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## When All Else Fails, Look To The Courts: Using Hybrid Tribunals To Build Judicial Capacity And End Environmental Destruction In Post-Conflict Countries

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# WHEN ALL ELSE FAILS, LOOK TO THE COURTS: USING HYBRID TRIBUNALS TO BUILD JUDICIAL CAPACITY AND END ENVIRONMENTAL DESTRUCTION IN POST-CONFLICT COUNTRIES

REEANA KEENEN\*

## INTRODUCTION

A news report from April 2017 that compiled data from South Sudan, Nigeria, Somalia, and Yemen stated that each country is either experiencing famine or on the brink.<sup>1</sup> These countries and their link to famine is not coincidental: each country is either in the midst of current armed conflict or trying to piece itself back together following an armed conflict.<sup>2</sup> For example, in South Sudan, violent clashes between South Sudan's army and a rebel militia resulted in the "razing and burning [of] entire villages."<sup>3</sup>

Famine and other environmental harms are common in pre- and post-conflict countries, often worsened by the conflict itself.<sup>4</sup> In many cases, natural resources may even be the cause of the conflict, such as in Sierra Leone and the Democratic Republic of Congo ("DRC").<sup>5</sup> With the advent of the Paris Climate Agreement, the international community has

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<sup>1</sup> Max Bearak & Laris Karklis, *Starving to Death: Wars in Four Countries Have Left 20 Million People on the Brink*, WASH. POST (Apr. 11, 2017), [https://www.washingtonpost.com/graphics/world/2017-famines/?utm\\_term=.cdc47e56378c](https://www.washingtonpost.com/graphics/world/2017-famines/?utm_term=.cdc47e56378c) [<https://perma.cc/75S9-YTBE>].

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> See, e.g., Janet Nackoney et al., *Impacts of civil conflict on primary forest habitation in northern Democratic Republic of the Congo, 1990–2010*, 170 *BIOLOGICAL CONSERVATION* 321, 321–22 (2014); Karmayne Thadani & Rohit Ayyagari, *Law of Armed Conflict and the Environment*, 45 *ENVTL. POL'Y & L.* 286, 288 (2015); Thomas Homer-Dixon et al., *Environmental Change and Violent Conflict*, 268 *SCI. AM.* 38 (1993).

<sup>5</sup> Paul Armstrong, *How diamonds fuel Africa's conflicts*, CNN (May 16, 2012), <https://www.cnn.com/2012/04/26/world/africa/blood-diamonds/index.html> [<https://perma.cc/2TW9-WYWB>].

sought to decrease global environmental degradation.<sup>6</sup> However, current international environmental policy fails to account for the unique challenges post-conflict countries face in reducing their negative impacts on the environment because these policies do not address armed conflict as both an underlying cause of harm to the environment and a major impediment to its protection.<sup>7</sup>

As awareness of increasing environmental degradation reaches the mainstream, the international community has attempted to ameliorate the effects of human activity on the environment.<sup>8</sup> International approaches, such as the Paris Climate Agreement and the Sustainable Development Goals, have treated countries enveloped in conflict the same as stable, secure nations, thus failing to recognize the role conflict plays in the destruction of natural resources.<sup>9</sup>

Using the DRC as a case study, this Note will argue that the international community should increase judicial capacity to prosecute crimes related to the armed conflict in the DRC as a means of reducing environmental harm resulting from the conflict. Part I of this Note will explore the connection between armed conflict and environmental degradation globally and particularly in the DRC. Part II shows why current international approaches to environmental protection in post-conflict countries are inadequate. Part III argues that building judicial capacity to prosecute conflict-related crimes is the most effective means of preventing environmental harms in post-conflict countries. Specifically, Part III analyzes the merits of different non-prosecutorial and prosecutorial approaches to capacity building, and ultimately concludes that hybrid tribunals are the best method to build judicial capacity. Finally, Part IV uses the DRC as a case study of how a hybrid model could best be employed in post-conflict countries to maximize tribunals' capacity building effects.

## I. ARMED CONFLICT AS BOTH A SOURCE OF HARM TO THE ENVIRONMENT AND AN IMPEDIMENT TO ITS PROTECTION

Where there is armed conflict, research has shown that environmental harm is an offshoot of the conflict and that the conflict itself was

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<sup>6</sup> NAT. RES. DEF. COUNCIL, THE PARIS AGREEMENT ON CLIMATE CHANGE ISSUE BRIEF 2 (2015).

<sup>7</sup> Thadani & Ayyagari, *supra* note 4, at 286.

<sup>8</sup> NAT. RES. DEF. COUNCIL, *supra* note 6.

<sup>9</sup> NAT. RES. DEF. COUNCIL, *supra* note 6; *UN and Congo Government explore new climate change projects*, UNITED NATIONS (Sept. 1, 2017), <http://www.un.org/sustainabledevelopment/blog/2017/09/un-and-congo-government-explore-new-climate-change-projects/> [<https://perma.cc/C6FN-HK7W>].

often caused by disputes over natural resources.<sup>10</sup> The UN Development Programme identifies the environment as one of the first casualties of armed conflict.<sup>11</sup> Armed conflict and environmental degradation go hand-in-hand, and the two are inextricably linked such that environmental harms cannot be stopped unless and until the conflicts are addressed.<sup>12</sup> The correlation is not merely theoretical or academic.

A. *Real World Situations Clearly Demonstrate That Natural Resources—Competition for Them and Destruction of Them—Are Both Fuel for and the Natural Result of Armed Conflicts*

The connection between the environment, natural resources, and armed conflict can be seen clearly in the following modern conflicts: Sierra Leone, South Sudan, and Côte d'Ivoire. Sierra Leone's civil war lasted from 1991 to 2002 and was characterized by brutal violence and displacement of most of its population.<sup>13</sup> Seeking recognition, economic independence, and a seat in power, youth rebel forces staged a series of coups against the government.<sup>14</sup>

At the heart of the struggle for power was the desire to control the country's vast mineral and diamond mines.<sup>15</sup> Perpetuating the exploitation of the DRC's natural resources, warlords from Liberia and Guinea sought control over Sierra Leone's vast diamond and mineral resources, often contributing to diamond smuggling across borders.<sup>16</sup> It is clear that although the mineral resources in Sierra Leone may not have been the

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<sup>10</sup> For a summary and analysis of leading research on the connection between environmental harms and armed conflict, see Simon Dalby, *Security and Ecology in the Age of Globalization*, 8 ECSP 95, 96–97 (2002).

<sup>11</sup> U.N. DEVELOPMENT PROGRAMME, THE CONFLICT IN CÔTE D'IVOIRE AND ITS EFFECT ON WEST AFRICAN COUNTRIES: A PERSPECTIVE FROM THE GROUND (2011), <http://www.undp.org/content/dam/rba/docs/Issue%20Briefs/The%20Conflict%20in%20Cote%20d%27Ivoire%20and%20its%20Effect%20on%20West%20African%20Countries%20a%20Perspective%20from%20the%20Ground.pdf> [https://perma.cc/6TAW-6NF6].

<sup>12</sup> See generally Walter G. Sharp, *The Effective Deterrence of Environmental Degradation During Armed Conflict: A Case Analysis of the Persian Gulf War*, 137 MIL. L. REV. 1 (1992) (arguing that merely proscribing environmental degradation during armed conflict is an insufficient deterrent and that enforcement mechanisms are required).

<sup>13</sup> MARY KALDOR & JAMES VINCENT, U.N. DEVELOPMENT PROGRAMME, CASE STUDY SIERRA LEONE: EVALUATION OF UNDP ASSISTANCE TO CONFLICT-AFFECTED COUNTRIES 6 (2006).

<sup>14</sup> *Id.* at 9–10.

<sup>15</sup> *Id.* at 10.

