Senegal, Exploitation of Natural Resources

This case discusses a criminal complaint submitted by TRIAL against the company Westwood for the war crime of pillage. Their business operation was facilitated by the Mouvement des forces démocratiques de Casamance (MFDC), who control the Casamance region of Senegal, where the precious timber was exported by the company. The case explores the exploitation of natural resources by armed groups and considers whether businesses have obligations under IHL.

Acknowledgments

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A. CASHING-IN ON CHAOS: HOW TRAFFICKERS, CORRUPT OFFICIALS, AND SHIPPING LINES IN THE GAMBIA HAVE PROFITED FROM SENEGAL’S CONFLICT TIMBER

[Source: Cashing-in on chaos: How traffickers, corrupt officials, and shipping lines in The Gambia have profited from Senegal’s conflict timber, Environmental Investigation Agency, June 2020, available at: https://content.eia-global.org/assets/2020/06/EIA-Cashing-In-On-Chaos-HiRes.pdf; footnotes omitted]

[…]

The long lasting Casamance conflict

Casamance, located in the southern-most region of Senegal between The Gambia and Guinea-Bissau, is religiously and ethnically distinct from the rest of the country and for almost forty years it has been the subject of an ongoing separatist conflict – West Africa's longest running unresolved conflict. The MFDC [Mouvement des forces démocratiques de Casamance] demanded independence from the Government of Senegal in 1982, and has continued to occupy the region ever since. The conflict grew violent in the 1990s, when MFDC rebels began attacking both the Senegalese army and civilians. Several attempts to end the conflict – including ceasefire agreements in May 1991,July 1993, December 1999, December 2004 and 2014 – have been ineffective and failed to last long-term. Apart from occasional lulls in fighting due to the ceasefire agreements, the conflict has remained active, killing hundreds of individuals […]

The conflict has significantly impacted the region's productivity and livelihoods, providing a sense of neverending instability described as "neither peace nor war." […] While violence has reportedly decreased since the death of MFDC leader Augustin Diamacoune Senghor in 2007, the group has splintered into separate factions and Casamance remains in political and geographical isolation from the remainder of the country.

[…]

B. *WESTWOOD*, DEALING IN CONFLICT TIMBER

[Source: Westwood, Dealing in Conflict Timber, TRIAL International, 23 March 2020, available at: https://trialinternational.org/wp-content/uploads/2020/03/press-kit-Westwood_EN.pdf]

[1] […] Between 2014 and 2017, The Gambia exported nearly 163 million US dollars-worth of rosewood, a rare and precious tree species, to China. During this time, Westwood, a Gambian company allegedly owned by Swiss national Nicolae Bogdan Buzaianu and former Gambian President Jammeh, had the exclusive license to export rosewood. The timber it exported was illegally felled in neighboring Casamance where the separatist armed group has been fighting the Senegalese army for decades. TRIAL International filed a criminal complaint with the Swiss Office of the Attorney General against Mr. Buzaianu accusing him of having pillaged conflict timber.

[2] According to the criminal complaint […] [the] company was involved in the pillaging of precious rosewood from Casamance between 2014 and 2017. During this period, Westwood Company Ltd –which TRIAL International alleges Mr. Buzaianu co-founded with former Gambian President Yahya Jammeh– had a monopoly on the export of rosewood, a precious tropical wood from The Gambia. But with Gambian rosewood nearly depleted since 2011, most of the timber was actually imported from Casamance, a region in southern Senegal that borders The Gambia. For several decades, large areas of this region have been under

the control of the separatist armed group, the Mouvement des forces démocratiques de Casamance (MFDC).

[3] ‘Exploiting natural resources from a conflict zone is a war crime that must be punished. Without the pillaging of natural resources, many armed groups would have no means of financing their wars’, said Montse Ferrer, Senior Legal Advisor and Corporate Accountability Coordinator at TRIAL International. ‘Despite numerous documented cases of pillage, not a single conviction against corporate actors has been made since the end of World War II.’

[…]

Logging that benefits an armed group

[5] Some estimates suggest that Senegal loses the equivalent of 40,000 hectares of forest per year, several dozen hectares of which are lost due to the illegal exploitation of rosewood in Casamance. This selective deforestation has led to a decrease in rainfall and increased desertification in the region. It has also led to conflicts between rebels and communities who can no longer use the forests for sustainable livelihoods.

[6] Illegal logging of precious woods is problematic, as it undermines reforestation efforts in the region. According to the International Institute for Environment and Development (IIED), "in the village of Koudioube, the restoration of the community forest has helped to overcome conflicts." Illegal logging has stopped, fruits and wildlife are abundant, and local people are once again able to sell forest products. Communities that used to fight each other are now working together.

