Application of the Rome Statute of the International Criminal Court to Illegal Natural Resource Exploitation Activities in the Congo conflict

A thesis submitted in fulfilment of the requirements of the degree of DOCTOR OF PHILOSOPHY of RHODES UNIVERSITY

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Faculty of Law
Abstract

This thesis explores the phenomenon of illegal natural resource exploitation in conflict zones and the application of international criminal law, particularly the Rome Statute of the International Criminal Court to combat the problem. Contemporary African conflicts, such as the Democratic Republic of Congo conflict explored as a case study herein, have become increasingly distinguishable by the tight connection between war and various forms of illegal natural resource exploitation, particularly targeting valuable and precious mineral resources. With their incidence being highest in Africa, wars funded by illegally exploited natural resources have gradually become one of the greatest threats to regional peace and human security on the African continent. The Congo conflict clearly demonstrated the problematic nature and impact of illegal natural resource exploitation and the widespread human, economic and political costs associated with this phenomenon. This thesis is based on the initial assumption that the quest by conflict actors to profit from war through illegal natural resource exploitation activities is at the centre of the commission of serious human rights violations as well as the complexity and longevity of African conflicts. Developments in international criminal law, culminating in the adoption of the Rome Statute and the establishment of the International Criminal Court, have given impetus to the argument that any group of conflict actors should be subjected to the individual criminal responsibility regime of this legal framework. A further underlying assumption of this thesis is therefore that international criminal law can constrain the acts and conduct defined in this thesis as illegal natural resource exploitation activities since they constitute war crimes under the Rome Statute framework. However, despite illustrating the illegal resource exploitation activities of various state and non-state actors, this thesis is confined to an application of the Rome Statute based international criminal liability regime against members of armed rebel groups involved in such acts. In exploring these issues, this work examines international criminal law institutions and the relevance of international criminal justice in addressing particular phenomena prevalent during African armed conflicts. It further provides the stage to assess the potential of international criminal law in safeguarding natural resources for the benefit of African societies perennially exposed to the depredations of natural resource financed warfare.
ACKNOWLEDGMENTS

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I thank my supervisor, Professor Laurence Juma for his invaluable guidance and assistance.

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Dedication

To Beata and Abigail
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A. Books and Chapters in Books


Dinstein, Y *The Defence of ‘Obedience to Superior Orders’ in International Law* (1965) Leiden University: Leiden


Heweston WB *History of Napoleon Bonaparte and Wars of Europe* Vol II (1816) Richard Evan: United Kingdom.


Kleingeld, P (ed) Rethinking the Western Tradition (2006) Yale University Press, USA.


May, L Crimes against Humanity: a normative account (2005), Cambridge.


**B. Journal Articles**


Carranza, R ‘Reparations and the Lubanga case: learning from transitional justice’ Briefing; International Centre for Transitional Justice, April 2012.


Cassese, A ‘When may senior state officials be tried for international crimes: Some comments on the Congo v Belgium case 2002 (13) EJIL 853.


Crane DM ‘When you get to the fork in the road, take it: reflections on fifteen years of developments in modern international criminal law’ (2010- 2011) 8:1 Loyola University Chicago International Law Review 1.


Cummings, ER ‘Oil resources in occupied Arab territories under the law of belligerent occupation’ (1974) 9 Journal of International Law and Economics 533.


Dubai, R ‘Closing the gap: symbolic reparations and armed groups’ (2011) 93:883 International Review of the Red Cross 783.


Gerson, A ‘War, conquered territory and military occupation in the contemporary international legal system’ (1977) 18 Harvard International Law Journal 525.


Jackson, RH ‘Opening Address for the United States, opening the American case under Count I of the Indictment’, delivered by Justice Robert H. Jackson, Chief of Counsel for the United States, before the Tribunal on 21 November 1945.


Marek, K ‘Criminalising state responsibility’ (1978 – 1979) 14 RBDI 460.


Nollkaemper, A ‘Concurrence between individual responsibility and state responsibility in international law’ (2003) 52 International and Comparative Law Quarterly 615.

Oberg, MD ‘The absorption of grave breaches into war crimes’ (2009) 91:873 International Review of the Red Cross 163.


Samset, I ‘Conflict of interest or interests’ in conflict? Diamonds and war in the DRC’ 93/94 *Review of African Political Economy* 463.


Scharf, MP and Kang, A ‘Errors and missteps: Key lessons the Iraq Special Tribunal can learn from the ICTY, the ICTR and SCSL’ (2005) 38 *Cornell International Law Journal* 911.


van den Hendrik, L and Dam-De Jong, D ‘Revitalising the antique war crime of pillage: The potential and pitfalls of using international criminal law to address illegal natural resource exploitation during armed conflict’ (2011) 22:3 Criminal Law Forum 237.


C. List of Internet sites

http://213.251.145.96/cable/2009/02/09STATE15113.html

http://avalon.law.yale.edu/imt/imtchart.asp

http://avalon.law.yale.edu/imt/imtconst.asp

http://avalon.law.yale.edu/imt/judgen.asp


http://pambazuka.org/en/category/features/50568


http://www.amicc.org/docs/ASPAsummary.pdf

http://www.amicc.org/docs/hrw20020802.pdf


http://www.worldpolicy.org/projects/arms/reports/congo.htm

www.icc-cpi.int/organs/otp/otp_com.html

D. Legislation

Constitution de la République Démocratique du Congo, 2005

Congo Ordinance Law no 67/231 of May 3, 1967

Ordinance Law no 81/013 of April 2, 1981


Military Criminal Code (Law No. 24/2002) of 18 November 2002

Military Judicial Code (Law No. 23/2002) of 18 November 2002

Statuts du Mouvement de Liberation du Congo, 1999

Mining Code (Law No. 007/2002) of 11 July 2002

Mining Regulations (Decree No. 038/2003) of 26 March 2003

E. Treaties and Conventions


Charter of the International Military Tribunal (Nuremberg), August 1945


Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and customs of War on Land, the Hague, July 1899.

Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, October 1907.


Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, January 1991

Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, April 1972.


Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, December 1868

General Agreement on Tariffs and Trade, 1947

Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, August 1864

Global and Inclusive Agreement on Transition in Democratic Republic of Congo, December 2002

International Covenant on Civil and Political Rights, December 1966.


Lusaka Ceasefire Agreement, August 1999.


Project of an International Declaration concerning the laws and customs of War, Brussels, August 1874.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, June 1977.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, June 1977.
Protocol against Illegal Exploitation of Natural Resources, November 2006

Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gas and Of Bacteriological Methods of Warfare, June 1925.


Statute of the International Court of Justice, June 1945


Statute of the Special Court for Sierra Leone, January 2002.

The 1st Geneva Convention on the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the field, August 1949.


The 3rd Geneva Convention relative to the Treatment of Prisoners of War, August 1949.


The Laws of War on Land; Oxford, September 1880.

Treaty of Westphalia, October 1648.


**F. Table of Cases**

*Achutan (on behalf of Banda) and Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi, African Commission on Human and Peoples’ Rights, Communication Nos. 64/92, 68/92, 78/92 (1995).*


Case Concerning the Arrest Warrant of 11 April 2000 (DRC v Belgium), February 2002.

Case concerning the Barcelona Traction, Light and Power Company Ltd (Belgium v Spain) International Court of Justice Judgment of 5 February 1970.


France et. al. v. Goering et. al, 22 International Military Tribunal 411, 466.


Grilli v Administration of State Railways 20 I.L.R 429, 430 (Court of Cassation, Italy, 1961).

Judgment of the International Military Tribunal of Nuremberg, 30 September and 1 October 1946.


Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004.


Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment (September 2, 1998).


Prosecutor v. Dusko Tadic aka ‘Dule’ (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), IT-94-1, International Criminal Tribunal for the former Yugoslavia (ICTY) (October 2, 1995).


Situation in the Darfur, Sudan: In the case of the Prosecutor v Omar Hassan Ahmad Al Bashir Decision on the Prosecution’s Application for an Arrest Warrant No. ICC-02/05-01/09.

Situation in the Democratic Republic of Congo: The Prosecutor v Germain Katanga and Martin Ngudjolo Chui No. ICC-01/04-01/07.

Situation in the DRC, Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58 ICC-01/04-196.

Situation in the DRC: Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber 1 entitled ‘Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58’ No. ICC-01/04 of 13 July 2006.
Situation in the DRC: The Prosecutor v Germaine Katanga and Mathieu Ngudjolo Chui; Decision on the confirmation of charges, ICC No. ICC 01/04-01/07.

Situation in the DRC: The Prosecutor v Jean Pierre Bemba Gombo Decision pursuant to Article 61 (7) (a) and (b) of the Rome Statute, No. ICC 01/05-01/08.

Situation in the DRC: The Prosecutor v Lubanga Dyilo ICC-01/04-01/06-803-tEn.

Situation in the DRC: The Prosecutor v Thomas Lubanga Dyilo, Decision on Sentence pursuant to Article 76 of the Rome Statute No. ICC01/04 – 01/06, 10 July 2012.

Situation in the DRC: The Prosecutor v Thomas Lubanga Dyilo, Judgment pursuant to Article 74 of the Rome Statute No: ICC01/04-01/06, 14 March 2012.

Situation in the DRC: The Prosecutor v Thomas Lubanga Dyilo, Judgment pursuant to Article 74 of the Statute ICC-01/04-01/06.

Situation in the DRC: The Prosecutor v Thomas Lubanga Dyilo; Decision establishing the principles and procedures to be applied to reparations Case No ICC-01/04-01/06, 07 August 2012.


The Prosecutor Against Charles Ghankay Taylor 7 Mach 2003

The Prosecutor Against Foday Saybana Sankoh 7 March 2003, SCSL 03 -02-01.


The Prosecutor v M Fofana and Kondewa Case No. SCSL-04-14-A.

The Prosecutor v Thomas Lubanga Dyilo, Preliminary Chamber I, decision of 29 January 2007, ICC-01/04-01/06.

The Prosecutor v Sessay, Kallon and Gbao Case No. SCSL-04-15-T.


TMG de Mbandaka, Affaire Mutins de Mbandaka, 20 June 2006, RP 086/05 - RP 101/06.


United Kingdom v. Tesch et al. (“Zyklon B Case”), (1947) 1 L.R.T.W.C. 93 (British Military Court).

U.S.A. v Von Weizsaecker et al. (Ministries Case), 14 Trials of War Criminals 314, p. 741 (1949).

United States v. Krauch et al. (IG Farben) 8 Trials of War Criminals 1081.

G. United Nations (Official) Documents

United Nations Security Council


UN Doc. S/1998/581 Report of the Secretary General’s Investigative Team charged with investigating serious violations of human rights and international humanitarian law in DRC.


United Nations Security Council Resolutions (UNSCR)

UNSCR 764 (1992)
UNSCR 771 (1992)
UNSCR 1234 (1999)
UNSCR 1279 (2000)
UNSCR 1341 (2001)
UNSCR 1355 (2001)
UNSCR 1376 (2001)
UNSCR 753 (2003)
UNSCR 1459 (2003)
UNSCR 1457 (2003)
UNSCR 1468 (2003)
UNSCR 1484 (2003)
UNSCR 1493 (2003)
UNSCR 1499 (2003)
UNSCR 1533 (2004)
UNSCR 1625 (2005)

H. Official Reports and Documents (International)


Belgium Senate: Parliamentary Commission of Inquiry to Investigate the Operation and the Legal and Illegal Trade of Natural Resources in the Great Lakes region in view of the present conflict and the involvement of Belgium (February 2003).


Combined report of seven thematic special procedures on Technical Assistance to the Government of the DRC and urgent examination of the situation in the east of the country (A/HRC/10/59) (March 2009).


International Criminal Court Office of the Prosecutor: *Response to communications concerning the situation in Iraq* (February 2006).


Office of the Prosecutor: *Paper on some policy issues before the office of the Prosecutor* (September 2003).


Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the


Report Presented to the Preliminary Peace Conference (March 1919).

The Preparatory Committee (Working Group on Elements of Crimes): Outcome of an Inter-sessional meeting of the Preparatory Commission for the International Criminal Court held in Siracusa from 3 1- January to 6 February 2000 (February 2000).


United States: Department of State Memorandum of Law on Israel’s Right to Develop New Oil Fields in Sinai and the Gulf of Suez (May 1977)

I. Acronyms

ADF/NALU  Allied Democratic Forces

AFDL  Alliance des Forces Démocratiques pour la Libération du Congo

AI  Amnesty International

ALC  Armée de Libération du Congo (armed wing of the MLC)

AMFI  American Mineral Fields International
ANC  
Armée Nationale Congolaise (armed wing of the RCD-Goma)

AU  
African Union

CEPGL  
Economic Community of the Great Lakes Countries

CNDD  
Centre National pour la Défense de la Démocratie (Burundian Hutu movement)

COMESA  
Common Market for Eastern and Southern Africa

DRC  
Democratic Republic of the Congo

FAC  
Forces Armées Congolaises (national army of the DRC from June 1997)

(ex)FAR  
Forces armées rwandaises (national army of Rwanda before July 1994)

FARDC  
Forces Armées de la République démocratique du Congo (formerly the FAC, national army of the DRC)

FAZ  
Forces Armées Zaïroises (national army of Zaire)

FDD  
Front pour la Défense de la Démocratie (armed wing of the Burundian Hutu movement CNDD)

FDLR  
Forces Démocratiques de Libération du Rwanda

FUNA  
former Ugandan national army

GDP  
Gross Domestic Product

Gecamines  
La Générale des Carrières et des Mines

ICAO  
International Civil Aviation Organization

ICC  
International Criminal Court
<table>
<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
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<tbody>
<tr>
<td>ICD</td>
<td>Inter-Congolese Dialogue</td>
</tr>
<tr>
<td>ICJ</td>
<td>International Court of Justice</td>
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<tr>
<td>ICTR</td>
<td>International criminal tribunal for Rwanda</td>
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<tr>
<td>ICTY</td>
<td>International criminal tribunal for Yugoslavia</td>
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<tr>
<td>ILC</td>
<td>International Law Commission</td>
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<tr>
<td>IMF</td>
<td>International Monetary Fund</td>
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<tr>
<td>IMT</td>
<td>International Military Tribunal</td>
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<tr>
<td>Interahamwe</td>
<td>Hutu militia who were involved in the 1994 Rwandan genocide</td>
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<tr>
<td>IPIS</td>
<td>International Peace Information Service</td>
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<td>ISDSC</td>
<td>Inter–State Defence and Security Committee (SADC organ)</td>
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<tr>
<td>KMC</td>
<td>Kamambankola Mining Company</td>
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<tr>
<td>MDM</td>
<td><em>Mudekereza-Defays-Minérais</em></td>
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<tr>
<td>MIBA</td>
<td><em>Societe Miniere de Bakwanga</em></td>
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<tr>
<td>MLC</td>
<td><em>Mouvement de Libération du Congo</em></td>
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<td>MONUC</td>
<td>United Nations Organisation Mission in the Democratic Republic of Congo</td>
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<tr>
<td>NALU</td>
<td><em>Armée nationale pour la libération de l’Ouganda</em></td>
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<td>OECD</td>
<td>Organisation for Economic Cooperation and Development</td>
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<td>OSLEG</td>
<td>Operation Sovereign Legitimacy</td>
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<td>OTP</td>
<td>Office of the Prosecutor (ICC)</td>
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<td>Full Name</td>
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<tr>
<td>RCD</td>
<td>Rassemblement Congolais pour la Démocratie</td>
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<td>RCD-Goma</td>
<td>Rassemblement Congolais pour la Démocratie-Goma</td>
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<td>RCD-ML</td>
<td>Rassemblement Congolais pour la Démocratie-Mouvement de Libération</td>
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<td>RCD-N</td>
<td>Rassemblement Congolais pour la Démocratie-National</td>
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<tr>
<td>RPA</td>
<td>Armée Patriotique Rwandaise (national army of Rwanda from 1994 to 2002)</td>
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<td>SADC</td>
<td>Southern African Development Community</td>
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<td>SCSL</td>
<td>Special Court for Sierra Leone</td>
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<td>SLM/A</td>
<td>Sudan Liberation Movement/Army</td>
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<td>SOMIGL</td>
<td>Societe Miniere Grands Lacs</td>
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<td>UN Charter</td>
<td>United Nations Organisation Charter</td>
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<td>UN</td>
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<td>UNDP</td>
<td>United Nations Development Programme</td>
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<td>UNHCR</td>
<td>United Nations High Commissioner for Human Rights</td>
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<td>UNITA</td>
<td>União Nacional para a Independência Total de Angola</td>
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<td>UNRF</td>
<td>Uganda National Rescue Front</td>
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<td>UNSC</td>
<td>United Nations Security Council</td>
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<tr>
<td>UPC</td>
<td>Union des Patriotes Congolais</td>
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<td>UPDF</td>
<td>Uganda People’s Defence Forces (Ugandan army)</td>
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<td>US, USA</td>
<td>United States of America</td>
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<td>WNBF</td>
<td>West Nile Bank Front</td>
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<td>WTO</td>
<td>World Trade Organisation</td>
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<td>ZDF</td>
<td>Zimbabwe Defence Forces</td>
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<td>ZDI</td>
<td>Zimbabwe Defence Industries</td>
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CHAPTER ONE: INTRODUCTION AND CONTEXT

1. Introduction

The practise of illegal natural resource exploitation in conflict zones has become an increasingly disturbing phenomenon in armed conflicts experienced in the past two decades in Africa.\(^1\) The significance and prevalence of economic agendas in these conflicts has led scholars to suggest the existence of a 'dialectic nexus' between war and illegitimate commerce.\(^2\) Other scholars have even characterized this phenomenon as a second scramble for Africa’s natural resources.\(^3\) Ultimately, the waging of war has become a profit making and revenue-generating enterprise that ignores the enormity of damage to societies and economies associated with such quest to make business out of war.

The carrying out of the varied forms of illegitimate economic exploitation during armed conflict is now identified by the term, ‘illegal natural resource exploitation’.\(^4\)

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\(^3\) See CN Okeke ‘The Second Scramble for Africa's Oil and Mineral Resources: Blessing or Curse?’ (2008) 42:1 *International Lawyer* 193 (distinguishing (p2) the first scramble in the late 1880s with the second scramble for Africa on the basis that the current second one “is more private sector-driven than foreign government-driven (as was the first), although foreign governments frequently hide behind private companies owned by their nationals.” See also RO Ononkwo ‘The second scramble for Africa’ available at [http://www.tlcafrica.com/Magazine/2nd_scramble_for_africa2.htm](http://www.tlcafrica.com/Magazine/2nd_scramble_for_africa2.htm) accessed on 20 June 2010 (distinguishing between scramble for underground mineral wealth from white collar scramble that targets economic and financial institutions).

Generally, the acts encompassed by this term range from the plundering or looting of existing natural resources by conflict actors, the predatory behavior of state and non-state actors and the rent seeking economic activities of individual persons and entities in a conflict state. In addition to this, the illegal corporate and commercial activities of indigenous and multinational private corporations is also captured within the meaning of this term, thus encompassing activities such as the illegal joint venture schemes, sub-contracting in exchange for mineral resources, racketeering activities, smuggling and trafficking of mineral resources from conflict states to industrialized countries of Europe and North America and the international exchange of natural resources smuggled from conflict states through covert methods.

In general, however, the major forms of illegal natural resource exploitation include the irregular access to, and unlawful exploitation of existing natural resources by interconnected networks of state and non-state actors such as authoritarian regimes, armies, foreign government militaries, armed rebel groups and indigenous private

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6 For instance, see P Le Billon Wars of plunder: conflicts, profits and the politics of resources (2012) 151 – 157 (on the use of private military companies to secure natural resource rich areas in return for payment in form of mineral resources), J Cilliers and P Mason (ed) Peace, Profit or Plunder: The privatisation of security in war – torn African societies (1999), describing this practise in Sierra Leone.

business entities.\(^8\) Other forms of this practice further include looting of stockpiles of mineral resources from state owned companies, the requisitions and extortions demanded from private companies and the forcible seizure of mineral resources from small scale traders and artisanal miners by armed groups and other state and non-state actors. A majority of these illegal natural resource exploitation activities are therefore characterized by criminal economic behavior that targets existing natural resources, particularly mineral resources in a conflict state, thereby adversely affecting resource use, management and exploitation in conflict zones. The common thread that distinguishes the major actors and networks implicated in such activities is the quest to make profit out of war, with the revenue generated from the consequent war economy enriching private individuals and not public institutions.

Apart from this, an analysis of the patterns of illegal natural resource exploitation activities in conflict areas illustrates that a substantial volume of these activities are conducted through informal and discrete arrangements amongst economic agents and institutions present in the conflict state.\(^9\) The logistical, transportation and exportation arrangements are often brokered by ‘conflict networks’ that operate extraneous to applicable domestic and international legal regimes.\(^10\) Consequently, the networks of actors that play a key role in indiscriminate plunder of natural resources easily evade monitoring, licensing and inspection mechanisms and are therefore difficult to sanction.\(^11\)

The inevitable consequence of the pursuit of profit through illegal natural resource exploitation activities is, primarily, the disregard for human life and dignity as well as the unmistakable trail of destruction that adversely affects the social and economic


systems of the conflict state. Such collapsed social, political and economic systems aggravate the social distress of affected local population groups and militate against expeditious conflict resolution processes and the eventual attainment of peace.\(^\text{12}\)

Apart from this, the manner in which illegal natural resource exploitation activities have been conducted has led to the commission of war crimes and gross human rights abuses such as mass murder, torture, rape, kidnap, destruction of property, sexual violence, abductions, forced labour and environmental destruction.\(^\text{13}\)

Siphoning and externalization of national wealth on a large scale basis means the conflict state remains economically impoverished decades after the guns cease smoking. Further, existing domestic institutions in the conflict state have lacked the capacity to address the problems of human suffering, poverty, economic decline, social tension and increased human insecurity engendered by natural resource financed warfare, consequently leading to external migration and internal displacement as affected local population groups take flight in search of refuge in neighboring states.\(^\text{14}\)

Accordingly, mechanisms and institutions aimed to respond to illegal exploitation of natural resources could incidentally limit the incidence of both the serious violations and breaches during armed conflict and forced population movements.\(^\text{15}\)

It can thus be argued that the regulation and management of natural resource exploitation in Africa’s conflict zones remains one of the greatest challenges for domestic and international legal regimes. A brutal war that demonstrates this challenge and that is subject of this research is the Democratic Republic of Congo

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\(^\text{15}\) L van den Hendrik and D Dam-De Jong 'Revitalising the antique war crime of pillage: The potential and pitfalls of using international criminal law to address illegal natural resource exploitation during armed conflict' (2011) 22:3 Criminal Law Forum 237. The writers questions (at p249 - 250) whether seeking prosecution for the crime of plunder cannot be indirectly used to prosecute other horrendous crimes such as mass killing and rape “that are committed in the context of illegal exploitation activities”.

\[\text{4}\]
conflict (‘the Congo conflict’), specifically between 1997 and 2005. In the researcher’s view, this conflict, not only provides the grimmest illustration of the challenge posed by illegal natural resource exploitation activities during protracted African wars, but also highlights the greatest need for an authoritative legal formula to address such challenge.

1.2 The DRC Conflict in Perspective

The armed conflict in the Democratic Republic of Congo (“the Congo conflict”) and its linkage to natural resource exploitation had a long history that spans several decades. From the time of Leopold’s Congo Free State (1885 – 1908) to Belgian Congo (1908 – 1960) and throughout the post-colonial dictatorship of Mobutu (1967 – 1997) to this day, control over the country’s vastly rich mineral resources has provided the stage for bitter political contestation between government and armed rebel outfits. The major mineral resources that have been targeted include gold, diamonds, copper, cobalt, uranium, tantalum, tin, coltan, zinc and silver, most of which are located in Congo’s geologically rich provinces.

As will be shown, during the currency of the conflict, the illegal exploitation of these and other valuable mineral resources led to serious violations of international humanitarian law and atrocities committed by parties to the conflict in the violent contests to gain access of and control the richest areas of Congo as well as in order to establish long term occupation of such economically rich areas.

16 The DRC conflict, in fact, began in 1996 as a civil rebellion led by Laurent Desire Kabila seeking the ouster of then President Mobutu Sese Seko from power. The first conflict ended in 1997 when Kabila installed himself the President of the newly christened Democratic Republic of Congo after toppling Mobutu. The second conflict began in mid-1998 with Rwanda, Uganda and Burundi supporting indigenous rebel groups desiring to topple Kabila from power. For a history, see generally GN Ntalaja The Congo from Leopold to Kabila (2002); T Turner The Congo Wars: Conflict, myth and reality (2007).


During the Congo conflict, illegal natural resource exploitation activities were discreetly conducted on a large scale basis by various actors, and in a number of ways. This thesis focuses on at least three discerned patterns. Firstly, the activities to be illustrated and analysed are those of foreign state armies and armed rebel groups that included the seizure, occupation and control of mineral rich areas for purposes of mineral resource extraction, production, commercialization and externalization. Secondly, this thesis will focus on Congo state sanctioned activities that roughly translated into the exchange of mineral resources for military support between the Congo government and its military allies, particularly Zimbabwe. The final stratum focuses on commercial and corporate arrangements between public and private corporate entities on one hand as well as between the indigenous and the international private sector on the other. The bulk of these illegal activities relied on preexisting trade and economic linkages between Congo and the international trade and financial system. As will be demonstrated, this was made possible by active complicity of officials and agents in Congo’s political, security and economic institutions as well as conflict entrepreneurs from within the Great Lakes region and farther abroad.

Most of the revenue and profits obtained from illegal natural resource exploitation activities were not destined to Congo’s public institutions or the fiscus. In overall terms therefore, the net impact of illegal natural resource exploitation activities deeply compromised the integrity and stability of Congo’s financial and economic

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system at a critical time where the Congo state needed to apply its own national wealth and resources to defend itself from domestic armed rebellion against Kabila’s government and direct military attacks from neighboring countries of Rwanda and Uganda. This means that the Congo state was fighting against aggressors and militant groups that used the state’s own resources to finance and consequently prolong the hostilities.

An exposition of the various forms of illegal natural resource exploitation during the Congo conflict as proposed necessarily highlights the compelling need for a system of international law that covers the intricate networks of implicated state and non-state actors. The preference for a supranational legal regime is predicated on the transnational character of the actors and their interconnectedness across state borders, a feature which necessarily required that their natural resource exploitation activities be inhibited through an international legal regime. Further, the difficulty involved in seeking to apply Congo’s compromised domestic legal system to address illegal natural resource exploitation activities experienced during the conflict dissuades any total reliance upon the domestic judicial system. It will be further shown that, during the Congo war, the prolonged hostilities led to the collapse of security, judicial and administrative institutions, thus rendering existing systems of accountability very difficult to operationalize or enforce.

1.2.1 International institutional framework

The increasing awareness at international level of the impacts of illegal natural resource exploitation activities during the Congo conflict necessitated the intervention of international institutional mechanisms for the purposes of responding to the commission of these activities during armed conflict. A primary institutional framework that played an active and critical role in seeking to address Congo’s illegal natural resource exploitation phenomenon and to be examined in this research is the United Nations system. One of the bases for its intervention is the fact that its institutional framework is ordinarily obligated to address problematic
phenomena and situations that endangers international peace and security. In view of this, the involvement of the United Nations in the Congo conflict will be viewed in the context that its responses to Congo’s illegal natural resource exploitation crisis was within this mandate of seeking the peaceful resolution of the Congo conflict. As will be further illustrated, Congo’s illegal natural resource exploitation activities became the focus of the United Nations when it became increasingly clear that such activities affected the resolution of the Congo conflict, and thus posed a grave threat to international peace and security in the Great Lakes region.