<sup>16</sup> *Id.*

sole cause of its civil war, capturing these resources both for personal gain and as a means to fund political and military campaigns served as a motivation for fighting.<sup>17</sup> Thus, “all sides were dependent upon the spoils of war to finance their activities.”<sup>18</sup>

Likewise, in South Sudan, tensions between it and Sudan were exacerbated by disputes over the oil-rich Abyei region.<sup>19</sup> Following South Sudanese independence in 2011, fighting continued over the Abyei region, despite peace talks and ceasefires.<sup>20</sup> For example, in 2012, South Sudan ceased oil production after it claimed that Sudan had stolen over \$800 million of its oil.<sup>21</sup> The fighting over oil-rich territories on the Sudan–South Sudan border led to the displacement of nearly one million people, worsening famine crises in South Sudan.<sup>22</sup>

In Côte d’Ivoire, political turmoil leading to the Ivorian Civil War destabilized its government and its economy.<sup>23</sup> Actors in the conflict, including security forces meant to ensure peace, actively engaged in the exploitation of Côte d’Ivoire’s natural resources.<sup>24</sup> Particularly, security forces received kickbacks from the illicit exploitation of cocoa and diamonds.<sup>25</sup> Furthermore, land conflicts between migrant and indigenous populations led to discrete violent clashes.<sup>26</sup> Côte d’Ivoire has tried to repair environmental harms resulting from its civil war and other conflicts within its borders by evicting cocoa farmers in protected national parks, although these evictions presented their own human rights problems.<sup>27</sup>

Notably, the conflicts in Côte d’Ivoire also had economic and environmental impacts on the entire West African region.<sup>28</sup> The spread of the Ivorian conflicts prompted large populations of refugees to flee to Guinea, leading to the exploitation of natural resources in the Guinée Forestière.<sup>29</sup>

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> CNN Library, *South Sudan Fast Facts*, CNN (Oct. 1, 2017), <https://www.cnn.com/2013/07/10/world/africa/south-sudan-fast-facts/index.html> [<https://perma.cc/TAW7-RD4E>].

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*; Bearak & Karklis, *supra* note 1.

<sup>23</sup> *Côte d’Ivoire: Events of 2016*, HUMAN RIGHTS WATCH, <https://www.hrw.org/world-report/2017/country-chapters/cote-divoire> [<https://perma.cc/6VC7-RXNQ>] (last visited Mar. 11, 2019).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> U.N. DEVELOPMENT PROGRAMME, *supra* note 11.

<sup>29</sup> *Id.*

Much like the above conflicts in Sierra Leone, South Sudan, and Côte d'Ivoire, the conflicts in the DRC have had significant environmental impacts, and natural resources have been a main source of the conflicts themselves.<sup>30</sup>

*B. The DRC Exemplifies the Connection Between Armed Conflict and the Destruction of Natural Resources*

Disputes over natural resources in the DRC have fueled armed conflicts in Eastern Congo in more ways than one.<sup>31</sup>

The conflict began in full force in 1994 when Hutu *genocidaires* fled to Eastern Congo following the Rwandan Genocide of the Tutsis.<sup>32</sup> Armed rebel groups and Congo military members have fought over so-called “conflict mineral” resources that are abundant in the DRC to fund their campaigns.<sup>33</sup> To much criticism, international efforts have focused on limiting supply chains originating from these conflict minerals.<sup>34</sup> Critics of this approach say it has done little to decrease conflict, increase stability, or prevent the exploitation of these resources.<sup>35</sup> In fact, it has exacerbated the problem by forcing miners out of work and toward rebel groups looking for sources of income.<sup>36</sup> As many as forty different armed forces are still clashing in Eastern Congo.<sup>37</sup>

In addition to illicit conflict mineral trading, long-standing disputes remain over fertile farmlands in the East.<sup>38</sup> Ongoing conflicts and depletion of natural resources without any meaningful international attempt to secure sustainable peace and security has left the DRC without critical legal and judicial infrastructure necessary to rebuild.<sup>39</sup> The international

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<sup>30</sup> UN HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, VIOLENCE LINKED TO NATURAL RESOURCE EXPLOITATION, INFO NOTE 5 UN MAPPING REPORT.

<sup>31</sup> Van Butsic et al., *Conservation and conflict in the Democratic Republic of Congo: The impacts of warfare, mining, and protected areas of deforestation*, 191 *BIOLOGICAL CONSERVATION* 266, 271 (2015); *The Eastern Congo: A CFR InfoGuide Presentation*, COUNCIL ON FOREIGN REL., <https://www.cfr.org/interactives/eastern-congo#!/> [<https://perma.cc/9TPG-GE5Y>] (last visited Mar. 11, 2019).

<sup>32</sup> COUNCIL ON FOREIGN REL., *supra* note 31.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> COUNCIL ON FOREIGN REL., *supra* note 31.

<sup>38</sup> *Id.*

<sup>39</sup> *Strengthening the Rule of Law and Protection of Civilians in the Democratic Republic of the Congo*, UNITED NATIONS PEACEKEEPING (Sept. 11, 2018), <https://peacekeeping.un>

community should focus its efforts on restoring peace to the DRC through criminal prosecutions in order to prevent further environmental harms associated with the conflict.<sup>40</sup> In conducting these prosecutions, the international community should aim to build judicial capacity, as institution-building is a cornerstone of peacekeeping operations.<sup>41</sup> However, current international approaches ignore the capacity-building aspect that is crucial to ending natural resource exploitation associated with armed conflict.<sup>42</sup>

*C. Current International Approaches Fail to Build Judicial Capacity to Prosecute Crimes Related to the Conflicts and so Fail to Prevent Further Environmental Destruction Arising out of Armed Conflict*

The situation in the DRC is currently under investigation at the International Criminal Court (“ICC”) at the request of the DRC,<sup>43</sup> but the exploitation of natural resources has not been a main focus.<sup>44</sup> The ICC has jurisdiction over war crimes including destruction of property, murder, and pillage<sup>45</sup>—pillage being the crime most closely related to destruction of natural resources as a part of the conflict.<sup>46</sup> However, even with pillage as one of the crimes under investigation, prosecutions at the ICC fail to address the destruction of environmental adequately.

The situations in Sierra Leone, South Sudan, Côte d’Ivoire, and the DRC exemplify the connection between armed conflict and environmental

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[.org/en/strengthening-rule-of-law-and-protection-of-civilians-democratic-republic-of-congo](https://perma.cc/SUB6-BLXM) [https://perma.cc/SUB6-BLXM].

<sup>40</sup> Sharp, *supra* note 12, at 5.

<sup>41</sup> UNITED NATIONS OFFICE OF THE HIGH COMM’R, RULE-OF-LAW TOOLS FOR POST-CONFLICT STATES: MAPPING THE JUSTICE SECTOR 1–2 (2006), <http://www.ohchr.org/Documents/Publications/RuleoflawMappingen.pdf> [https://perma.cc/P89B-JUFF].

<sup>42</sup> See *infra* Section III.A.

<sup>43</sup> *Democratic Republic of the Congo: Situation in the Democratic Republic of the Congo*, INT’L CRIM. CT., <https://www.icc-cpi.int/drc> [https://perma.cc/VWA3-BS38] (last visited Mar. 11, 2019).

<sup>44</sup> *Id.* (focusing primarily on conscription of child soldiers, rape, and forced displacement). Note, however, that the Court has declared an intention to focus on environmental harms in cases going forward, but it remains to be seen whether this intention will become practice. Richard J. Rogers, *ICC will investigate environmental destruction as well as war crimes*, OPEN DEM. (Oct. 19, 2016), <https://www.opendemocracy.net/openglobalrights/richard-j-rogers/icc-will-investigate-environmental-destruction-as-well-as-war-crim> [https://perma.cc/8FKB-GRPK].

<sup>45</sup> INT’L CRIM. CT., *supra* note 43.

<sup>46</sup> Patrick J. Keenan, *Conflict Minerals and the Law of Pillage*, 14 CHI. J. OF INT’L L. 524, 527 (2014).

destruction. Actors in these armed conflicts used and continue to use natural resources to fuel their campaigns while simultaneously competing with their opponents for control and access to these resources.<sup>47</sup> While the ICC is currently investigating the situation in the DRC, these investigations and prosecutions fail to redress environmental harms adequately, much less as a priority.<sup>48</sup> They also fail to build domestic judicial capacity to prevent future environmental harms.<sup>49</sup>

## II. CURRENT INTERNATIONAL APPROACHES TO ENVIRONMENTAL PROTECTION IN POST-CONFLICT COUNTRIES FAIL TO ADDRESS THE CONFLICT AS A CAUSAL FACTOR OF ENVIRONMENTAL HARM

Current international approaches generally seek to impose limitations on a state's carbon emissions.<sup>50</sup> Similarly, treaties may also require that the ratifying state also take steps to mitigate its damage to the environment.<sup>51</sup> International environmental law could advocate environmental protection through treaties in two ways: (1) by providing an enforcement mechanism for the laws at an international level<sup>52</sup> or (2) by requiring that states take steps to implement the provisions of the treaty at the domestic level with laws that enact provisions of the treaty, as the Paris Climate Agreement has done.<sup>53</sup>

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<sup>47</sup> See *supra* Section I.A.