[7] A large share of the trafficking and logging has been taking place directly in the territory controlled by the MFDC for almost thirty years. ‘Westwood’s illegal activity is all the more serious because it contributed to an illegal timber trade that has historically financed the MFDC. Equally striking is that this trade has had such a negative impact on the lives of local people contributing directly to the deforestation of the region’, said Jennifer Triscone, Legal Advisor at TRIAL International. The armed group exercises de facto control over the precious wood industry by issuing logging authorizations and transport permits, and by ensuring the security of the latter. The rebels also illegally exploit and sell precious hardwood timber to finance their armed struggle: an illegal trade fuelled by demand from the global tropical hardwood market

[…]

Summary of the case

[8] […] Westwood, a Gambian company owned by entities affiliated to Mr. Buzaianu and former President Jammeh, allegedly exported over 315 million tons of Pterocarpus erinaceus to China (roughly equivalent to USD 163 million). This precious rosewood species was illegally harvested from the neighboring Casamance

region, where the armed group the Mouvement des forces démocratiques de Casamance (MFDC), has been fighting the Senegalese army since the 1980s. With Jammeh as an ally, the MFDC was able to monopolize the timber trade in Lower Casamance, using its profits to finance its armed struggle. […]

[9] […] This is the first case where illicit timber traders are accused of pillaging conflict resources in Switzerland; and if this case succeeds, it would be the first case anywhere to convict someone for the pillaging of timber or any natural resource. It is also a groundbreaking case as it seeks to use the existing international criminal legal framework to punish non-enumerated environmental crimes, a subset of crimes that go mostly unpunished, in part given the lack of applicable legal regimes

Timber trade supply chain

[10] In the course of its investigation at the border between The Gambia and Casamance, TRIAL International was able to visit the timber trade supply chain, from the forest controlled by the MFDC in Casamance to the port in Banjul where the timber was exported.

[11] Rosewood was felled in Casamance with the support of the MFDC. The armed group allowed the cutting to take place and benefited financially by issuing transport permits in exchange for fees –at times, they also directly engaged in the trade. […]

[12] The traders would then transport the timber to The Gambia via a network of small roads that were not subject to customs control. On the other side of the border, Gambian traders would set up timber depots displaying the valuable rosewood for sale. Convoys of trucks would then carry the timber through the main checkpoint, located in Mandina Ba, on the road to the capital, Banjul. The checkpoint was staffed by officials from the customs, forestry and tax authorities as well as a Westwood agent that would collect fees. Every shipment received a permit from the Gambian government before proceeding to the port. From this point on, their Senegalese origin was blurred.

[13] The logs were placed in containers at the port of Banjul and then loaded onto cargo ships mainly headed for China. Between mid 2014 and early 2017, Westwood was the only company allowed to export any of this rosewood from The Gambia.

‘Ivory of the forest’

[…]

[15] China has been the main importer of rosewood. Within 15 years, the volume of its imports increased from 200,000 cubic meters to more than 1.1 million cubic meters in 2017. Until 2009, the country was importing between 70% and 90% of this wood from South-East Asia. However, from 2010 onwards, wood imports from West Africa gradually increased, reaching more than three-quarters of the country’s imports in

2016.

C. SWISS CRIMINAL CODE, ART. 264

[Source: Swiss Penal Code, Art. 264g, available at: https://www.fedlex.admin.ch/eli/cc/54/757_781_799/en#a264g]

d. Prohibited methods of warfare

Art. 264g

The penalty is a custodial sentence of not less than three years for any person who, in connection with an armed conflict:

[…]

c. as a method of warfare, pillages or otherwise unlawfully appropriates property or destroys or seizes enemy property in a way not imperatively demanded by the necessities of war, deprives civilians of objects indispensable to their survival or impedes relief supplies;

D. SECOND REPORT ON PROTECTION OF THE ENVIRONMENT IN RELATION TO ARMED CONFLICTS BY MARJA LEHTO SPECIAL RAPPORTEUR

[Source: Second report on protection of the environment in relation to armed conflicts by Marja Lehto, Special Rapporteur, 27 March 2019, available at: https://digitallibrary.un.org/record/3801185?ln=en; footnotes omitted]

I. Introduction

[…]

C. Purpose and structure of the report

11. […] It should be underlined here that the two questions […] – illegal exploitation of natural resources and unintended environmental effects of human displacement – are not exclusive to non-international armed conflicts. Nor do they provide a basis for a comprehensive consideration of environmental issues relating to non-international conflicts. At the same time, they are representative of problems that have been prevalent in current non-international armed conflicts and have caused severe stress to the environment.