It was in pursuit of this mandate that the United Nations Security Council identified the role played by illegal natural resource exploitation in prolonging the conflict and in 2000, proceeded to appoint the Panel of Experts on the Illegal Exploitation of Natural Resources and other Wealth of the Congo. The specific mandate of this Panel was reporting and collecting information on all illegal natural resource exploitation activities in Congo and providing an analysis of the links between illegal natural resource exploitation and continuation of the conflict. The findings of this panel confirmed the critical connection between illegal natural resource exploitation and the Congo conflict, and also exposed the intricate network of actors from the public and private sectors, as well as from indigenous and international sources. The Panel of Experts reports further gave the Congo government ample basis to institute international judicial proceedings seeking financial compensation from the governments of Rwanda, Uganda and Burundi in the International Court of Justice in 2005 for illegal exploitation of resources during the conflict. The judicial proceedings (Case concerning Illegal Armed Activities in the territory of the DRC (DRC v

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22 Article 1 of the UN Charter mentions the purposes of maintenance of "international peace and security", the taking of "effective collective measures for the prevention and removal of threats to the peace" and further, the peaceful settlement of international disputes or situations which might lead to a breach of the peace."

23 This position was subsequently consolidated by the findings of successive reports of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Wealth of the Congo supra. See also the Mapping Exercise Report corroborating the findings of the Panel of Experts and describing the role of various UN organs in the Congo conflict.


Uganda)\(^{26}\) and Case Concerning Illegal Armed Activities in the Territory of DRC (DRC v Rwanda)\(^{27}\) reinforced the contention that the desire for the Congo’s natural resources might have been integral in the subsequent military motives of aggressor states and armed rebel groups involved in the Congo conflict, particularly their continued occupation of Congo territory.\(^{28}\)

In response to this clear conflict – resource nexus in the Congo war, the United Nations proceeded to pass resolutions condemning practices as trade in conflict minerals and the illegal exploitation of Congolese natural resources.\(^{29}\) Another parallel measure by both the United Nations General Assembly and Security Council was their endorsement of the Kimberley Process Certification scheme, an international certification scheme set up to regulate, restrict and manage international trade in diamonds obtained from conflict zones.\(^{30}\) The Kimberley Process was aimed at international regulation of the exploitation and trade of diamonds only; other precious mineral resources were outside the ambit of this scheme, thus illustrating the limitations in scope and substance of this measure as a mechanism to respond to illegal exploitation of various other mineral resources during conflict. The Kimberley Process regime brought home the point that there is a dearth of international regulatory frameworks for the rest of the mineral resources targeted by the interlinked networks and elites implicated in illegal natural resource exploitation activities in Congo’s conflict zones.\(^{31}\)

\(^{26}\) See Case Concerning Illegal Armed Activities in the Territory of the DRC (DRC v Uganda) ICJ Reports 2005 168.


\(^{28}\) T Turner The Congo wars: conflict, myth and reality (2007) 9 – 10 also affirming this view.

\(^{29}\) Some of the Security Council Resolutions to condemn illegal natural resource exploitation during the Congo conflict include 1457(2003), 1468(2003), 1484(2003), 1489(2003), 1493(2003), 1499(2003) and also1501 (2003), see http://www.securitycouncilreport.org/site/?c=glKWLEmTlsGandb=2892725 accessed on 01/06/2010.

\(^{30}\) The United Nations Security Council welcomed and endorsed the adoption of the Kimberley Process in UN Security Council Resolution 1459(2003), that, among other issues, noted “…with deep concern the linkage between the illicit trade in rough diamonds from certain regions of the world and the fuelling of armed conflicts that affect international peace and security”. The UN Security Council further pointed in the same Resolution that it “[s]trongly supports the Kimberley Process Certification Scheme, as well as the on-going process to refine and implement the regime … as a valuable contribution against trafficking in conflict diamonds”.

\(^{31}\) For instance, one of the reports of the Panel of Experts listed various mineral resources and specific corporations that targeted them during the Congo conflict, consequently pointing to a lack of
The United Nations Security Council continued to exert pressure against the resource – conflict crisis in Congo,\(^{32}\) continually issuing resolutions that condemned in even deeper terms the linkage between illegal natural resource exploitation activities and the prolongation of the Congo conflict.\(^{33}\) In a Presidential Statement, the UN Security Council proceeded to recognize the role played by natural resources in armed conflict and urged its peacekeeping missions thereafter to consider the additional mandate of helping governments of resource rich countries to prevent illegal exploitation of natural resources from fuelling conflict.\(^{34}\)

Despite the apparent connection between conflict and natural resource exploitation exemplified in greater terms in the Congo conflict, the United Nations institutional framework only succeeded in providing patchworks of responses that support outdated procedures of soft law institutions which, as the analysis of the Congo conflict will show, are often ignored by the major conflict actors implicated in illegal natural resource exploitation activities.

1.3 Problem Statement

The ineffectiveness of international institutional responses to illegal natural resource exploitation during the Congo conflict calls into question the capacity and limits of applicable international legal frameworks to address this phenomenon during war. It is asserted, and will later be shown that, most international legal regimes do not directly address the various forms of unlawful natural resource exploitation by conflict actors during armed conflict. Thus, apart from international humanitarian law, other legal regimes are unhelpful in addressing the use, access and exploitation of existing natural resources during armed conflict. The international humanitarian law framework, which is the legal regime applicable during armed conflict, is thus expected to confront illegal natural resource exploitation activities during armed conflict head-on and provide comprehensive responses to the phenomenon. The fact


\(^{34}\) UN Doc. S/PRST/2007/22.
that illegal natural resource exploitation activities flourished during the Congo conflict and seemingly outside the mechanisms and institutions within the international humanitarian law framework points to either serious institutional shortcomings or enforcement constraints that inhere in this regime and that militates against addressing the commission of such activities. The question is therefore whether an alternative regime of international law can provide adequate and effective institutional mechanisms to address and respond to illegal natural resource exploitation activities of conflict actors during armed conflict.

A seemingly waterproof legal regime with an international criminal jurisdiction is that established under the Rome Statute of the International Criminal Court.³⁵ The Rome Statute legal framework has universal criminal jurisdiction over listed crimes and further covers the illegal activities of both state and non-state actors within its ambit. This research thus proceeds on the assumption that the Rome treaty based international criminal law framework could offer the most effective response to behaviour and conduct that constitute illegal natural resource exploitation by non-state actors such as armed rebel groups during armed conflicts. A factual basis for this ‘faith’ in international criminal law is that, since its normative years after the Second World War, international criminal law has made significant progress in bringing individuals within its ambit.³⁶ In so doing, it has exposed individuals to the risk of international sanctions for committing war crimes and other serious international crimes during war.³⁷ It will be argued that these advances were made particularly possible by evolving jurisprudence and international treaties clearly defining the nature of crimes regarded as most serious to international society.


³⁶ An important example is the Nuremberg Tribunal of 1945 which declared that, ‘crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced’, see France et. al. v. Goering et. al, 22 IMT 411, 466 (International Military Tribunal 1946).

³⁷ Other international (ad hoc) criminal tribunals that gained prominence were the International Criminal tribunals for Rwanda (ICTR), and for Yugoslavia (ICTY), the Special Court of Sierra Leone (SCSL) and the Cambodia Executive Chambers tribunal system.
However, despite such notable advances in international criminal law, it is still not clear whether contemporary forms of illegal natural resource exploitation can be addressed by this legal regime. Barring post-second World War judgments on economic spoliation, there is little guidance on whether the various forms of illegal natural resource exploitation experienced today constitute war crimes under any convention or treaty. Such guidance might not be readily available from the existing body of international criminal law; as this study will show, existing international criminal law jurisprudence has appeared to revolve around a war crimes discourse that pays more attention to crimes considered “more abhorrent” at the exclusion of others. In keeping up with the legacy of the Nuremberg trials, such discourse has given pride of place to “abhorrent” crimes such as mass murder, kidnaps, indiscriminate killings and extermination at the exclusion of crimes such as pillaging, seizure or unlawful appropriation of property. This inevitably parochial discourse has consequently militated against the development of a more expansive war crimes discourse that is needed to condemn and punish all war crimes in an even handed manner.

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39 See L van den Hendrik and D Dam-De Jong 'Revitalising the antique war crime of pillage: The potential and pitfalls of using international criminal law to address illegal natural resource exploitation during armed conflict' (2011) 22:3 Criminal Law Forum 237 (on the possible dangers likely to be encountered in prosecuting contemporary forms of illegal natural resource exploitation).

40 See W Schabas The UN international criminal tribunals: the former Yugoslavia, Rwanda and Sierra Leone (2006) Cambridge; DM Crane 'When you get to the fork in the road, take it: reflections on fifteen years of developments in modern international criminal law' (2010-2011) 8:1 Loyola University Chicago International Law Review 1 (The author, a Chief Prosecutor for the Special Court of Sierra Leone, indicated (p5) that prosecuting in Sierra Leone was an “opportunity, jurisprudentially” to prioritize “gender crimes”); Human Rights Watch Genocide, war crimes and crimes against humanity: a digest of the case law of the ICTR (2010), on the bias of cases before the ICTR.

41 There were four charges against the 22 defendants at the IMT trials. The first charge was Conspiracy to Wage Aggressive War, the second was Crimes against Peace, the third count was War Crimes and the fourth charge was Crimes against Humanity. See JG Stewart Corporate war crimes: Prosecuting pillage of natural resources (2010) 9, highlighting this position.

42 Currently, the Office of the Prosecutor has charged five war crimes suspects from Congo with various war crimes that include ‘pillaging’. See Office of the Prosecutor ‘Situations and cases’ http://www.icc-cpi.int/EN_Menus/ICC/Situations%20and%20Cases/Pages/situations%20and%20cases.aspx accessed on 19 September 2012.
In addition, the International Criminal Court is yet to flesh out and create a comprehensive jurisprudence of the definitions of all the crimes in the Rome Statute, and this includes those crimes identified as illegal natural resource exploitation in this work. It would therefore seem that, in order to chart the course for the future two basic questions need to be asked. The primary inquiry is whether the narrow war crimes discourse can be relied upon to shed sufficient light and provide guidance on the interpretation of those criminal offences in the Rome Statute that could encompass illegal natural resource exploitation activities. If the existing war crimes discourse has to be dispensed with, the question is whether charting a new course in the interpretation of the Rome Statute equates to ‘groping in the dark’ or should be viewed as a necessary step in the development of a more expansive war crimes jurisprudence.

In tackling these critical issues, this research proceeds on the assumption that some forms of illegal natural resource exploitation activities could be interpreted as fulfilling the elements of certain war crimes and are thus prosecutable under the Rome Statute framework. It however acknowledges that there is a gap since current war crimes jurisprudence provides little, if any, indication pertaining to the criminality of illegal natural resource exploitation activities under the Rome Statute. By seeking to provide a deeper appreciation of the criminality of illegal natural resource exploitation activities under the Rome Statute framework in this way, this work attempts to plug this gap in contemporary war crimes jurisprudence. It is hoped that by so doing, this work can hopefully contribute to the broadening of existing discourse in this area.

1.4 Scope

In order to address issues identified above, the trajectory taken by this study is to largely focus on the activities of Congo’s armed rebel groups. Thus, this work will explore the international humanitarian law framework in order to determine the

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43 C Kress ‘The International Criminal Court as a turning point in the history of international criminal justice’in A Cassese (ed) The Oxford Companion to international criminal justice (2009) 143. (observing that “[t]he unprecedented emphasis on the legality principle (in the Rome Statute] should not detract from the fact that the ICC definitions of crimes are nevertheless vague in many respects. Judges interpreting these definitions will therefore need to flesh out and concretize the precise scope of these crimes.”
rights, duties and responsibilities of armed rebel groups in relation to the exploitation of existing natural resources during armed conflict. Further, this work will analyse, on the basis of the Rome Statute, the individual criminal liability of members of armed rebel groups involved in illegal resource exploitation activities during the Congo conflict. The focus on armed rebel groups is however aware, as will be illustrated in this thesis, that various categories of persons and entities were involved and implicated in the plunder of Congo’s natural resources during the conflict. These ranged from state and non-state actors, private and public bodies and indigenous and international corporations. It would definitely be an impractical task in this research alone to examine the international legal rights and responsibilities as well as the criminal liability of each category or class of persons involved.

The trajectory preferred herein does not therefore reject the fact that illegal natural resource exploitation activities were interconnected and perpetrators relied on networks of other economic actors for the success of their endeavours. To reiterate, although this research affirms that armed rebel groups played a significant role in illegal natural resource exploitation activities and the commission of other serious international crimes, in no way does it suggest that this group alone bore the greatest responsibility for illegal natural resource exploitation activities of the Congo war.

In addition, this research is aware that some illegal natural resource exploitation activities can be dealt with in terms of the municipal criminal justice system. However, it is common cause, as will be shown later, that Congo’s legal, administrative and judicial institutions were practically mal-functional during the conflict. Accordingly, the criminal justice system was unable to respond to the criminality that fed off the war. It should be stated that the gradual recovery of Congo’s justice and security apparatus does not render international criminal justice processes irrelevant. International criminal legal institutions are always necessary and relevant where there is proof of the commission of international crimes within the jurisdictional ambit of the Rome Statute. Further, as will be shown below,  

44 This is the subject of Chapter Two.
international criminal law authorities are likely to continue supporting the strengthening of the justice administration system of a war torn state since such apparatus constitute critical complements of international criminal legal institutions.\textsuperscript{45}

By choosing to focus on international legal mechanisms, this study is able to explore the potential and limits of the international law responses to illegal natural resource exploitation activities and social behaviour that engenders such phenomenon during armed conflicts. Such an approach can also assist in exploring whether the primary aspirations of international criminal law are in tandem with the general purposes of international law during armed conflicts, which include the maintenance of peace and security, the setting of standards and procedures to minimize conflicts between and among states and the promotion of peaceful resolution of disputes.

\textbf{1.5 Aims and Objectives}

The first object of this research is to assess the nature and extent of illegal natural resource exploitation activities that were experienced during the Congo conflict. This descriptive rendition demonstrates the extent of this phenomenon and how it has proved a challenge to various legal regimes. The argument is that the absolute freedom enjoyed by the major actors implicated in illegal natural resource exploitation activities clearly highlights this challenge and the need for applicable international regulatory frameworks to provide comprehensive responses that should curtail the commission and escalation of such activities during war.

The second objective is to explore the legal regime applicable in the regulation of natural resource exploitation activities during armed conflicts. As this research focuses on a conflict situation, the investigation will be restricted to conventional and customary international humanitarian law. The aim is to critique the applicable international humanitarian legal regime and determine the extent to which the mechanisms of this regime addresses and responds to the commission of illegal natural resource exploitation activities by parties to armed conflict.

\textsuperscript{45} See discussion of the principle of complementarity in Chapter 5 para 5.2.1 below.
Finally, this research aims to examine whether contemporary forms of illegal natural resource exploitation could be considered war crimes, hence subject to prosecution under provisions of the Rome Statute based international criminal law regime. This will be achieved by applying provisions, principles and concepts of the Rome Statute based international criminal law regime in order to show the possible criminality of illegal natural resource exploitation activities of armed rebel groups.

1.6. Approach and Methodology

1.6.1 Case Study Research Method

This thesis focuses on illegal natural resource exploitation during the Congo conflict. It therefore primarily adopts the Case Study research method, defined as involving a qualitative empirical enquiry that investigates a contemporary phenomenon in depth and in its real life context. The general motive for adopting this research method is usually to test the generalizability of certain conclusions underlying, or arrived at in this work.

Generally, in the application of this method, a selection of more than one case is usually preferred in lieu of examining just a single particular case. A single ‘case’ is however chosen if certain indicia are met. Merriam et al, for instance, observe that, one ‘case’ could be chosen in case study research if it is unique or critical or it exhibits a characteristic of interest to the researcher or finally, if it is typical or representative of a common practice. The choice of the Congo conflict and its illegal natural resource exploitation phenomenon meets these prerequisites without difficulty. Further, characteristics of illegal natural resource exploitation activities witnessed during the Congo’s resource crisis have been witnessed in other resource rich conflict torn parts of Africa. Specific focus on the Congo conflict provides the

46 RK Yin Case Study Research: Design and Methods (2009) 18 (on the definition and nature of this research method).
48 For instance, see RK Yin Case Study Research: Design and Methods (2009) 19 (stating that this is done for the reason that it enhances “the generalizability of conclusions and findings” arrived in the work.
stage to identify significant features of this phenomenon that might not be discerned in a general analysis of all conflicts where such phenomena were present.

This research is primarily desktop library research. Accordingly, a wide range of relevant primary and secondary sources will be relied on. Primary sources will include original versions of treaties and conventions, official governmental and intergovernmental documents, judgments of international tribunals, United Nations resolutions, peace agreements, declarations and other official legal documents from national and international institutions such as the organs of the United Nations and their various sub organs and departments. Secondary sources will include published material such as books, chapters in books, international reports and journal articles.

The second chapter of this thesis adopts the descriptive method to assess the nature and extent of illegal natural resource exploitation activities during the Congo conflict and the extent to which these activities challenged applicable international legal regimes. This method is preferred in this chapter in order to clearly portray how the illegal natural resource exploitation phenomenon is considered problematic in this thesis. In Chapter Five, the doctrinal research method is used in the determination of the existing law from the primary and secondary sources of law identified above. This method implies “selecting and weighing (legal) materials, taking into account hierarchy and authority as well as understanding social context and interpretation”. In particular, the method is adopted in this thesis to present, expound, interpret and comment on sources of law, such as international treaties, legal doctrine, customary international law and domestic legislation.

Most importantly, the doctrinal method is applied in the analysis of the Rome Statute criminal jurisdiction and relevant international criminal law jurisprudence against illegal natural resource exploitation activities. Such analysis assists in determining the criminal nature of illegal resource exploitation activities. Ultimately, the approaches adopted in all the chapters are designed to identify and present the problem, analyze it and apply and critique the relevant law.

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1.7 Terms and Concepts

It has been highlighted above that a significant part of this work examines the application of provisions of the Rome Statute against practices generally described as constituting “illegal natural resource exploitation”. The Rome Statute and international criminal law per se does not contain this term anywhere; it is thus adopted and used here merely for its clearly descriptive characteristics. Notwithstanding, it will be argued that the Rome Statute specifically identifies three war crimes that could be encompassed within the understanding of “illegal natural resource exploitation” as used and defined in this work. These war crimes are “pillaging”,51 “seizure of enemy property” not demanded by military necessity52 and “extensive … appropriation of property” not justified by military necessity and carried out wantonly and unlawfully.53

The term “illegal natural resource exploitation” is further adopted herein for the reason that in my view, it correctly encapsulates the various contemporary forms of economic exploitation and spoliation witnessed during the Congo conflict better than other traditional terms found in international humanitarian law. This practice of using a single descriptive term has precedent. For instance, the Nuremberg International Tribunal followed the approach of adopting a single descriptive term in order to correctly reflect the various forms of economic exploitation carried out by Nazi Germany during the Second World War.54 In the IG Farben case, the term ‘spoliation’ was adopted and given a meaning synonymous to that of ‘plunder’, ‘pillage’ or other illegal forms of dispossession of public or private property, with the Tribunal establishing that the term ‘spoliation’

51 Article 8 (2) (b) (xiii) and Article 8 (2) (e) (xii) criminalises as a war crime “destroying or seizing the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of war”.
52 Article 8(2) (b) (xvi) and Article 8 (2) (e) (v) prohibits “pillaging a town or place, even when taken by assault”.
53 Article 8(2) (a) (iv) prohibits the “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”
“... is used interchangeably with the words ‘plunder’ and ‘exploitation.’ It may therefore be properly considered that the term ‘spoliation’, which has been admittedly adopted as a term of convenience by the Prosecution, applies to the widespread and systematised acts of dispossession and acquisition of property in violation of the rights of the owners which took place in territories under the belligerent occupation or control of Nazi Germany during World War II. We consider that ‘spoliation’ is synonymous with the word ‘plunder’ as employed in Control Council Law No. 10, and that it embraces offences against property in violation of the laws and customs of war of the general type charged in the Indictment.”55

This thesis considers the use of the term ‘illegal natural resource exploitation’ as more appropriate than the term “spoliation’ or any other term in capturing the true nature, forms and modes of economic exploitation experienced during the Congo conflict. In doing so, it follows the lead taken by international judicial tribunals, international organizations as well as other multilateral institutions to be identified later in this work. Accordingly, the term ‘illegal natural resource exploitation’ as used in this thesis will refer to all forms of ‘spoliation’, ‘plunder’, ‘pillage’, ‘unlawful appropriation’ or ‘unlawful seizure of property’ as understood in conventional and customary international humanitarian law.

1.8 Penal theory and Illegal natural resource exploitation

An important part of this thesis investigates the possible use of international criminal law institutions to address acts and behavior of particular social groups that constitutes illegal natural resource exploitation during armed conflict. These groups include both state and non state actors implicated as active participants in Congo’s natural resource exploitation crisis such as government armies, armed rebel groups, multinational companies and individual persons.56 The Rome Statute framework that will be examined in this thesis establishes an international criminal jurisdiction applicable to natural persons and to that extent, provides an opportunity to explore the nature, impact and relevance of the criminal process in combating problematic

55 Law Reports of Trials of War Criminals Volume X, supra 44- 45.
56 See ‘Scope”, para 1.4 above, for the specific social group whose behavior is investigated and explored.
behavior of identified social groups during armed conflict. Further, an investigation of the international criminal law framework provides a platform to analyse specific issues of crime and punishment in international society, albeit to the extent that these issues relate to particular social groups in war.

It will be asserted that penal theories, upon which criminal justice institutions are founded, are essentially state-centric as they derive from an examination of domestic society, and not international society. It will further be illustrated that there is a consequent transposition of domestic criminology onto the international system the logic or propriety of which is fiercely contested. It will be contended that the fact that international legal norms and consequent jurisprudence originates from domestic jurisprudence might not better serve the objectives of international criminal punishment. For instance, critics question any congruence between the social purposes of punishment in domestic and international society to justify such transposition. There is the related argument that the role, purpose and

57 See generally on the theories, RA Duff Punishment, Communication and Community (2003) Oxford University Press (on the theories of criminal punishment. In general terms, penal theory generally sees criminal punishment as serving three major social purposes, namely deterrence, retribution and restoration. These fundamental justifications are in addition to a number of other approaches to punishment that have sought to justify the criminal process on other more or less similar grounds. However, it is observed that the foci of a majority of these approaches have been the domestic plane, not international society.


59 For instance, see I Tallgren ‘The sensibility and sense of international criminal law’ (2002) 3 European Journal of International Law 561, 565 – 566, observing that “it generally seems to be taken for granted that whatever objectives and justifications work – or are supposed to work – on the national level should also, without any extra effort, cover the decisions and actions taken by states in concert.”

60 See also See T Farer ‘Shaping agendas in civil wars: Can international criminal law help’ in M Berdal and DM Malone (ed) Greed and Grievance: Economic Agendas in Civil Wars (2000), lamenting the extension of domestic law purposes and institutions onto international law.

61 In general terms, penal theory generally sees criminal punishment as serving three major social purposes, namely deterrence, retribution and restoration. Another more recent ‘unitary theory’ adds that criminal punishment serves a “communicative purpose”; it communicates to “offenders the censure they deserve for their crimes and should aim through that communicative process to persuade them to repent those crimes, to try to reform themselves, and thus to reconcile themselves with those whom they wronged.” These fundamental justifications are in addition to a number of other approaches to punishment that have sought to justify the criminal process on other more or less
effectiveness of criminal punishment in international society has been taken for
granted based on the aspects of domestic criminal justice systems. The question is
to what extent can the inability of domestic criminal justice systems to address illegal
natural resource exploitation activities during war be cured by international criminal
justice measures?

Research on the impacts of international criminal justice on the behavior of important
conflict actors suggests that international prosecution could indeed function as an
instrument to compel parties to a conflict to move towards positive outcomes such as
peace. That said, this thesis is underpinned by the belief that criminal punishment,
or the threat thereof, at an international level could possibly diminish the incidence of
illegal natural resource exploitation activities during conflict. To that extent,
international criminal punishment of such activities is necessary in order to address
such phenomena in ongoing or future conflicts.

1.9 Outline of Thesis Chapters

Chapter One introduces the research topic, the context in which the research is
anchored and the goals of the research. Further this chapter identifies the
fundamental problem sought to be explored by the research, the context in which it
occurs and the context in which it could be addressed. An explanation will be given
of key concepts, approach and the methodology adopted. The discussion on

University Press, 3.

See T Farer ‘Shaping agendas in civil wars: Can international criminal law help’ in in M Berdal and
that “(b)elief about the potential efficacy of penal sanctions as vehicles for enforcing international law
is a fairly straightforward extrapolation from the collective appreciation of law enforcement at the
national level”

For instance, one author argues that in addition to contributing towards establishing political
cultures that condemn atrocities, anecdotal evidence suggests that international prosecutions compel
compliance with international humanitarian law, see D Whippman ‘Atrocities, deterrence and the limits
observing the implications of the ICTY in influencing positive political developments concluded that
although a mechanical cause and effect process could not be discerned between indictments and
political moderation in Serbia and Bosnia, international prosecution succeeded in “discrediting the
remnants of wartime ultranationalism and in the prevention of a resumption of interethnic conflict”, P
95:7American Journal of International Law 7, 14.
approach will highlight the substantive conceptual and theoretical framework underpinning the whole thesis.

**Chapter Two** explores the DR Congo conflict in detail, focusing on the nature, extent and various forms of illegal natural resource exploitation that occurred during the conflict. It will further highlight the extent to which illegal natural resource exploitation activities remained unregulated and outside the purview of many legal regimes.

**Chapter Three** is an exposition of applicable rules of conventional and customary international humanitarian law, the characteristics of institutions of this legal regime and the perceived strengths and challenges of this legal framework in responding to illegal natural resource exploitation during conflict.

**Chapter Four** explores Congo’s association with international criminal justice institutions, particularly the International Criminal Court and implications thereof. It also analyses the debate on crime and punishment and the capacity of international criminal law to address and respond to the illegal natural resource exploitation activities of militant social groups during armed conflict.

**Chapter Five** provides an analysis of the relevant provisions of the Rome Statute that can be applied against illegal natural resource exploitation activities of armed rebel groups. The investigation therefore focuses on the individual criminal responsibility of rank and file members of armed opposition groups involved in illegal natural resource exploitation activities during the Congo conflict.

**Chapter Six** concludes the thesis. It gives a final word on the role that can be played by international criminal law in regulating behavior and influencing the incidence of illegal natural resource exploitation practices in conflict situations.
CHAPTER 2: THE CONGO WAR AND ILLEGAL NATURAL RESOURCE EXPLOITATION DURING THE CONFLICT

2.1 INTRODUCTION

The nature in which illegal natural resource exploitation activities were carried out during the Congo conflict has been extensively documented, illustrating the extent to which such activities contributed to the financing and consequently the duration of the conflict. A careful description of these activities leaves no doubt that they clearly challenged existing legal regimes. In addition, an analysis of the same activities also exposes the limits and ability of applicable legal regimes that were meant to provide comprehensive responses. The nature of the Congo conflict itself contributed to the difficulties in the application of institutional responses, domestic or international, against illegal natural resource exploitation activities. Evolving from an internal armed conflict to a full blown international armed conflict, the Congo war emerged as one of the most complex wars in the post-colonial history of Africa. Its major actors, protagonists and role players failed to fit within a single legal definition or category. The various illegal natural resource exploitation activities committed by these diverse actors were clearly interconnected and interwoven in a war economy that was dominated by conflict entrepreneurship and military adventurism.