<sup>48</sup> INT'L CRIM. CT., *supra* note 43.

<sup>49</sup> See *infra* Section III.A.

<sup>50</sup> Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 13, 2015, in Rep. of the Conference of the Parties on the Twenty-First Session, U.N. Doc. FCCC/CP/2015/10/Add.1, annex (2016) [hereinafter Paris Climate Agreement]; H. Carolyn Peach Brown, *Implementing REDD+ in a Conflict-Affected Country: A Case Study of the Democratic Republic of Congo*, 4 ENVIRONMENTS 1, 2–3 (2017) (discussing the obligations of Reducing Emissions from Deforestation and Forest Degradation on the DRC and its difficulties in implementation).

<sup>51</sup> Paris Climate Agreement, *supra* note 50, arts. 4, 6.

<sup>52</sup> See, e.g., African Charter on Human and Peoples' Rights, June 27, 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, <http://www.achpr.org/instruments/achpr/> [<https://perma.cc/NU6V-USJL>] (providing in Article 21 that people have the right to free disposal of wealth and natural resources, in Article 24 that individuals have the right to a "general satisfactory environment favourable to their development," and in Part II of the treaty for enforcement through state reporting to a commission). A subsequent protocol was later adopted providing for a court to enforce the treaty provisions.

<sup>53</sup> See generally Paris Climate Agreement, *supra* note 50 (providing that states take steps toward reducing emissions, preserving natural resources, developing "ambitious" national targets, and implementing mitigation strategies).

While those two methods of protecting the environment theoretically could work for post-conflict countries such as the DRC, there is also a hierarchy of needs that post-conflict countries must address before they can implement international environmental law.<sup>54</sup> As a country still largely in the throes of violent conflict, the DRC's first priority, its most basic need, is for the conflict to end and peace to be restored.<sup>55</sup>

Unless, and until, a certain level of peace and stability are reached, post-conflict countries cannot begin to implement or even consider international environmental laws.<sup>56</sup> This hierarchy of needs makes sense: safety and security must come first, and then recovery from the conflict follows naturally from human security. Consider the DRC as an illustration and case study of these concepts. The DRC, a post-conflict country still grappling with restoring its legal capacity, has committed itself to environmental protection measures that are overly burdensome for it to implement effectively.<sup>57</sup>

The DRC signed on to the Paris Climate Agreement in April 2016, ratified it in December 2017, and the treaty entered into force in the DRC in January 2018.<sup>58</sup> The DRC is working with the UN Development Programme to create adaptation and mitigation projects to reduce its carbon emissions with funding from the Green Climate Fund.<sup>59</sup> However, these efforts will take second priority as more pressing security and peacebuilding needs continue to go unresolved.<sup>60</sup>

With a crumbling judicial system and a total lack of legal or governmental infrastructure necessary to carry out international environmental treaty obligations,<sup>61</sup> the DRC must first shift its focus to regaining security and stability within the state. The DRC should focus on addressing armed conflict as a contributing factor to the exploitation of natural

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<sup>54</sup> Peter Yeung, *Paris climate agreement has 'failed' poor countries, report says*, THE INDEPENDENT (May 15, 2016), <http://www.independent.co.uk/environment/climate-change/paris-climate-agreement-report-oxfam-a7030446.html> [<https://perma.cc/GR3T-F7U8>].

<sup>55</sup> See, e.g., Peach Brown, *supra* note 50, at 2–3 (noting that civil conflict and lack of governance and rule of law in the DRC has prevented it from implementing Reducing Emissions from Deforestation and Forest Degradation+ measures).

<sup>56</sup> *Id.*

<sup>57</sup> Peach Brown, *supra* note 50, at 2–3; UNITED NATIONS, *supra* note 9.

<sup>58</sup> *Paris Agreement—Status of Ratification*, UNITED NATIONS CLIMATE CHANGE, [http://unfccc.int/paris\\_agreement/items/9444.php](http://unfccc.int/paris_agreement/items/9444.php) [<https://perma.cc/5947-9X8F>] (last visited Mar. 11, 2019).

<sup>59</sup> UNITED NATIONS, *supra* note 9.

<sup>60</sup> Peach Brown, *supra* note 50, at 2–3, 8–9.

<sup>61</sup> UN OFFICE OF THE HIGH COMM'R, CLIMATE OF IMPUNITY IN THE DRC, INFO NOTE 7 UN MAPPING REPORT [hereinafter INFO NOTE 7].

resources and environmental harms. Specifically, the DRC, with the help of the international community, should address armed conflict through increasing its judicial capacity to prosecute crimes arising from the conflict.

III. THE INTERNATIONAL COMMUNITY SHOULD ADDRESS CONFLICT AS A CONTRIBUTING FACTOR TO ENVIRONMENTAL HARM BY BUILDING JUDICIAL CAPACITY OF POST-CONFLICT COUNTRIES TO PROSECUTE CRIMES RELATED TO ARMED CONFLICT

The international community should build the DRC's judicial capacity to prosecute crimes related to armed conflict in order to prevent the destruction and exploitation of natural resources. Armed groups continue to operate in the DRC with impunity.<sup>62</sup> According to the International Center for Transitional Justice, the military and other armed groups, working either in conjunction or in competition with one another, have continued to exploit natural resources, though the majority of the conflict has ceased.<sup>63</sup> Furthermore, although the DRC has held free presidential elections and adopted a new constitution, it continues to lack an efficient and effective judiciary, which would allow it to implement sustainable transitional justice measures.<sup>64</sup> There are both non-prosecutorial and prosecutorial methods of addressing impunity and restoring peace to the DRC that could prevent further environmental destruction.

A. *Non-prosecutorial Methods Include Truth Commissions and Governance Restoration Operations*

The DRC implemented a Truth and Reconciliation Commission, but this effort failed to hold parties accountable in any meaningful way.<sup>65</sup> As the Open Society Initiative for Southern Africa noted in its assessment of the DRC's situation, the justice sector "plays the additional role of guaranteeing peace and stability," and if it is ineffective or weak, "it can plunge a society into anarchy and social unrest."<sup>66</sup>

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<sup>62</sup> COUNCIL ON FOREIGN REL., *supra* note 31.

<sup>63</sup> *The Democratic Republic of Congo (DRC)*, ICTJ, <https://www.ictj.org/our-work/regions-and-countries/democratic-republic-congo-drc> [<https://perma.cc/6ELU-TXDU>] (last visited Mar. 11, 2019).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> Richard Lee, *Justice sector is failing in Congo*, OPEN SOCIETY INITIATIVE FOR SOUTHERN AFRICA (Sept. 17, 2013), <http://jss.osisa.org/law/drc/justice-sector-failing-congo.html> [<https://perma.cc/B7M2-SRMQ>] (last visited Mar. 11, 2019).