12. Research […] has identified the use of extractive industries to fuel conflict, and human displacement as being among the six principal pathways for direct environmental damage in conflict. […]

[…]

II. Protection of natural resources in relation to armed conflict

17. […] [P]rotracted conflicts […] have thrived on the illegal exploitation of natural wealth. According to the United Nations Environment Programme, 40 per cent of internal armed conflicts over the past 60 years were related to natural resources and, since 1990, at least 18 armed conflicts have been fuelled directly by natural resources. […]

[…]

19. The severe environmental impacts of illegal resource extraction and the link between conflict and deforestation have been well evidenced. It should also be pointed out that such impacts may be long lasting. Not all resources are renewable, reforestation can take decades and may not produce expected results, restoring areas affected by erosion or desertification is difficult, forms of land use may change permanently, and species may be lost. In addition, resources may not be available to clean up the polluted or destroyed habitat. The structures of environmental administration, management and governance must be rebuilt. All this impacts the ability of a society emerging from conflict to manage its natural resources sustainably.

20. The need to address the connection between the legal protection of natural resources and the environment has been recognized in the earlier work of the Commission on the topic. It has furthermore been pointed out that such a connection relates to all three temporal phases of the work: preventive measures, conduct of hostilities and reparative measures. This is evident, as far as phase one is concerned, in the designation of protected zones in areas of major ecological importance, including for the protection of the traditional lifestyles of indigenous peoples in accordance with the Convention on Biological Diversity, the presence of military forces, and peace operations, to mention a few examples. […] In phase three, protection of natural resources is related, inter alia, to peace agreements, which may, and are encouraged to, include provisions “on enforcing national laws and regulations on natural resources”, as well as to post-conflict environmental assessments and remediation. In the following sections of the present report, wartime environmental harm related to natural resources is discussed from two additional viewpoints.

A. Illegal exploitation of natural resources

21. “Illegal exploitation of natural resources”, as used in the relevant Security Council resolutions, is a general notion that may cover the activities of States, non-State armed groups, or other non-State actors, including private individuals. Accordingly, it may refer to illegality under international or national law. The rules of international law protecting natural resources in conflict are few and derive from several areas of law, including the law of armed conflict and international environmental law. More generally, legal regimes applicable to natural resources tend to be sector-specific and fail to cover certain critical areas. […]

22. As far as the law of armed conflict is concerned, the prohibition of pillage is an established rule of customary law recognized since the earliest codifications. The Geneva Convention IV contains an absolute prohibition of pillage, both in the territory of a party to an armed conflict, and in an occupied territory. Additional Protocol II to the Geneva Conventions confirms the applicability of this general prohibition in non-international armed conflicts meeting the criteria set out in the Protocol and, literally, “at any time and in any place whatsoever”. The prohibition has been widely incorporated into national legislation as well as in military manuals. There is also considerable case law from both the Second World War and modern international criminal tribunals confirming the criminal nature of pillage.

23. According to the commentary of the International Committee of the Red Cross (ICRC) on Geneva Convention IV, the prohibition covers both organized pillage and isolated acts of indiscipline, and applies to all categories of property, whether public or private. That wording is general and allows a reading that includes natural resources, whether owned by the State, communities or private persons. This interpretation was acknowledged by the International Court of Justice in its Armed Activities judgment, in which it found that Uganda was internationally responsible “for acts of looting, plundering and exploitation of the [Democratic Republic of the Congo]’s natural resources” committed by members of the Ugandan Armed Forces in the territory of the Democratic Republic of the Congo.

[…]

26. The African Charter also prohibits pillage: “In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation”. The Lusaka Protocol of the International Conference on the Great Lakes Region reproduces the same provisions and contains a separate article requiring States parties to establish the liability of legal entities for participating in the illegal exploitation of natural resources. The motivation for the adoption of that Protocol was the need to break the link between illegal exploitation of natural resources and armed conflict, but it also draws attention to the negative environmental effects of illegal exploitation of those resources.