This chapter will explore the nature in which illegal natural resource exploitation activities occurred during the Congo conflict. As hinted above, the main reason for this is to highlight the forms of illegal economic exploitation that characterised the Congo war and that defied both domestic and international legal regulation. The factual description is also intended to provide the foundation for Chapter Three, which explores the weaknesses of existing legal regimes in dealing with issues of access, use and exploitation of natural resources during conflict. It will be evident in this whole chapter that a number of important official and international sources

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64 AMB Mbangu ‘Conflict in the DRC: An international legal perspective’ (2003) 28 South Africa Yearbook of International Law 82.
have been relied upon to establish the true nature, patterns and forms of illegal natural resource exploitation activities of the Congo conflict.

This chapter is divided into three component parts. The first part will illustrate the socio-political landscape of Congo in the period immediately preceding the Congo conflict. The necessity of such a contextual landscape is predicated on the premise that the conflict and the resultant illegal natural resource exploitation activities did not occur in a vacuum; most of the activities that grew to prominence during its lifespan had their own roots and linkages to pre-existing conditions. In this first part therefore, analysis will be made of the geopolitical conditions that previously existed but acted as a catalyst for the flourishing of illegal natural resource exploitation activities when the war erupted. The second part dwells on a brief description of the conflict, its main actors and their involvement in illegal natural resource exploitation activities. A sub issue also explored in this part is the actual manner of resource exploitation processes and activities by state and non-state actors and the extent to which such state of affairs contributed to the conflict’s complexity and prolongation. The third component of this chapter focuses on the extent to which the predation war economy that developed during the conflict thrived and festered despite comprehensive reports exposing this state of affairs to the international community.

2.2 Congo Geo-Politics and the Resource Curse

Congo is a giant country in many ways. In size, it spans 2,345, 410 sq km making it the third largest on the African continent after Sudan and Algeria. It has a population of sixty million spread over eleven provinces. More than two hundred different ethnic groups can be found in Congo, albeit with most of these sharing similar

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Allegations into Illegal Exploitation of Natural Resources and other Forms of in the DRC 2001 (the Porter Commission).
cultural, social and historical identities. Congo shares a border with nine other African countries namely Sudan, Rwanda, Burundi, Uganda, Zambia, Tanzania, Angola, Central African Republic and Republic of Congo (Brazzaville). It is important to note that of these nine neighbours, only two have been politically stable (Tanzania and Zambia). The other seven have been constantly volatile, making the central African region generally unstable. This generally volatile central African region, identified by a number of major lakes, has come to be known as “the Great Lakes Region of Africa”.

The natural resources of Congo are beyond doubt vast and plenteous, making the country pregnant with economic potential. The list of mineral resources in particular, is long and impressive and includes copper, cobalt, gold, diamonds, tantalum, tin, coltan, zinc, cassirite, iron ore, uranium, and silver among others. The 2010 Mapping Exercise Report of the United Nations High Commissioner for Human Rights released in October 2010, states that Congo alone accounts for seventeen per cent of global production of diamonds and its Katanga copper belt contains thirty four per cent of the world’s cobalt and ten percent of the world’s copper. The provinces of North and South Kivu, in the north east and eastern parts of the country contain about eighty percent of the world’s coltan supplies.

Despite such huge economic potential, Congo’s 2009 Human Development Index ranking was a mere 176, a position above only five other African, mostly resource poor and desert countries and Afghanistan. The United Nations Development Programme placed Congo’s Gross Domestic Product (GDP) per Capita at US$714 in 2007, a figure representing one seventeenth that of Botswana. Its life expectancy is

68 G Nzongola-Ntalaja The Congo From Leopold to Kabila 14.
69 G Nzongola –Ntalaja The Congo from Leopold to Kabila 215.
71 Mapping Exercise Report, para 729
72 “Human Development Index” refers to a summary measure and indicator of development used to compare and rank countries. The lower the country is ranked, the poorer that country is considered to be.
73 According to the Human Development Report (2008), these countries were Burkina Faso, Mali, Central African Republic, Sierra Leone and Niger. See Table G (p170).
74 UNDP: DRC Human Development Report (2008), Figure 1.
pegged at 47.6 years. According to the 2005 Human Development Report, the Congo conflict claimed approximately four million lives between 1996 and 2005. Juxtaposing the golden economic potential besides the despondent social – developmental challenges and circumstances in which the Congo finds itself today, writers have identified Congo as “terre de paradoxes” (land of paradoxes) and a “geological scandal”.

2.2.1 The Congo State: Political and Economic Administration

The various conflicts characterising the political history of Congo demonstrates beyond doubt that it is difficult to separate Congo politics from its economics. The vastness of Congo’s natural resources and the fact that its economy is natural resource based compels this tight relationship between the country’s politics and economic system. Successive ruling elites in the Congo have thus sought to apply the country’s natural resources in their quest for political survival. For instance, a colonial secretary of the Belgian government in exile in London acknowledged the contribution of Congo mineral resources to the expenses of the government of the time, stating that:

“During the war, the Congo was able to finance all expenditure of the Belgian government in London including the diplomatic service as well as the cost of our armed forces in Europe and Africa, a total of some 40 million pounds. In fact, thanks to the resources of the Congo, the Belgian government in London had not to borrow a shilling or a dollar, and the Belgian gold reserve could be left intact.”

This strong relationship between politics and economics has proved not only to be a historical fact, but also a perpetual source of tension in Congo’s political terrain. The country’s successive regimes has monopolised the use, access, distribution and exploitation of Congo’s vast mineral wealth to serve selfish political objectives at the

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77 G Nzongola-Ntalaja The Congo From Leopold to Kabila 28.
78 G Nzongola-Ntalaja The Congo From Leopold to Kabila 29
79 W Rodney How Europe Underdeveloped Africa 172.
expense of the population. An unfortunate offspring borne out of the relationship between politics and economics is the militarisation of access and exploitation of natural resources by various actors in Congo’s political and economic spaces. Since most of the avenues, methods and *modus operandi* preferred in economic exploitation of Congo’s resources have constantly evaded formal legal, fiscal and economic systems, a highly informalised and increasingly privatised economy emerged and this favoured the proliferation of local and foreign predatory elements in the national economic system. These criminal elements were to prove the greatest perpetrators and facilitators of natural resource exploitation activities when the Congo wars began in 1996.

It could be argued that the large scale predation encountered during the conflict necessarily grew out of the economic mismanagement of the previous regimes that had gradually developed only to spread across Congo’s vast natural resource and economic space. An illustration of Mobutu’s legacy in this work, serves to show that not only did his economic adventures prepare the seedbed for illegal natural resource exploitation activities to sprout and spread during the war, but also that his economic designs highly compromised judicial, security and administrative institutions making such vital institutions incapable of combating natural resource centred criminal activities experienced during the Congo conflict.

It is argued that the economic policies and adventures of Mobutu made the Congo dead game for local and foreign vultures when the Congo war broke out. These economic policies were characterised by widespread corruption, breakdown of the rule of law, lack of good governance in economic institutions and improper resource management.

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80 JO MacCalpin ‘Historicity of a crisis’ in JF Clark (ed) *African stakes of the Congo war* 48. The author observes that Congo’s post-colonial regimes gave priority to regime survival at the expense of functional political institutions and economic systems.


82 JO McCalpin ‘Historicity of a crisis’ in JF Clark (ed) *African Stakes of the Congo War* 45. The writer argues that Mobutu’s patrimonial regime was characterised by “economic accumulation through warlord politics and a politico-economic culture of kleptocracy”. See also WK Muzongi ‘Anticorruption challenges in post-election DRC’ (2007) *Royal Institute of International Affairs* 15.
2.2.2 Corruption

Corruption and patronage in both the private sector and public service was rampant in Mobutu’s era and it continued unabated in post-Mobutu years, crippling the national fiscus. Consequently, in the past two decades, Congo was ranked in the list of twenty most corrupt countries on the globe. Commenting on Mobutu’s corruption, Dunn estimates that owing to executive greed, corruption and cronyism, Mobutu and his close allies pillaged between US$4 billion and US$10 billion of the country’s wealth and that they siphoned off up to twenty percent of the government’s operating budget, thirty percent of its mineral export revenues and fifty percent of its capital budget. Another writer, McCalpin charges that at one time, the Presidency accounted for eighty percent of the government expenditure with agriculture, an important economic sector, accounting for only eleven percent of the budget. Nzongola-Ntalaja claims that the 1996 Congo annual budget of a mere US$300 million was much smaller than that of less resource rich Congo Brazzaville or even that of a medium sized university in the United States. This unbridled corruption that benefitted both domestic patrons and external entrepreneurs might have led to the development of corrupt linkages between domestic criminal networks and those networks that thrive in collapsed or war torn economies.

2.2.2.1 Patronage, Nepotism and External Influence

In pursuit of his ill-planned economic policies, Mobutu allied with various agents, allies, relatives and officials in the state administration who were dependant on the “culture of authoritarianism and patrimonial predatory practises”. The political and administrative class necessary for the effective running of the state evolved into a corrupt, rent seeking bureaucracy waiting to jump and grab any opportunity at self-

83 Congo was ranked thus by Transparency International, an organisation with an interest in measuring and fighting corruption trends and patterns. See for instance http://www.transparency.org/policy_research/surveys_indices/cpi/2003 (last visited February 12, 2011). In 2003, Transparency International for the first time in its report, ranked DRC 133rd out of 145 countries. In 2007, DRC was ranked 168 out of 179 countries while in 2010, DRC was ranked 164 out of 178 surveyed countries.
85 JO McCalpin ‘Historicity of a crisis’ 43.
86 G Nzongola-Ntalaja The Congo From Leopold to Kabila 158.
87 JO McCalpin ‘Historicity of a crisis’ 41.
enrichment when conditions suited it. Foreign private businesses flourished under the patronage of Mobutu’s rule. Nzongola-Ntalaja observes that Mobutu’s grovelling to American interests meant that in effect, he “became the instrument by which US led international bourgeoisie sought to break the Belgian colonial monopoly” and enter the Congolese market and economy. The new entrepreneurs welcomed to participate in Congo’s economy included those from Italy, Japan, Germany, France, Britain and South Africa. When war erupted, these various actors in the economy sought to maximize the economic advantages presented by the war and for their economic objectives to succeed, critically relied on local and regional actors in the Congo’s economic system whose corrupt practises had been encouraged and promoted during the era of Mobutu.

Nzongola-Ntalaja identifies three classes of people in Congo society who benefitted from Congo’s wealth and fed the lines of plunder when the Congo war erupted. The politico-administrative elite were composed of top managers with financial responsibilities in parastatals and other state financial institutions. They also included managers of revenue producing institutions such as customs, reserve banks, state mining companies, state electricity supply, tax departments and agriculture. The senior military elite were in the national army and embezzled military wages, created ghost soldier lists and took huge commissions from military purchases they ordered. It was the corruption and inefficiency in the military that made Mobutu’s army a very weak force unable to withstand any serious rebellion or external attack. The corrupt activities of the senior military elite were to prove “essential” for this class during the conflict as it enabled this class to establish contacts, networks and alliances enabling them to engage in illicit trading, exchanges, smuggling and various other forms of illegal natural resource exploitation. This class obviously was not concerned with the welfare of the army in general. Nzongola-Ntalaja claims that the general army was underpaid, ill equipped, ill-disciplined and corruptible. During the confusion of the second anti Kabila conflict, the disbanded former armed forces

88 G Nzongola-Ntalaja The Congo From Leopold to Kabila 147.
89 G Nzongola-Ntalaja The Congo From Leopold to Kabila 158 - 161.
90 G Nzongola-Ntalaja The Congo From Leopold to Kabila 159.
91 G Nzongola-Ntalaja The Congo From Leopold to Kabila 159.
of Zaire (FAZ) were to fill ranks of RCD and MLC rebel armies, using their years of corruption to engage in extortion, smuggling, theft, plunder and coercion of the civilian population during the conflict.

Nzongola-Ntalaja also identifies the association of the senior military class with Lebanese merchants as a profitable symbiotic relationship, involving the military providing cover and security for the Lebanese merchants in exchange for kickbacks and gifts in cash or kind.\(^\text{92}\) The Lebanese merchants were significant players in the Congolese politics of patronage, being involved in “high risk business” activities such as illegal trafficking of mineral resources with the aid of the senior army officials. Upon the occupation of Congo by Rwanda and Uganda and their rebel allies, the Lebanese merchants were co-opted into the illegal exploitation activities by private businessmen, senior political and military figures from these states. They thus continued to be at the fulcrum of the illegal exploitation and exportation economy during the conflict.

### 2.2.3 Weak Security Systems

Besides the political and economic malaise that were permissive of resource theft and corruption, Mobutu’s domestic security policies left Congo highly ungovernable in the event of a major conflict whilst also making the Great Lakes region volatile. As hinted earlier, only two of Congo’s neighbours were politically stable and the other seven states were constantly fighting anti-government armed rebel groups with bases in the Congo. Mobutu was responsible for selling and supplying arms to some of these rebel groups in violation of international sanctions.\(^\text{93}\) Although these armed groups did not pose a threat to Mobutu and Congo at the time, they brought with them the seeds of regional strife that culminated in the Congo war.\(^\text{94}\) The security challenges they engendered in the Great Lakes region, particularly to Uganda,

\(^\text{92}\) G Nzongola-Ntalaja *The Congo From Leopold to Kabila* 159.


Rwanda and Burundi, subsequently sparked the complicated conflict waged on Congo soil.

The knowledge of Congo’s security and political dynamics and trade routes enabled local and regional militants to successfully engage in and benefit from regional arms trade for their own survival. The opening of massive Cold war surplus stockpiles of arms and liberalisation of the arms market meant the flourishing of gun running practises in the Great Lakes region. Arms brokers facilitated the sale, acquisition and supply of arms to these rebel groups and therefore guaranteed their survival. During the war, arms brokers, rebel chiefs, army commanders and local criminal agents thus directly profited out of the Congo’s natural resource crisis by linking their professions to the prevailing conflict entrepreneurship. Their participation in the Congo’s conflict economy provided them with more income to finance the military objectives and operations of armed rebel groups. When the conflict was drifting towards the end, ceasefire agreements were drafted that insisted on the withdrawal of foreign armies, but this condition was difficult to fulfil since foreign armed rebel groups continued to thrive, thereby justifying continued military presence of Rwanda and Uganda in parts of Congo.

It is thus apparently clear that Mobutu’s domestic security policies inadvertently contributed to natural resource centred predatory activities after his demise. These activities constituted a threat to various institutions of control and most importantly, pointed to the powerlessness of Congo’s justice system. The justice and regulatory system existed, but its capacity to deal with an intricately organised criminal economy that saw the participation of Congo’s senior politico-military elite, was highly compromised. As will be shown immediately below, the justice system could have alleviated the crisis but Mobutu’s policies made it the very victim of the impunity it should necessarily be designed to combat.

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96 T Raeyemaekers ‘Network war: An introduction to Congo’s privatised war’ IPIS Oct, 2002, para 3.3
97 T Rayenmaekers ‘Network war’ para 3.3
2.2.4 Congo’s Constitutional, Legal and Justice System

2.2.4.1 Constitutional Framework

The constitutional framework of any state is essential in the fight against organised crime especially where such crime threatens the very fabric of the state in question. Congo has a civil law legal system traceable to the Napoleonic Code but fundamentally structured along the lines of its former colonial power, Belgium. Congolese sources of law thus include the constitution, international treaties, legislation and custom as well as doctrinal writings, precedent and administrative regulations.\(^9\) Currently, the 2006 Constitution stands at the apex of the legal system. However, during Mobutu’s rule, two constitutions, the 1967 Constitution and the 1994 Constitution were the fountain of Congolese law.\(^10\)

An analysis of these documents will not be done here, but some general observations have to be made. Both legal documents did not make provision for the creation of appropriate governance institutions to stem executive corruption such as anti-corruption mechanisms. Most importantly, these documents did not establish a constitutional framework that would make provision for a proper natural resource management regime and left this in the domain of legislation.\(^11\) The 1994 constitution, for instance, acknowledged Congo’s obligation to adhere to international obligations and protect, and respect human rights but was silent on the position of the country’s vast natural resources.\(^12\) Unlike the current framework where there exist a comprehensive Mining Code, there was nothing in the Constitution to encourage adoption of efficient institutions that would regulate granting of mining rights of access, exploration, licensing and supervision of mining activities by both state and private mining companies. Further, both constitutions did not acknowledge

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\(^10\) See for this, D Zongwe et al ‘The Legal system and research of the DRC: An overview’ 3.1.

\(^11\) The major piece of mining legislation introduced by Mobutu was the Ordonnance Loi no. 67/231 of May 3, 1967.

\(^12\) See the preamble and also Article 9 and Article 35.
the state’s permanent sovereignty over its natural resources or the state’s inherent power to safeguard, protect and equitably distribute Congo’s natural resources.\textsuperscript{103}

\textbf{2.2.4.2 General Law Framework}

The most important piece of mining legislation introduced by Mobutu was the Ordinance Law no. 67/231 of May 3, 1967\textsuperscript{104} and Ordinance Law no. 81/013 of April 2, 1981.\textsuperscript{105} This legislation was essentially administrative and regulated the granting of mining rights and exploration, exploitation and prospecting licenses by convention.\textsuperscript{106} In the 1970s, Mobutu had embarked on a \textit{zairinisation} policy of nationalising all foreign owned mines, a move that led to the formation of state companies and monopolies run by state appointed officials.\textsuperscript{107} These state companies were also exempted from various administrative, good governance responsibilities.\textsuperscript{108} As expected, the process led to increased corruption, inefficiencies and mismanagement in the mining sector. The dismal failures that attended the nationalisation process led to a policy reversal favouring foreign ownership again in the late 1970s. The patronage that had been borne out of the nationalisation policy however did not die a sudden death upon the ending of the nationalisation policy. The most important observation however is that mining laws, codes and regulations could not constitute a proper natural resource management regime that would guard against corruption and irregular methods natural resource access to, exploitation and management in Congo.

Constitutional shortcomings were not cured by criminal legislation or administrative regulations. Congo’s criminal law during Mobutu’s era was substantially progressive.\textsuperscript{109} The criminal law is based on two 1940 Penal Codes, namely the

\begin{flushright}
\textsuperscript{103} The 2006 Constitution now makes provision for these principles in the Bill of Rights section.  
\textsuperscript{104} This law regulated mining and hydrocarbons.  
\textsuperscript{105} This law repealed statute no. 67/231 of May 1967.  
\textsuperscript{106} Most Congo legislation statute no. 67/231 of May 1967.  
\textsuperscript{107} JM Haskin \textit{The tragic state of Congo 47} (discussing the policy of \textit{zairinisation} in full).  
\textsuperscript{108} JM Haskin \textit{The tragic state of Congo 47}.  
\textsuperscript{109} See Mapping Exercise Report para 845, stating that in Congo, “a significant corpus of legal rules and measures does exist, both in international and domestic law’ to deal with serious violations of international humanitarian law and other crimes.
\end{flushright}
Penal Code for Civilians and the Penal Code for the Military. Both codes have corresponding codes of procedure. With time, the provisions of these Codes have been amended to suit emerging social conditions. In terms of substance, there is little to fault from the corpus of Congo’s criminal law; its content is not any different from that of other civil law African states. However, owing to the strategic role of natural resources in Congo’s social, political and economic life, it would appear that there was need to extend the reach of criminal law into the administrative field, particularly in the mining sector. The failure to do this may have encouraged flagrant breaches of administrative regulations by parastatals, private companies and the public service involved in the mining sector, consequently leading to corruption, mismanagement and public inefficiencies.

Further, in view of Congo’s history of brutal conflicts characterised by war crimes and crimes against humanity, there would have been need for the criminal law to be infused with principles, concepts and components of international criminal law defining these crimes. This would make prosecution less difficult and add substantial international criminal law jurisprudence to Congo’s criminal law, thus assisting judicial officers in implementation of the law. Any gaps in domestic criminal law would necessarily be filled with progressive interpretation and application of provisions of international humanitarian law as well and international criminal law. The gap continued to exist and this highly made existing concepts inadequate to guard against natural resource governance ‘crimes’.

2.2.4.3 Congolese Justice System

In spite of the substantial corpus of Congo’s criminal law, sight should not be lost of the fact that impunity during Mobutu’s era required more than intelligently drafted statutes and legal instruments. Without being complemented by a corrupt-free and efficient police and penitentiary system, these rule books remained paper guardians in need of a life of their own. Thus, whilst on paper, the content of Congo’s legal systems contain progressive safeguards and statutory systems that are useful in the

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110 D Zongwe et al ‘The Legal system and research of the DRC: An overview’ para 5.1
111 As pointed above, The Mapping Exercise Report acknowledges this (para 845 - 847).
112 See Mapping Exercise Report para 847.
punishment of criminal actions, it will be seen that judicial practice in the country paints a different picture altogether.\(^{113}\)

For Congo, state collapse during Mobutu’s “kleptocracy” had unfortunately meant the decline of virtually the whole state administrative edifice.\(^{114}\) Congo’s administrative law simply failed to check the corruption of public systems and to regulate the delivery of public services. In essence, administrative law should be able to effectively regulate the relations of public authorities with private persons, organizations or with other public authorities; it should thus regulate the exercise of public power or the performance of public functions.\(^{115}\) For Congo, the administrative law was founded on a number of core principles including the principles of equal access to public services, legality of administrative acts and the principle of continuity of public services.\(^{116}\) Administrative decisions had to be prospective and not retrospective and such decisions had to comply with specific and applicable rules. In order to ensure these aspects of the administrative system were complied with, internal administrative controls existed within administrative bodies. The fact that this administrative legal framework failed to check rampant corruption suggests that this framework was not enforced or implemented efficiently.\(^{117}\)

While most of the resultant collapse was clearly evident in the political and economic systems, there was nothing to celebrate in other less public institutions such as the judiciary, the penitentiary system and the police.\(^{118}\) Corruption of the civil bureaucracy, thanks to Mobutu, had permeated and spread across all branches of the arms of the state such as the executive, the legislature and the judiciary by the

\(^{113}\) Lawyers Committee for Human Rights Zaire: Repression as policy (1994) and also Human Rights Watch Prison Conditions in Zaire (1994) on the state of prison conditions in the failing state of Zaire during the Mobutu era.

\(^{114}\) JM Haskin The tragic state of the Congo; From decolonization to dictatorship (2005) 68 -69.

\(^{115}\) C Hoexter Administrative Law in South Africa 2\(^{nd}\) ed (2012) 2.

\(^{116}\) D Zongwe, F Butendie and PM Clement ‘The Legal system and research of the DRC: An overview’ 2011, para 5.

\(^{117}\) See discussion of the findings of the Report of the Lutundula Commission below ( para 2.3.8) to substantiate this.

\(^{118}\) Human Rights Watch Prison Conditions in Zaire (1994) 9 – 11, describing the prison system.
time the war broke out.\textsuperscript{119} It could thus be said that whilst there was a significant corpus of legal rules defining the domestic judicial justice system, there was a fatal lack of commitment to justice administration and rule of law during Mobutu’s era.\textsuperscript{120}

The coming of the war worsened the plight of Congo’s justice system, further weakening it and eroding its capacity as a social institution to combat organised crime. A mission visit by the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy in 2007 unearthed the great challenges that has afflicted Congo’s justice administration system for most of the 1990s up to 2007.\textsuperscript{121} Although focussing on the period after the war, the Report’s highlights also pointed to challenges that had compromised Congo’s justice system before the war. The Special Rapporteur paints a gloomy picture of justice administration in Congo in 2007 in the following terms:

“Theoretically, there are thus three to six courts of major jurisdiction per province. In reality, however, some districts, created during the 1990s, do not have a court. There are 39 courts of major jurisdiction nationwide. Commercial courts, which were established by a 2001 Act, have the same location and jurisdiction as the courts of major jurisdiction. Only three have been set up to date, and not all of these are operational. Labour courts, introduced by a 2002 Act, also have the same location and jurisdiction as the courts of major jurisdiction, but have not yet been set up. As regards community justice, the Act of 1978 provides that the magistrates’ courts shall gradually replace customary justice. Although the plan is to have a magistrate’s court in each territory, only 53 out of the expected 180 have been set up so far. As a result, customary justice, which provides no guarantee of independence or professionalism, is still too widespread.

31. The shortage of courts outside urban areas is exacerbated by the fact that judges do not have the vehicles needed to reach the rest of the country where human rights violations - in some cases extremely serious - are committed. Several judges have

\textsuperscript{119} Human Rights Watch \textit{Prison Conditions} in Zaire (1994) 37, commenting that “(t)he crisis in Zaire’s prisons is exacerbated by corruption at all levels of the prison hierarchy, from the Minister of Justice to the jail guard.”

\textsuperscript{120} See for instance Lawyers Committee for Human Rights \textit{Zaire: Repression as policy} (1994) and also Human Rights Watch \textit{Prison Conditions} in Zaire (1994).

stated that when they are informed of people being killed or raped even 30 km from the city in which their court is located, they are unable to travel to the area for lack of a vehicle. In some cases, particularly in the eastern parts of the country, MONUC provides road or air transport for judges so that investigations can be carried out and suspects arrested. In the absence of such assistance, however, it is impossible to investigate and prosecute violations committed in rural areas, leaving citizens without any legal remedy."

Another report tabled before the United Nations General Assembly\textsuperscript{122} further exposed the state of the Congo’s justice and penitentiary. The Report noted that impunity was rooted in the capacity of the justice system that was deprived of an adequate budget and remained in a deplorable state without the capacity to handle its caseload.\textsuperscript{123} The report also castigated the state penitentiary system, noting that;

63. The disastrous state of the prison system, perhaps the weakest link in the justice chain, facilitates escapes of suspects and convicts, including high profile offenders who sometimes “escape” with the connivance of the authorities. For this reason, but also in light of the generally appalling prison conditions, characterized by serious overcrowding, a lack of basic health care, and starvation due to the virtual absence of a budget to provide to detainees without family support, penitentiary reform is an absolute necessity."

2.3. Illegal Natural Resource Exploitation and the Outbreak of the Congo war

The origins of the Congo conflicts have been explored from various angles such as historical,\textsuperscript{124} geopolitical\textsuperscript{125} and regional security perspectives.\textsuperscript{126} One of the major explanations floated around however predicates the origins, longevity and consequences of the conflict to the need to control, exploit and profit from Congo’s

\textsuperscript{122} Combined report of seven thematic special procedures on Technical Assistance to the Government of the DRC and urgent examination of the situation in the east of the country (A/HRC/10/59), (March 2009) paras. 63.
\textsuperscript{123} A/HRC/10/59 para 62.
\textsuperscript{124} GN Nzongola-Ntalaja \textit{The Congo The Congo From Leopold to Kabila} 214.
\textsuperscript{125} JO MacCalpin ‘Historicity of a Crisis’ in JF Clark (ed) \textit{African Stakes of the Congo War} 33 .
\textsuperscript{126} G Prunier \textit{From genocide to continental war} (2008).
natural resources. This view argues that the Congo conflict was in effect a resource war, pitting various state and non-state conflict actors against each other in the quest to exploit and profit from Congo’s vast natural resources. A number of scholars have pointed out that the access to Congo’s vast mineral resources by an originally weak rebel group, the *Alliance des Forces Democratiques pour la Liberation du Congo – Zaire* (“the AFDL”) led by Laurent Desire Kabila explains its rapid rise to popularity and military successes against Mobutu’s forces. The same scholarship observe that integral to the success of the AFDL, was the revenue it generated from mineral commodities and its sale of state controlled mineral concessions in areas under its influences.

