their illicit war economies.⁸²

l'implication de la Belgique, available at <http://www.senate.be/www/?Mlval=/publications/viewPub&TID=33621897&LANG=fr> (last visited Nov. 17, 2013).

77. U.N. Secretary-General, Letter dated Oct. 15, 2002 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/2002/1146, ¶ 141 (October 16, 2002) [hereinafter "S/2002/1146"] (Panel of Experts reports identified 17 end-user countries in Asia, Middle East, Europe, and North America, while countries representing processing centers and major consumer markets for Congo's primary commodities and natural resources included Belgium, China, France, Germany, India, Israel, Japan, Kazakhstan, Lebanon, Malaysia, the Netherlands, the Russian Federation, Switzerland, Thailand, the United Arab Emirates, the United Kingdom, and the United States.); see also NEST ET. AL, *supra* note 23, at 69 (stating the actions of France, United States, and the United Kingdom in relation to Congo's conflict resources were never transparent, but were acts of "hypocrisy" intended to apply pressure on Congolese actors while disguising the deep involvement of European and North American multinational corporations in natural resource exploitation).

78. S/2002/1146, *supra* note 77, at ¶ 141.

79. *Id.* at ¶ 143.

80. *Id.*

81. *Id.*

82. Congo's mineral resources include: copper, cobalt, gold, diamonds, tantalum, tin, coltan, zinc, cassirite, iron ore, uranium, and silver. The 2010 Mapping Exercise Report of the United Nations High Commissioner for Human Rights illustrates that Congo alone accounts for 17 percent of global production of diamonds and its Katanga copper belt contains 34 percent of the world's cobalt and 10 percent of the world's copper. Office of the

III. SOLUTIONS TO CONFLICT EXPLOITATION

UNCLOS clearly defines the rights of maritime states to certain maritime zones, and leaves no doubt as to the regulations to be followed by foreign actors engaging in economic activities in the zones. UNCLOS empowers maritime states to make laws and institute measures to safeguard their resources from theft and predation by foreign actors. There is no doubt, then, that involvement of foreign state and non-state actors within these waters is a violation of international law that should be addressed under UNCLOS.⁸³ Further, such economic activity during periods of armed conflict should constitute the war crime of pillaging or appropriation of property, which is recognized under the international criminal jurisdiction regime established by the Rome Statute framework.⁸⁴ The following sections explore how the provisions of this international criminal justice framework are important in the prosecution of implicated persons and corporations, and describe the concurrent efforts to protect against this illegal activity, specifically the 2050 Africa's Integrated Maritime Strategy.

A. International Criminal Law

While the illicit activities of corporations seem to succeed under the guise of war, the largest problem with respect to illegal natural resource exploitation is that such activities are not currently classified as war crimes under international criminal law. In order to impose international criminal liability, the governing principles of international criminal law require that a corporation be a party to prevailing hostilities or be directly connected to any of the parties participating in ongoing

High Comm'r for Human Rights, *Dem. Rep. Congo, 1993-2003: Report of the Mapping Exercise Documenting the Most Serious Violations of Human Rights and International Humanitarian Law Committed within the Territory of the Democratic Republic of the Congo Between March 1993 and June 2003*, ¶ 729 (August 2010).

83. Disputes between states do not immediately attract penalties. States are required to settle their disputes by peaceful means, for instance through arbitration procedures of their choice or by bringing the case to the International Tribunal on the Law of the Sea (ITLOS), the International Court of Justice, or a special tribunal. These tribunals mete out the penalties, which are primarily in the form of payment of reparations.

84. The Rome Statute is an international treaty that was formulated in 1999 with the objective of creating a permanent international criminal court. The treaty entered into force in July 2002, upon the deposition of the required ratifications, and the International Criminal Court was subsequently established in the same year. Rome Statute of the International Criminal Court, Art. 8, U.N. Doc. A/CONF.183/9 (Jul. 1, 2002) available at http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf [hereinafter Rome Statute].

wars.⁸⁵ These illegal natural resource exploitation activities will continue to fall outside the ambit of war crimes unless and until there is proof that parties to the conflict conducted them in furtherance of the commission of war crimes, or that the corporations involved are owned by parties to the conflict. Further, for the activity to be considered a war crime under the current regime, there must be proof that the activity is a serious violation of the laws and customs applicable to international armed conflict.⁸⁶