27. International environmental law provides special protection to certain categories of natural resources that are relevant to the present topic. […] The critical role of forests in the preservation of biodiversity and

mitigation of the effects of climate change has been recognized in the Paris Agreement and the World Heritage Convention. The International Tropical Timber Agreement promotes international trade in tropical timber from sustainably managed and legally harvested forests, as well as the sustainable management of forests producing tropical timber. […]

28. The Convention on Biological Diversity obliges its Parties to conserve the components of biological diversity within the limits of their national jurisdiction, but also in relation to “processes and activities, regardless of where their effects occur, carried out under its jurisdiction or control, within the area of its national jurisdiction on or beyond the limits of national jurisdiction”. All the above-mentioned conventions protect the interests of a larger community of States: the negative implications of armed conflict on biodiversity, for instance, have been described as “complex, multiscaled, and not limited to conflict zones or the time period of active hostilities”. The special protection provided by these treaty regimes can be presumed to continue to apply in armed conflict, at least to the extent that their provisions do not conflict with the law of armed conflict, but the countries’ capacity to effectively enforce the conventions is often significantly weakened because of the conflict. In post-conflict situations, however, multilateral environmental agreements provide a legal framework for supporting and assisting States emerging from conflict to meet their environmental obligations.

[…]

38. The brief overview of the applicable rules above shows that there is a firm basis in the law of armed conflict for the prohibition of the worst forms of misappropriation of resources in armed conflict, which can be characterized as pillage. More generally, the particular challenges related to the extraction of minerals and other high-value natural resources in areas of armed conflict and in post-conflict situations have been addressed by way of non-binding standard-setting, as well as national and regional initiatives that seek to ensure that natural resources are purchased and obtained in a responsible manner. In some cases, those initiatives have provided the impetus for States to incorporate standards into their national legislation to make them binding on corporations subject to their jurisdiction that operate in or deal with conflict- affected areas. Such standards may not, however, always have a clear environmental focus.

[…]

III. Responsibility and liability of non-State actors

A. Armed non-State actors

1. Legal accountability of organized armed groups

[…]

52. It is generally accepted that organized armed groups, as parties to an armed conflict, are bound by the law of armed conflict. The relevant treaties address all parties to a conflict, and the obligation of all parties to a non-international armed conflict to comply with international humanitarian law has been frequently recalled by the Security Council and the General Assembly. Furthermore, the obligation of armed groups to comply with customary international humanitarian law gets support from international jurisprudence. The Commission, too, has recognized the possibility that a non-State armed group “may itself be held responsible for its own conduct under international law, for example for a breach of international humanitarian law committed by its forces”.

53. Non-State armed groups are increasingly also seen as capable of violating international human rights law. Security Council resolutions frequently refer to abuses or violations of human rights by armed non-State actors. A recent analysis of over 125 Security Council resolutions, 65 General Assembly resolutions and 50 Security Council presidential statements concludes that the two bodies have recognized, at a minimum, that the conduct of at least some armed non-State actors can amount to violations or abuses of human rights. Moreover, the analysis concludes that the Security Council appears to assume that such actors, or some of them, may bear the responsibility for taking appropriate steps to protect a relevant civilian population, consistent with human rights. Reference can also be made to the special procedure mechanisms of the Human Rights Council, the mandate holders of which have taken the view that non-State armed groups exercising control over a territory and having a political structure can be expected to comply with human rights standards. More controversially, it has been submitted that when armed non-State groups exercise territorial control and administer a territory, they should comply with the law of occupation.

54. Unilateral commitments by non-State armed groups to comply with international humanitarian law are fairly frequent and may also specifically touch on environmental issues. Similarly, respect for international humanitarian law or international human rights law, or mechanisms to implement such law, can be the subject of special agreements between parties to a non-international armed conflict, including peace agreements. It is not, however, always clear to what extent such a commitment can be seen as legally binding on the group that has made it. A further uncertainty applies to whether the courts of armed non-State groups can play a role in the enforcement of international humanitarian law. This would be a logical corollary to the duty to “respect and ensure respect” for international humanitarian law, and the Security Council has required “all warring factions, regardless of their governmental or non-governmental status, to enforce international humanitarian law, to end impunity, and to bring the alleged perpetrators to justice”. The possibility of establishing courts is also related to the criminal responsibility of commanders for war crimes committed by their subordinates, which is applicable both in international and non-international armed conflicts. The International Criminal Court has held in this regard that “the availability of a functional military judicial system within the [armed group] through which [a commander] could have punished crimes committed and prevented their future repetition” is an important element of the duty to punish crimes of subordinates.

55. Common article 3 of the Geneva Conventions prohibits “the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples”. While the notion of “regularly constituted court” is no longer exclusively interpreted as referring to the regular courts of a State, questions can be raised regarding the actual capacity of armed groups to comply with the requisite judicial guarantees.