The AFDL was further directly supported by Rwanda and Uganda, two neighbouring states that had their own economic objectives in addition to their apparently security concerns along their border with Congo. The aggression of these foreign states received the blessing of important global powers and organisations with deep rooted economic interests in the Congo, namely the United States, France, Britain and Belgium as well as the United Nations Security Council. Nzongola for instance, notes that the major parochial interests of the Western world were their access to Congo’s strategic resources, selling of weapons and arms of war. The fact that the Congo war was not discussed at UN Security Council level immediately after its outbreak has been pointed as clear evidence that the war served the interests of these major powers causing them to drag their foot. The presence of the international private sector domiciled in powerful states that constituted the Security Council explains the “indifference” of the international community and its

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127 D Renton et al *The Congo: plunder and resistance* (2007) 173. The authors argue (p173) that the war “… brought together a shifting constellation of forces: African nations, Western powers and a complicated array of multinational companies, artisanal commerce and criminal networks.”


130 M Nest et al *The DRC* 22.

131 JM Haskin *The tragic state of the Congo* 78 - 79.


133 GN Nzongola *The Congo The Congo From Leopold to Kabila* 233.
unwillingness to regard the aggression against Congo as a threat to international peace and security.\textsuperscript{134}

It should however be admitted that economic interests did not, \textit{per se}, cause the Congo wars; scholars across the divide seem to agree that there were other deep rooted political and social factors that ignited the war.\textsuperscript{135} Economic interests have been seen as a function of the Congo war, evolving during the war and sometimes gaining more prominence than original causes.\textsuperscript{136} Michael Klare admits to the secondary importance of resource interests, stating that conflicts typified as resource conflicts are usually “interwoven with longstanding ethnic, political and regional antagonisms”.\textsuperscript{137}

In light of this, it is easy to point out that the Congo war, particularly the 1996 rebellion could certainly have occurred even if Congo had no vast natural resources. However, it is not certain whether the conflict could have proceeded the way it did and evolve to reach the same complexity level had it not been for the subsequent economic agendas that developed to characterise its landscape. The decade – old war has seen a death toll of approximately three million people and more than two-and-a-half million being driven from their homes, five hundred thousand to neighbouring countries.\textsuperscript{138} A major feature of this war was the extensive manner in which state and non-state actors, agents and parties to the conflict gained access to, and exploited Congo’s vast natural resource space, thus creating a highly volatile and informal war economy.

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\textsuperscript{134} M Duffield ‘Globalisation, trans-border trade and war economies’ in M Berdal and DM Malone (ed) \textit{Greed and Grievance} 84. The writer argues that there is a high level of complicity among international companies, offshore banking facilities and Northern governments in assisting the war economies in conflict sates such as Congo.
\textsuperscript{135} The Panel of Experts (S/2002/1072 para148) notes the initial motivation of foreign countries to intervene as primarily “political and security-related in nature” and gradually the “motive of extracting the maximum commercial and material benefits” evolved.
\textsuperscript{136} M Nest et al \textit{DRC} 129. After a convincing analysis of economic agendas in the Congo war, the authors conclude that economic interests “were not the main factor in the onset of the Congo war,” and neither were economic interests “the main factor that led foreign governments to intervene”.
\textsuperscript{137} MT Klare \textit{Resource Wars} (2001) 190.
\textsuperscript{138} Amnesty International DRC: ‘Our brothers who help kills us: Economic exploitation and human rights abuses in the east’ (April 2003) 3, for statistical data on some of the toll and cost of the Congo war.
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2.3.1 Natural Resource Motivations vis a vis Official Justifications for Aggression

The governments of Rwanda, Burundi and Uganda gave various justifications for their invasion and occupation of Congo. At first, these governments sought to categorise the Congo conflict as a civil war, without any trace of external involvement. However, this characterisation was later abandoned when the governments of these countries began to reluctantly admit to the presence of their troops in Congo, especially after the outbreak of the second war. It is important to note that, whatever the intentions of the regional powers were, their expectations were that most of their objectives could be realised if the conflict was classified as an internal armed conflict. Once this became the case, they hoped to feel unconstrained in furthering their own hidden economic interests in Congo under cover of a conflict situation that both domestic and international law did not have definite responses to.

After it became clear that the armies of Rwanda, Burundi and Uganda were in Congo, their justifications were centred on the decade-old insecurity problem at the Congo border with Rwanda, Uganda and Burundi. The security concerns at these border areas had been acknowledged in a 1998 Final Report of the International Commission of Inquiry (Rwanda), that observed that since the 1994 flight of Hutu genocide perpetrators out of Rwanda, a total of 1, 7 million former Rwandan soldiers

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139 For instance, Museveni had vehemently denied Uganda’s presence in Congo, stating that the fighting was between Zairean dissident groups; See Gerard Prunier, Rebel Movements and Proxy Warfare: Uganda, Sudan and the Congo (1986-1999), 103 (2004) African Affairs 359 375 – 376.

140 On 10 March 1999 during the ninth meeting of the 156th session of the ICAO, Rwanda boldly admitted that the “government of national unity in Kigali was compelled to back an internal rebellion in Congo which eventually led to the overthrow of Mobutu”. See Annex 4, ICAO Council Minute C – Min 156/9 attached to the Memorial of the Republic of Rwanda filed before the ICJ on 21 April 2000 in the Case Concerning Armed Activities on the Territory of Congo (DRC v Rwanda).

141 UN Security Council Doc S/1998/1096, available at http://www.undemocracy.com/S-1998-1096.pdf accessed 10 September 2010. The commissioners had the following specific mandate (a) To collect information and investigate reports relating to the sale, supply and shipment of arms and related material to former Rwandan government forces and militias in the Great Lakes region of central Africa in violation of the Security Council resolutions (918) 1994, (997) 1995 and (1011) 1995, (b) To identify parties aiding and abetting the illegal sale to or acquisition of arms by former Rwandan government forces and militias, contrary to the resolutions referred above; (c) To make recommendations relating to the illegal flow of arms in the Great Lakes region.
and *ex - genocidaires* based in Congo refugee camps and other armed rebel bases in Congo “trained, rearmed and plotted to retake control of their country”.  

During much of the first conflict, Rwanda, Burundi and Uganda had fiercely disputed that they had invaded Congo and occupied its territory. Rwanda in particular, maintained that the forays of its troops into Congo areas near the border were necessitated by the security concerns along the Congo – Rwanda border and that its troops were only present in the border security red zones.  

For the involvement in the second war, Rwanda argued that Kabila’s AFDL led government was arming anti-Rwandese rebels to launch attacks against Rwanda, and thus, Rwanda had to assert a right to put an end to that situation, even by way of the invasion of Congo.

Uganda stuck to the claim that it did not participate in the first war that ended with Kabila assuming power in 1997. In its submissions before the International Court of Justice, it stated that although the Congolese government had been providing military and logistical support to anti Ugandan rebels between 1994 to 1997, it had confined its own military responses to its own side of the Congo – Uganda border. Subsequent to 1997 when Kabila assumed power, Uganda stated, he had proceeded to invite Uganda to deploy its own troops in eastern Congo in order to eradicate anti - Ugandan insurgents and jointly with Congolese troops, assist in securing the Uganda – Congolese border. However concerning the second war, Uganda gave a bizarre explanation that has not been supported by subsequent events to date. It claimed that it had increased troops in Congo and attacked Congo in August – September 1998 upon learning that Congo and its “new ally”, Sudan planned to attack Ugandan forces in eastern Congo. Its attack of Congo, its

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145 DRC v Uganda case para 36.  
146 DRC v Uganda case para 36.  
147 DRC v Uganda case para 39. On the 156th session of the International Civil Aviation Organization (ICAO), Uganda asserted that the DRC has for a long time been a sanctuary for several rebel groups including the National Army for the Liberation of Uganda (NALU), Uganda National Rescue Front (UNRF) and Rwandese *Interahamwe* and that these rebels had used for all this time the DRC as a launch pad for their attacks on innocent civilians of Uganda.
invasion of Congo and its occupation of Congolese territory was therefore, in Uganda’s words “the lawful exercise of its sovereign right of self-defence”.\textsuperscript{148}

The involvement and participation of Burundi in both conflicts was limited in comparison to that of Uganda and Rwanda but its justification was based on same security concerns on its border with Congo. During the 4317\textsuperscript{th} UN Security Council session, Burundi stated that “the deployment of security arrangements on its border with the Democratic Republic of the Congo was dictated by security concerns and by the need to keep open the trading corridor via Lake Tanganyika”.\textsuperscript{149} Despite earlier reports claiming that Burundi had also participated in the illegal exploitation of Congo’s resources during the war, the final report of the Panel of Experts put the matter to rest, stating that it had found “no evidence directly linking the presence of Burundi in the Democratic Republic of the Congo to the exploitation of resources” and that although its army was positioned in Congo near a traditional trade and transit point for minerals, the army’s “presence has been and continues to be directed at blocking attacks from the Burundi rebel groups, particularly FDD, which are based in South Kivu and Katanga”.\textsuperscript{150}

For these three countries, the security situation at their borders with Congo seemed to pose a major problem that justified their military actions. These actions were to include military invasion and occupation of Congo territory and defence of that territory against opposing forces.

From the explanations of Rwanda and Uganda, it was clear that the second Congo conflict was clearly an international armed conflict. However, the fact that it became an international armed conflict does not mean that the intrastate conflicts pitting rebel groups against the state, and also against each other were extinguished. These armed groups received support from armies of states participating in the conflict such as Rwanda, Uganda and Zimbabwe and constituted an integral element of the conflict.\textsuperscript{151} This led to intense militarisation of Congo by the entrance into its territory

\textsuperscript{148} DRC v Uganda case paras 39 – 40.
\textsuperscript{149} UN Security Council meeting S/PV.4317, 3 May 2001.
\textsuperscript{150} UN Doc. S/2002/1072 para 101.
\textsuperscript{151} UN Doc. S/2001/1072 para 58.
of foreign armed forces. It is for this reason that some writers still opt to label the conflict as an “internationalised” non-international armed conflict in an effort to explain its evolution from an internal armed conflict driven by external states into a full scale interstate conflict involving about seven states.\textsuperscript{152}

In view of the various controversies and uncertainties surrounding the outbreak and development of the Congo war, there is no doubt that any legal regime designed to address issues arising from such multidimensional conflict was bound to face problems. The major state and non-actors were not oblivious of the difficulties involved in addressing individual aspects of the conflict, such as illegal natural resource exploitation activities. As will be clearly shown, the factual uncertainties surrounding the conflict were exploited by the major conflict actors for selfish motives, such as in order to carry out illegal economic activities under the cover provided by the conflict. It was in these circumstances and for these reasons that illegal natural resource exploitation activities took place, and reached alarming levels especially in areas under military occupation. However, before analysis is given of the actual resource related criminal activities that occurred during the conflict, it is important to investigate the identity, contribution and activities of its other protagonists, the Congo armed rebels groups, particularly their access to, use and exploitation of Congo’s natural resources’ space.

\textbf{2.3.2 Congo’s Armed Rebels and Illegal Natural Resource Exploitation}

Various armed rebel groups emerged as integral components in Congo’s natural resource space in the same way they dictates the Congo conflict, consequently reshaping natural resource exploitation patterns during the conflict. These groups contributed to the heavy militarisation of access and control of natural resources, particularly mineral resources in parts of Congo under their sphere of influence.\textsuperscript{153} However, at their emergence, the anti-Kabila rebel groups presented a list of

\textsuperscript{152} See HP Gasser ‘Internationalised non-international armed conflicts: Case studies of Afghanistan, Kampuchea and Lebanon’ (1983 – 1984) 33 American University Law Review 145 -162. The writer defines an internationalised armed conflict as “a civil war characterised by the intervention of the armed forces of a foreign power”\textsuperscript{153} Mapping Exercise Report para 734, stating that control over mineral resources was “established maintained by force” and that this led to extortion at various points in the illegal trafficking and smuggling chains.
democratic grievances as the basis for the rebellion against Kabila. Afoaku states that in 1998, the leaders of the rebellion “decried the growing ‘crises in state institutions’ with its attendant plethora of political and economic woes, including corruption, nepotism, vote catching, arbitrary rule, growing impoverishment of the population, mismanagement of public funds by Kabila and his entourage, and the government’s inability to restore peace, security and unity at the national and regional levels”.

However, Afoaku observes, the fact that the main rebel groups owed their creation and allegiance not to Congo’s indigenous forces but to Rwanda and Uganda made it difficult to separate their legitimate democratic grievances from the security and economic interests of Rwanda and Uganda.

Some writers have convincingly argued that initially, these rebel groups were not motivated by control of, or the need to illegally exploit natural resources when they elected to form a rebellion against Kabila in 1998. Nevertheless, the same writers have traced how the initial agendas of various rebel formations evolved with time to include economic motives at the centre of their militarism. Further, the armed rebels were used as pawns by their external sponsoring states to maintain a conflict situation and justify the military presence of these external armies in Congo. It can thus not be disputed that they aggravated and later perpetuated the eventual conflict that came to be defined by misappropriation of Congo’s natural resources. For this reason, they played into the subsequent economic agendas of their sponsor states by maintaining conditions in which these patrons could carry out illegal natural resource stripping and plunder in areas under their occupation. Further it is inescapable that the failure to swiftly achieve military success to advance their political objectives and the subsequent cost of waging the war compelled them to seek financing their military campaigns with the Congo’s resources.

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155 O Afoaku ‘Congo’s Rebels’110.
156 M Nest et al DRC 129, GN Ntalaja The Congo from Leopold to Kabila 229.
158 See for instance the finding against the Zimbabwe army and the Burundian FDD rebel group made by the Panel of Experts Report UN Doc. S/2001/1072 para 58.
159 O Afoaku “Congo’s Rebels” 110.
160 MT Klaire Resource Wars (2001) 193, explains this method as one of the ways in which armed actors’ agendas reorient towards economic interests. He states that, “To pay their troops and obtain
of this necessity, their occupation of Congolese territory and their involvement in illegal exploitation of Congo's resources thus appeared to be a matter of survival. However by so doing, their activities directly bolstered the fulcrum of the Congo plunder based war economy,\textsuperscript{161} in as far as they engaged and participated in, and facilitated irregular resource exploitation activities by state and non-state actors.

The control of Congo’s natural resource space by armed rebel groups left Congolese territory “carved” into “virtual fiefdoms” and spheres of influence. Rebel controlled zones were heavily militarised allowing the rebel groups to take maximum advantage of their occupation to illegally exploit existing natural resources and finance their war campaigns.\textsuperscript{162} Congo was thus divided into parts, with Kabila controlling Kinshasa, the southern tier of Congo and portions of East Kasai and southern Katanga.\textsuperscript{163} The mineral resources found in this area were just sufficient to fund the war budget and these minerals included copper, cobalt, oil and diamonds.\textsuperscript{164} In the north Equateur province was the MLC under Jean Pierre Bemba. The RCD and their Rwandan patrons controlled North and South Kivu and Maniema provinces including parts of Katanga, Kasai and Orientale. These rough divisions kept on shifting owing to the changing face of the conflict and other micro-conflicts engendered by the war.

The Mapping Exercise Report observed that rebel control over natural resources was established and maintained by force, giving rise to extortion at mining sites, along main roads and transportation routes, the imposition of formal and semi-formal systems of taxation, licences and fees as well as frequent requisitioning of stockpiles of precious minerals.\textsuperscript{165} Further, other armed rebels sought to take control over the administrative machinery of the provinces and areas they controlled and occupied, enabling them to create front companies, monopolies and networks that did business with foreign armies and companies friendly to them. The mineral rich areas were heavily defended and it was not surprising that the richer the area was in terms of

\textsuperscript{161} The concept of war economy has been widely discussed by D Keen ‘The Economic Functions of Violence in Civil Wars’ Adelphi Papers 320, IISS, 1998.
\textsuperscript{162} O Afoaku ‘Congo’s Rebels’ 119.
\textsuperscript{163} O Afoaku ‘Congo’s Rebels’ 120.
\textsuperscript{165} Mapping Exercise Report, para 734.
mineral resources, the heavier the militarisation of natural resource exploitation. This predicament was demonstrated in North and South Kivu (coltan), Ituri (gold), Maniema, Orientale (gold and diamonds), Katanga (copper and cobalt), Lubumbashi and Kisangani (diamonds).

It is however apparent that the rebel groups contributed to illegal exploitation of the Congo’s resources during the war in three major ways. Firstly, major rebel groups were implicated in requisitioning, extortion, excessive taxation, smuggling, confiscating and trafficking mineral resources from mining companies and mineral stockpiles, warehouses and storage facilities located in areas under their occupation. Secondly, prominent personalities at the leadership of these rebel groups established businesses, corporate contacts and international ties with foreign networks with the objective of exchanging mineral resources with these persons for arms, cash, weapons and other valuable commodities. Finally, the rebels contributed to illegal natural resource exploitation by maintaining a conflict situation that justified the continued presence of foreign armies on Congolese soil. By pointing to “the state of war” situation created by armed rebels in Congo between 1998 and 2001, foreign armies justified and took advantage of, their military presence to participate in the economic exploitation of the Congo’s mineral resources.

A brief description of major rebel groups operating during the Congo conflict is necessary before expanding on the manner in which these groups contributed to illegal natural resource exploitation.

2.3.2.1. The Rally for Congolese Democracy (“RCD”)

This armed rebel group announced its name days after its commander sparked the outbreak of the second rebellion on 2 August in Goma. Created and funded by Rwanda, the RCD was politically and militarily dependant on Rwanda. It was thus used as a proxy to oust Laurent Kabila from power and attempted to present a list of

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166 Mapping Exercise Report, para 737.
democratic grievances against Kabila to justify their rebellion. It was composed of some Congolese troops from Kabila’s army, the *Armee Nationale Congolaise* (ANC), ex armed forces of Zaire (FAZ), a few Rwandan and Ugandan troops and other Tutsi elements. In every sense, the RCD was a puppet of the Rwandan and Ugandan army and used as a front by these two powers to push their secret objectives in the Congo. At the peak of the conflict, the RCD controlled and occupied most of North and South Kivu, parts of Katanga, Kasai and Orientale provinces.\(^{170}\) This rebel group took part in the direct economic life and activities of areas under its control and occupation.

Later, RCD had to split into RCD –Goma, supported and owing allegiance to the Rwandan army and RCD-*Mouvement du Libération*, a puppet of the Ugandan army concentrated mostly in Bunia and Kisangani. RCD –ML was led by Enerst Wamba dia Wamba, once a leader of the RCD before its split. RCD –ML later joined the MLC to form Front for the Liberation of Congo (FLC) operating in Ituri. Another RCD breakaway faction formed the RCD National, but this was very weak and quickly disbanded to join the ranks of other stronger and more established rebel groups.\(^{171}\) RCD ML further disintegrated and a breakaway faction went on to form *the Union des patriots congolais* (UPC) which established its bases in north eastern Congo provinces of North and South Kivu. The UPC was supported by Uganda on its formation but went on to seek the support of RCD Goma in 2002.\(^{172}\)

RCD Goma engaged in various natural resource exploitation activities at the instigation of its Rwandan principals and for its own survival. Based in the Congo provinces of North and South Kivu, Maniema and Orientale, RCD Goma also occupied the whole of northern Katanga and parts of central Congo.\(^{173}\) It therefore targeted coltan, gold, diamonds and taxes on companies on such minerals in these provinces. The Panel of Experts reports claims that RCD Goma managed to engage in illegal natural resource exploitation activities since it assumed control of all State

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\(^{171}\) AI: *DRC: Our brothers who help kill us* 7.
\(^{172}\) AI: *DRC: Our brother who help kill us* 7.
\(^{173}\) D Renton et al *The Congo: plunder and resistance* 194.
administrative functions in areas under its occupation.\textsuperscript{174} To this extent, it was the de facto government in areas it placed under its control; the continuation of the conflict perpetuated this status quo and enabled it to continue stripping Congo’s resources under this assumption that it was the governing authority. The Panel of Experts note that RCD-G’s assumption of administrative functions in areas it controlled enabled it to give its activities a cloak of legality, providing “official” documents and other papers accompanying its commodities at various points of exit.\textsuperscript{175} It shipped some of the mineral resources through Dar es Salaam with the assistance of its networks for sale in the international market.\textsuperscript{176} Most of the cash realised would then go towards purchasing arms and military equipment to continue its war against Kabila’s government.\textsuperscript{177} Having obtained the weaponry and armament, RCD Goma would be in a position to even challenge other rebel groups situated in mineral rich areas such as MLC/FLC or the Mai Mai. By provoking such micro conflicts, RCD Goma played into the military strategies of formal state armies occupying Congo that had a stake in the continuation of the conflict situation in Congo.

RCD Goma relied heavily on taxation of companies in the mineral sector that produced, exported and dealt in mineral resources in areas it occupied and controlled. As will be shown below,\textsuperscript{178} RCD Goma created corporate structures such as the SOMIGL coltan monopoly in order to compel all minor traders to trade with these monopolies. The Panel of Experts estimates that the RCD Goma fiscal system at one time levied about six different forms of tax in the mineral rich Kivu and parts of eastern Congo it administered, giving it a monthly receipt of approximately US$1 million. The tactics and methods of RCD Goma were in the main at the instigation of their sponsor state, Rwanda and, as will be shown later, were carried out with the military backing of the Rwandan Patriotic Army.\textsuperscript{179}

2.3.2.2 The Movement for Liberation of Congo (“MLC”)

\textsuperscript{174} UN Doc. S/2001/1072 para 125.
\textsuperscript{175} UN Doc. S/2001/357 para 145.
\textsuperscript{176} UN Doc. S/2001/357 para 145.
\textsuperscript{177} UN Doc. S/2002/357 para 146.
\textsuperscript{178} See below at 2.3.6
\textsuperscript{179} See below at paras 2.4.2
Led by Jean Pierre Bemba, currently facing charges before the International Criminal Court,\textsuperscript{180} this group owed some allegiance to Uganda although it was also allegedly funded by ex Mobutu financiers. Its partial allegiance to Uganda benefitted MLC in supply of weapons and armament from the Ugandan People’s Defence Forces, consisting mainly of those captured and confiscated from Congolese forces.\textsuperscript{181} Owing to its increasing participation in illegal natural resource exploitation, MLC gradually became semi-autonomous from its Ugandan patrons and was able to purchase its own arms and weapons to establish and defend its positions from rival armed groups.\textsuperscript{182}

The Panel of Experts claims that most of the deals involved the MLC leader, Jean Pierre Bemba and local businessman and traders, granting them opportunities to carry out their business or granting them mining concessions.\textsuperscript{183} The MLC leadership however relied on the patronage of Uganda to facilitate exportation of smuggled mineral resources and defend its territorial control from rival rebel organisations and other opposing armies.

The MLC is reported to have smuggled exploited mineral resources, particularly gold and diamonds from Kisangani through Central African Republic.\textsuperscript{184} The proximity of the MLC base in Kisangani, Equateur province to Central African Republic made the illegal trafficking easy. The MLC leader, Bemba had strong ties to the President of Central African Republic, Mr Ange-Félix Patassé, assisting him to quell rebellion against him on two occasions between 2001 and 2002.\textsuperscript{185} Thus the trafficking of illegally exploited diamonds and gold may have been done with the full knowledge of CAR authorities who may have actually facilitated the transit on orders from the country’s political leadership.

\textsuperscript{180} International Criminal Court: The Prosecutor v. Jean-Pierre Bemba Gombo ICC -01/05-01/08.
\textsuperscript{181} UN Doc. S/2001/357 para 143.
\textsuperscript{182} UN Doc. S/2001/1072 para 143.
\textsuperscript{183} UN Doc. S/2001/1076 para 122.
\textsuperscript{184} UN Doc. S/2001/1072 para 119 – 120.
\textsuperscript{185} See International Criminal Court Case The Prosecutor v. Jean-Pierre Bemba Gombo ICC -01/05-01/08.
2.3.2.3 The Mai Mai militias

The Mai Mai militias consisted of a loose collection of ethnic Congolese militias united in their armed opposition to Tutsi political and military superiority in Congo during Kabila’s time. They deeply resented foreign invasion of Congo territory by Rwanda, Uganda and their local rebel pawns.\textsuperscript{186} The Mai Mai attacks were thus indiscriminate against Rwandans and other foreign troops. At first this group even fought against Kabila’s Banyamulenge details before Kabila’s ascension to power. However, during the second conflict, they allied with Kabila in fighting against foreign invading armies of Rwanda, Uganda and Burundi.\textsuperscript{187} Their indiscriminate attacks on RCD Goma and their Rwandan backers resulted in heavy repression from Rwandan and Ugandan armies.\textsuperscript{188}

The Mayi Mayi initially appeared to be the exception to the rule of rebels in Congo; refusing to participate in illegal natural resource exploitation activities that other armed groups depended on for survival.\textsuperscript{189} The Mayi Mayi stated to the Panel of Experts that they actually fought against Rwandan troops and their RCD allies in order to deny them occupation of resource rich areas.\textsuperscript{190} Thus the Mayi Mayi believed that it was the Congo’s resources that motivated Rwanda and Uganda and for the same reason, led these two countries to occupy Congo.\textsuperscript{191} Further, this group is reported to have had weak connection to networks for the supply of arms and ammunition, relying mostly on confiscated weapons and those provided to it by its Congo government allies during the war.\textsuperscript{192} As the conflict progressed and changed shape, the Mayi Mayi are reported to have extended their attacks on Congolese Tutsi and carrying out indiscriminate attacks, looting, sexual crimes and murders of Congolese population groups.\textsuperscript{193}

\textsuperscript{186} G Nzongola-Ntalaja \textit{The Congo From Leopold to Kabila} 243. \\
\textsuperscript{187} See for instance UN Doc. S/2001/1072 para 12. \\
\textsuperscript{188} F Reyntjens \textit{The Great African War} 224. \\
\textsuperscript{189} UN Doc S./2002/1072 para 131 – 133. \\
\textsuperscript{190} UN Doc. S/2001/1072 para 132. \\
\textsuperscript{191} UN Doc. S/2001/1072 para 131 -132 \\
\textsuperscript{192} UN Doc S/2001/1072 para 132 \\
\textsuperscript{193} G Nzongola Ntalaja \textit{The Congo From Leopold to Kabila} 243.
2.3.2.4 The ex-FAR and Interahamwe

These were marginal players in the economic exploitation of Congo, though they provided a constant recruitment source to established rebel groups. They constituted former armed forces of Rwanda that had disbanded following the Tutsi led victory after the genocide. They were thus hostile to Tutsis at the helm of Rwanda’s politics and hoped to return to Rwanda sometime in the near future. Their strong ally was the Interahamwe, the mostly Hutu genocide perpetrators who had fled Rwanda upon the ascension of the ruling Rwanda Patriotic Front to power. However, both the ex-FAR and the Interahamwe were not concentrated in Congo alone. According to the Report of the International Commission of Inquiry (Rwanda), these groups were scattered in as many as ten countries including Angola, Kenya, Tanzania, Zambia, Sudan, Uganda and Central African Republic. The Report proceeds to claim that the governments of Sudan and Congo supplied arms, training and bases for both the ex-FAR and Interahamwe to fight Rwandan, Ugandan and Burundian armies during the Congo war.