Even though criminal liability cannot be imposed under the current regulatory framework, illicit economic exploitation by corporations should be considered a war crime. Under the Elements of Crime of the Rome Statute,⁸⁷ the Prosecutor is required to establish whether the illegal natural resource exploitation activities in question occurred “in the context of” and were “associated” with either an international armed conflict or non-international armed conflict, whichever would be the case.⁸⁸ Furthermore, it has been held that “the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator’s ability to commit [the crime], his decision to commit it, the manner in which it was committed or the purpose for which it was committed.”⁸⁹ It should also be shown that “the perpetrator acted in furtherance of or under the guise of the armed conflict . . . to conclude that his acts were closely

85. For criminal liability under the international criminal justice regime, see Kai Ambos, *Article 25: Individual Criminal Responsibility*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVER’S NOTES, ARTICLE BY ARTICLE 743 (Otto Triffterer ed., 2008); see also Gerhard Werle, *Individual Criminal Liability in Article 25 ICC Statute* 5 J. INT’L CRIM. JUST. 953, 957 (2007).

86. *Id.* See also Updated Statute of the Int’l Crim. Trib. for the Former Yugoslavia, Art. 1, (Sep. 2009) available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf; Statute of the Int’l Crim. Trib. For Rwanda, Art. 1, (Jan. 31, 2010) available at <http://www.unictt.org/Portals/0/English/Legal/Statute/2010.pdf>.

87. See Int’l Crim. Court, *Elements of Crimes*, Art. 8, ICC-ASP/1/3 (2011) available at http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/official%20journal/Pages/elements%20of%20crimes.aspx (last visited Sept. 7, 2013).

88. In the *Katanga* and *Chui* case the International Criminal Court endorsed an earlier view that this element is fulfilled “when the alleged crimes were closely related to the hostilities.” Prosecutor v. Katanga & Chui, Case No. ICC 01/04-01/07, Decision on the Confirmation of Charges, ¶ 380 (September 30 2008), <http://www.iccpi.int/iccdocs/doc/doc571253.pdf>. The *Katanga* case followed the early view of the ICC. See Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, ¶ 288 (Jan. 29, 2007), <http://www.icc-cpi.int/iccdocs/doc/doc266175.pdf>.

89. Prosecutor v. Kunarac, Kovac, & Vukovic, Case No. ICC IT-96-23/1-A, Judgment, ¶ 58, (Int’l Crim. Trib. For the Former Yugoslavia Feb. 22, 2002) <http://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf>.

related to the armed conflict.”⁹⁰ Corporations involved in illicit natural resource exploitation can be directly linked with parties to the prevailing conflict in situations where the corporations belong to conflict actors.⁹¹ Furthermore, these activities can and should be viewed as being committed in furtherance of war crimes because they enable parties of the conflict to continue to conduct war, partly due to the weakened infrastructure of the African state, and thus corporations should be subject to international criminal jurisdiction under the war crimes doctrine.

Unfortunately, under the Rome Statute, the International Criminal Court⁹² (“ICC”) has criminal jurisdiction over natural persons only; juridical entities such as corporations are exempt.⁹³ Therefore, corporations aligned to the conflict are not prosecutable, per se, under the criminal jurisdiction of the Rome Statute framework as it currently stands. However, this does not prohibit some states from adopting particular legal principles of international criminal law in their domestic criminal codes and applying them to corporations that are exploiting natural resources. State parties to the Rome Statute can thus confront the problem of corporate immunity by providing mechanisms in their domestic criminal codes aimed at exposing corporations to criminal sanctions if it can be established that such corporations committed particular transgressions.⁹⁴ Such domestic criminal law must permit the prosecution of both natural and juristic persons in courts, meaning corporations and the natural persons who operate them would be exposed to criminal sanctions. Accordingly, domestic criminal jurisdictions could use such laws to prosecute corporate entities. Such an approach can be taken once it becomes clear that the illicit activities in question constitute war crimes, either because

90. *Id.* at ¶ 58. See also Prosecutor v. Ntagerura, Bagambiki, & Imanishimwe, Case No. ICTR-99-46-T, Judgement and Sentence, ¶ 793, (Int’l Crim. Trib. for Rwanda Feb. 25, 2004).

91. A clear example is German corporations that were implicated and convicted of committing the war crime of looting and economic spoliation since they were linked with the Nazi imperial state during the Second World War. See *The IG Farben Trial*, 10 L. REPS. TRIALS WAR CRIMS., 44–45 (1949), available at http://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-10.pdf [hereinafter *The IG Farben Trial*].

92. The International Criminal Court is the international court created under the Rome Statute treaty for the prosecution of four major international crimes, namely aggression, war crimes, crimes against humanity, and genocide. It is based in The Hague, Netherlands. Int’l Crim. Court, *About the Court*, http://www.icc-cpi.int/EN_Menus/ICC/About%20the%20Court/Pages/about%20the%20court.aspx (last visited Nov. 17, 2013).