56. The non-governmental organization Geneva Call, on the basis of its dialogue with non-State armed groups, recommends that when [….] a group has the capacity to carry out judicial processes in accordance with the established fair trial guarantees, everything feasible should be done to respect them in full. Armed groups are encouraged to seek advice and support in their attempt to comply with the relevant humanitarian norms

57. A further question is related to the possible obligation on armed non-State groups to provide reparations. The ICRC study on customary international humanitarian law refers to “some practice” in internal conflicts, as well as to resolutions of the Security Council and the Human Rights Council, but concludes that it is unclear whether armed opposition groups “are under an obligation to make full reparation”. The Basic Principles on the Right to a Remedy and Reparation, while primarily based on obligations of States, leave the door open for the responsibility of “other entities”. The resolution of the International Law Association on reparations for victims of armed conflict refers to “responsible parties” who “shall make every effort to give effect to the rights of victims to reparation”. “Responsible party” means, in this context, States and international organizations, but the notion “may also include non-State actors other than international organizations”. The liability of non-State actors to pay reparations for violations of the law of armed conflict is thus recognized as a possibility and as a goal well worth pursuing. For the time being, however, there are uncertainties regarding the legal basis for such obligations under international law.

58. In conclusion, while there are certain developments clarifying the status and international obligations of organized armed groups, a number of questions remain. The international responsibility of organized armed groups, while not a legally uncharted area, is a fragmented topic on which few solid conclusions can be drawn.

2. Individual criminal responsibility

[…]

60. The effectiveness of the Rome Statute framework in addressing environmental harm caused in conflict depends mainly on the substantive criminal law provisions. The sole crime specifically related to environmental damage, contained in article 8, paragraph 2 (b) (iv), of the Statute is only applicable in international armed conflict. Several war crimes contained in article 8, paragraph 2 (a) and (b), addressing international armed conflicts, and in article 8, paragraph 2 (c) and (e), addressing non- international armed

conflicts, may nevertheless be connected to environmental destruction. […]

[…]

62. […] The war crime of pillaging is also prosecutable under the Rome Statute, in both international and non-international conflicts. The Elements of Crime of the International Criminal Court, which provide further detail of the definitions of crimes contained in the Rome Statute, require that "[t]he perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use". While this requirement may be taken to restrict the scope of the crime, the purpose of the words "private or personal use", according to the accompanying footnote, is to make it clear that "appropriations justified by military necessity "cannot constitute the crime of pillaging. It is furthermore doubtful whether the motive of private gain can ever be completely absent from pillaging, whether looting of private houses or illegal exploitation of natural resources.

[…]

E. REPORT OF THE WORKING GROUP ON THE ISSUE OF HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES, BUSINESS, HUMAN RIGHTS AND CONFLICT-AFFECTED REGIONS: TOWARDS HEIGHTENED ACTION

[Source: Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, Business, human rights and conflict-affected regions: towards heightened action, 21 July 2020, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N20/190/21/PDF/N2019021.pdf?OpenElement; footnotes omitted]

[…]

4. For businesses, […] many face complex challenges in respecting human rights as they operate in such environments, either because their activities require them to be in or to re-enter conflict-affected areas, or because they become caught up in the outbreak of a conflict.

[…]

7. In the present report, the Working Group […] identifies and clarifies a range of policies and tools that States, alone or when acting as members of multilateral organizations, and businesses, could employ in

conflict-prone regions to help ensure that business does not stimulate or exacerbate conflict or negatively impact peacebuilding.

II. Normative environment: human rights and humanitarian law

9. The Guiding Principles provide that business should respect the standards of international humanitarian law in situations of armed conflict. International human rights law and international humanitarian law are similar but distinct bodies of law. The Guiding Principles specifically reference international humanitarian law, the specialized set of standards which applies during armed conflict, both international and internal, as well as situations of military occupation, “when a State exercises an unconsented-to effective control over a territory on which it has no sovereign title.” International human rights law applies in times of peace and conflict but some rights may be temporarily suspended during states of emergency and armed conflict.

10. Another characteristic of international humanitarian law is that it binds State and non-State actors, including businesses, as well as individual managers and staff of businesses whose activities are closely linked to an armed conflict. As mentioned by the International Committee of the Red Cross (ICRC), determining which corporate activities are “closely linked to an armed conflict” can be a complex task because businesses carry out a wide range of activities that could be perceived as directly or indirectly connected to armed conflict. Business activities may be considered closely linked to an armed conflict if they provide direct support – be it military, logistical or financial assistance – even if they do not take place during actual fighting or on the physical battlefield and even if the business did not actually intend to support a party to the hostilities.