2.3.3 Foreign Armed Groups

Owing to its vast size, dense jungles and general domestic security problems in the past two decades, the Congo has acted as a second home for several foreign armed rebel groups. Most of these armed groups therefore use the Congo as both a base and a launch pad for their attacks against regional governments, especially the governments of Burundi, Rwanda, Uganda, Angola and Sudan.

Angola’s main rebel group, the Uniao Nacional para Independencia Total de Angola (UNITA) had established a base during Mobutu’s reign and with the full knowledge and, according to other sources, assistance of the Zairean government. Mobutu is rumoured to have sold tons of weapons and ammunition to UNITA rebels, triggering

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197 G Nzongola-Ntalaja The Congo From Leopold to Kabila 240.
a Luanda Kinshasa standoff.\textsuperscript{198} Angola therefore welcomed the AFDL rebellion against Mobutu and the Luanda government is reported to have supplied weapons, ammunition and other assistance to Laurent Kabila.\textsuperscript{199} During the second war, Angola defended Kabila’s regime as Kabila had promised the eradication of UNITA bases in Congo.\textsuperscript{200}

Uganda claimed that there were a number of rebel groups in Congo that were launching attacks on Uganda. These included the National Army for the Liberation of Uganda (NALU), the Allied Democratic Forces (ADF)\textsuperscript{201}, West Nile Bank Front (WNBF) and the Uganda National Rescue Front (UNRF).\textsuperscript{202} Few elements of the former Ugandan national army (FUNA) also existed in the Congo and were clearly hostile to the Museveni led Ugandan government. It has been admitted that these groups used the Congo as their base especially after 1996. Uganda boldly stated before the ninth meeting of the ICAO that its presence in the Congo “was to deny these murderous groupings territory that can be used to launch attacks against its people and will immediately leave when a mechanism capable of effectively checking rebel activities is in place”.

Rwandese armed groups were mainly the former armed forces of Rwanda (ex – FAR) and the Rwandan Interahamwe, the \textit{genocidaires}. Another group, the \textit{Armee pour la liberation du Rwanda}, later the \textit{Forces democratiques pour la liberation du Rwanda} (FDLR) also had bases in Congo and carried campaigns against the Rwandan army. It is these groups that Rwanda used to justify its military involvement in the Congo. Rwanda’s claim was that the Congo governments of Mobutu, and then Kabila was arming, training and providing bases for these groups.

For Burundi, the most hostile elements were the Forces pour la defense de la democracie (FDD) which was the military wing of the \textit{Counseil national pour la}

\textsuperscript{198} F Reyntjens \textit{The Great African War} 62.
\textsuperscript{199} F Reyntjens \textit{The Great African War} 63.
\textsuperscript{200} F Reyntjens \textit{The Great African War} 63.
\textsuperscript{201} This group was allegedly based in the Ruwenzori Mountains along the Uganda/Congo border and attacked Bunia, Gemena, Gbadolite, Kisangani and Buta towns. See MR Rupiya ‘Zimbabwe’s Involvement in the Second Congo war’ in JF Clark (ed) \textit{African Stakes of the Congo War} 95.
\textsuperscript{202} See Uganda’s response in the Security Council meeting, UN Doc. S/PV. 4317.
defense de la democratie (CNDD), a major political grouping opposed to the ruling Burundian government. The Panel of Experts claim that the FDD was provided with military training, arms and ammunition by Zimbabwean forces in their fight against Burundian forces.\textsuperscript{203} They were not directly involved in illegal natural resource exploitation activities. However, the Panel of Experts claim that the FDD were used by the Zimbabwe forces to perpetuate a conflict situation under which the Zimbabwe military could use as a justification for their continued presence in Congo. The Panel reports that the FDD were trained and equipped by Zimbabwean forces in Lubumbashi, an area that had substantial copper and cobalt interests which Zimbabwean forces were exploiting, albeit with the knowledge and consent of the Kabila government.\textsuperscript{204}

By analysing the various alliances for convenience between the state armies and foreign rebel groups, the Panel of Experts reached a damming conclusion, observing that,

“...the arming of these irregular groups is contributing to sustaining what could be viewed as a war by proxy in the east. It allows the ceasefire to remain intact, while creating a “controllable” conflict in the occupied zone that satisfies the interests of many parties. With this sporadic, low-intensity conflict dragging on, a certain status quo is being maintained in this region where many precious resources are extracted, traded and routed for export.”\textsuperscript{205}

2.3.4 The “Invited” Forces

Following an Inter-State Defence and Security Committee (ISDSC)\textsuperscript{206} meeting of the defence ministers of Southern African Development Community (SADC) in Harare in mid-August 1998, the governments of Zimbabwe, Angola and Namibia were authorised to deploy their armies in the Congo to help defend Kabila from

\textsuperscript{203} UN Doc. S/2001/1072 para 136.
\textsuperscript{204} UN Doc. S/2001/1072 para 58.
\textsuperscript{205} UN Doc. S/2001/1072 para 58.
\textsuperscript{206} According to the SADC website (http://www.sadc.int/index/browse/page/157), the ISDC is established pursuant to Article 7 of SADC’s Protocol on Politics Defence and Security. It reports to the Ministerial Committee on Politics, Defence and Security.
external aggression and internal rebellion. The SADC Charter itself makes provision for such kind of mutual assistance and solidarity in conflict situations, with the Declaration and Treaty of the SADC (1992) providing that the member states of SADC shall act in accordance with the principles of solidarity, peace and security.

Notwithstanding the above, many theories have been floated around trying to explain the intervention of these forces in the Congo war, particularly the second conflict. Some of the reasons suggest that the economic motives of the interveners predominantly determined whether they could intervene or not. Analysis of Zimbabwe’s intervention and to a smaller extent, Angola has been based on this view. The involvement of Namibia has largely been pinned to the SADC authorisation and no economic motives have been suggested. For Angola, the protection of its petroleum and diamond exploitation zones in the oil rich areas of northern Cabinda also influenced its entry into the conflict, over and above its desire to destroy UNITA bases in Congo. The intervention of other states on the sides of Kabila was not decisive and as significant as that of Zimbabwe, Namibia and Angola. Thus the governments of Chad, Libya and Sudan entered the conflict either directly or indirectly albeit with their own domestic political and security interests uppermost in their agenda. Of all the intervening forces, the motivations of Zimbabwe have raised sufficient controversy to warrant a brief description in this thesis.

2.3.4.1 Zimbabwe

One of the explanations proffered for Zimbabwe’s involvement as Kabila’s ally in 1998 was that Congo had incurred debts against Zimbabwe during the first war and

207 M Nest ‘Ambitions, Profits and Loss: Zimbabwe’s Economic involvement in the DRC’ 471, explaining Zimbabwe’s motivations in the Congo war.
208 Article 4 of the Treaty of the SADC available on http://www.sadc.int/index/browse/page/120#article4 accessed 15/10/2010.
210 G Nzongola-Ntalaja The Congo From Leopold to Kabila 240. The writer comments that only Namibia and Chad could justifiably claim that non-economic motives were paramount in their intervention.
211 G Nzongola-Ntalaja The Congo From Leopold to Kabila 238.
212 For instance see Nzongola-Ntalaja The Congo From Leopold to Kabila 240 – 241 for the reasons why other states intervened on the side of Kabila, though in a limited way.
the overthrow of Kabila would endanger repayment of that debt.\textsuperscript{213} Although Zimbabwe’s involvement in the first war had been more of a secret and even so, logistical, it has never been disputed.\textsuperscript{214} Thus, according to this explanation, Zimbabwe entered the fray for this economic motive, fully knowing that the Congo’s huge natural resources could be used by Kabila to offset Zimbabwe’s debts. The other vein of this argument is that the Zimbabwe military linked businesses wanted to penetrate the Congolese economic space, especially its mining and timber sectors at the expense of the unstoppable South African entrepreneurs.\textsuperscript{215} Dietrich, for instance writes:

“Therefore, Zimbabwe had assisted Kabila before the ouster of Mobutu, reportedly including US$5 million in financial support and military assistance, and a US$53 million commercial venture between Zimbabwe Defence Industries (ZDI) and Kabila for the supply of military equipment and commodities, reportedly concluded immediately prior to the fall of Kinshasa”.

Another writer, Dashwood charges that ‘Mugabe’s widely unpopular decision in August 1998 to intervene in the conflict in the DRC … was motivated by the ruling elite’s desire to obtain lucrative supply contracts and mining partnerships, as well as to protect existing investments”.\textsuperscript{216} Yet another view brushes aside the SADC mandate defence put forward by Zimbabwe and its allies, and alleges that the “involvement of these nations was not propelled by benevolence or the desire to uphold international law only” but also because their interests were no different from those of Rwanda and Uganda, although such interests came cloaked with a veil of invitation by the Congo government\textsuperscript{217}.

\textsuperscript{213} M Nest ‘Ambitions, Profits and Loss: Zimbabwe’s Economic involvement in the DRC’ 471-473.
\textsuperscript{214} MR Rupiya, A Political and Military Review of Zimbabwe’s Involvement in the Second Congo War in JF Clark (ed) \textit{African Stakes of the Congo War} 95.
\textsuperscript{216} HS Dashwood \textit{Zimbabwe: The political economy of transformation} (2000) 104.
A contrasting view however claims that the Zimbabwe Defence Forces did not go to Congo “for money”. Nest, for instance, charges that economic interests were not the main factor that led foreign governments to intervene in the Congo conflict although economic agendas of these foreign forces eventually became a prominent part of the conflict. Rupiya echoes similar sentiments and focuses on the military and political reasons for Zimbabwe’s involvement in the Congo war, thus discounting economic motives as a primary factor.

The official position of Zimbabwe was given by its representative before the United Nations Security Council session, meeting to debate the first Panel of Experts report. The explanation for Zimbabwe’s involvement in the Congo war was by invitation from Kabila. The explanation is that after acknowledging that he could not defeat the aggressors and their rebel puppets on his own,

“…the late President Kabila appealed for assistance from the member countries of the SADC. The request was made at a meeting of the Inter-State Defence and Security Committee that was held in Harare on 18 August to consider the situation in the Democratic Republic of the Congo. The military intervention by Angola, Namibia and Zimbabwe came as a result of this appeal by the internationally recognized Government of the Democratic Republic of the Congo, a member of SADC. Furthermore, the request of the Democratic Republic of the Congo to SADC was in line with Article 51 of the United Nations Charter regarding the right of a State to ask for military assistance when its security, sovereignty and territorial integrity are threatened. The decision was also in line with a resolution of the Inter-State Defence and Security Committee at a meeting held in Cape Town, South Africa, in 1995, at which SADC countries agreed to take collective action in the case of attempted coups to remove Governments by military means.”

Despite this unambiguous statement of Zimbabwe’s official position, it will be argued, the natural resource exploitation motives of the ZDF were no different from that of

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\textsuperscript{218} M Nest “Ambitions, Profits and Loss” 470.
\textsuperscript{219} M Nest et al \textit{DRC} 129.
\textsuperscript{220} MR Rupiya ‘Zimbabwe’s Involvement in the Second Congo war’ in JF Clark (ed) \textit{African Stakes of the Congo War} 95.
\textsuperscript{221} UN Doc. S/PV 4317 (Resumption 1).
\textsuperscript{222} UN Doc. S/PV 4317 (Resumption 1).
Rwanda and Uganda. A select group of top military and political personalities sought to benefit from the chaos created by the war and exploit the vast resources of the Congo. Thus, as the case with Rwanda, Uganda and Burundi, there was a world of difference between the official position of the governments and the actual activities being carried out on the ground.

The involvement of foreign armies in the economic exploitation of Congo’s natural resources owes a lot to the activities of a particular group of predators, namely transnational criminal networks. This group facilitated the illegal natural resource exploitation, marketing and trafficking out of Congo thus lubricating Congo’s war machine. As follows below, it will be clear that this group made it possible for the activities of other predatory groups to link up in criminal chains of production and consumption.

2.3.5 Transnational Criminal Networks in the Congo war

That the Congo war economy flourished to benefit various indigenous and foreign actors owes much to the agency and participation of what have come to be known as “transnational conflict networks”. These networks are constituted by individuals and groups of persons that engage in illegal, “dirty” and clandestine economic activities for profit mainly by forming secret unconventional alliances with corrupt, legitimate and senior political authorities. Juma claims that some of the activities of this group during conflicts are to “carry out the dirty business of legitimate functionaries within governments” or to act as unofficial agents of multinational companies. The activities of these networks are extremely secret and designed to link up the informal, criminal economy with the formal economy albeit through strategies in circumvention of local laws and regulatory systems. The Security

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223 This is explored later in this Chapter.
Council appointed Panel of Experts acknowledged the obscurity of networks’ activities when carrying out its investigations, observing that:

“The exploitation is carried out by numerous State and non-State actors, including the rebel forces and armed groups, and is conducted behind various facades in order to conceal the true nature of the activities. While some of these activities may be conducted under the umbrella of joint ventures, other activities are carried out by the de facto authority in the area, which purports to exercise the same authority and responsibilities as the legitimate Government. Still others take different forms...”

As a result of the obscurity, the activities of transnational conflict networks are not constrained by indigenous legal, security, administrative and judicial systems. The difficulty of regulating their activities on the local and regional scale makes it highly impossible to seek to regulate their activities at the global scale, consequently implying that these social predatory forces exist in an economic sphere that legal regulation cannot penetrate.

Raeymaekers identifies these networks in the Congo war as including on one hand agents and officials of international private companies, aviation companies, mining corporations, international traders and local Congolese businessman, individuals in the mining and agricultural sectors and local warlords on the other. Most of these networks used army and political officials as a front to engage in illegal natural resource exploitation activities since most of the front group would have deeper knowledge of existing economic and communication frameworks of the informal economy. In its first report, the Panel of Experts alludes to this, observing that the transportation frameworks relied by the networks are those that existed prior to 1998, consisting of key airlines and trucking companies bringing into the Congo arms, weapons and other merchandise and taking out of Congo various commodities including mineral resources and other illegally exploited natural resources. The outbreak of war thus transformed the nature of trading commodities and saw the arrival of new merchants displacing genuine cross border traders that had benefitted

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229 T Raeymaekers “Network war” 10.
on the trade routes for decades prior to the war. It should be noted therefore that by acting as middlemen and brokers between warring groups in the Congo, facilitating exchange of arms, mineral resources and other merchandise, these criminal networks in effect encouraged rebel groups and militias to intensify illegal natural resource exploitation activities in search of means to engage in the trade off and finance their arms purchases and for personal enrichment.

It should further be noted that these “shadow” networks do not vanish with the signing of peace treaties or the withdrawal of armies. The Panel of experts noted that the self-financing war economy built by these networks centred on mineral resource extraction can indeed outlast conflicts observing that “the necessary networks have already become deeply embedded to ensure that the illegal exploitation continues independent of the physical presence of the foreign armies.” In the Congo, these economic spider webs designed to milk existing natural resources continued to operate and function even in the absence of the principal constructors.

2.3.6 International linkages facilitating illegal natural resource exploitation

The exploitation of natural resources by both state and non-state conflict actors during the Congo conflict could not have reached alarming levels had it not been for a ready international market, gladly willing to accept tainted mineral resources from Congo from whoever had them in possession. Again, the invisible hand of transnational criminal networks cannot be discounted in the various international transactions, transportation, smuggling, exportation, repackaging and transhipment of Congo’s mineral wealth to Europe, Asia and North America. Raeymaekers

231 Before the Security Council, Burundi denied any illegal transportation of natural resources through its traditional trade routes with Congo, arguing that there has always been trade along the border with Congo. It charged that “… companies for gold and diamonds existed long before independence, both in the eastern Democratic Republic of the Congo and in Bujumbura. They were run either by Congolese or Burundians, or by nationals of other countries.” However, Burundi did not respond to the fact that the nature of trade commodities had changed since the outbreak of the Congo war. See UN Doc. S/PV.4317.


233 A member of the United Nations Panel of Experts later expressed the notion that the network system functions like a spider and its web, “when the spider leaves, the web remains”. See ‘Foreign Armies Exploit Congo’s Riches’ Sunday Independent (South Africa), 22 April 2001.

234 For instance the Panel of Experts Reports identifies a minimum of seventeen end user states in which most of the multinational corporations were registered or headquartered. See UN Doc. S/2002/1146 para 141.
that in so doing, these criminal “agents” were integrating “the Congolese market into
the global economy” whilst on the other hand linking local economic networks to
global economic forces. However, the fact that the activities of these predatory
agents were outside the purview of both the Congolese domestic legal system and
any applicable international legal regimes deprives their quasi-commercial activities
of any moral or ethical legitimacy. The mere fact is that to war torn Congo, these
forces were veritable “merchants of death” facilitating resource theft, arms
acquisition and supply to rebels and militias whilst they secure vital and necessary
commodities for consumer markets in the peaceful developed world.

The Panel of Experts reports identified eleven African countries in which illegally
exploited natural resources of Congo are likely to transit through on their way to
Europe, America and Asia and these are Rwanda, Uganda, Zimbabwe, Burundi,
Zambia, South Africa, Zambia, Tanzania, Mozambique, Kenya and Republic of
Congo (Brazzaville).235 The Reports also identified seventeen end user countries in
Asia, Middle East, Europe and North America, with countries representing
processing centres and major consumer markets for finished products and these
include Belgium, China, France, Germany, India, Israel, Japan, Kazakhstan,
Lebanon, Malaysia, the Netherlands, the Russian Federation, Switzerland, Thailand,
the United Arab Emirates, the United Kingdom and the United States.236 It should
also be noted that some of these countries include those most implicated in selling
arms and military equipment to unstable regions across the world.237

It should be admitted that legal systems in the end user states where most of the
processing and beneficiation of mineral commodities takes place have more effective
regulatory mechanisms in comparison to their developing world counterparts. To that
extent, smuggling, illegal trafficking and violation of import control and monitoring
systems in these states is more difficult especially in light of modern sophisticated
technology and stringent policing strategies. However, the greatest setback in these

235 UN Doc. S/2001/1146 para 139.
237 WD Hartung and B Moix ‘Deadly Legacy: U.S. Arms to Africa and the Congo War’ World Policy
accessed on 25/10/2010 (illustrating how the powerful Northern states contribute to the global arms
trade and the acquisition of small arms by armed groups conflict states.
countries is the reluctance of governments, especially in Europe and North America to impose a stricter regulatory framework on the private sector even amid indications that their extra territorial activities are at times financing conflicts in developing countries. A strict adherence to self-regulation and a free market system in the developed world makes government intrusion in these developed countries almost impossible. Thus complaints by conflict-torn states that illegally exploited mineral resources are entering the developed world market have not been acted upon with the haste and vigour that this deserves. This is hugely disappointing in light of the fact that multinational corporations with headquarters in the developed countries are the ones most involved in the illegal exploitation and trafficking of natural resources from conflict states.238

For Congo, European states demonstrated this reluctance by refusing to take closer scrutiny into the transnational activities of multinational companies importing from Congo and its neighbours. The first response from the developed world was subjective fears that more intrusive regulation would obstruct trade and affect trade inflows.239 The argument advanced was that issues of import controls, monitoring and policing are no longer the unilateral responsibility of individual states but of the European Union.240 This bloc, other member states claimed, was the only one that could make binding declarations affecting trade flows and regulate trade in conflict commodities such as those from Congo in such a way that does not affect legitimate trade.241

Surprisingly, most of these states sought to deflect attention to the private sector, declaring that the burden to ensure that multinational corporations do not contribute to prolongation of the war by transacting unethically in Congo lay with their private

238See evidence from Canadian Centre for the Study of Resource Conflict ‘Corporate Social Responsibility: Movements and Footprints of Canadian Mining and Exploration Firms in the Developing World’ 10, available on http://www.miningwatch.ca/sites/miningwatch.ca/files/CSR_Movements_and_Footprints.pdf accessed on 30 October 2010. This institute observed that Canadian mining companies, for instance were responsible for committing sixty percent of “infractions” associated with community conflict in areas they operate such as Congo. See figure 6.
240UN Doc. S/2002/1146 para 143
sector, not the governments.\textsuperscript{242} This view further echoed that it was the responsibility of the private sector to enter into voluntary measures or abide by voluntary non-binding OECD Guidelines for Multinational Enterprises.\textsuperscript{243} This assertion represents an abdication of governmental regulatory power; leaving the private sector to engage in self-regulation can in no way benefit conflict torn states. An analysis of the activities of multinational corporations in Congo clearly reveals that this faith in the self-regulation capacity of the private sector is both misplaced and misleading.\textsuperscript{244}

The responses of end user states therefore suggests that these states cannot be relied upon to impose restrictive measures against their own companies, or in the least scrutinise their activities in war torn conflict states. It might not take substantial economic resources for end user states in Europe, Asia and North America to immediately investigate companies and nationals involved in the trade, trafficking and processing of mineral resources originating from Congo. Some scholars suggest that in addition to this, these countries should monitor and scrutinise their customs controls and other commodity entry points to assess the nature of goods coming from central Africa and its destinations.\textsuperscript{245} However, as most of the multinational companies are registered in countries that are permanent members of the Security Council, there is fear that political considerations threatens active and strict debate on the extra territorial activities of corporations originating from these states.

Besides the self-denial attitude adopted by end user states, the major global and regional economic organisations have shown a disturbing state of helplessness. These include the Southern African Development Community, Common Market for East and Southern Africa, the World Bank and the International Monetary Fund. The scope of this research makes an excursus into their constitutive legal documents and their limits unnecessary. However it is not a secret that these treaty bodies have demonstrated a crippling inability to act against the production, transportation, 

\textsuperscript{242} UN Doc. S/2002/1146 para 143.
\textsuperscript{243} UN Doc. S/2002/1146 para 143. Belgium, the United Kingdom and Germany put forward this point with Germany further indicating that it has encouraged companies to abide by the voluntary, non-binding guidelines.
\textsuperscript{244} See also D Kinley and J Tadaki ‘From talk to walk: The emergence of human rights responsibilities for corporations at international law’ (2003-2004) 44 \textit{Virginia Journal of International law} 934.
\textsuperscript{245} See for instance, J Cuvelier and T Raeyemaekers ‘Supporting the war economy in DRC: European companies and the coltan trade’ IPIS Report 2002.
trafficking and importation of illegally exploited natural resources from conflict states into end user, mostly first world countries. An instance in particular is the IMF and World Bank institutions that, with the full knowledge and evidence that Rwanda and Uganda have no substantial deposits of coltan, gold and diamonds failed to question the fact that these two countries’ exports of these mineral commodities increased during the Congo war, while Congo experienced a sharp decline during the same period.246

Countries involved in the irregular accessing and exploitation of Congo’s resources were fully aware of the ineffectiveness of the international trade system to provide definitive redress to the problem of illegal natural resource exploitation during conflict.247 Rwanda for instance, viciously denied allegations of looting Congo’s resources arguing that the rules of major international bodies such as WTO, COMESA and CEPGL and the Northern Corridor Organisation248 permitted transit of Congo resources through Rwanda for export or re exportation.249 These assertions by Rwanda demonstrated the inapplicability of the regional and international trade regimes to combat the kind of plunder occurring during the Congo conflict. It highlights beyond doubt that both the regional and international trade system are not the best institutions to address illegal natural resource exploitation activities pendente bello.

2.3.7 Private Corporate Entities and Access to Resources

The Panel of Experts identified more than sixty companies importing mineral resources from Congo during the conflict with most of these headquartered in

246 UN Doc. S/2001/357 para 105. See also Congo’s criticism of some of the institutions in UN Security Council Doc. S/PV.4317.
247 During a Security Council debate on the findings made by the Panel of Experts, Congo’s representative bitterly resented this, highlighting that, "We were outraged to hear that even yesterday Uganda was being praised by the Bretton Woods institutions when at the same time the report of the Panel of Experts, in paragraphs 187 to 190, shows how the systematic looting of Congolese resources has directly contributed to improving the balance of national accounts in that country and in Rwanda." See UN Security Council Doc. S/PV.4317.
248 The abbreviations refer, World Trade Organisation, Common Market for Eastern and Southern Africa, and Economic Community of the Great Lakes Countries, respectively. The Northern Corridor Organisation is an organisation of east and central African states aimed at establishing a transportation network of goods and commodities through the region’s sea ports.
Europe, Asia and North America. Whilst some imported directly from Congo through their subsidiaries, others did so via their companies from countries in the region such as Rwanda, Uganda, South Africa, Zimbabwe, Burundi and Tanzania.250 Some companies however had fictitious residency details, and although most of these were owned by nationals from the developed world, they were registered in tax havens or other less known safe havens such as St. Kitts, British Virgin Islands, the Isle of Man and Switzerland.251

As with other state and non-state actors during the Congo conflict, corporations took advantage of Congo’s collapsed legal, political and security systems to engage in rent seeking and profit maximisation activities. In principle, Congo’s institutional weaknesses and dysfunctional security systems do not divest legal subjects of their legal obligation to operate within the parameters of applicable law. Thus, to start with, it is the Congo state that has the task of regulating the activities of multinational corporations within its borders in times of either war or peace.252 Multinational corporations operating in Congo’s conflict zones were therefore required to observe Congo laws. Further, they were under an obligation to comply with conventional and customary international humanitarian law that had become part of Congolese domestic law. Congo’s post 1994 constitutional law have always provided that treaties and international agreements that are concluded have, upon publication, a higher legal authority than national laws.253 The pursuit of maximum profit under the

250 UN Doc. S/2002/1072 Part IV.
252 For Congo and since 1997, the regulatory framework was founded upon the Legislative Decree of 1997 and 1998, the Transitional Constitution of the DRC of 2003 and the current Congo Constitution of 2006. All these supreme laws similarly provided for ratification of international treaties as sufficient for such treaty to be binding Congolese law. Such laws are thus the major source for specific substantive and procedural obligations for multinational corporations operating within Congo’s borders. PI Bloomberg ‘Accountability of multinational corporations: the barriers presented by concepts of the corporate juridical entity’ (2001) 24:297 Hastings International and Comparative Law Review 297.
guise of the conflict and consequent criminal behaviour, in theory, exposes corporations to criminal sanctions if their activities directly or indirectly contributed to the commission of war crimes.254

Unlike combatant groups such as armies, militias and armed rebels that adopt strategies aimed at achieving military objectives through the systematic monopoly and employment of violence, corporations are usually not involved in the direct commission of war crimes. They are often located away from the combat zones. However, the increasing reliance by armies on the end products of industrialisation means that corporations can play a significant role on the instigation of violence and the physical, human and social impacts of conflict.255

Foreign companies in Congo have taken advantage of the “grey” zone under which they operate in international law to descend into Congo and transact with various groups involved in the conflict. It could be argued that the apparent ineffectiveness of binding transnational regimes of law that govern the extra territorial activities of multinational corporations acts in favour of their illicit behaviour in war torn regions characterised by collapsed legal systems.256 Clearly, it is highly unlikely that the agents of these multinational companies and their subsidiaries in Congo and in the region were ignorant of the state of war, lawlessness and criminal conditions giving impetus to the illegal exploitation of natural resources in Congo. Parent companies even those with a substantial degree of operational or daily control of their subsidiaries constantly shrugged off accusations on the basis that they have no

254 A number of investigations into the plunder of Congo’s resources during the conflict highlight the contribution of corporations; see for instance Greenpeace International ‘Carving up the Congo’, April 2007; Global Witness, Same Old Story: A Background Study on Natural Resources in the DRC, 2004; Human Rights Watch, The Curse of Gold, 2005.
256 See for instance Amnesty International “Court decision in Kilwa Massacre case denies right to remedy for victims of corporate human rights abuses” Public Statement AI Index AMR 20/002/2012, 01 February 2012, observing that the interpretation of applicable laws in home states is “often limited and have not evolved to ensure that companies comply with international human rights standards wherever they operate.” This subject is further explored in detail Chapter 4, para 4.3.2.
knowledge of the criminal methods used in the acquisition of mineral resources by local companies or other third party brokers with which they do business. These multinational companies indicated a willingness to adhere to human rights standards in their operations whilst not committing themselves to stop transacting with unknown corporate entities that may be involved in shady deals with rebel groups.