This is especially true of the DRC where, although criminal prosecutions in military courts have been carried out for some Congolese soldiers, government and military interference has prevented the judiciary from carrying out criminal prosecutions for those most responsible for crimes related to the conflict.<sup>67</sup> Human Rights Watch attributes impunity for these crimes as a major cause of the perpetuation of violence in the DRC.<sup>68</sup> Failure to prosecute these crimes has led to the creation of new armed forces because members of these forces believe there will be no repercussions for their actions.<sup>69</sup> Moreover, even where the DRC has prosecuted serious crimes related to the conflict, its judicial proceedings have fallen well below international standards in terms of investigatory proficiency, protection of due process rights, fairness and impartiality, and independence from government and military interference.<sup>70</sup> As long as armed groups continue to operate in the DRC with impunity, natural resources will continue to be destroyed and exploited as the groups fight to gain power and control.<sup>71</sup> As Human Rights Watch stated in its report to the United Nations regarding judicial accountability in the DRC, the international community has “an important responsibility to support . . . steps to enhance the national judicial system’s capacity to tackle impunity.”<sup>72</sup>

There are multiple ways the international community can work in conjunction with the DRC to address impunity and restore peace and stability to the country. Each of these approaches has pros and cons in terms of their effectiveness in building peace and preventing further harm to the environment. For example, one way to restore peace and security would be to allow truth commissions to investigate atrocities without criminal prosecutions.<sup>73</sup> Truth and reconciliation commissions, such as the one created in post-conflict Sierra Leone, serve to hold transgressors accountable by creating an accurate, impartial, and full account of the

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<sup>67</sup> *Accountability for Atrocities Committed in the Democratic Republic of Congo*, HUMAN RIGHTS WATCH, [https://www.hrw.org/news/2014/04/01/accountability-atrocities-committed-democratic-republic-congo#\\_ftnref1](https://www.hrw.org/news/2014/04/01/accountability-atrocities-committed-democratic-republic-congo#_ftnref1) [<https://perma.cc/4DTH-BEMD>] (last visited Mar. 11, 2019).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> ICTJ, *supra* note 63.

<sup>72</sup> HUMAN RIGHTS WATCH, *supra* note 67.

<sup>73</sup> UN DEPT OF ECON. & SOCIAL AFFAIRS AND UN DEV. PROGRAMME, *THE CHALLENGES OF RESTORING GOVERNANCE IN CRISIS AND POST-CONFLICT COUNTRIES* 73–85 (2007), <https://publicadministration.un.org/publications/content/PDFs/E-Library%20Archives/2007%20The%20Challenges%20of%20Restoring%20Governance%20in%20Crisis%20and%20Post-Conflict%20Countries.pdf> [<https://perma.cc/6Z8G-VP38>].

atrocities committed.<sup>74</sup> These commissions are appealing options because they promote healing and address the needs of the victims while also naming the actors who are responsible for the victims' suffering.<sup>75</sup>

However, the commissions cannot fully promote security and peace because they, by nature, do not have the power to impose criminal sanctions upon the responsible actors and they require a large amount of resources that are often unavailable, as was the case in Sierra Leone when a lack of adequate resources sharply diminished the functions of the Truth and Reconciliation Commission.<sup>76</sup> Eventually, the Sierra Leonean government had to work with the United Nations to set up the Special Court for Sierra Leone ("SCSL"), a hybrid tribunal meant to prosecute those most responsible for the atrocities committed in Sierra Leone.<sup>77</sup> The SCSL was created at least partially in response to the blanket immunity granted by the Sierra Leonean Truth and Reconciliation Commission.<sup>78</sup> Thus, even though truth and reconciliation commissions can help a country heal, they lack the teeth necessary to provide actual accountability for serious human rights violations committed in the context of an armed conflict.

Another non-prosecutorial approach to capacity—and peacebuilding—is to provide international support for governance restoration.<sup>79</sup> This approach would focus on filling in personnel gaps in the government, training government officials on issues such as corruption and human rights protection, and creating the necessary legal and physical infrastructure to run an effective government.<sup>80</sup> It may also include such measures as constitution building or implementing peace agreements.<sup>81</sup> Undoubtedly, governance capacity building is an important, and even crucial, step in the peacebuilding process. However, these measures alone are insufficient to promote long-term peace, stop human rights abuses, and avoid further destruction of natural resources because they do not hold perpetrators of armed conflict accountable and they do not address the specific role of the justice sector in promoting peace and security through prosecutions.<sup>82</sup> The DRC is a prime example of the shortcomings of governance

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<sup>74</sup> *Id.* at 80–81.

<sup>75</sup> *Id.* at 80.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 80–81.

<sup>78</sup> *Id.* at 81.

<sup>79</sup> United Nations Development Programme, *Capacity Development in Post-Conflict Countries 3* (Capacity is Development Global Event Working Paper (2010)).

<sup>80</sup> UN DEPT OF ECON. & SOCIAL AFFAIRS AND UN DEV. PROGRAMME, *supra* note 73, at 82.

<sup>81</sup> United Nations Development Programme, *supra* note 79, at 4.

<sup>82</sup> HUMAN RIGHTS WATCH, *supra* note 67, at 2.

capacity building alone. It further serves as an illustrative example of why it is crucial for the international community to build judicial capacity to prosecute crimes related to conflict in order to stop the destruction of natural resources.

In the DRC, despite a new constitution and the implementation of democratic elections, the government and military continue not only to promote the exploitation of resources, but also to interfere with criminal prosecutions against members of other armed groups that are responsible for destroying natural resources and carrying out human rights abuses.<sup>83</sup> Thus, non-prosecutorial methods alone cannot fully restore peace or build judicial capacity to end armed conflicts.

*B. Prosecutorial Methods Include International Prosecutions, Domestic Prosecutions, and Hybridized Prosecutions*

The three main types of prosecutorial approaches the DRC could take, with support from the international community, to increase its judicial capacity include: fully international prosecutions at the International Criminal Court (“ICC”), fully domestic prosecutions within the DRC’s existing judicial system, and hybrid tribunals conducted in the DRC.

1. Fully International Prosecutions

The ICC came into force in 2002 by way of the Rome Statute, and it now has 123 signatories.<sup>84</sup> The ICC is a permanent body that has complementary jurisdiction—making it a court of last resort—with domestic courts to prosecute war crimes, crimes against humanity, and genocide.<sup>85</sup> There are currently eleven situations under investigation at the ICC, including the DRC.<sup>86</sup> The fact that the situation in the DRC is already under investigation at the ICC is significant because the DRC itself referred the

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<sup>83</sup> *Id.*

<sup>84</sup> *How the Court Works*, INT’L CRIM. CT., <https://www.icc-cpi.int/about/how-the-court-works/Pages/default.aspx> [<https://perma.cc/Z2PE-SACX>] (last visited Mar. 11, 2019); *The States Parties to the Rome Statute*, INT’L CRIM. CT., [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx) [<https://perma.cc/JH8N-FADE>] (last visited Mar. 11, 2019).

<sup>85</sup> Jovana Davidovic, *The International Criminal Court & Africa*, CRITIQUE (Sept. 13, 2016), <https://www.icc-cpi.int/about/how-the-court-works/Pages/default.aspx> [<https://perma.cc/Z2PE-SACX>].

<sup>86</sup> *Situations*, INT’L CRIM. CT., <https://www.icc-cpi.int/Pages/Main.aspx> [<https://perma.cc/JH8N-FADE>] (last visited Mar. 11, 2019).

situation to the Court.<sup>87</sup> However, the Congolese government's apparent buy-in to the ICC process has not led to a high rate of convictions or prosecutions: there have only been four prosecutions, two of which have led to convictions in the cases of Thomas Lubanga and Germain Katanga.<sup>88</sup>

However, the ICC, as a permanent international judiciary, has significant benefits that could help the DRC in the long run. Most notably, the ICC brings "robust international law jurisprudence and [helps] end or limit the impunity for the worst of crimes," according to Professor Jovana Davidovic in her analysis of the ICC for *The Critique*.<sup>89</sup> The creation of a body of international criminal law jurisprudence could build the judicial capacity of the DRC indirectly by giving national courts a model for investigation and prosecution of complex crimes the national courts would not ordinarily prosecute.<sup>90</sup> ICC prosecutions also provide indirect benefits for domestic judiciaries by promoting long-term peace and security.<sup>91</sup> Because the ICC prosecutes only grave breaches of international humanitarian law, its cases are often, and especially in the case of the DRC, focused on high-ranking officials, which provides visibility and serves as a deterrent for future crimes.<sup>92</sup>

But the limitations of the ICC to directly build judicial capacity in the DRC and promote long-term stability make it a less desirable option than other prosecutorial methods might be.<sup>93</sup> For example, although the high-profile nature of the DRC cases under ICC investigation can bring visibility and serve as a potential deterrent, the ICC will be severely hampered in the number of prosecutions it can carry out, limiting the reach of justice.<sup>94</sup> Prosecutions of high-ranking officials at the ICC require the prosecutor to invest a large amount of resources and energy into investigating charged crimes because the stakes are higher and the Court—though it may not like to admit it—has political concerns.<sup>95</sup>

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<sup>87</sup> *Id.*

<sup>88</sup> *Democratic Republic of Congo*, INT'L CRIM. CT., <https://www.icc-cpi.int/drc> [<https://perma.cc/5GWL-ECGG>] (last visited Mar. 11, 2019).