[…]

12. International humanitarian law and a review of court cases in many jurisdictions highlight activities where businesses should ensure that they allocate resources and attention. These include forcibly displacing people from their communities, forcing people to work, acquiring questionable assets through pillage, using abusive security forces or allowing the use of business assets for gross abuses.

III. Heightened action: States and businesses

[…]

E. Additional considerations for business

1. Armed non-State actors

[…]

56. […] Beyond the violence, businesses find themselves confronted with potential criminal liability if found to have benefited or assisted an armed group designated a terrorist organization […] At the same time, it is often impossible to continue operating in a region without having some interaction with armed groups or dealing with a business operated by an armed group as part of the group's own profit-making operations.

57. Armed groups are indubitably subject to, and must respect, international humanitarian law. Nonetheless, their existence, and how to deal with them, has been largely neglected as an issue in the context of business activities. This is not surprising, considering how legally and politically challenging – and sensitive – the topic is. Nonetheless, more clarity is needed in order to help business navigate this very specific challenge. The Working Group convened a consultation with business and humanitarian organizations to identify potential good practices that could be transferred from their practice to the business and human rights field. Interestingly, the main finding is that the issue has rarely been openly discussed or acknowledged in either the humanitarian or development communities. While more research is needed to guide business, and other actors, operating in conflict-affected contexts, some useful insights have emerged from consistent personal experiences and anecdotal evidence.

58. First, armed groups should be understood. The lack of engagement between business and armed groups gives rise to a poor understanding of their motivations and objectives. For example, armed groups may be respectful of communities or willing to permit business to operate in the hope that doing so will earn them greater international legitimacy. Other groups may see business as a source of revenue or logistical support, or may attack a business because it represents foreign interests. Having a clear understanding of their structure, their control of territory and population, their objectives, their political agenda and the support from the local population are essential to identifying how likely it is that the armed group will interact with the business.

59. Second, business should have a clear engagement strategy. Experience seems to indicate that interacting with armed groups is mostly left to an ad hoc approach at the operational level. […] Businesses need to be aware of the formal classification of an armed group, particularly when they are designated as terrorist organizations. However, when reality dictates that they must engage with them, they should consider tools developed by relevant initiatives dealing with security and human rights issues, such as the Voluntary Principles, to avoid abuses. Developing a strategy should be an opportunity to communicate with the host and sometimes home government, about engagement with the armed group, as it may have criminalized any contact with such groups. Experience demonstrates that businesses have an interest in keeping home and host Governments informed of their interactions, even when such contact is officially forbidden. Business, like humanitarian groups, may have to engage in dialogue with armed groups and should be prepared to explain their own commitments to human rights and to respect for the well-being of people impacted by their operations.

60. Third, businesses should strive to maintain impartiality. […[[B]usinesses cannot be neutral actors in a

conflict context. This does not mean that businesses should not try to be impartial, including by consistently demonstrating independence from government-led or armed group-led efforts and avoiding any activity or public statement that may be construed as supporting either side of the conflict or as excusing their abuses.

[…]

V. Access to remedy and transitional justice

86. Often, businesses, like others present in the area, may be victims, perpetrators, or both at different times. States should be cognizant of this complexity when designing transitional justice processes. Where a business has the dual role of victim and perpetrator, its responsibility to respect and remedy impacts cannot be excused by the fact that it has been a victim at other points of the conflict. This requires States to distinguish between the types of businesses involved in the conflict. Where they were part of the conflict and committed conflict-related human rights abuses, the State has an obligation to investigate their role and to hold them to account. From a transitional justice perspective, this can be done through a combination of various mechanisms based on the four pillars of transitional justice: truth, justice, reparation and guarantees of non-recurrence.

[…]

95. Similarly, the breakdown of the rule of law and the judiciary system or the polarization and/or repression of civil society organizations, which ordinarily provide an avenue for communities to raise grievances, may transform a business mechanism into a sole recourse for communities to be heard. Businesses should ensure that their design allows for such grievances to be transmitted to the appropriate actors. An interesting example of such a process is […] when grievances and/or complaints may refer to abuses by the army or armed groups against people in the community, employees or contractors, the business "should make the facts known to competent authorities, to avoid any accusation of complicity by omission and can and should communicate to victims or their families the ICRC contact information for reporting their case.… ICRC and its delegates, in accordance with its own rules, should explain to the victims or their families the course of action to follow, as well as any humanitarian answers ICRC may provide, on a case-by-case basis."