Although most violations by these companies have allegedly been in the area of human rights\(^\text{257}\), a study carried out in Canada by the Canadian Centre for the Study of Resource Conflict found that about sixty percent of the activities of Canadian based mining companies in war torn areas such as Congo contributed to the flaring of community conflict.\(^\text{258}\) This in itself suggests that not only should the liability of multinational companies be investigated from a human rights perspective, but also from an international criminal law. Their complicity is beyond doubt especially if they are deemed to be aware of the contribution of natural resources to financing the conflict situation.

In the Congo war, the role of multinational companies in illegal exploitation of resources and therefore in indirectly funding the conflict, has taken various forms. It has entailed for instance the establishment of purchaser – seller trading relationships with other corporate entities controlled, operated or owned by rebel groups. Transactions from the subsequent trading deals have meant multinational companies directly purchasing mineral resources from rebels who would definitely use the money realised to finance their war and prolong the conflict. Amnesty International captures the complicity of multinational companies succinctly when it proclaims that:

"Clearly, companies active in eastern DRC have little choice but to provide resources in the form of taxation, or provide services, or otherwise contribute to the warring factions’ revenues. Failing this, they cannot operate in the area. Consistent testimonies show that such contributions are the major, if not the sole, source of


finance with which armed groups acquire weapons to administer the region they control. These weapons are used to commit human rights abuses and violations against civilians in the region. The link between companies and the war is clear, and the companies are indirectly contributing to the cycle of violence and the consequent human rights and humanitarian catastrophe in eastern DRC.\textsuperscript{259}

It will not be necessary to provide concise case by case illustrations of the activities of individual multinational companies and the manner in which these fuelled the war. Clear examples however exist and one of these is the case of RCD Goma controlled Societe Miniere Grands Lacs (SOMIGL) and other coltan related companies in Kivu.\textsuperscript{260} SOMIGIL was given a coltan trading monopoly by RCD Goma meaning all coltan was to be traded through SOMIGL only. Coltan related companies in South Kivu were compelled to trade with SOMIGL which also levied tax on all coltan exports. By so doing, RCD Goma was able to acquire substantial cash resources to purchase arms, strengthen its positions and finance its war campaigns.\textsuperscript{261}

SOMIGL transacted with two prominent Belgian companies, Cogecom and Cogear, entities that had existed before the Congo war. These two companies directly purchased from SOMIGL, thus directly dealing with RCD rebels.\textsuperscript{262} The Panel of Experts listed Cogecom as exporting coltan from Congo via Rwanda to Belgium,\textsuperscript{263} meaning that the coltan was transported to Rwanda, the patron of RCD before onward shipment to Belgium.

Another prominent Belgian company, Sogem, a subsidiary of Umicore was also listed by the Panel of Experts as “doing business with the devil” in Congo. Sogem transacted with a Congolese coltan producer, MDM\textsuperscript{264} in purchasing coltan which it transported to Europe afterwards. MDM itself paid taxes to RCD Goma for all its

\textsuperscript{259} AI DRC:Our brothers who help kill us: Economic exploitation and human rights abuses in the east (2003) 37. Amnesty International further states that business deals between international traders and tantalum processing companies worldwide have paid for “the war within a war” in eastern Congo involving rebel groups.

\textsuperscript{260} J Cuvelier and T Raeymaekers ‘Supporting the war economy in DRC’ IPIS Report, 2002.

\textsuperscript{261} J Cuvelier and T Raeymaekers ‘Supporting the war economy in DRC’ IPIS Report 2002.

\textsuperscript{262} J Cuvelier and T Raeymaekers ‘Supporting the war economy in DRC’ IPIS Report 2002.

\textsuperscript{263} S/2001/357 Annex 1.

\textsuperscript{264} Acronym for Mudekereza-Defays-Minéraux, run by a Congolese businessman, Namegabe Mudekereza and a Belgian expatriate, Michel Defays.
commercial activities since RCD Goma was the administrative authority in South Kivu. The involvement of Sogem was therefore indirect; it transacted with a third party, MDM, fully cognisant of the likelihood that this party was highly exposed to RCD Goma.

2.3.8 Joint Ventures: Congo and Zimbabwe

A common corporate instrument used in the illegal exploitation of natural resources in Congo was joint venture schemes. Most of the joint ventures were entered into between the Kabila government and Zimbabwe’s politico-military elite. Kabila’s actions were motivated by the desire to reward his allies for their military assistance in securing his reign of Congo. Further, Kabila hoped that the allies could finance their war budgets with the economic activities they engaged in whilst securing the Congo and fighting off rebels and their backers.

Kabila therefore awarded mining concessions to the Zimbabwe politico–military elite and encouraged them to develop business partnerships with what was left of Congo’s private sector and parastatals. The pattern was fundamentally in the establishment of joint ventures involving big companies such as Gecamines, Sengamines, SCEM, SOCEBO and MIBA. To establish these joint venture corporate structures, Kabila issued presidential decrees.

To illustrate the nature of corporate fraud, the specific example of the joint venture scheme involving Sengamines suffices.

Sengamines was created out of numerous partnerships between Zimbabwe Defence Industries’s front company, OSLEG, Kabila’s company, COMIEX and a private investor’s company, Oryx Natural Resources. Kabila provided the mining concessions, with the Zimbabwe military providing the security and hunting for investors to capitalise the operationalisation of joint venture projects. The outcome of this joint venture was that Kabila awarded the new corporate establishment (now

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265 UN Doc. S/357/2001 para 1158. The Panel of Experts noted that the Government of Zimbabwe viewed these exploitation activities as legitimate commercial ties with a neighbouring State, to whose aid it had come under the SADC Treaty’s collective security provision. See UN Doc. S/2002/1072 para 80.

266 UN Doc. S/2001/1072 para 79.
called Oryx Zimcon Ltd) with two rich mineral concessions previously owned by Congo’s largest mineral producer, MIBA located in Senga River. The proportions of the profits, according to the Panel of Experts, would be shared as forty percent to Oryx, forty percent to OSLEG and twenty percent to COSLEG.

Another joint venture pushed by Zimbabwean military and political interests involved GECAMINES, a state-owned mining company and Tremalt Ltd, a company owned by a Zimbabwean national, John Bredenkamp, with links to the Zimbabwe president. This venture was the subject of investigation by the Lutundula Commission, a special Congo National Assembly commission established to investigate irregularities in mining and other contracts that had been signed between 1996 and 2003 by rebels and government authorities. According to the Lutundula Commission report, the GECAMINES and Tremalt venture formed Kamambankola Mining Company (KMC), whose object was to prospect, explore, develop, exploit, process and trade mineral resources, metal goods and their by-products. Tremalt acquired eighty percent ownership of the company in comparison to twenty percent for Gecamines although no documentation could be produced justifying the share allocation. Tremalt had been created in 2000 and was registered in British Virgin Islands. The duration of KMC was pegged to twenty-five years and most of the legal basis for the creation and operation of KMC was merely a Presidential decree.

The Lutundula Commission further found out that various contracts were either designed to enrich the signatories and not contribute anything to the development of Congo. Concerning KMC, the report found damning irregularities. It found that the joint venture terms led to the unilateral transfer by Gecamines to Tremalt of seven mining concessions, all parts of the capital of the Group and other quarry rights. It

268 Full name is La Societe Miniere de Bakwanga.
270 Full name is La Generale des Carrières et des Mines.
272 Lutundula Commission Report 2.2.1.
273 Lutundula Commission Report para 2.2.1.
also gave KMC the use of the installations and industrial and social infrastructure of Gecamines built on its site for a symbolic lease of US$1 per month.\textsuperscript{275}

The Commission noted that the mining convention granted KMC with a particularly advantageous and generous fiscal, para-fiscal and custom regime; for instance, KMC benefitted from among other things, total exemption of tax, duty, fees and any other levies, whether direct or indirect owed to the State and other decentralized government entities. This exemption also extended to KMC social activities, its equipment, educational and health establishments, as well as the cultural and leisure activities of the personnel.\textsuperscript{276}

Further, the Commission observed that KMC was also exempted from paying Gecamines any premium for the transfer of mining deeds or royalties whilst its partner Tremalt had been relieved of the obligation to pay access fees for geological data.\textsuperscript{277} The operations of KMC resulted in a huge financial loss of US$11,356,875, despite benefiting from very advantageous conditions at the beginning of, and during its operation.\textsuperscript{278} This loss, noted the Lutundula Commission, overtook KMC’s authorized capital which was established at approximately US$ 80,000. Tremalt contributed a mere 15% of the expected US$130,000,000. The partnership of Tremalt-Gecamines was therefore and clearly not advantageous to the State or to Gecamines.\textsuperscript{279}

Such was the nature of corporate facades entered into mostly between Congolese state companies and Zimbabwean private companies, albeit at the behest of senior political and military figures in both countries. The joint ventures were established in terms of executive decrees and their management resulted in huge loss to the Congo fiscus. These joint ventures were generally indicative, as shown below, of the manner in which Kabila sought to apply his access of Congo’s resources for private interests and in the defence of his grip on power.

\textsuperscript{275} Lutundula Comission Report para 2.2.1 B.  
\textsuperscript{276} Lutundula Comission Report para 2.2.1 B.  
\textsuperscript{277} Lutundula Comission Report para 2.2.1 B.  
\textsuperscript{278} Lutundula Commission Report para 2.2.1.B.  
\textsuperscript{279} Lutundula Comission Report para 2.2.1 B.
2.4. The Use and Exploitation of Congo’s Natural Resources

2.4.1 The Congo government

The military success of Kabila’s AFDL in its march towards Kinshasa in 1996 -1997 and the survival of the Kabila’s AFDL led government after assuming power owes much to Kabila’s use and exploitation of Congo’s natural resources. As with his predecessor, Kabila was not blind to the economic potential of Congo’s resources and the role they could play in achieving his own objectives. He thus used Congo’s natural resources, particularly mineral resources to finance his war, at first against Mobutu’s regime and then against Rwanda, Uganda and Burundi and the armed rebel groups they supported. It can as well be argued that the manner in which Kabila applied and appropriated the Congo’s natural resources during the march to Kinshasa was an eye opener to his foreign backers, Rwanda and Uganda. One author observes that indeed, the top Rwandan and Ugandan politically connected military elites directing the Congolese campaigns gained the idea of how easy it was to obtain riches in Congo amidst the smoke created by conflict.\(^{280}\)

In the march to Kinshasa between 1996 and 1997, Kabila initiated alliances with the mining sector, mostly foreign owned, by renegotiating existing mining concessions and cancelling others for cash. Gerard Prunier traces this trend from the outbreak of the first war, observing that mining companies had sought to close shop and cease operations in rebel held territories owing to the uncertainty brought about by the rebellion.\(^{281}\) The author further establishes that in December 1996, Kabila had issued an “ultimatum” to these companies to resume operations of face cancellation of their contracts and concessions.\(^{282}\) However as the AFDL continued to record successes and the certainty of Mobutu’s overthrow grew, a number of mining transnational corporations began to want to acquire mining concessions and sign contracts with Kabila, even before he assumed power. In substantiation, Prunier offers a few examples, which will be highlighted here.

\(^{280}\) T Turner *The Congo wars: conflict, myth and reality* 40, on the gradual evolution from military interests to natural resource exploitation interests.
\(^{281}\) G Prunier *From genocide to continental war* 406.
\(^{282}\) G Prunier *From genocide to continental war* 406.
In March 1997, Tenke Mining company began the first to “do business” with Kabila, signing a mining contract worth US$50 million. In addition, further copper and cobalt transactions were signed between Kabila and Consolidated Eurocan Ventures of the Lundin Group of Vancouver, Canada with the AFDL receiving an initial payment of US$50 million, with the AFDL set to receive a further US$200 million for the copper and investment deal. Another huge multinational corporation, American Mineral Fields International (AMFI) reportedly signed a US$1,5 billion mineral contract with Kabila in May 1997. Jean Raymond Boulle, the owner of AMFI is reported to have loaned his private jet to Kabila for use in “his visits to liberated cities in the Congo and diplomatic missions in Africa”. Lebanese diamond merchants, a relic of Mobutu’s patrimonial system were targeted and, according to Prunier, asked to pay to the AFDL about US$960 000 in back taxes whilst De Beers, that had seemed to benefit from the informal diamond market created by the conflict, was asked to pay US$5 million to the AFDL for its diamond concessions.

The manner in which Kabila moved quickly to take advantage of Congo’s resources in areas under the AFDL control meant that the central Kinshasa government was economically squeezed. For instance, Dunn observes that in April 1997, Kabila’s AFDL and its Rwanda allies seized the mineral rich Kasai and Shaba regions, thereby robbing Mobutu and his regime of the vital mineral resources in these areas. The rebellion therefore became a form of “war of economic attrition” with parties to the conflict seeking to appropriate the resources and deny the other party access and exploitation of same. However, one thing is clear: Congo’s natural resources played a huge part in financing the war effort of these parties.

Once in power and facing an even stronger coalition of foreign backed enemies, Kabila sought to apply Congo’s resources in the defence of Congo’s sovereignty. Michael Nest succinctly captures the dire straits in which Kabila was, commenting that:

283 G Prunier From genocide to continental war 406.
284 For this, see also G Nzongola-Ntalaja-Ntalaja The Congo From Leopold to Kabila 236 – 237.
285 G Prunier From genocide to continental war 137.
286 G Nzongola-Ntalaja The Congo From Leopold to Kabila 238.
287 G Prunier From genocide to continental war 142.
288 KC Dunn ‘A survival guide to Kinshasa’ 57.
“..its (Kabila’s Congo) sovereignty and survival were under assault, it had lost control of half of its territory along with the commerce within it that it previously taxed, and it had to fund a military campaign.”

In addition to increasing taxation for Congolese citizens, Kabila proceeded to sell and distribute the country’s natural resources for cash to wage the war against him. One such way of doing this was to form joint ventures between Congo mining parastatals and foreign companies from countries allied to Congo during the conflict such as Zimbabwe. The consequences for this was not always beneficial to Congo’s fiscus as most of these companies failed to deliver on their promise. In similar fashion as RCD Goma had created SOMIGL, coltan trading monopoly managed by Lebanese traders, Kabila gave a diamond monopoly to International Diamond Industries in exchange of US$20 million, military training from Israel and for arms. Again this deal failed and was later cancelled by Kabila. Another tactic by Kabila was to demand a proportion of the income from mining parastatals such as MIBA and Gecamines to finance the war although these companies were not performing to capacity.

2.4.2 Illegal Natural Resource Exploitation Activities: Rwanda and Uganda Militaries

The major tactics and methods adopted by Rwanda and Uganda in the illegal exploitation of Congo’s natural resources were fundamentally similar. It would be impossible to illustrate these methods by taking an incident by incident approach; a combined wholesale approach can substantially give a summation of the overall nature of the processes, methods and tactics adopted by these two states and their militaries.

289 M Nest ‘The Political Economy of the Congo war’ in M Nest et al DRC 38.
290 M Nest DRC 38.
291 See “Joint venture schemes” above.
292 UN Doc. S/2001/357 paras 150 -152.
2.4.3 Military and Diplomatic Tactics

Both the Rwandan and Ugandan armies carried out or facilitated the looting and plundering of Congo resources through military occupation. Such occupation was in two forms, namely direct occupation and occupation by proxy. Direct occupation entailed the physical territorial control of parts of Congo by the Rwandan or Ugandan armies and the exercise of such control in various ways. Occupation by proxy involved the occupation of Congo territories by armed rebel groups created, supported and sponsored by Rwanda and Uganda but exercising semi-autonomous administrative functions in areas under their control. This was the case with, for instance, RCD Goma, MLC, RCD ML and UPC in Ituri. It should be remembered that Rwanda and Uganda had refused having any “official” policy of military occupation in the Congo and subsequent use of that occupation to carry out illegal natural resource exploitation activities. The activities of their armies, sanctioned or not, during the period they occupied Congo would however make these states responsible in international law.

To that extent, as states whose armies were in military occupation of parts of Congo, they were under an obligation to take appropriate measures to prevent illegal natural resource exploitation, not only by their armed forces but also by private actors in areas falling under their control.

Besides military occupation, Rwanda and Uganda also exploited developments related to peace initiatives for the purposes of justifying illegal natural resource exploitation by their puppet armed rebel allies. In July and August 1999, the six participating African states and the MLC and RCD rebel factions signed the Lusaka Ceasefire Agreement, but this did not bring the conflict to a halt. In July 2002,

294 The ICJ has adopted the definition of military occupation from Article 42 of the Hague Regulations, 1907 which has become customary international humanitarian law. See also the use of this definition in the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, paras 78 and 89). Thus territory is considered to be occupied when it is “actually placed under the authority of the hostile army and the occupation extends only to the territory where such authority has been established and can be exercised”.

295 See Chapter Three. See also Armed Activities case (DRC v Uganda) paras 241 –243.

296 Armed Activities case (DRC v Uganda) paras 241 – 243.

Rwanda and the DRC signed the Pretoria Agreement while in September of same year, the DRC and Uganda signed the Luanda Agreement.

Another peace agreement was signed in December 2002 between the Congolese government and the local rebel groups. Inclusion of the main rebel groups on the negotiations table was pushed by Rwanda and Uganda and once this succeeded, the legitimacy of Congo’s main rebel groups and their territorial occupation of parts of Congo was guaranteed. Rwanda and Uganda therefore insisted that the Lusaka Agreement and subsequent peace efforts had recognized the existence and legitimacy of RCD and MLC in Congo’s political landscape. Further, these states suggested that by so doing, the peace accords acknowledged the lack of total territorial control by Congo government and the divided nature of state administration functions between the Congo government on one hand and RCD and MLC on the other. Thus in the eyes of Rwanda and Uganda, rebel factions legitimately exercised state administration functions in areas under their occupation; they were de facto governing authorities sharing state administration functions with Kabila government and their access to, use and exploitation of Congo’s natural resources were to be seen as not irregular.

2.4.4 Specific Methods

The involvement of Rwanda and Uganda, through its army and senior military – political elite in illegal exploitation of Congo’s mineral resources dispels any doubt that economic motives were paramount in their continued military presence in Congo. The successive reports of the Panel of Experts established that the Rwandan Patriotic Army (RPA) was instrumental in commercial and quasi commercial activities that resulted in the production, freighting and transhipment of Congo’s mineral resources to Kigali and onward to Europe and other destinations.

300 G Nzongola-Ntalaja The Congo From Leopold to Kabila 234. The writer castigating the Agreement as flawed on this basis.
301 G Nzongola-Ntalaja The Congo From Leopold to Kabila 234, comments that by so doing, the Agreement seemed to legitimize the de facto partitioning of Congo by rebel groups with the support of Rwanda, Burundi and Uganda.
302 UN Doc S/PV. 4317 and UN Doc S/PV. 4317 Resumption 1.
The Uganda People’s Defence Forces was similarly implicated in the reports for leading the race for illegal exploitation of Congo’s natural resources. Also significant were activities of Rwandan and Ugandan owned companies that owned mining sites, trading stations and other private companies for the transportation of Congolese resources to Kigali and Kampala. Rwanda denies that it never formulated a policy to exploit Congo resources during the war. However, although resource exploitation activities by the army and the senior political elite seemed to be spontaneous and opportunistic particularly in the early stages of the conflict, the manner in which the Rwandan government reacted and responded to allegations of plunder by its army suggests that the activities were done with the full its tacit. In contrast, for Uganda, the exploitation activities were purely for private interests and not for the army making the structures used by Uganda less hierarchical and more decentralised.304

Further, the Panel of Experts noted that with time, the methods of illicit exploitation continually evolved, assuming different forms.305 Firstly, upon imposing military administration in areas under their control, both the RPA and UPDF used their loyal rebel allies (RCD Goma and RCD ML and MLC) to run the occupied provinces. These rebel organisations were thus de-facto government authorities directly controlled by, and paying allegiance to the Rwandan and Ugandan politico - cum - military forces in these areas, a situation reminiscent of Vichy France during the Second World War. Once this military administration was established, systems of taxation and levying of extortionate license fees and levies could be carried out on residents, traders, artisanal miners, local companies and foreign companies. Mineral resources, such as gold and diamonds were used to pay tax to the rebel administration in some instances and a proportion of this would be passed over to their superiors.306

Both the RPA and the UPDF relied on their troops to provide the muscle and force necessary to extort, demand, order payment and control mineral exploitation activities in their regions. The RPA established a “Congo Desk” within its structures

304 M Nest DRC 52.
305 UN Doc. S/2002/357 para 70.
to link its military and commercial activities. This Congo Desk was highly hierarchical, and it was instrumental in deploying troops that directly supervised, directed, controlled and oversaw mining activities at mining sites and also the freighting of the mineral resources to Kigali from nearby aerodromes. The UPDF was less organised and it was the actions of senior officers to deploy troops to carry out similar activities, albeit for enrichment of senior military and political officials. Use of forced labour and child labour at these sites was rampant under the supervision of both armies.\textsuperscript{307}

For Rwanda, these activities were condoned at “official” level where all profits went. Income from the commercial wing for instance, provided the RPA with eighty percent of its budget in 1999.\textsuperscript{308} The Panel of Experts notes that the overall contribution of the Congo Desk ran into more than to US$200 million and that this was made possible by the control and extraction of mineral resources mostly in eastern DRC by, or under the direct surveillance of the RPA officers.\textsuperscript{309} According to the same author, in 1999, a total added value of diamonds, gold and coltan plundered by Rwanda in the DRC amounted to 6, 1\% of Rwanda’s Gross Domestic Product and to about 146\% of its official military expenditure.\textsuperscript{310} Uganda however did not organise its military accounts in this way; its major activities constituted a re-exportation economy and impacted on Uganda’s exports more than army extra budgetary accounts.\textsuperscript{311}

A rather direct unsophisticated method by both state armies and rebel forces was requisitioning.\textsuperscript{312} Both armies would requisition stockpiles of mineral resources from state owned mining companies and sometimes loot the storage facilities of these companies.\textsuperscript{313} The same criminality was also adopted against private local and foreign companies especially during the beginning of the occupation. In addition to

\textsuperscript{308} UN Doc. S/2002/1146 para 71.
\textsuperscript{309} UN Doc. S/2001/357 paras 126 -131. See also F Reyntjens The Great African War 227.
\textsuperscript{310} F Reyntjens The Great African War 227.
\textsuperscript{311} UN Doc. S/2001/357 para135.
\textsuperscript{312} UN Doc. S/2002/565 para 47
\textsuperscript{313} UN Doc. S/2001/357 paras 32 – 42.
this, the RPA and UPDF in the company of their RCD Goma, RCD ML and MLC rebel allies would carry out attacks on artisanal miners, burn villages and loot stockpiles of coltan, gold and diamonds from helpless civilians. The UPDF was however rather less vicious, opting to let their rebel allies do the dirty work whilst they collected a proportion of the booty from them.

Another tactic was the creation of trading monopolies to control trade, with SOMIGL being a prime example. This would ensure that local traders sold their commodities to SOMIGL. Usually, the administrations of both armies would choose foreign, international traders to operate the monopolies and thereafter require a quota of the proceeds. This quota ran into huge money and any form of dishonesty by the foreign, mostly Lebanese operators, invited expulsion. It is reported that a significant percentage of exported coltan was however produced by Rwandan companies with links to Rwanda’s senior military and governmental elite. These companies included Eagle Wings (Rwanda Metals) and MHI. Ugandan major companies included the Victoria Group, Trinity Investments, Sagricof and LA Conmet. An insignificant portion were produced and sold by local Congo companies who were constantly unable to compete with Ugandan and Rwandese companies that enjoyed indefinite tax levies and other substantial fiscal benefits.

The freighting of Congolese resources was facilitated by a network of Rwandan and Ugandan politically connected airline companies as well as international criminal freight and cargo charter companies. Rwanda’s most prominent airline companies included New Goma Air, Air Navette, Air Boyoma, Sun Air Services and Kivu Air Services whilst Ugandan airlines included Air Alexander, Air Navette and Uganda Air cargo. Owing to the lawlessness of Congo and the attraction of its mineral resources other international freight networks also offered their services such as cargo charter companies and freight forwarding companies. The Panel of Experts

315 UN Doc. S/2001/357 para 144.
316 UN Doc. S/2201/357 para 82–84.
317 UN Doc. S/2002/1146 para 76.
319 UN Doc. S/2001/357 para 74.
320 T Raeymaekers ‘Network War’ para 3.3
observed that Victor Bout’s aircraft were utilized for a number of purposes including transport of coltan and cassiterite, the transport of supplies into mining sites and the transport of military troops and equipment.\textsuperscript{321} Not surprisingly, most of the freight routes were between Congolese occupied areas and Kigali or Kampala with various aerodromes situated in Goma, Kisangani, Bunia, Maniema, Walikale and Kivu.\textsuperscript{322}

Rwanda, especially supported banking services to facilitate trading of Congolese resources with international buyers. The Panel of Experts identified four prominent banks that bankrolled various financial transactions instigated by Rwanda senior political –military elite and other politically connected businessmen.\textsuperscript{323} Banks such as BCDI and SONEX were used by RPA to handle most of its financial deals and that of RCD Goma.\textsuperscript{324} These banks for instance financed loans by RPA and also paid RPA and RCD suppliers in Congo, Kigali or in the region.

Owing to the huge volumes of Congo mineral resources entering Kigali and Kampala, Rwanda and Uganda were able to export minerals they did not produce locally in large volumes. The Panel of Experts observed that Rwanda was producing gold, diamonds and coltan although its official position was that Rwanda did not have any of these minerals locally.\textsuperscript{325} The Diamond High Council noted that between 1998 and 2000, Rwanda’s diamond exports multiplied from less than two hundred carats to more than thirty thousand carats.\textsuperscript{326} The same was the case with various other minerals such as nobium, cassiterite, coltan. Gold production shot from just two kilogrammes before 1996 to more than sixteen kilogrammes after the outbreak of the Congo war.\textsuperscript{327} Ugandan exports grew as a result of the boom in the war supported reexportation economy.\textsuperscript{328} For instance, the overall value of exports increased seven times, with diamond exports reaching a peak of US$1.8 million and gold exports

\begin{footnotes}
\item[321] UN Doc. S/2002/1146 para 72.
\item[323] UN Doc. S/2001/357 para 77.
\item[324] S/2001/357 paras 130 -132.
\item[325] UN Doc.S/2001/357 para 104.
\item[326] UN Doc. S/2001/357 Table 5.
\item[327] UN Doc. S/2001/357 Figure 4.B.
\item[328] M Nest DRC 51.
\end{footnotes}
doubling between 1998 and 2000. Coltan exports in 2000 were twenty seven times those of 1997 and finally cobalt exports in 2000 were four times greater than 1999.\textsuperscript{329}

\section*{2.5 Concluding Remarks}

In general terms, the illegal natural resource exploitation activities of armies and rebel groups meant that Congo funded its own occupation and its own war. The conflict provided an opportunity for local and foreign armies, the senior politico – military elite, private businessmen, foreign multinational companies and transnational criminal networks to thrive from Congo’s natural resources. The huge human and economic cost of all the illegal activities was borne by Congo alone: its people were victims of gross human rights abuses committed by the warring parties in their quest to exploit Congo’s wealth.