<sup>89</sup> Davidovic, *supra* note 85.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *See id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> Davidovic, *supra* note 85. The ICC is a part of the UN controlled by the Security Council and by extension, the Permanent 5 (China, France, the U.S., Russia, and the U.K.). *Current Members*, UNITED NATIONS SECURITY COUNCIL, <https://www.un.org/securitycouncil/content/current-members> [<https://perma.cc/6FCM-EKKX>] (last visited Mar. 11, 2019).

The most glaring drawback of using the ICC to carry out prosecutions for crimes in the DRC is that it has little to no direct effect on the judicial capacity of Congolese judges, judicial staff, court clerks, defense attorneys, or prosecutors.<sup>96</sup> The ICC is composed of eighteen judges from State Parties to the Rome Statute, but there is nothing to guarantee that judges from the State Party under investigation will have a seat at the ICC.<sup>97</sup> The lack of participation by individuals from the DRC therefore means that the Congolese judiciary is left to interpret and apply international due process standards and international criminal law jurisprudence in complex cases without any guidance or prior training.<sup>98</sup> In post-conflict countries, such as the DRC, where judicial capacity is already lacking because of armed conflict, purely international prosecutions at the ICC fail to curtail impunity for the vast majority of perpetrators responsible for natural resource destruction and human rights abuses because they fall outside the ICC's limited reach.<sup>99</sup>

The Court's limited reach also contributes to critics' perception that the Court lacks social legitimacy, which can in turn affect the validity of the Court's judgments within the DRC. Only prosecuting high-ranking officials could make victims feel that they have not received adequate justice for the crimes committed against them.<sup>100</sup> Although legitimacy may be less of a concern in the DRC, which referred the situation to the ICC, a lack of legitimacy could contribute to the perception of impunity responsible for the perpetuation of violence in the DRC.<sup>101</sup>

Thus, prosecutions at the ICC do not ensure armed groups will cease to destroy natural resources and commit other grave crimes, even though such prosecutions sometimes promote long-term peace and stability. Namely, ICC prosecutions fail to build domestic judicial capacity, and so leave countries to walk the line between allowing impunity and holding prosecutions that fail to meet acceptable standards.<sup>102</sup> To address the

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<sup>96</sup> Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295, 303–04 (2003); UN OFFICE OF THE HIGH COMM'R, TRANSITIONAL JUSTICE OPTIONS, INFO NOTE 8 UN MAPPING REPORT [hereinafter INFO NOTE 8] (proposing that a hybrid model would be best to address capacity problems in the DRC).

<sup>97</sup> *Structure of the ICC*, ABA-ICC PROJECT, <https://www.aba-icc.org/about-the-icc/structure-of-the-icc/> [<https://perma.cc/2XLE-CKJJ>] (last visited Mar. 11, 2019).

<sup>98</sup> Dickinson, *supra* note 96, at 304.

<sup>99</sup> HUMAN RIGHTS WATCH, *supra* note 67.

<sup>100</sup> Davidovic, *supra* note 85 (explaining the importance of social and political legitimacy of the ICC).

<sup>101</sup> *Id.*

<sup>102</sup> INFO NOTE 7, *supra* note 61.

shortcomings of purely international prosecutions in building the DRC's judicial capacity, the international community could alternatively focus its efforts on helping the DRC carry out domestic prosecutions using the existing Congolese legal system.

## 2. Fully Domestic Prosecutions

Fully domestic prosecutions of crimes related to armed conflict in the DRC could enhance judicial capacity to prosecute such crimes in the future and prevent future environmental harms related to conflict. Domestic prosecutions allow for actors in the international community to enter the country and provide crucial capacity training to members of the judiciary, prosecutors, and public defenders.<sup>103</sup> Such capacity would, because it is implemented directly into the country by national actors, foster predictability and stability in the judicial system,<sup>104</sup> which is vital to establishing the legitimacy of a country's own judiciary to promote sustainable peace.<sup>105</sup> Significant barriers to implementation of these prosecutions exist: lack of physical infrastructure; lack of training; lack of appropriate domestic laws to handle such serious crimes as genocide, war crimes, and crimes against humanity; and extensive time required to adapt these capabilities.<sup>106</sup>

Elizabeth Ludwin King, Professor of Law at Wake Forest University, advocates for passive ICC participation in fostering domestic judicial capacity to overcome the obstacles in national prosecutions of international crimes.<sup>107</sup> She suggests the ICC should only intervene and take jurisdiction, if, after two years and submitting a legal development plan to the ICC, the country fails to build up its own judicial capacity sufficiently.<sup>108</sup> This passive approach, she argues, would ensure that domestic judiciaries take ownership of the capacity building and peacebuilding processes.<sup>109</sup> She argues this would avoid the issue of impunity.<sup>110</sup> Additionally, she notes that, although the two-year waiting period would initially delay prosecutions, it would be more beneficial in the long run because domestic

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<sup>103</sup> Elizabeth B. Ludwin King, *Big Fish, Small Ponds: International Crimes in National Courts*, 90 INDIANA L.J. 829, 837 (2015).

<sup>104</sup> *Id.*

<sup>105</sup> Dickinson, *supra* note 96, at 304

<sup>106</sup> Ludwin King, *supra* note 103, at 837–39.

<sup>107</sup> *Id.* at 843–46.

<sup>108</sup> *Id.* at 846.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

justice is generally thought to proceed faster than international law.<sup>111</sup> While it may be true that domestic justice can be carried out more rapidly than the ever-cautious ICC prosecutions,<sup>112</sup> this does not mean wholly domestic prosecutions are an ideal substitute for international prosecutions or some combination thereof, such as hybrid tribunals.<sup>113</sup> The two-year waiting period, however, would ideally give the country a chance to build the necessary legal infrastructure, implement the necessary domestic laws, and undergo crucial judicial training to adjudicate international crimes at the national level.<sup>114</sup> If the goal is to engender sustainable peace (and this is an important goal), in order to prevent future conflict and destruction of natural resources, then it is only logical that the country should have time to prepare in order to get the prosecutions “right” the first time.<sup>115</sup> It makes little sense to rush a country into prosecuting before it is ready because any resulting prosecutions would likely fail to adequately bring justice or prevent future conflicts.<sup>116</sup>

Thus, while domestic prosecutions have an enormous potential to build national judicial capacity to prosecute international crimes related to armed conflict, King’s approach is wholly dependent on the ability of the country to bring its legal infrastructure up to par on its own, bearing in mind time, resource, and knowledge constraints.<sup>117</sup> This is no easy task, and seems to be more idealistic than pragmatic, as has been the case in the DRC,<sup>118</sup> which has carried out numerous military prosecutions<sup>119</sup> and a few dozen non-military domestic prosecutions<sup>120</sup> for crimes related to

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<sup>111</sup> *Id.* at 847.

<sup>112</sup> For example, Ludwin King notes that ICC prosecutions of Lubanga and Katanga took several years and included additional years of pretrial detention for each before the cases were concluded. Ludwin King, *supra* note 103, at 847.

<sup>113</sup> Section IV.A, *infra*, discusses the value of hybrid tribunals in building domestic judicial capacity, as compared to purely domestic or purely international prosecutions.

<sup>114</sup> Ludwin King, *supra* note 103, at 846.

<sup>115</sup> *Id.* at 837.