[…]

Discussion

I. Classification of the situation and applicable law

1. *(Document A; Document D, para. 10)*

a. How would you classify the situation between Senegal and the Mouvement des forces démocratiques de Casamance (MDFC)? Has there been an armed conflict? Is there there still an armed conflict? Which

specific body of law is applicable to that situation? If there has been an armed conflict, but the level of intensity and/or the degree of organization of the armed group(s) involved no longer meets the threshold of a non-international armed conflict does IHL still apply? (GC I-IV, Common Article 3; P II, Art. 1)

b. May an armed group “occupy” a territory? May it control a territory? What difference does it make?

c. (*Document D, para.* 38; *Document E, paras 10-12*) Can businesses become parties to an armed conflict? If they provide direct military, logistical or financial support to armed groups? (ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities, p. 39-40)

II. Specific Protections

2.

a. How is the natural environment protected under IHL? In international armed conflicts? In non-international armed conflicts? What are some of the specific IHL rules in respect to the natural environment? What differences and similarities would you identify with the protection of the natural environment between different IHL texts? (P I, Art. 35(3), 55(1); PII, Art. 14 and 15; CIHL, Rules 43, 44, and 45; ENMOD, Art. 1; 2020 Guidelines, Rules 1-4).

b. (*Document D, para. 20*) What protection does IHL provide for areas of particular environmental importance or fragility? Can the rules on protected zones contribute to the protection of the natural environment? (CIHL, Rule 37; 2020 Guidelines, paras 144-146 and Recommendation 17)

III. Exploitation of natural resources by armed groups

3. *(Document B, paras [2]-[7], [10]-[13]; Document D, paras 17-38)*

a. What are the obligations of NSAGs with regard to natural resources? Do armed groups have a right to use natural resources in the areas which they effectively control?

b. (*Document C*) In what circumstances may an NSAG use those natural resources? Is it possible to distinguish between use of natural resources required by military necessity and illegal exploitation? To what extent may the legal provisions protecting the environment be bypassed by invoking imperative military necessity? Can use of natural resources by armed groups which is expected to cause ‘widespread, long-term and severe damage’ ever be justified by military necessity? In your opinion, is this threshold sufficient to address the problem of environmental damage caused by exploitation of natural resources during armed conflicts? (CIHL, Rules 43, 44, and 45; ENMOD, Art. 1; 2020 Guidelines, Rules 1-4, 17)

c. Do you agree that the protection of the environment is less codified in non-international armed conflict? In the absence of a sufficient legal framework, are States allowed to damage the environment inside their

own territory? (GC I-IV, Common Article 3; 2020 Guidelines, Recommendation 18 and Rules 26-32)

d. (*Document D, para. 53*) Should the rules applying in international armed conflict be applied by analogy in non-international armed conflict? Which regime, in particular, could apply by analogy? What rules do you foresee as relevant? How would transplantation of certain international armed conflict rules affect the equality of belligerents? What issues might arise with such an approach? Would certain rules help to perpetuate the conflict? (GCI-IV, Common Article 3; 2020 Guidelines, Recommendation 18 and Rules 26-32)

4. *(Document B, paras [1]-[4]; Document C; Document D, paras 22-23, 26, 38, 60-62)*

a. Is pillage prohibited in non-international armed conflicts? Does the exploitation of natural resources by armed groups constitute, in all or some circumstances, pillage as prohibited by IHL? Could the exploitation of natural resources by the government or a corporation owned by a Head of State ever constitute pillage under IHL? (HR, Arts. 28, 47 and 56; GC I, Art. 15(1); GC II, Art. 18(1); GC IV, Art. 16(2) and 33(2); P II, Arts. 4(2)(g); CIHL, 52)

b. (*Document B, para. [3])* Is exploiting natural resources from or in a conflict zone always a violation of IHL? A war crime? Is a company buying such resources from an armed group complicit in a war crime? What if it buys them from a State involved in an armed conflict? (HR, Arts. 28, 47 and 56; GC I, Art. 15(1); GC II, Art. 18(1); GC IV, Art. 16(2) and 33(2); P II, Arts. 4(2)(g); CIHL, 52)

c. Would the legal situation under IHL have been the same if the MFDC had used the proceeds of selling timber to build hospitals and schools for the local population? Is it at all possible for an armed group to exploit raw materials in a region which comes under its control without committing pillage? Could there ever be a situation in which a government exploiting raw materials on its territory during a non-international armed conflict would commit pillage? Are the two parties unequal in IHL when it comes to the prohibition of pillage?