Most importantly, most of the activities were done outside of existing institutional, administrative and regulatory frameworks. Thus, the \textit{modus operandi} adopted by the main actors evaded internal and regional monitoring systems, checks and inspection mechanisms and systems. The major networks involved kept changing loyalties, forging new alliances and adopting new means and methods in order to effectively maximise their access to Congo’s resources during the conflict. As a result, these activities challenged not only the collapsed domestic institutions but international mechanisms as well. In light of this, it becomes easy to question the nature of applicable legal regime, the subject of the following Chapter, and inquire into the corpus of this legal framework and its application against illegal natural resource exploitation activities during armed conflict.

\textsuperscript{329} M Nest \textit{DRC} 51.
CHAPTER THREE: INTERNATIONAL LEGAL REGULATION OF NATURAL RESOURCE EXPLOITATION DURING ARMED CONFLICT

3.1 Introductory

This chapter explores the international humanitarian legal regulation of natural resource exploitation by conflict actors during armed conflict. In essence therefore, this chapter seeks to lay open the international humanitarian law framework, specifically those rules that can be applied to address illegal natural resource exploitation activities by parties to armed conflict during war. An illustration of the international humanitarian law framework is also carried out in order to lay out the rights, duties, responsibilities and obligations of parties to a conflict vis a vis the exploitation of natural resources existing in conflict areas. The primary objective for examining this legal regime is to discover the nature of the applicable rules and their limits in scope and substance in responding to illegal natural resource exploitation by conflict actors during war and secondly, to investigate the inherent strengths and weaknesses of this regulatory regime in achieving its specific objectives.

The previous chapter illustrated that the Congo conflict had complex elements that made it very difficult to apply any regime of law. In illustrating these elements, the chapter further demonstrated how certain challenges specific to the Congo state, such as its geopolitical and regional security challenges militates against the successful resolution of crucial issues such as the illegal exploitation of existing natural resources during war. This chapter shifts attention from the non-legal geopolitical, socio economic and security impediments to the legal framework aimed at the regulation of exploitation of natural resources during conflict. Accordingly, it will provide a critical analysis of the law against which the conduct of actors and participants in the Congo natural resource crisis can be weighed and judged.

In structure, the chapter is laid out in three parts. The first part sets off by investigating the early history of economic exploitation during conflict by basically tracing the origins of the international legal framework responsible for regulating the exploitation of existing resources during war. In this part, an investigation will be done into the nature and extent of the “freedom” to plunder and early forms of
restraints regarding these practises. The second part explores the contemporary humanitarian framework regarding the regulation of illegal exploitation of natural resources during armed conflict. Finally, the third part is an analysis of the major constraints in the international legal system that affects the application and enforcement of international humanitarian law. In particular, the focus will be on the constraints that negatively impact on the application and enforcement of identified rules aimed at inhibiting the practise of illegal natural resource exploitation during armed conflicts.

3.2.1 Early History of Looting, Pillage and Plunder During War

The practise of exploitation of economic resources during conflict has existed since ancient times albeit in various forms. The most common forms included looting, plundering, pillaging and confiscation of booty such as livestock, gold bullion and grain. There is ample evidence to suggest that these practises can be traced to the earliest histories of military warfare. The major European centres of civilisations such as the militant Greek and Roman civilisations accepted the practise of looting, pillage and confiscating booty during war as a legitimate consequence of warfare and an important military strategy adopted by armies for economic reasons. For instance, in his Bellum Civile, Caesar writes that the capture of enemy military camps provided the opportunity for obtaining plunder. The

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330 See J Westlike International Law Part II: War (1908) 107. The author states that plunder was habitually practised against the enemy. The author (at 108) describes pillage as indiscriminate plundering amounting to the unauthorised taking away of property, public or private. This is supported by Grotius’ 17th century writings (Grotius on the Rights of War and Peace) that apply the terms plunder and pillage interchangeably, suggesting that they were in strict terms, legally synonymous. Also, see generally for same view R Finland and KH O’Rouke Power and plenty: trade, war and the world economy in the second millennium (2007) Princeton.

331 See W Whewell (translation) Grotius on the Rights of War and Peace (1953) 345.

332 Greek kings built huge flamboyant cities on booty and gain confiscated from conquered territories. See RL Fox An epic History of Greece and Rome (2007) 256. The author observes that war was essential to Greek royalty since “it yielded highly valuable booty and was a major element in the kings’ economies”.


335 Caesar Bellum Civile 3.96, quoted from CM Gilliver “Battle” in P Sabin, H Van Wees and M Whitby (ed) The Cambridge History of Greek and Roman Warfare Vol II, Chapter 4. Gaius Julius Caesar,
confiscation could be carried out as looting or seizure of gold, livestock and other valuable economic resources such as crops and grain.\textsuperscript{336} In an age that accepted practises such as slavery, the looting of enemy economic resources appears to have been the norm, rather than the exception although in some cases it was not always permitted.\textsuperscript{337} Apparently, the practise was viewed as neither against the law of nature, nor contrary to the law of nations but as integral to the customary practises of war. In Book III Chapter 5 (“Of Ravaging and Pillaging of Property”), Grotius opens by declaring the following;

“Cicero says it is not against nature to despoil him whom it is honourable to kill. Wherefore it is not to be wondered at if the Laws of Nations permit the property of enemies to be destroyed and ravaged, when it has permitted them to be killed. Polybius says that by the Laws of War, all munitions of the enemy, ports, cities, men ships, fruits, and anything of like kind, may be either plundered or destroyed.”\textsuperscript{338}

Justinian writings support this position, mentioning that goods that can be appropriated by ‘\textit{occupatio bellica}’ relate to the property of enemies.\textsuperscript{339} Thus ancient warfare, as it was, seems not to have given priority to the sparing of enemy resources and their property from destruction and seizure upon defeat in war. Thus, although Cicero’s statement might suggest the despoiling of enemy combatants only, it would appear that such spoliation was extended to both public (state) property and civilian (private) property.\textsuperscript{340}

In light of this background, there is little, if any to suggest that ancient societies regarded looting, pillaging and confiscation of booty during war as offensive to the

\textsuperscript{336} See generally G Holmes (ed) \textit{The Oxford Illustrated History of Medieval Europe} (2001).

\textsuperscript{337} See A Goldsworthy ‘War’ in P Sabin, H Van Wees and M Whitby (eds) \textit{The Cambridge History of Greek and Roman Warfare} Vol II, Chapter 3, 83 – 93. Grotius (Whewell trans p.345) mentions that “They who condemn this practice (of pillage) say, that greedy hands, active in pillage, are so forward as to snatch the prizes which ought to fall to the share of the bravest; for it commonly happens that they who are slowest in fight are quickest in plunder.”

\textsuperscript{338} W Whewell \textit{Grotius on the Rights of War and Peace} (abridged version) (1853) 332.

\textsuperscript{339} Gaius \textit{Institutionum Juris Civilis} (On Roman Law) 69, quoted in N Bentwich (reprint) \textit{The law of private property in war} (2009) 10.

\textsuperscript{340} See also the support for this position in J Westlake \textit{International Law} 104.
conscience of humanity.\textsuperscript{341} Even further, there seems to be no documented and convincing history of collective efforts to constrain the practise of pillaging and plundering of the economic resources of adversaries in this era.

The actual outlawing of the practises of looting, plunder and pillage only came with the dawn of modern civilisation and international law starting in Europe. Europe is viewed as the birth place of modern international law; writers actually attribute international law as the public law of a few European states in the 16\textsuperscript{th} and 17\textsuperscript{th} centuries.\textsuperscript{342} It was thus during the 16\textsuperscript{th} and 17\textsuperscript{th} century that international law entered its formative stages, including the international laws of war. However, the laws of war were still rudimentary and could not significantly impact and transform the brutish manner in which wars were fought after this period. A few European wars after the 17\textsuperscript{th} century testify to this fact. Firstly, the Thirty Years War that engulfed Europe following the disintegration of the Holy Roman Empire witnessed extensive looting, plundering and confiscation of economic resources in conquered territories before the signing of the Treaty of Westphalia in 1648.\textsuperscript{343} The Napoleonic Wars (1795 – 1815) were conducted in brutal fashion, with massive plunder, pillaging and looting of public property and other resources.\textsuperscript{344} The French armies led by Napoleon and his generals across Europe were notorious for pillaging and plundering enemy resources, stockpiles of gold bullion, silver and other valuable items.

The first half of the nineteenth century did not see a shift in military practise relating to confiscation of enemy property during armed conflict. Passing judgment in 1814, the United States Chief Justice conceded this, declaring that “war gives to the sovereign full right to take persons and confiscate the property of the enemy,

\begin{itemize}
\item This view is also supported by G Dietze ‘The disregard for property in international law’ (1961 - 1962) 56 \textit{Northwest University Law Review} 99.
\item DJ Harris \textit{International Law: Cases and Materials} (2004) 12, notes that these states shared a common Christian background and the legacy of the civilisation of Greece and Rome.
\item The Treaty of Westphalia is hailed as signalling the dawn of modern civilisation in Europe. The Treaty itself contains various sections that testify to the practice of looting and confiscation of property, economic resources and other commodities during the war.
\item Al Grab \textit{Napoleon and the transformation of Europe} (2003) 156 -157 on the general plunder and damage to property that came with the Napoleonic wars.
\end{itemize}
Both the First World War (1914 – 1918) and Second World War witnessed even greater plundering of economic resources across Europe by all parties before negotiations for peace and the end of the war.\textsuperscript{346}

Apart from Europe, the practise of plunder, pillage and other forms of economic exploitation of enemy resources was also evident in pre-colonial Africa.\textsuperscript{347} For instance, an integral feature of warfare in pre-colonial West Africa, Southern and Central Africa was the seizure of enemy wealth and property such as livestock, gold, grain and other valuable commodities.\textsuperscript{348} The onset of colonisation in these regions meant increased economic dominance and spoliation at the hands of the armies of the colonial power, often made up of African troops.\textsuperscript{349} With economic reasons at the arguably at the centre of the debate on African colonisation, the presence of European armies in Africa meant more plundering and pillaging of African natural resources and their externalisation to Europe.\textsuperscript{350}

The extensive spoliation and exploitation of economic resources witnessed in the two World Wars of the twentieth century spurred the international community to move towards regulating and prohibiting such practises. The following section explores the progressive evolution of such regulations and prohibitions as well as their content both in multilateral treaties and customary law.

\begin{flushleft}3.2.1.1 The Prohibition of Economic Exploitation in Contemporary Humanitarian Law\end{flushleft}

\begin{flushright}\textsuperscript{345} Brown v United States 12 US. (8. Cranch), 110, 122 – 123 (1814). The Chief Justice however admitted possible limitations to this rule, immediately stating that “The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but cannot impair the right itself.” \textsuperscript{346} Although the German and Japanese forces are accused for most of the plunder, there is no doubt that all parties to the conflicts were involved. See \textit{Foreword}, United Nations War Crimes Commission \textit{Law Reports of Trials of War Criminals} VI. \textsuperscript{347} For a history, see JD Fage \textit{A history of Africa} (2001) on the major patterns of economic activities in Africa and warfare practices. \textsuperscript{348} See also generally RA Oliver and JD Fage \textit{A short history of Africa} (1988), giving an overview of the militant economic practices of African kingdom states. \textsuperscript{349} For the military tactics and forms of economic spoliation by such armies, see B Davidson \textit{The black man's burden: Africa and the curse of the nation-state} (1993), W Rodney \textit{How Europe underdeveloped Africa} (1973) on the exploitative and destructive nature of European colonialism. \textsuperscript{350} See W Rodney \textit{How Europe underdeveloped Africa} (1973) for a complete treatise on the manner in which European imperialism, advanced through military means, culminated in the pillaging of African natural resources by European powers.\end{flushright}
In spite of the leading role claimed by Europe in the formulation and development of modern international law, events in another continent provided the spark that led to the first real attempt at codifying customary practises on warfare. The American Civil War of the 1860s provided such an opportunity when it led to the promulgation of the Lieber Code, albeit exclusively meant for American troops fighting in the civil war.\footnote{BM Carnahan 'Lincoln, Lieber and the laws of war: the origins and limits of the principle of military necessity' (1998) 92 AJIL 213, detailing the background to the adoption of the Lieber Code.} Prepared by Francis Lieber and promulgated as General Orders No 100, 1863, by President Lincoln, the Lieber code reflected the laws of war not only in America but as known to the whole world at that particular time.\footnote{D Schindler and J Toman The Laws of Armed Conflict (1988) 3.} It is no wonder that subsequent international humanitarian law rules were to expand, clarify and improve upon the Lieber Code in a bid to make them contemporaneous with the developments in military practise.

The Lieber Code itself provided for strict rules for the US army to follow and the correspondent punishment or sanctions upon breach thereof. There was no use of the term “war crimes' in the Code. Further, the Code did not apply to non-American forces, having been passed as legislation of the United States.\footnote{Its full name was Instructions for the Government of Armies of the United States in the Field General Orders No 100 of April 1863. The Lieber Code has long been replaced by various US Military Field Manuals.}

Two articles of the Lieber Code were germane to economic exploitation; Article 31 permitted a victorious army to appropriate all public money, seize all movable property and sequestrate all the revenue of real property of the adversary state. Article 44 however forbade all pillage, sacking and robbery at the pain of death. This general prohibition of plunder and pillage were to permeate subsequent conventions, treaties and other international instruments in international humanitarian law. Some of the provisions of the Lieber Code and those in most of the 19\textsuperscript{th} and 20\textsuperscript{th} century conventions and treaties adopted before the Second World War that codify the laws of war have developed into customary international humanitarian law.\footnote{This was confirmed in the Judgment of the International Military Tribunal of Nuremberg, 30 September and 1 October 1946, 64- 66.} While most

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of these tried to cover specific matters, the ones that sought to outlaw plunder, pillage and looting in the same spirit as the Lieber Code include the 1874 Brussels Declaration, the 1880 Oxford Manual, the 1899 and 1907 Hague Conventions and Regulations. At the end of the First World War, the victorious powers drew up the *Report by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties* of March 29, 1919. This Report listed economic plunder and pillage as some of the war crimes committed during the First World War.

Another historical instrument describing and condemning acts of spoliation and looting of property by Germany in occupied territories during the Second World War was the *Inter Allied Declaration*, 5 January 1943, which condemned the “systematic spoliation of occupied or controlled territory” by Germany. Before signing the Declaration, the British Government noted that Nazi-instigated spoliation had “... taken every sort of form, from open looting to the most cunningly camouflaged financial penetration, and it has extended to every sort of property – from stocks of art to stocks of commodities, from bullion and bank notes to stocks and shares in

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355 For instance, the 1864 Geneva Convention was for the Amelioration of the Condition of the Wounded in Armies in the Field.
359 Article 47 of the 1899 Hague Regulations provides “Pillage is formally prohibited.” Both Article 28 and Article 47 of the 1907 Hague Regulation prohibit pillage as well. Article 7 of 1907 Hague Conventions IX and Article 21 of the 1907 Hague Conventions X further outlaw pillage in similar terms.
362 Inter Allied Declaration, was adopted when the Second World War was coming to an end amid massive evidence of plunder by parties to the conflict, especially Nazi Germany. The Declaration is available at [http://www.lootedartcommission.com/inter-allied-declaration](http://www.lootedartcommission.com/inter-allied-declaration) accessed on 26 February 2011.
business and financial undertakings.” This description constitutes a clear acknowledgment of the practise of plunder and pillage in modern times.

At the end of the Second World War in 1945, the victorious Allies drafted the Nuremberg Charter listing a number of war crimes and crimes against humanity committed by German officials during the war. Article 6(b) of the 1945 Nuremberg Charter included plunder of public or private property among the list of war crimes which invited individual criminal responsibility. In one of the cases against German corporate officials before the Nuremberg tribunal, the accused persons’ indictment included participation in “the plunder of public and private property, exploitation, spoliation, and other offences against property, in countries and territories which came under the belligerent occupation of Germany in the course of its invasions and aggressive wars.”

In yet another case before the Nuremberg IMT, (the Krauch case), the Tribunal took occasion to provide a consideration of the terms “plunder”, “spoliation” and “exploitation of economic resources” stating that the legal meaning of these terms is synonymous and that they relate to “widespread and systematised acts of dispossession and acquisition of property in violation of the rights of the owners which took place under the belligerent occupation or control of Nazi Germany during World War II.”

Post World War II developments saw the codification of the laws of war in more comprehensive conventions and treaties, a task made easy by the fact that a number of the principles, concepts and rules had inevitably evolved into customary rules of international humanitarian law. Thus in addition to the 1945 Nuremberg

363 See Inter Allied Declaration, Introductory Statement made by the United Kingdom Government's Foreign Office.
366 The Law Reports of War Criminals, IG Farben and Krupp Trials 44.
367 The Law Reports of War Criminals, IG Farben and Krupp Trials 44.
368 That the Hague Regulations had assumed the status of customary international law has since been confirmed in a number of cases before international tribunals. These cases include Legal
International Military Tribunal Charter, other important conventions that acknowledged plunder, pillage and spoliation as a war crime include three Geneva Conventions of 1949 and Additional Protocol II to the Geneva Convention, 1977. In addition, the prohibition of plunder is recognised in the Statute of the International Criminal Tribunal for Yugoslavia (ICTY), while the Statute of the International Criminal Tribunal for Rwanda recognised “pillage” as a serious violation of the law of war. Further to this, both Statutes make provision for “the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners” in addition to any sentence of imprisonment.

3.2.1.2 The Rome Statute and Illegal Natural Resource Exploitation

The Rome Statute created a permanent international criminal court when it was adopted in 1999, subsequently entering into force in July 2002 upon the deposition of the required ratifications. Accordingly, the Statute is essentially an international criminal law instrument, and not per se an international humanitarian law convention. However, the Statute provides a permanent criminal justice framework to deal with serious violations of international humanitarian law such as war crimes. For this reason, it can be seen as a convergence of international criminal law and international humanitarian law.

After the requisite ratifications of the Statute, the International Criminal Court was subsequently established in 2002. By creating a pendente bello and post-conflict permanent criminal justice mechanism, the Rome Statute framework provides a
progressive legal system in comparison to previous attempts, particularly in the manner in which it covers the four major international crimes, namely war crimes, genocide, crimes against humanity and aggression. Germane to this research is that the Statute identifies as a war crime the “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly”. In addition, it identifies as a war crime the pillaging of a town or place and the seizure of enemy property unless “imperatively demanded by the necessities of war”.

Adopting the stance of the previous ICTY and ICTR statutes, the Rome Statute also provides for forfeiture of proceeds, property and assets derived directly or indirectly from that crime in addition to imprisonment. Another important feature of the Rome Statute legal framework is that it criminalises on equal terms the commission of listed war crimes in both international armed conflicts and conflicts not of an international nature. Accordingly, although this legal regime recognises the distinction between these two kinds of armed conflict, it does not distinguish the nature or elements of the war crimes or differentiate their gravity on the basis of the nature of conflict.

Congo ratified the Rome Statute on 11 April 2002, four months before the Rome Statute came into force. In March 2004, the Congo government subsequently referred for investigation and possible prosecution its own national “situation” to the

375 The Rome Statute and the International Criminal Court is the subject of Chapter Four.
376 Article 5 of the Rome Statute lists these as war crimes, crimes against humanity, genocide and aggression.
377 Article 8 (2) (a) (iv).
378 Article 8 (2) (b) (xvi) and Article 8(2) (e) (v).
379 Article 2(b) (xiii) and Article 2 (e) (xii) prohibits this offense in both conflicts of an international nature and in non-international armed conflicts.
380 Article 77 (2) (b).
381 This date is confirmed by the ICC on its website. See http://www.icc-cpi.int/Menus/ASP/states+parties/African+States/Democratic+Republic+of+the+Congo.htm accessed on 17 March 2011.
International Criminal Court’s Prosecutor.\(^{383}\) The Prosecutor’s investigations covered the period from July 2002 when the Statute entered into force. Although this period was well after the Congo conflict had started, it is still significant since it was at this period and afterwards that evidence of illegal natural resource exploitation activities began to emerge and mount.\(^{384}\)

Besides the legal framework provided in specific multilateral treaties, post-conflict criminal tribunals in Africa have also added to international humanitarian law jurisprudence relating to the irregular access, use and exploitation of natural resources during conflict. For instance, following the end of the Sierra Leone civil war in 1999, a Special Court of Sierra Leone was established in terms of the Statute of Sierra Leone.\(^{385}\) The Special Court indicted Charles Taylor and Foday Sankoh, architects of the civil war, accusing them of being responsible for various war crimes and crimes against humanity,\(^{386}\) including using financial and military means in order to obtain illegal access to Sierra Leone’s mineral resources.\(^{387}\)

It is however the Congo conflict that challenged the manner in which natural resource exploitation during war is regulated in contemporary humanitarian law. As demonstrated earlier, the major actors in Congo’s natural resource space were not only state armies but included non-state conflict actors off the field of combat such as multinational companies, businessmen, private agents, arms brokers, armed groups and politicians.\(^{388}\) The activities of these groups were trans-boundary, and defied the territorial limitations imposed by the Congolese state. Owing to this reality of a complex war economy that was based on resource exploitation activities, the United Nations Security Council appointed Panel of Experts on the Illegal


\(^{384}\) For instance, the Report of the Panel of Experts (UN Doc. S/2001/357) had been published on 12 April 2001 and its Addendum (UN Doc. S/2001/1072 was published on 13 November 2001.

\(^{385}\) Available at [http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3Dand](http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3Dand) accessed on 13 February 2011.

\(^{386}\) See Case No SCSL 03 The Prosecutor Against Charles Ghankay Taylor 7 Mach 2003, and Case No SCSL 03 -02-01 The Prosecutor Against Foday Saybana Sankoh 7 March 2003.

\(^{387}\) Indictment, The Prosecutor against Charles Ghankay Taylor para 20.

\(^{388}\) These issues were the subject of Chapter Two.
Exploitation of Natural Resources and other Wealth of the Congo adopted its own terminology to correctly capture the scope, nature and extent of these activities that occurred during the war. The term “illegal exploitation of natural resources” was preferred to define the various irregular resource exploitation activities by state and non-state conflict actors as well as by private and public entities.

In terms of the Panel of Experts Report, the “illegality” aspect was clear from the fact that the activities violated the sovereignty of the Congo government and were in defiance of existing regulatory frameworks in areas they were carried out. Further, it noted, the activities were done in violation of widely accepted business practises and ethics in Congo or in contravention of international law, including soft law. The definition of “illegality” was hotly contested by Rwanda and Uganda who argued, among other things, that such a definition did not take into account the fact that the overall control of Congolese territory was at some point during the conflict exercised jointly with other armed rebel groups and these were the legitimate authority in such areas.

Despite the contestations surrounding the use and application of the term ‘illegal exploitation of resources’ the majority of international references to the economic appropriation of Congo’s resources during the conflict have embraced the term. For

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390 In light of the very broad meaning of ‘sovereignty’ the Panel chose to restrict the meaning in this case to the carrying out of economic exploitation activities “without the consent of the legitimate government” of Congo.
393 See UN Doc S/PV. 4317. This allegation had merit. The 2002 Lusaka Agreement acknowledged this loose division of state administration functions between the Congo government and armed rebels as party to the negotiations. See Lusaka Ceasefire Agreement, “Annex A” Chapter 6.
395 See also I Samset ‘Conflict of interest or interests’ in conflict? Diamonds and war in the DRC’ 93/94 Review of African Political Economy 463, 466, contending that, “(t)he main problem of this (definition of illegality) is that economic activities regarded as ‘legal’ may contribute to fuelling war as much as ‘illegal’ activities do. What matters for analyzing the continuation of war is hence not primarily an activity’s lawfulness, but whether it has helped to keep the war going or not. Focusing on ‘illegal’ activities only blurs a clear understanding of why war is sustained.”
instance, the International Court of Justice in the "Armed Activities Case (DRC v Uganda)" finds no difficulties in embracing the term, using it interchangeably with "plunder" and "looting". Another international organ, the African Commission on Human and People's Rights dealing with a communication received from Congo against Rwanda, Burundi and Uganda also applied the term "illegal exploitation of resources" as synonymous with looting. In light of all this widespread and extensive acceptance of the term "illegal natural resource exploitation" to describe acts traditionally characterised as plunder, pillage or looting, it would appear that a more broader view has been taken to appropriately capture the true nature of modern forms of economic exploitation during armed conflicts.

The term illegal exploitation was further defined in a progeny of the Congo conflict, namely the Protocol against the Illegal Exploitation of Natural Resources signed at the International Conference on the Great Lakes Region. It defined "illegal exploitation" to include "any exploration, development, acquisition, and disposition of natural resources that is contrary to law, custom, practice, or principle of permanent sovereignty over natural resources, as well as the provisions of this Protocol."

The following section investigates the contemporary legal framework in order to determine its nature, strengths and weaknesses against illegal exploitation of resources during armed conflict.

3.2.2 General International Humanitarian Law Framework

3.2.2.1 Sources

As a species of public international law, the major sources of international humanitarian law are not different from those of international law expressed in

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397 Armed Activities (DRC) case para 232 – 243.
398 Communication 227/99 DRC/Burundi, Rwanda and Uganda para 94.
400 Article 1 (under "definitions").
section 38 (1) (a) – (c) of the Statute of the International Court of Justice. These therefore include multilateral treaties, custom, judicial decisions and general principles of law recognised by civilised nations. International judicial practice has been to resort to and apply these sources in the hierarchical order dictated in international law. It is however important to note that a large volume of contemporary international humanitarian law has attained the force of customary international law through widespread usage and global recognition.

Since the dawn of the nineteenth century, particularly following the American Civil War of 1863, more and more treaties and conventions were adopted to regulate the conduct of hostilities, the means and methods of waging war and the protection of specific categories of persons and property during armed conflict. The more comprehensive treaties thus span the past three centuries and most of these have consequently solidified into customary international humanitarian law. In addition, customary humanitarian law has also been derived from an analysis of national practises, military manuals, national legislation and case law, practise of international organisations and also the practise of international judicial and quasi-judicial bodies. Thus in addition to the more recent treaties, customary usages have proved to be one of the major sources of contemporary humanitarian law. These two sources have been extensively complemented and developed by national and international judicial tribunals that have interpreted international humanitarian law on

401 The statute is available at http://www.icj-cij.org/documents/index.php?p1=4andp2=2andp3=0 accessed on 12 June 2010. Section 38 (1) states that:
1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
   b. international custom, as evidence of a general practice accepted as law;
   c. the general principles of law recognized by civilized nations;
   d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

402 Most scholars do not take issue with the hierarchy of sources as expressed in Article 38. See for instance I Brownlie Principles of International Law 7th ed (2008) 5. Though endorsing the order as probably defensible, the author goes on to argue, correctly, that it is unwise to seek to follow that hierarchy “in all cases.”

403 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 172 para. 89 highlighting this position.

404 See J Henckaerts and L Doswald-Beck (eds) Customary international humanitarian law Vol II xxiii – xxv using these sources to produce a comprehensive text on customary international humanitarian law.
various occasions.\textsuperscript{405} Whilst all these sources provide a definitively large corpus of international humanitarian law, this research will be limited to analysis of only the relevant sources whose provisions address illegal exploitation of natural resources during armed conflict.