<sup>116</sup> Sofia Candeias et al., *The Accountability Landscape in Eastern DRC*, ICTJ BRIEFING (2015), [https://www.ictj.org/sites/default/files/ICTJ-Briefing-DRC-Prosecutions-2015\\_1.pdf](https://www.ictj.org/sites/default/files/ICTJ-Briefing-DRC-Prosecutions-2015_1.pdf) [<https://perma.cc/4AC2-38RR>]; Dunia P. Zongwe et al., *UPDATE: The Legal System of the Democratic Republic of the Congo (DRC): Overview and Research*, GLOBALLEX, [http://www.nyulawglobal.org/globalex/Democratic\\_Republic\\_Congo1.html](http://www.nyulawglobal.org/globalex/Democratic_Republic_Congo1.html) [<https://perma.cc/MC8E-TCJ2>] (last visited Mar. 11, 2019).

<sup>117</sup> Ludwin King, *supra* note 103, at 837.

<sup>118</sup> Candeias et al., *supra* note 116.

<sup>119</sup> Anneke Van Woudenberg, *Dispatches: First Congolese General Convicted of Rape*, HUMAN RIGHTS WATCH (Nov. 10, 2014), <https://www.hrw.org/news/2014/11/10/dispatches-first-congolese-general-convicted-rape> [<https://perma.cc/GQH2-WGQZ>].

<sup>120</sup> Ludwin King, *supra* note 103, at 846–47.

the conflict. The formal domestic system, including military courts, have initiated investigations and prosecutions against individuals for war crimes, crimes against humanity, and genocide, but these cases have been fraught with problems because the domestic system still lacks capacity to handle these types of crimes.<sup>121</sup>

In the wake of the armed conflicts, the DRC's judicial system suffers from corruption and a severe lack of adequate resources.<sup>122</sup> Although legislators and international actors have drafted laws to incorporate the Rome Statute into domestic law—even attempting to create a specialized court system to handle the prosecution of international crimes—judges and lawyers still lack sufficient understanding and experience with international criminal law to carry out prosecutions effectively.<sup>123</sup> Furthermore, the DRC's lack of resources continues to constrain its ability to investigate crimes outside its physical reach and to implement the necessary training and infrastructure to carry out subsequent prosecutions.<sup>124</sup>

Moreover, where the DRC has been able to investigate certain cases and bring them to trial, the courts have conflated elements of international crimes, creating an inconsistent and sometimes incoherent body of jurisprudence on such crimes.<sup>125</sup> The problem, therefore, with domestic prosecutions of crimes arising out of conflict in the DRC is not a lack of infrastructure-developing mechanisms (the DRC has implemented appropriate legislation and attempted to set up the necessary institutions to adjudicate cases<sup>126</sup>), but rather a lack of expertise that requires not time, but supervised experiential learning in the form of a hybrid tribunal.

#### IV. HYBRID TRIBUNALS PRESENT THE BEST SOLUTION TO PREVENTING ENVIRONMENTAL DESTRUCTION FROM ARMED CONFLICTS BY BUILDING DOMESTIC JUDICIAL CAPACITY TO PROSECUTE CONFLICT-RELATED CRIMES

Hybrid tribunals are internationalized courts comprising domestic and international substantive and procedural law, as well as national and international actors in the tribunals themselves.<sup>127</sup> They function as

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<sup>121</sup> Candeias et al., *supra* note 116.

<sup>122</sup> Zongwe et al., *supra* note 116.

<sup>123</sup> Candeias et al., *supra* note 116.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Hybrid Courts*, PROJECT ON INT'L CTS. & TRIBUNALS, <http://www.pict-pecti.org/courts/hybrid.html> [<https://perma.cc/ZE7T-YD7D>] (last visited Mar. 11, 2019).

ad hoc institutions that are particular to a specific set of circumstances within a country, and they are peculiar in their creation in that the country involved has a say in the composition, laws, and jurisdiction of the tribunal.<sup>128</sup> Hybrid tribunals, though ad hoc in nature, should not be confused with more traditional ad hoc tribunals, such as the International Criminal Tribunal for the Former Yugoslavia or the International Criminal Tribunal for Rwanda, which were still fully international institutions.<sup>129</sup> Hybrid tribunals, because of their mixed nature, build domestic judicial capacity to prosecute conflict-related crimes and promote sustainable peace, both of which would prevent further environmental harms arising out of armed conflict.<sup>130</sup>

A. *Hybrid Tribunals Build Domestic Judicial Capacity to Prosecute Crimes Related to Armed Conflict and Prevent Further Destruction of Natural Resources*

Hybrid tribunals are uniquely qualified to build judicial capacity through prosecution of conflict-related crimes, diminishing the likelihood of continued destruction of natural resources.<sup>131</sup> While the Rome Statute for the ICC includes, as a constituent act for a war crime, the destruction of natural resources and pillage,<sup>132</sup> fully international prosecutions cannot adequately incorporate this jurisprudence into domestic law.<sup>133</sup> Whereas international prosecutions provide solid jurisprudence on crimes related to conflict and destruction of natural resources, hybrid tribunals combine this asset with domestic ownership over the justice process that fully domestic prosecutions provide.<sup>134</sup> Hybrid tribunals, therefore, act as the necessary bridge between fully international and fully domestic prosecutions to build domestic capacity in post-conflict countries.

At their inception, hybrid tribunals were hailed as the end-all be-all of international criminal law's future, but their popularity petered out around 2007.<sup>135</sup> In the past couple of years, however, hybrid tribunals have experienced a resurgence of popularity in the international community.<sup>136</sup>

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<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> See Dickinson, *supra* note 96, at 306.

<sup>131</sup> *Id.*

<sup>132</sup> Rome Statute of the International Criminal Court, art. 8, Jul. 17, 1998, 2187 U.N.T.S. 3.

<sup>133</sup> Dickinson, *supra* note 96, at 306–08.

<sup>134</sup> *Id.* at 307.

<sup>135</sup> Harry Hobbs, *Hybrid Tribunals and the Composition of the Court: In Search of Sociological Legitimacy*, 16 CHI. J. OF INT'L LAW 482, 488–89 (2016).

<sup>136</sup> *Id.*

This reflects a heightened sensitivity to the cultural values of post-conflict countries and a recognition not only of their sovereignty, but also of their capacity *to be* sovereign.<sup>137</sup> Hybrid tribunals by their very nature respect national sovereignty of post-conflict countries by requiring buy-in to the creation of the tribunal and active involvement throughout the process.<sup>138</sup>

Hybrid courts also benefit domestic capacity building and promote sustainable peace,<sup>139</sup> which would allow post-conflict countries to prevent future armed conflict, and therefore, future harm to the environment.<sup>140</sup> Several advantages of hybridized prosecutions allow them to ensure sustainable peace in ways that fully international or fully domestic prosecutions cannot.<sup>141</sup> First, and perhaps most importantly, involving local judges and lawyers in the process serves the valuable purpose of respecting cultural sensitivities and incorporating familiar domestic laws and procedures.<sup>142</sup> Local judges and lawyers contribute to the judicial process as “translators” of local norms and customs to international judges, which could increase the legitimacy of the tribunal to the local population, as well as increase the efficiency and efficacy of the tribunal’s adjudicative process.<sup>143</sup> Indeed, where local judges have been incorporated into hybrid tribunals but have not been given an adequate voice on those tribunals, the failure of international personnel to understand the intricacies of local cultural norms all but halted proceedings altogether.<sup>144</sup>

The involvement of local judges and lawyers in the tribunal’s proceedings is important to the success of the tribunal in achieving long-term peace in another important way, as well. Hybrid tribunals provide an avenue for local judges and lawyers to learn alongside well-practiced international judges and lawyers, building judicial capacity that lasts well beyond the mandate of the hybrid tribunal.<sup>145</sup> Because hybrid tribunals

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<sup>137</sup> *Id.* at 492–95.

<sup>138</sup> See Lindsey Raub, *Positioning Hybrid Tribunals in International Criminal Justice*, 41 INT’L L. & POL’Y 1013, 1043–44 (2009).

<sup>139</sup> *Id.* at 1043.

<sup>140</sup> Sharp, *supra* note 12, at 12.

<sup>141</sup> Raub, *supra* note 138, at 1042.

<sup>142</sup> *Id.* at 1043.

<sup>143</sup> *Id.* at 1042–44.