93. Rome Statute, *supra* note 84, at Art. 25(1).

94. See generally Andrew Clapham, *The Complexity of International Criminal Law: Looking Beyond Individual Responsibility to the Responsibility of Organizations, Corporations and States*, in FROM SOVEREIGN IMPUNITY TO INTERNATIONAL ACCOUNTABILITY: THE SEARCH FOR JUSTICE IN A WORLD OF STATES 233, 239 (Ramesh Thakur & Peter Malcontent eds., 2004).

parties to the conflict committed them to further the commission of war crimes, or because the corporations belong to a party in conflict.

Illicit natural resource exploitation has been criminalized before: the post-World War II Nuremberg International Tribunal (“NIT”) focused on illicit economic exploitation by private actors who were linked to conflicts. The NIT’s rulings show that natural persons directing corporate entities that are involved in illicit exploitation have been held criminally liable for their activity.⁹⁵ In the *IG Farben* case,⁹⁶ the Tribunal adopted the term “spoliation” to describe the nature of “plunder,” “pillaging,” and other illegal forms of dispossession of public or private property during the war.⁹⁷ The Tribunal specifically stated that the term “spoliation”:

is used interchangeably with the words ‘plunder’ and ‘exploitation.’ It may therefore be properly considered that the term ‘spoliation’ . . . applies to the widespread and systematiz[ed] 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 offen[s]es against property in violation of the laws and customs of war of the general type charged in the Indictment.⁹⁸

The *IG Farben* case and many cases that followed demonstrate that corporations have been implicated for various forms of economic exploitation under international criminal law based on their role, participation, and connection to parties to the conflict.⁹⁹ The NIT has imposed criminal liability on individuals responsible for operating entities, such

95. See The *IG Farben* Trial, *supra* note 91, at 44–45.

96. In the *IG Farben* case, representatives of IG Farben, a German private company, were convicted of pillage for purchasing land, buildings, machinery, equipment from a French factory, which the Nazi German Ministry of Economics had seized. Six directors of the IG Farben firm were held criminally liable for pillaging the Strassbourg Schiltigheim oxygen and acetylene plants in Alsace-Lorraine on the basis that the German civil administration’s decree confiscating the plants was “without any legal justification under international law.” The company’s directors were liable because they acquired such plants from the Nazi Government without payment to or consent of the French owners. *Id.* at 21.

97. *Id.*

98. *Id.* at 44–45.

99. See JAMES G. STEWART, CORPORATE WAR CRIMES: PROSECUTING THE PILLAGE OF NATURAL RESOURCES 77 (William Kramer et al., eds., 2011). See also *The Flick Trial*, 9 L. REPS. TRIALS WAR CRIMS. 1, 21–24 (1947), available at http://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-9.pdf [hereinafter *The Flick Trial*]; and *Trial of Alfred Felix Alwyn Krupp Von Bohlen und Halback and Eleven Others*, 10 L. REPS. TRIALS WAR CRIMS. 69, 150

as multinational corporations, for the purposes of conflict exploitation.¹⁰⁰ According to the NIT, the laws of war are “binding no less on private individuals than upon government officials and military personnel,”¹⁰¹ and “[o]fficers, directors, or agents of a corporation participating in a violation of law in the conduct of the company’s business may [thus] be held criminally liable individually therefor.”¹⁰² The NIT’s specific views on multinational corporations were that “when the corporation itself is forbidden to do an act, the prohibition extends to the board of directors and to each director, separately and individually.”¹⁰³ The NIT rejected the notion of corporate liability, but specifically sanctioned targeting the directors of corporations for criminal prosecution.¹⁰⁴

The NIT also endorsed the approach of discarding the corporate veil, and exposed individual officers and directors of corporations to individual criminal liability for their role in the illegal natural resource exploitation activities of the corporation.¹⁰⁵ Even though war crimes are usually committed by individuals using the corporation as a smokescreen, prosecutors seek to pierce the corporate veil by focusing on the individuals driving the company.¹⁰⁶ For example, in *IG Farben*, the NIT held that criminal responsibility is personal and not based on membership in a group by stating that individual criminal “responsibility does not automatically attach to an act proved to be criminal merely by virtue of a defendant’s membership” of a corporation’s board of directors, and that corporate structure cannot be utilized “to achieve an immunity from

(1948), available at http://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-10.pdf [hereinafter *The Krupp Trial*].

100. See *The Flick Trial*, *supra* note 99, at 21–24; see *The Krupp Trial*, *supra* note 99, at 150.

101. *The Krupp Trial*, *supra* note 99, at 150.