IV. Interplay with International Human Rights Law and International Environmental Law

5.

a. (*Document D, paras 53-54*) Do armed groups have environmental obligations under international human rights law (IHRL)? If so, what is the scope of these obligations? Do they comprise both positive and negative obligations? Can IHRL obligations be tailored according to the capacity of the armed group? (2020 Guidelines, paras 37-40)

b. (*Document D, paras 26*-28) Do all rules under International Environmental Law (IEL) apply during armed conflicts? How does this framework interplay with IHL? Are armed groups bound by IEL obligations? By regional treaties protecting the environment?

c. (*Document D, paras 54*-55) Can armed groups agree to extend their obligations to protect the environment? Or can such agreements only bring into force the existing provisions of the four Geneva Conventions and Additional Protocol I? To what extent are such agreements legally binding? Would they remain enforceable after the cessation of active hostilities? Would these agreements reflect or contribute to the formation of customary international law? (2020 Guidelines, paras 29-36 and Recommendation 17)

d. Are non-state armed groups required to take measures to mitigate the effects of climate change? Is climate protection covered by the rules protecting the environment in armed conflict? How? Should IHL be further developed in that respect?

V. Business and IHL

6. *(Document E, paras 10-12)*

a. Are businesses bound by IHL? If so, why are they bound? Are they bound by customary international law? According to the Working Group, under which circumstances can they be bound? Is an expression of consent to be bound necessary to bind private corporations? How do certain rules of IHL bind individual members of corporations?

b. (*Document E, paras 10 and 60*) Is any activity with an armed group governed by IHL? What about activities between companies and States engaged in a non-international armed conflict? Do you agree that businesses cannot be neutral actors, but must nevertheless remain impartial? What is the difference between these two concepts? According to the Working Group, are businesses expected to disseminate and provide IHL training to its staff? (See also, Australian Red Cross, Doing Responsible Business in Armed Conflict)

7. How does IHL protect businesses? Do individuals who engage in business deals to directly finance armed groups directly participate in hostilities? Can the offices of businesses financing armed groups be targeted? Are company vehicles transporting timber from MFDC territory lawful military objectives? (P I, Arts 51 and 52(2); P II, Art. 13; CIHL, Rules 1, 3, 5 and 6; ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities, p. 34; See also Australian Red Cross, Doing Responsible Business in Armed Conflict, p. 26-27)

8. *(Document B, paras [7]-[8], [12]-[13]; Document D, paras 60-62; Document E, para. 12)*

a. What exactly was the role of Westwood in the present case? Can war crimes be committed by private corporations? Does purchase of natural resources from armed groups by businesses always amount to pillage? Even if the extraction of those resources was justified by military necessity? Does it make a difference if the timber is considered public or private property? (HR, Arts. 28, 47 and 56; GC IV 33(2) and

147; P II, Arts. 4(2)(g); CIHL, 52; Art. 8(b)(xvi) and 8(c)(v) Rome Statute; 2020 Guidelines, Rule 14; See also Australian Red Cross, Doing Responsible Business in Armed Conflict, p. 24)

b. Based on the definition in Art. 264g of the Swiss Criminal Code, do you consider that the owners of Westwood can be prosecuted for the war crime of pillage? Why/Why not? Do Gambia or Switzerland bear any state responsibility for the actions of its nationals?

9. Does IHL require the prosecution of a private enterprise that may be complicit in the commission of a war crime? How can private enterprises be prosecuted? What conditions need to be fulfilled? Are they the same in every country? (CIHL Rule 158; See also, ICRC/Geneva Academy, *Guidelines on investigating violations of IHL: Law, policy and good practice*, 2019)

VI. Reparations

10. *(Document E, paras 57-58)*

a. Do non-state armed groups have a duty to provide reparations for violations of IHL in non-international armed conflicts? For environmental damages? For violations of provisions of special agreements? Who has the right to receive such compensation? Only those who were displaced by the environmental degradation? Can the laws of State responsibility apply by analogy to armed groups? How could this responsibility be enforced? What other forms of reparation could armed groups offer? Are these more realistic? (UN, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law)

b. (*Document B, para.* 15) Are States obliged to provide reparations to victims of environmental damage caused by armed groups? Even if they are not complicit? Does the obligation to prosecute war crimes under IHL require States to introduce corporate criminal responsibility into their legal system? Do third States at the end of the supply chain violate IHL? If so, must they for providing reparations? (GC I-IV Common Art. 1; CIHL, Rules 149, 150; See also UN International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, p. 39 para. 4)