<sup>144</sup> See generally Jessica Almqvist, *The Impact of Cultural Diversity on International Criminal Proceedings*, J. INT’L CRIM. JUSTICE 1, 2, 15 (2005) (arguing that a lack sensitivity to local culture of the affected country in international tribunals has diminished both the efficacy and legitimacy of these tribunals). Note that although Almqvist argues for fully domestic prosecutions as the solution to cultural sensitivity, hybrid tribunals equally solve this problem, for the reasons stated in this Section.

<sup>145</sup> Raub, *supra* note 138, at 1043.

involve international actors who are accustomed to fair trial standards and standards of judicial efficiency, their expertise adds to that of local judges through a kind of cultural exchange of ideas.<sup>146</sup> Local judges impart knowledge of the local culture, domestic laws, and customs to international actors, and the international actors share their years of legal practice and familiarity with fair trial standards.<sup>147</sup>

As Lindsey Raub puts it in her article on hybrid tribunals, “such a back-and-forth dialogue allows the national government to assert the needs and wants of the victimized society, while allowing the international community to ensure that international standards of justice are met.”<sup>148</sup> Whether a tribunal’s work has lasting effect on the country it serves is directly tied to its institutional legitimacy within that country, and that legitimacy comes from fair and effective trials.<sup>149</sup> Through side-by-side collaboration of local and international judges, hybrid tribunals thus build judicial capacity to handle conflicts that involve the destruction of natural resources.<sup>150</sup> Furthermore, hybrid tribunals also promote sustainable peace in order to prevent future armed conflicts by conducting proceedings in-country.<sup>151</sup>

*B. Hybrid Tribunals Promote Sustainable Peace, Preventing Further Destruction of Natural Resources During Armed Conflict*

Hybrid tribunals also have the advantage of being located within the country that experienced the conflict.<sup>152</sup> This means that victims of atrocities can see up-close that the crimes committed against them are given due weight, providing catharsis.<sup>153</sup> Placement within the country also serves a practical function: members of the tribunal have ready access to evidence and witnesses, as well as access to the perpetrators.<sup>154</sup> Location within the country, in combination with the involvement of local actors and the familiarity with and sense of ownership over the tribunal

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<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 1044.

<sup>150</sup> Dickinson, *supra* note 96, at 307.

<sup>151</sup> *Id.* at 310.

<sup>152</sup> Raub, *supra* note 138, at 1042.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

as a local institution, increases the tribunal's power of enforcement.<sup>155</sup> The tribunal's ability to enforce its judgments and indictments through communication and cooperation with local actors is one of the biggest predictors of the success of a tribunal in affecting long-term change.<sup>156</sup> Contrast this with fully international prosecutions and investigations at the ICC: for example, the situation in Darfur was referred to the ICC by the UN Security Council in 2004, and the ICC issued a still-outstanding arrest warrant for Omar al-Bashir in 2009.<sup>157</sup> Indeed, "[i]ssues of enforcement have plagued the ICC since it first opened its doors," and the ICC still cannot ensure the necessary international and local cooperation to arrest al-Bashir.<sup>158</sup>

The visibility of locally situated hybrid tribunals ensures the judiciary is accountable to the public<sup>159</sup>—that it is not conducting sham trials or failing to prosecute high-ranking political officials who hold great power.<sup>160</sup> While some would argue that this level of visibility within the community creates a sense of "victor's justice," its effect on protecting the independence of the judiciary outweighs this effect.<sup>161</sup> Having a hybrid tribunal located in-country also ensures the local community views the tribunal as a local institution rather than an external body imposing unfamiliar standards, giving the tribunal legitimacy over purely international

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<sup>155</sup> Frank Dame, *The Effect of International Criminal Tribunals on Local Judicial Culture: The Superiority of the Hybrid Tribunal*, 24 MICH. ST. INT'L L. REV. 211, 272 (2015).

<sup>156</sup> *Id.*

<sup>157</sup> Maryam Jamshidi, *The enforcement gap: How the International Criminal Court failed in Darfur*, AL JAZEERA (Mar. 25, 2013), <https://www.aljazeera.com/indepth/opinion/2013/03/201332562714599159.html> [<https://perma.cc/ZDU2-MEDC>].

<sup>158</sup> *Id.*

<sup>159</sup> Raub, *supra* note 138, at 1042.

<sup>160</sup> See, e.g., Heather Ryan, *New Year, Same Problems at ECCC*, INT'L JUSTICE MONITOR (Jan. 9, 2015), <https://www.ijmonitor.org/2015/01/new-year-same-problems-at-eccc/> [<https://perma.cc/5Q2L-JA4H>] (where public distrust and a lack of accountability for both defense counsel and the Cambodian government led to enforcement issues and a perception of illegitimacy, hampering the tribunal's efficacy).

<sup>161</sup> Victor Peskin, *Beyond Victor's Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 4 J. OF HUM. RIGHTS 213, 217 (2005) (explaining that victor's justice is a problem facing international prosecutions that stems from inadequate enforcement and a lack of accountability for local government, which is often composed of the winning side after a conflict). However, the problem of victor's justice is less an issue in hybrid models because they solve the issues of accountability and enforcement not only because domestic actors are on the tribunal itself (acting as liaisons between the tribunal and the national government), but also because the location in-country requires that the government be beholden to the governed, who are likely more diverse the post-conflict government may be. See Dame, *supra* note 155, at 272.

models.<sup>162</sup> The ultimate goal of the tribunal should be ensuring sustainable peace—this is the only way to prevent further conflict and ancillary destruction of natural resources—and pursuing prosecutions of those the community deems most responsible is a crucial element of sustainable peace.<sup>163</sup>

Application of the hybrid tribunal model to the DRC shows why hybrid tribunals are best equipped to build judicial capacity, not only in the DRC specifically, but also in post-conflict countries generally, and can help countries move toward preventing further destruction of natural resources.<sup>164</sup>

## V. APPLYING THE HYBRID TRIBUNAL MODEL TO THE DRC

The situation in the DRC lends itself particularly well to the hybrid tribunal model because it is in a “sweet spot” of post-conflict reconstruction.<sup>165</sup> The local judiciary, while not *well*-functioning,<sup>166</sup> is functioning and has even carried out prosecutions itself for conflict-related crimes, albeit with some fair trial hiccups along the way.<sup>167</sup> Likewise, the DRC has also held democratic elections and filled in personnel gaps in government positions, thereby restoring governance.<sup>168</sup> By requesting the ICC initiate investigations and prosecutions for its situation, the DRC has taken an important step toward restoring peace and stability to the country.<sup>169</sup>

Together, these measures make the DRC a prime candidate for a hybrid tribunal to pick up where the ICC has left off and begin prosecuting those responsible for environmental crimes committed during the armed conflict. The DRC has, in effect, brought its legal infrastructure to a sufficient level to allow international actors to implement a hybrid tribunal that will have a lasting positive effect on its domestic judicial capacity.<sup>170</sup> To ensure the efficacy of the DRC’s hybrid tribunal, the international

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<sup>162</sup> Dame, *supra* note 155, at 276.

<sup>163</sup> See Ludwin King, *supra* note 103, at 837.

<sup>164</sup> INFO NOTE 8, *supra* note 96.

<sup>165</sup> Ludwin King, *supra* note 103, at 846 (local judiciaries must have some time to rebuild before they can begin prosecuting conflict-related crimes); UN DEP’T OF ECON. & SOCIAL AFFAIRS AND UN DEV. PROGRAMME, *supra* note 73, at 73.

<sup>166</sup> INFO NOTE 7, *supra* note 61.

<sup>167</sup> *Id.*; Lee, *supra* note 66.

<sup>168</sup> TED DAGNE, THE DEMOCRATIC REPUBLIC OF CONGO: BACKGROUND AND CURRENT DEVELOPMENTS, CONGRESSIONAL RESEARCH SERVICE 6–7 (2009).

<sup>169</sup> *Situation in the DRC*, INT’L CRIM. CT., <https://www.icc-cpi.int/drc> [<https://perma.cc/AU5F-T4KH>] (last visited Mar. 11, 2019).

<sup>170</sup> Ludwin King, *supra* note 103, at 846.

community should avoid pitfalls of past tribunals when crafting the tribunal. The composition of the tribunal and the substantive and procedural rules to be used are the two main issues the international community should focus on when applying the hybrid tribunal model to the DRC.