102. *Id.* (quoting 19 C.J.S. *Corporations* § 649 (1940)).

103. *Id.*

104. See LIESBETH ZEGVELD, *THE ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW*, 56 (James Crawford et al., eds., 2002) (Arguing “[w]hile the Nuremberg Charter recognized for the first time the possibility of individual criminal responsibility under international law based on membership in a criminal group, it did not empower the International Military Tribunal to hold organizations as such criminally responsible. Indeed, the primary aim of this Tribunal was not to criminalize organizations, but to convict individuals against whom other evidence might be lacking.”).

105. See STEWART, *supra* note 99, at 77 (“[T]here is little doubt that the traditional approach to prosecuting commercial actors for international crimes involves dispensing with the corporate entity and assessing whether individual business representatives satisfy requirements for regular modes of liability such as aiding and abetting, instigating or direct perpetration.”).

106. William Schabas, *Enforcing International Humanitarian Law: Catching the Accomplices*, 83.842 INT. REV. OF THE RED CROSS 439, 453 (2001).

criminal responsibility for illegal acts” that an officer of the corporation “directs, counsels, aids, orders, or abets.”¹⁰⁷

Therefore, the current approach to this issue is to hold the directors and senior management personnel of corporations individually criminally liable if it is clear that they participated in exploitation by sanctioning, authorizing, and directing the carrying out of such activity. The rationale is that

corporations act through individuals and, under the conception of personal individual guilt . . . , the Prosecution to discharge the burden imposed upon it . . . , must establish by competent proof beyond a reasonable doubt that an individual defendant was either a participant in the illegal act or that, being aware thereof, he authorized or approved it.¹⁰⁸

Criminal liability further attaches when a corporation’s officers, agents, or employees act within the scope of their employment duties and with the intent to benefit the corporation.¹⁰⁹ Thus, liability attaches to this class of defendants despite the fact that they carried out the illegal acts for “organizational,” not personal, ends, and despite the fact that key decisions to exploit resources were “supported by operational and organi[z]ational subcultures, contingencies and priorities.”¹¹⁰ If a corporation’s object and purpose is acquisition, commercialization, trafficking, and exportation of natural resources outside the existing legal or regulatory framework, the specific responsibility and participation of the directors of the corporation is scrutinized.

The acts that are scrutinized are not only those carried out in violation of criminal law, but those that breach civil, administrative, and other applicable regulations.¹¹¹ Accordingly, in circumstances where a corporation is involved in illegal natural resource exploitation, the criminal case must be based on the fact that senior management personnel systematically and deliberately authorized and sanctioned the exploita-

107. The IG Farben Trial, *supra* note 91, at 52.

108. *Id.*

109. A number of states, including the United States, recognize corporate criminal liability on the basis of the principle of “vicarious liability,” which attributes responsibility for the actions of company employees to the corporation. See GEORGE P. FLETCHER, *BASIC CONCEPTS OF CRIMINAL LAW* 190 (1998).

110. SALLY S. SIMPSON, *CORPORATE CRIME, LAW AND SOCIAL CONTROL* 7–9 (Alfred Blumstein & David Farrington eds., 2002).

111. According to one view, illegality by corporations and their agents “differs from the criminal behavior of the lower socio-economic class principally in the administrative procedures which are used in dealing with the offenders.” See SUTHERLAND, *WHITE-COLLAR CRIME* 9 (1949).

tion activity during conflict, in violation of prescribed administrative and governance processes.¹¹² Furthermore, it is necessary to demonstrate that such corporate representatives individually participated in the formulation, implementation, and supervision of illegal natural resource exploitation strategies and methods in the territorial waters of affected states during conflict.

B. The 2050 Africa's Integrated Maritime Strategy

The African Union has acknowledged threats and challenges to Africa's maritime zones and has sought to address them in various ways. In December 2012, the Second Conference of African Ministers Responsible for Maritime-Related Affairs and the First High Level African Maritime Cross-Sectoral Senior Officials met in Addis Ababa, Ethiopia and adopted the 2050 Africa's Integrated Maritime Strategy ("AIMS").¹¹³ AIMS addresses various issues, including maritime safety, security arising from maritime threats and vulnerabilities, a framework for strategic action, and maritime governance and legal regimes.¹¹⁴ AIMS acknowledges the need to create a Combined Exclusive Zone of Africa ("CEMZA"),¹¹⁵ which would introduce a common information sharing environment for African states. The ability to share information would "allow for the convergence of existing and future monitoring and tracking systems used for maritime safety and security, protection of the marine environment, fisheries control, trade and economic interests, border control and other law enforcement and defen[s]e activities."¹¹⁶ CEMZA would also introduce regional policing mechanisms through enhanced "inter-agency/transnational cooperation and coordination on maritime safety and security."¹¹⁷

CEMZA would "grant Africa enormous cross-cutting geo-strategic, economic, political, social and security benefits, as it will engender

112. In *IG Farben*, the Nuremberg International Military Tribunal (IMT) defined "pillage" as when "private individuals, including juristic persons, proceed to exploit the military occupancy by acquiring private property against the will and consent of the former owner." The *IG Farben Trial*, *supra* note 91, at 44.