A. *Composition of the Tribunal*

The composition of the court, comprising international and national judges alike, fosters the capacity building prospect of the hybrid tribunal model.<sup>171</sup> Where the balance of the tribunal is off, serious concerns over the legitimacy and efficacy of the court arise.<sup>172</sup> Such was the case in the Extraordinary Chambers in the Courts of Cambodia (“ECCC”), where domestic judges, appointed by and closely related to Cambodian government officials, outweighed international judges at every level of the courts.<sup>173</sup> Despite a “super-majority” requirement in making decisions on conviction or acquittal, the political influence of the Cambodian government in appointing the majority of judges to the ECCC resulted in what were largely perceived among the Cambodian people as “a slap in the face.”<sup>174</sup> Because the domestic judges outweighed their international counterparts, and because Prime Minister Hun Sen exerted a great deal of control over those judges, the tribunal doled out harsh punishments predominately for the Prime Minister’s political opponents.<sup>175</sup>

To avoid these problems, the hybrid tribunal in the DRC should thoroughly vet domestic judicial candidates, and these candidates should be subject to a veto option by the UN Secretary General.<sup>176</sup> Further, the international community should consider creating an even-numbered panel of judges for each court within the DRC’s tribunal, requiring a majority of judges to make important decisions.<sup>177</sup> Unlike the ECCC, this would ensure cooperation and avoid politicization.<sup>178</sup> This composition would give the court more legitimacy in the eyes of Congolese citizens, and

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<sup>171</sup> Dickinson, *supra* note 96, at 306; Susannah Linton, *Cambodia, East Timor & Sierra Leone: Experiments in International Justice*, 12 CRIM. L. FORUM 185, 186 (2001).

<sup>172</sup> Dickinson, *supra* note 96, at 301–02.

<sup>173</sup> Linton, *supra* note 171, at 191.

<sup>174</sup> Peter Maguire, *Cambodia’s Troubled Tribunal*, N.Y. TIMES (July 28, 2010), <https://www.nytimes.com/2010/07/29/opinion/29iht-edmaguire.html> [<https://perma.cc/6F3L-EX88>].

<sup>175</sup> *See id.*

<sup>176</sup> *See* Linton, *supra* note 171, at 244–45 (suggesting that the international community should retain some control over these processes).

<sup>177</sup> *See id.* at 242–43.

<sup>178</sup> *See id.* at 199.

therefore allow the tribunal to build domestic capacity to prosecute conflict-related crimes more effectively, thereby decreasing the likelihood that natural resource destruction related to the conflict would continue.<sup>179</sup> However, the composition of the court is not the only issue the international community should consider when crafting a hybrid court in the DRC to end environmental destruction through judicial capacity building.

*B. Substantive and Procedural Law*

The second component of a DRC hybrid tribunal is the mixture of substantive and procedural law.<sup>180</sup> The tribunal should focus heavily on domestic substantive law to allow domestic judges to have a chance to build a body of jurisprudence and gain experience adjudicating crimes under their own law;<sup>181</sup> this would ensure that domestic judges benefit from the experience of international judges and create capacity to handle these crimes after the tribunal ends.<sup>182</sup> However, the tribunal should also include provisions for violations of international humanitarian law and international criminal law that specifically deal with destruction of natural resources.<sup>183</sup> As a necessary component of preventing future environmental harms arising out of armed conflict, domestic judges will have to build their capacity to adjudicate such claims, and international law provides a body of jurisprudence to use as an example. The procedural law should be primarily that of international criminal law in order to ensure fair trial standards are upheld and to teach domestic judges how to uphold them going forward.<sup>184</sup>

Together, a balanced mix of international and domestic law, as well as a balance of judges on the tribunals, will ensure a hybrid tribunal in the DRC will be successful, providing a model to be used for future tribunals in other post-conflict countries.

CONCLUSION

The most effective way to prevent future destruction of natural resources in post-conflict countries is to build domestic judicial capacity

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<sup>179</sup> See Sharp, *supra* note 12, at 5.

<sup>180</sup> Linton, *supra* note 171, at 243–44.

<sup>181</sup> Raub, *supra* note 138, at 1048.

<sup>182</sup> *Id.* at 1043.

<sup>183</sup> See Sharp, *supra* note 12, at 5.

<sup>184</sup> Linton, *supra* note 171, at 243–44; Raub, *supra* note 138, at 1043.

to prosecute crimes related to the armed conflict. This approach recognizes that clashes over natural resources are deeply connected to armed conflict: armed conflict causes the destruction of natural resources and serves as an impediment to their protection.<sup>185</sup> Countries emerging from conflict lack basic legal infrastructure to put an end to the conflict,<sup>186</sup> which would thereby put an end to the exploitation of natural resources. Those countries cannot begin to implement other environmental protections.<sup>187</sup>

Building domestic judicial capacity to prosecute crimes related to armed conflict, therefore, has both direct and indirect benefits on preventing environmental degradation: It puts an end to the conflict itself, alleviating the immediate harm. And it fosters sustainable peace by giving domestic judges and lawyers the skills they need to prosecute future conflict-related crimes,<sup>188</sup> allowing the country to focus on non-peacekeeping measures, such as implementing environmental protections under the Paris Climate Agreement.

While there are three prosecutorial methods to address conflict-related crimes in post-conflict countries (fully international prosecutions at the ICC, fully domestic prosecutions, or hybrid tribunals),<sup>189</sup> the model the international community should focus on going forward is the hybrid tribunal because of its unique ability to shape the judicial culture of the affected country.<sup>190</sup> Hybrid tribunals build domestic judicial capacity and create sustainable long-term peace because they involve local judges and are located in-country.<sup>191</sup> This provides legitimacy, buy-in, and a “spill-over” effect on local judicial culture.<sup>192</sup>

The DRC serves as a prime example of how a hybrid tribunal could be implemented to achieve these goals to prevent future environmental degradation. Actors in the Congolese armed conflict exploited the DRC’s vast natural resources to gain power and to fuel their campaigns.<sup>193</sup> Although most of the conflict has ceased, the country still faces instability in Eastern Congo, where much of its natural resources lie.<sup>194</sup> The DRC is ripe for international intervention in the form of a hybrid tribunal; it

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<sup>185</sup> See Dalby, *supra* note 10, at 96, 98; U.N. DEVELOPMENT PROGRAMME, *supra* note 11.

<sup>186</sup> INFO NOTE 8, *supra* note 96.

<sup>187</sup> See, e.g., Peach Brown, *supra* note 50, at 2–3.

<sup>188</sup> See *supra* Section III.B.1.

<sup>189</sup> See *supra* Section III.B.

<sup>190</sup> Dickinson, *supra* note 96, at 306.

<sup>191</sup> Raub, *supra* note 138, at 1042–43.

<sup>192</sup> See *supra* Section III.B.1.

<sup>193</sup> COUNCIL ON FOREIGN REL., *supra* note 31.

<sup>194</sup> *Id.*

has achieved a minimum level of governance reform, and it recognizes the need for prosecutions to restore peace, illustrated by referring the situation to the ICC and instituting some domestic prosecutions of its own.<sup>195</sup>

The ideal hybrid tribunal to build domestic judicial capacity in the DRC includes a balance of local and international judges, with safeguards against politicization via checks by international judges.<sup>196</sup> The DRC's hybrid tribunal should also include a heavy emphasis on domestic criminal law and should incorporate international law to address environmental harms specifically.<sup>197</sup> These measures target the pitfalls of other tribunals, and maximize the likelihood that the DRC's tribunal will be viewed as a legitimate and effective judicial body within the DRC.<sup>198</sup>

This hybrid tribunal model can then be applied to other post-conflict countries going forward. It is only after basic security needs have been addressed through hybridized prosecutions for conflict-related crimes that post-conflict countries can implement more long-term international environmental protections.<sup>199</sup>

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<sup>195</sup> Ludwin King, *supra* note 103, at 846 (stating that local judiciaries must have some time to rebuild before they can begin prosecuting conflict-related crimes); UN DEP'T OF ECON. & SOCIAL AFFAIRS AND UN DEV. PROGRAMME, *supra* note 73.

<sup>196</sup> *See supra* Part IV.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> Yeung, *supra* note 54.