113. Press Release, African Union, The 2nd Conference of African Ministers in charge of Maritime-related Affairs Consider the 2050 Africa's Integrated Maritime Strategy (2050 AIM Strategy), No. 149 (Dec. 6, 2012) <http://pages.au.int/sites/default/files/Press%20Release%20ENG.pdf>. See African Union, *2050 Africa's Integrated Maritime Strategy (2050 AIM Strategy)*, <http://pages.au.int/maritime/documents/2050-aim-strategy-0> (last visited Jun. 25, 2013) [hereinafter 2050 AIMS].

114. 2050 AIMS, *supra* note 113, at 7.

115. *Id.* at 15–16.

116. *Id.* at 16.

117. *Id.*

collective efforts and reduce the risks of all transnational threats, environmental mismanagement, smuggling and arms trafficking.”¹¹⁸ The framework for maritime safety and security would include establishment of a naval security arm from the existing Africa Standby Force, a continental security group comprised of the chiefs of African navies.¹¹⁹ Regional, maritime headquarters with maritime operations centers would also be established for purposes of “mutuali[z]ed response capabilities.”¹²⁰ In order to deter illegal, unregulated fishing, AIMS supports the imposition of inhibitive sanctions against offenders.¹²¹

AIMS is progressive and seems to adequately address the maritime problems faced by African states. It should be stated, however, that AIMS is still a vision, and is not yet a binding framework of action. It remains unclear when the institutions, mechanisms, and other strategies listed in AIMS will come into being. Fortunately, the document’s provisions can be the foundation for practical action aimed at achieving and enhancing maritime safety and security for the benefit of Africa’s economy.

CONCLUSION

An analysis of armed warfare in Africa clearly shows that war and illegitimate forms of commerce are both interconnected and devastating. Various forms of illicit economic exploitation have followed the outbreak of almost every armed conflict on the continent in the past two decades. State and non-state actors have driven the resultant war economies, further linking up different criminal networks for the sole purpose of profiting from conflict. The phenomenon of illegal natural resource exploitation is characterized not only by illicit acquisition and exploitation of marine resources, but also by dumping of toxic waste in territorial waters of politically unstable states. These activities are difficult to police in war-torn maritime zones because warfare and insecurity claims and diverts all of the attention and resources of domestic crime fighting institutions. The inability of crime fighting institutions to police maritime resources in the region thus allows international corporations to escape sanction for illegal exploitation of numerous natural resources.

African states do not take lightly the challenges posed by maritime resource exploitation. Various initiatives have been considered in an attempt to plug institutional gaps and reduce exploitation. These ef-

118. *Id.*

119. *Id.*

120. 2050 AIMS, *supra* note 113, at 17.

121. *Id.* at 18 (The 2005 Rome Declaration against Illegal and Unregulated Fishing created this regime.).

forts should be applauded as they are intended to defend Africa's economic integrity during times of both war and peace. Such initiatives and strategies are pivotal at a time when the exploitation of African maritime resources is critical for economic growth and development.

There is a clear need for continuous review and overhaul of existing institutional and policing infrastructure if illicit maritime resource exploitation during armed conflict is to be effectively addressed. The Africa Progress Panel has acknowledged the need for the reformation of the "international infrastructure" so that there is increased accountability and transparency within natural resource governance frameworks. These noble objectives are achievable with the establishment of supranational and regional institutions with the specific role of monitoring, policing, and responding to complex war economies and illicit economic activities at sea by private corporations during times of war.

An additional deterrent to illicit natural resource exploitation is criminalizing the conduct as a war crime under the Rome Statute. Only with such concerted efforts can it be guaranteed that criminal action by international private corporations in African maritime zones will be effectively addressed. While not a panacea to the phenomenon, the regional approach envisioned by AIMS is likely to be effective in diminishing the threat posed by illicit natural resource exploitation activities by private corporations in Africa's maritime zones. In the meantime, allowing governments to prosecute these corporate entities for illicit natural resource exploitation in maritime zones might prove to be the greatest strategy to effectively discourage this conduct in ongoing and future conflicts in Africa.