\textbf{3.2.2.2 Scope and Application}

By reason of its specific application during armed conflict, international humanitarian law would clearly be the most appropriate to regulate the access, exploitation and use of natural resources in occupied territories during a state of war. For convenience, humanitarian law has traditionally been categorised into two major branches, namely Hague law and Geneva law.\textsuperscript{406} Hague law is founded upon the 1899 and 1907 Hague Conventions such as the Hague Convention with Respect to the Laws and Customs of War on Land, with annexed Regulations. With time, these earliest conventions have been extensively supplemented by various conventions aimed at banning and restricting the use of certain weapons such as ammunition,\textsuperscript{407} biological weapons,\textsuperscript{408} anti-personnel mines\textsuperscript{409} and other means and methods of warfare. Geneva law is composed of the four Geneva Conventions of 1949\textsuperscript{410} as well as two 1977 Additional Protocols to the Geneva Conventions.\textsuperscript{411} Hague law has been conservatively categorised as regulating the means and methods of combat in

\textsuperscript{405} Examples include the decisions of the Nuremberg International Military Tribunal and the Tokyo International Military Tribunals of 1946. See \textit{Law Reports of Trial of War Criminals Selected by the United Nations Commission on War Crimes} Vol. 1 to Vol 15.

\textsuperscript{406} See F Kalshoven and L Zegveld \textit{Constraints on the waging of war} 4\textsuperscript{th} ed 19.

\textsuperscript{407} For instance, the St Petersburg Declaration, adopted at the instigation of Tsar Nicholas II of Russia, banned the so called ‘dum dum’ bullet and the use of exploding projectiles of less than 400 grams.

\textsuperscript{408} The examples here include the 1925 Geneva Protocol prohibiting the use of asphyxiating, poisonous or other gases and bacteriological methods of warfare and the 1972 Convention on Biological Weapons and the 1993 Convention on Chemical Weapons.

\textsuperscript{409} This is covered by the 1997 Ottawa Convention on the Prohibition of the use, stockpiling, production and transfer of anti-personnel mines and on their destruction.

\textsuperscript{410} Namely the 1\textsuperscript{st} Geneva Convention on the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the field, 12 August 1949, the 2nd Geneva Convention on the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at sea, the 3\textsuperscript{rd} Geneva Convention relative to the Treatment of Prisoners of War, 12 August 1949 and the 4\textsuperscript{th} Geneva Convention Relative to the Protection of Civilian Persons in time of War, 12 August 1949.

\textsuperscript{411} Namely the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), 8 June 1977 and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II) of 8 June 1977.
war, whilst Geneva law has been generally described as concerned with protecting “protected persons”, who are essentially victims of war or those persons not participating in the hostilities.

An important basis for understanding the legal regimes created by both sets of Conventions and the Protocols is that the set of humanitarian rules they contain were conceived of during an age when the principle of state sovereignty was of undisputed paramountcy in international law. During these early ages, humanitarian law was inevitably predicated on the assumption that only formal states were the subjects of international law and only these subjects could sign treaties and be bound by international obligations flowing from these. Being the affair of states, the object of humanitarian law was to regulate the military activities and operations of formal state armies during international conflicts, where only formal state armies were the lawful combatants. Thus the Hague law and, to a lesser extent, Geneva law provided little advice on regulation of other non-state conflict actors in the battlefield or the regulation of non-international armed conflicts. As a result, the scope of international humanitarian law, as represented by these two sets of Conventions, was rather narrow and needed to be progressively developed to accommodate new and emerging forms of intra-state armed conflicts in contemporary society.

A consequential feature deriving from international humanitarian law’s original focus on states meant that it was only the duty of states to prosecute and punish their

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413 M Shaw International Law 5th ed 1065 on the diminishing importance of state sovereignty in contemporary times, particularly in relation to international human rights law.
415 Y Sandoz “Implementing international humanitarian law” in UNESCO International dimensions of humanitarian law (Dordrecht: Martinus Nijhoff, 1988) 259. Sandoz further notes that the system of international humanitarian law was devised for international conflicts, and cannot without difficulty, be switched over to non-international conflicts.
416 The Geneva Conventions Common Article 3 was the only global “constitution” for regulating internal armed conflicts. According to one author, the Geneva Conventions and earlier treaties were modeled after conventional warfare where regular armies confront each other along an equally distinguishable front line, and not for situations such as guerrilla warfare. See G Abi-Saab ‘Non-international armed conflicts’ in UNESCO International dimensions of humanitarian law (1988) 223.
armies for violations of the laws of war. Testimony to this is borne by virtually all treaties and conventions that sought to codify the laws of war, in as far as they oblige all “High Contracting Powers” party to the Conventions to respect, enforce and implement the concerned rules. The 1907 Hague Conventions, for instance, expressly state that the Regulations on the wars and customs of war “do not apply except between Contracting powers,” and when they do apply, shall be applicable “only if all the belligerents are parties to the Convention.”

After the Second World War, the emphasis on states and interstate conflicts diminished, albeit gradually. All four Geneva Conventions of 1949 signalled this break with tradition by attempting to extend its application to non-international armed conflicts. Given the fact that the Congo conflict commingled features of both international armed conflict and non-international armed conflict, it is necessary to examine the new jurisdictional regime.

The regulation of non-international armed conflicts was restricted to one Common Article 3 inserted in all Geneva Conventions, whose other provisions comprehensively and exclusively dealt with international armed conflicts.

In relation to non-international armed conflicts, common article 3 is relevant and provides as follows:

Art. 3. In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

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417 For instance, the 1907 Hague Convention respecting the Laws and Customs of War on Land provides in Article 1 that “(t)he Contracting Powers shall issue instructions to their armed land forces which shall be in conformity with the Regulations respecting the laws and customs of war on land, annexed to the present Convention.” Common Article 1 of the four Geneva Conventions provides that Article 1 provides (t)he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.

418 For instance, all the four Geneva Conventions of 12 August 1949 are addressed to states, with common Article 1 of the Geneva Conventions stipulating that “the High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances”.

419 See Article 1 of the 1899 and 1907 Hague Conventions, Article 1 of the four 1949 Geneva Conventions as well as Article 1 of Additional Protocol II.

(1) Persons taking no active part in the hostilities, including members of
armed forces who have laid down their arms and those placed hors de
combat by sickness, wounds, detention, or any other cause, shall in all
circumstances be treated humanely, without any adverse distinction founded
on race, colour, religion or faith, sex, birth or wealth, or any other similar
criteria. To this end, the following acts are and shall remain prohibited at any
time and in any place whatsoever with respect to the above-mentioned
persons:
(a) violence to life and person, in particular murder of all kinds, mutilation,
cruel treatment and torture;
(b) taking of hostages;
(c) outrages upon personal dignity, in particular humiliating and degrading
treatment;
(d) 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.
(2) The wounded and sick shall be collected and cared for.
An impartial humanitarian body, such as the International Committee of the
Red Cross, may offer its services to the Parties to the conflict.
The Parties to the conflict should further endeavour to bring into force, by
means of special agreements, all or part of the other provisions of the present
Convention.
The application of the preceding provisions shall not affect the legal status of
the Parties to the conflict. 421

The major observation to make regarding Common Article 3 is that it is a ground
breaking, though clearly tentative provision that extends the material scope of
humanitarian law beyond its traditional domain. 422 However, its limitations in scope
and application should not be missed. For the purposes of this research, it is
important to note that its list of breaches excludes plunder, pillage or any form of
economic or resource exploitation by parties to the conflict. In comparison to the
other detailed rules of warfare contained in all Geneva Conventions concerning
international conflicts, the article offers very little advice on the regulation of non-
international armed conflicts. 423 In particular, its list of prohibitions in non-

421 Article 3 Common to the four Geneva Conventions of 12 August 1949.
422 Common article 3 has been termed a “miniature convention” regulating non-international armed
conflicts within a legal regime aimed at regulating only international armed conflicts. See F Kalshoven
and L Zegveld Constraints on the Waging of War 4th ed 69.
423 In the Prosecutor v Tadic (Interlocutory Appeal, the ICTY explained(at para. 96) that “(t)he
dichotomy (between regimes of inter-state and intrastate conflicts) was clearly sovereignty-oriented
and reflected the traditional configuration of the international community, based on the coexistence of
international armed conflicts is too short, though not exhaustive. There is no doubt that violations and serious war crimes in these conflicts outnumber those in this list and are no different from serious violations in international armed conflicts. Abi-Saab laments these limitations of Common Article 3, observing that its general language "makes it highly non self-executing as a legal regulation (...), and leaves a wide margin for interpretation, hence controversy, as to the scope of protection it affords."  

Notwithstanding these flaws however, by extending the application of international humanitarian law to non-international armed conflicts, Common Article 3 set the stage for the future recognition and regulation of the activities of militias, armed rebels and other non-state armed groups during war. Common Article 3 thus established a skeletal structure that was eventually fleshed out by the 1977 Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-international Armed Conflicts (Additional Protocol II). Additional Protocol II applies to the classical civil war, being an armed conflict within a state party to the Protocol between its armed forces and dissident armed opposition groups in that territory. However, these armed groups should be "under responsible command," and be able to "exercise such control over a part of its territory as to enable it to carry out sustained and concerted military operations and to implement this Protocol." This sets a rather high threshold for the application of international humanitarian law, particularly in light of contemporary internal armed conflicts in Africa where armed rebel groups have proliferated without necessarily exercising territorial control or carrying out sustained and concerted military operations in any one area. These irregular militants have gone on to commit sovereign States more inclined to look after their own interests than community concerns or humanitarian demands".

424 The fact that the Article mentions that "each Party to the conflict shall be bound to apply, as a minimum" can be interpreted as meaning that the parties should consider applying the other general rules of warfare not included in this list.


426 Article 1 of Additional Protocol II.

427 Article 1 of Additional Protocol II.

428 Abi-Saab criticizes this aspect, arguing that the Protocol is modeled after conventional warfare and is thus difficult to apply in cases of guerrilla warfare based on surprise, mobility and camouflage. See
serious breaches condemned by the Protocol and the Geneva Conventions as a whole, despite failing to fit within the definition in the Protocol and falling short of the prerequisites in the Protocol.

At the outbreak of the Congo conflicts, Congo had not acceded to the 1899 or 1907 Hague Regulations. Congo is still not a signatory to the Hague Conventions. It is only bound by the Hague Conventions by virtue of the fact that they have attained the status of customary international law. As early as the time of the Nuremberg International Military Tribunal decision in 1946, the Hague Regulations had already been recognised as customary international law; the Tribunal declared that the rules in the Hague Conventions “were recognised by all civilised nations and were regarded as declaratory of the laws and customs of war.” This position was subsequently approved in Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, where the International Court of Justice reiterated that the provisions of the Hague Regulations have become part of customary law.

Congo however acceded to the Geneva Conventions in 1961, having deposited its notification of succession on 24 February 1961, albeit with effect from 30 June 1960. It is clear therefore that Congo became party to the Geneva Conventions by the principle of succession, which recognises a state’s capacity to succeed to the treaties adopted by a prior regime, such as the former colonial power.

In summary therefore, the scope of contemporary international humanitarian law is now broader than it was in the previous two centuries. It now covers within its ambit

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G Abi-Saab ‘Non-international armed conflicts’ in International dimensions of humanitarian law (1988) 223.

429 This is confirmed by the International Court of Justice in the Armed Activities (DRC) case para 217.

430 For the binding nature of customary international law, see generally I Brownlie Principles of International law 7th ed (2008) 6 – 9.


432 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 172 para. 89. Congo acceded to Additional Protocol I on 03/06/ 1982.


both interstate and intrastate armed conflict. It is further binding on all parties to such armed conflict, and this includes armed opposition groups, state armed forces, militias and dissident forces. Most importantly, it is binding on these parties to the conflict regardless of whether they or they have not signed or ratified the Hague Conventions, Geneva Conventions or the Additional Protocols.

3.2.3 Substantive Framework

3.2.3.1 Hague Law

As indicated above, the body of Hague law is founded upon the 1899 and 1907 Hague Conventions and Regulations adopted during the First Hague Peace Conference of 1899 and the Second Hague Peace Conference of 1907. The 1899 Conference, convened at the particular instance of Russia’s Tsar Nicholas II, led to the adoption of a number of Conventions and the Declarations on the laws and customs of war. The Second Hague Conference of 1907 led to the adoption of even more conventions, with some of these revising and replacing those of 1899. Of all the Hague Conventions however, the most important one was the 1907 Hague Conventions No IV respecting Laws and Customs of War on Land and its Annexed Regulations concerning the Laws and Customs of War on Land.

The major focus of Hague law is the regulation of the means and methods of war, mostly through listing certain conduct, means and methods as permitted, prohibited or limited. It should however be stated at the outset that the Hague Conventions represents a codification of customary law and usages of war until 1907; they are rather more “backward looking” and declaratory of existing international law. In essence however, all the Hague Conventions and Regulations expand, add upon

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435 The Second Hague Conference took the additional burden of revising and adding upon the Conventions adopted in 1899. For instance, the 1899 Hague Convention II with Respect to the Laws and Customs of War on Land was revised to become the 1907 Hague Convention IV with respect to the Laws and Customs of War on Land with its annexed Regulations. See RB Baxter ‘Duties of combatants and the conduct of hostilities (law of the Hague)’ in International Dimensions of humanitarian law 97.


437 This Convention was adopted on 18 October 1907 and has proved the foremost reflection of humanitarian law in 1907. See G Draper ‘The development of international humanitarian law’ in UNESCO International Dimensions of Humanitarian law 71.

438 D Schindler and J Toman The laws of armed conflict 941.
and integrate the provisions of earlier international humanitarian law instruments such as the 1863 St Petersburg Declaration.

Generally, the Hague Conventions rest on the fundamental pillars of international humanitarian law of that time such as the principles of restraint, military necessity, distinction and proportionality.\textsuperscript{439} In addition, the Conventions identify various persons ordinarily involved in war such as combatants and non-combatants,\textsuperscript{440} prisoners of war,\textsuperscript{441} spies,\textsuperscript{442} as well as relief personnel.\textsuperscript{443} They further delineate the nature of responsibilities and expectations that relate to each category of persons and the nature of conflict relations that should subsist among them. Apart from this, and most importantly, the Regulations identify a conflict situation known as belligerent occupation,\textsuperscript{444} or in other terms, military occupation.\textsuperscript{445} This conflict situation is critical in the examination of the law relating to the access, use and exploitation of natural resources as well as the appropriation of the property of public and private persons during military occupation.\textsuperscript{446} Related to the law on these issues are provisions on requisition,\textsuperscript{447} pillage\textsuperscript{448} and confiscation of private property.\textsuperscript{449}

In terms of rules regulating military occupation, the rights of an occupying power in relation to access and exploitation of existing natural resources differ from the rights

\textsuperscript{439} These principles are set out in the Regulations annexed to the Hague Convention respecting the laws and customs of war, 1907. For instance, Article 1 enshrines the principle of distinction between combatants and non-combatants, whilst Article 22 and Article 23 insist on restraint. Article 23(g) of the Regulations prohibits destruction or seizure of enemy property “unless imperatively demanded by the necessities of war”.
\textsuperscript{440} Article 1 of the Regulations annexed to the Hague Conventions Respecting the laws and customs of war, 1907.
\textsuperscript{441} Chapter II (Article 4 – Article 20) of the Regulations.
\textsuperscript{442} Chapter II (Article 29 -31) of the Regulations.
\textsuperscript{443} Article 15 of the Regulations.
\textsuperscript{444} Article 56 of the Regulations; see also E Benvenisti ‘The origins of the concept of belligerent occupation’ (2008) 26:3 Law and History Review 622.
\textsuperscript{446} See for instance an attempt to do this in ER Cummings ‘Oil resources in occupied Arab territories under the law of belligerent occupation’ (1974) 9 Journal of International Law and Economics 533.
\textsuperscript{447} Article 52 of the Regulations.
\textsuperscript{448} Article 28 of the Regulations.
\textsuperscript{449} Article 46 of the Regulations.
of non-occupying forces.\textsuperscript{450} The power of an occupying power is not however unlimited and an army in occupation is bound by the laws of war at all material times. The Hague Regulations expressly prohibit plunder and looting but permit limited and controlled requisition albeit only to the extent that it is proportional to the resources in the occupied territories.\textsuperscript{451} Article 5 of the Regulations further permits the army in occupation to seize all property of the state such as cash, funds, securities, stores, supplies, and all movable property that may be used for military purposes.

The overall scope and extent of the Hague Regulations was clearly enunciated by the Nuremberg Tribunal in the \textit{Krauch} case.\textsuperscript{452} The Tribunal declared that;

“The ... provisions of the Hague Regulations are broadly aimed at preserving the inviolability of property rights to both public and private property during military occupancy. They admit of exceptions of expropriation, use, and requisition, all of which are subject to well-defined limitations set forth in the articles. Where private individuals, including juristic persons, proceed to exploit the military occupancy by acquiring private property against the will and consent of the former owner, such action, not being expressly justified by any applicable provision of the Hague Regulations, is in violation of international law.”\textsuperscript{453}

A number of scholars have fleshed out the content of the Hague law and produced jurisprudence that has consequently become legal doctrine in this area. In terms of this legal doctrine, it has been argued that an occupying power’s relationship to natural resources occurring in the occupied area is that of a possessor, or a usufructuary in terms of the Hague Regulations.\textsuperscript{454} Gerson, for instance, points out that to this extent, the property interests that the Hague Regulations sought to

\textsuperscript{450} See generally E Benvesti ‘The origins of the concept of belligerent occupation’ (2008) 26:3 Law and History Review 622.
\textsuperscript{451} Article 52 of the Hague Regulations.
\textsuperscript{452} \textit{United States v. Krauch et al. (IG Farben)} 8 Trials of War Criminals 1.
\textsuperscript{453} \textit{United States v. Krauch et al. (IG Farben)} 8 Trials of War Criminals 44.
\textsuperscript{454} Article 55 of the Hague Regulations. See ER Cummings ‘Oil Resources in Occupied Arab Territories under the Law of Belligerent Occupation’ (1974) 9 Journal of International Law and Economics 592(describing this legal position); A Gerson ‘War, Conquered Territory, and Military Occupation in the Contemporary International Legal System’ (1977) 18 Harvard International Law Journal 525 (supporting the same view); E Benvesti ‘The origins of the concept of belligerent occupation’ (2008) 26:3 Law and History Review 622 (on the legal rights and responsibilities of an occupying power in occupied territories.)
protect were those of the ousted power, not of the occupying power.\textsuperscript{455} Exploitation of natural resources by the occupying power, he further argues, can only be carried out if that is necessary to ensure that the occupying forces and sources of supply are not adversely affected by the hostile acts of the conquered population.\textsuperscript{456}

Cummings, another scholar, argues that natural resources and property seized by an occupying power in occupied territories may not be exploited for commercial purposes or be shipped to the occupying state.\textsuperscript{457} In relation to export, Von Glahn points out that it is unlawful for the occupant to seize property and remove it beyond the borders of the occupied enemy territory.\textsuperscript{458} Regarding trading and commerce, Vasarhelyi observes that it is forbidden to remove from an occupied territory any private or public property to merge it into the proper economic life of the occupying state.\textsuperscript{459} A number of war crimes cases albeit in domestic courts have followed this reasoning, admitting that seizure of property during military occupation was permitted only for military purposes, not for trade and it did not matter whether such property belonged to the state or private persons.\textsuperscript{460}

It is important to state that of all these provisions of international humanitarian law illustrated above and that have solidified into customary international law are clearly binding on all state armies such as the armies of Congo, Rwanda,\textsuperscript{461} Uganda\textsuperscript{462} and Burundi.\textsuperscript{463} As demonstrated in the previous Chapter, the armies of these countries

\textsuperscript{455} A Gerson ‘War, Conquered Territory, and Military Occupation’ 538.
\textsuperscript{456} A Gerson ‘War, Conquered Territory and Military Occupation’ 540.
\textsuperscript{457} ER Cummings ‘Oil Resources in Occupied Arab Territories’ 583.
\textsuperscript{458} A Von Glahn The Occupation of Enemy Territory (1957) 188.
\textsuperscript{459} I Vasarhelyi Restitution in International Law (1964) 59. The author also confirms the views of other authors above in relation to occupation.
\textsuperscript{460} Grilli v Administration of State Railways 20 I.L.R 429, 430 (Court of Cassation, Italy, 1961). See also US v Weizsecker (Ministries Case) 14, Trials of War Criminals before the Nuremberg Military Tribunals 771 – 772, where the Tribunal stated that it was a violation of the Hague Regulations to ship machinery from occupied territories to the Reich, whether such property was taken from the state or private persons.
\textsuperscript{461} Rwanda is bound by the Hague Conventions by virtue of the customary international law status of the Conventions. Rwanda however acceded to the Geneva Conventions on 05 May 1964; see http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P accessed on 16 March 2013.
\textsuperscript{462} Uganda is bound by the Hague Conventions owing to their customary nature, while it acceded to the Geneva Conventions on 18 May 1964; see http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P accessed on 20 March 2013.
\textsuperscript{463} Burundi is a signatory to the Geneva Conventions (27/12/1971) whilst it is bound by the Hague Conventions customary international law regime; see http://www.icrc.org/ihl.nsf/Pays?ReadForm&c=BI accessed on 16 March 2013.
were actively involved in the exploitation of natural resources in areas they had seized from Congolese forces. However, it has been demonstrated that they entered into Congolese economic space not for the benefit of the local population or local economy but for self-enrichment and the economic well-being of their respective states. As the conflict unravelled and unfolded, their primary aim was to engage in the trading and trafficking of Congolese natural resources outside the framework of either Congolese law or any other applicable legal regimes.

Further, whilst their respective states continued to deny being in occupation of Congo territory, their armies proceeded to establish financial and economic systems that enabled the military elites to claim advantages associated with occupying forces. The position of the Rwandan and Ugandan armies was different from that of the armies of Zimbabwe, Namibia and Angola that controlled some parts of Congo upon seizing them from anti-Congolese armies but did not qualify to be occupying powers. It is however necessary to set out the rights and obligations of belligerent actors under the Geneva Law before assessing whether their conduct constitute a violation of international humanitarian law relating to natural resource exploitation during armed conflict.

3.2.3.2 The Law of Geneva

The fountain of “the law of Geneva” rests on the four Geneva Conventions adopted on 12 August 1949 that make provision for the sick and wounded on land and at sea, for the treatment of prisoners of war and the protection of civilians during armed conflict. In 1977, these four Conventions were supplemented by two prominent Additional Protocols to the Geneva Conventions, specifically aimed at the protection of victims of international armed conflicts and the other one for victims

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464 Namely the 1st Geneva Convention on the Amelioration of the condition of the Wounded and Sick in Armed Forces in the field, 12 August 1949.
466 The 3rd Geneva Convention relative to the Treatment of Prisoners of War, 12 August 1949.
468 The Additional Protocol to the Geneva Conventions of 12 August 1949 Relative to the Protection of Victims of International Armed Conflicts, 8 June 1977.
of non-international armed conflicts.\textsuperscript{469} With time, these instruments have been further supplemented by more comprehensive and specific conventions responding to the exigencies of modern warfare.\textsuperscript{470} It should be stated that the two Additional Protocols of 1977 add upon, expand and further develop rules and provisions contained in the Geneva Conventions.\textsuperscript{471} They further develop the rules and provisions of the 1899 and 1907 Hague Conventions and Regulations.

As with the Hague Regulations, the Geneva Conventions and Additional Protocols also contains fundamental rules, principles and concepts germane to the regulation of illegal natural resource exploitation during conflict. Firstly, all four Conventions and the Additional Protocol I hinge upon the concept of “protected persons” and “protected property”.\textsuperscript{472} Thus, a contravention of the prohibitions aimed at safeguarding the well-being of protected categories of persons and property constitutes either commission of “grave breaches” or other lesser criminal offences in terms of the Conventions and Additional Protocol 1.\textsuperscript{473} A point of note is however that violations against protected public or private property governed under Common Article 3 were not believed to constitute “grave breaches”.\textsuperscript{474} Both the text of Common Article 3 and Additional Protocol II was believed to lack a “grave breaches regime” as they apply exclusively to the regulation of non-international armed

\textsuperscript{469} The Additional Protocol to the Geneva Conventions Relative to the Protection of Victims of Non-international Armed Conflicts, 8 June 1977.

\textsuperscript{470} For instance the Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954.

\textsuperscript{471} For instance Additional Protocol 1 extends the scope to peoples fighting against colonial domination, alien occupation or racist regimes and regards such conflicts as international armed conflicts. See Article 1 (4) of Additional Protocol 1. See also Commentary on Additional Protocol 1 at http://www.icrc.org/ihl.nsf/INTRO/470?OpenDocument accessed on 3 May 2011.

\textsuperscript{472} All four conventions and the two protocols seek to protect a specifically identified group of persons and property such as civilians, the wounded and the sick, the shipwrecked, prisoners of war or private and public property. The list of protected property in the Civilian Convention, for instance, is found in Articles 18, 21, 22, 33 and 57.

\textsuperscript{473} Article 85 of Additional Protocol 1 is the “grave breaches regime”; it adds significantly to the Conventions’ grave breaches regime, see for this reasoning, F Kalshoven and L Zegveld Constraints on the waging of war 4\textsuperscript{th} ed (2001)146.

\textsuperscript{474} There is no mention of grave breaches in both Common Article 3 and Additional Protocol II. Violations against protected property in these instruments invite penal prosecutions. See for instance Article 6 of the Additional Protocol II. Common Article 3 calls upon State Parties to ensure the observance of the rules in it as “a minimum threshold” when prosecuting for violations of its provisions. See the Tadic Case No. IT-94-1-AR72 para 102 and the Nicaragua case para 218.
conflicts. Judicial development of the law in this area has however cleared the uncertainty, with the Tadic (Interlocutory Appeal) case declaring that serious violations of international humanitarian law constitutes commission of war crimes that attracts individual criminal liability.

The Geneva Conventions and Additional Protocol I largely depend for enforcement on the “grave breaches” regime created by specific provisions in each of the four Conventions and Additional Protocol I. The ICTY in the Tadic Case (jurisdiction), has declared that the grave breaches regime in the Conventions establishes two things; it imposes a duty upon states parties to prosecute or extradite for the breaches whilst on the other hand, also creating a universal mandatory criminal jurisdiction among contracting states.

It is important to note that, with the exception of the Prisoners of War Convention, the grave breaches regimes of all the other Geneva Conventions are couched in more or less the same terminology. In relation to property, these other

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475 Scholars are agreed that Common Article 3 and Additional Protocol II lack a grave breaches regime. See for instance L Zegveld The Accountability of armed opposition groups in international law (2002) 103. See also WA Schabas ‘Punishment of non-state actors in non-international armed conflict’ (2003) 26 Fordham International Law Journal 907, 917. See also Prosecutor v Tadic Case No. IT-94-1-AR72, (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995), (hereafter, Tadic Interlocutory Appeal) para. 98. The ICTY in this case pointed out (para 81) that violations against persons and property protected by the four Geneva Conventions can only constitute grave breaches “only to the extent that they are caught up in international armed conflict.” See however the contrasting views of the United States in its Submissions of the Government of USA Concerning Certain Arguments Made by Counsel for the Accused in the Case of the Prosecutor of the Tribunal v Dusko Tadic available at http://www.state.gov/documents/organization/65825.pdf accessed on 28 February 2011.

476 Tadic Interlocutory Appeal paras 94 – 137. The ICTY explores the development of humanitarian law applicable in internal armed conflicts, effectively rejecting the traditional belief that in such conflicts, committing serious violations does not invite individual criminal liability, or did not constitute a violation of the grave breaches regime. For a commentary, see MP Scharf ‘The Prosecutor v Dusko Tadic: An appraisal of the first international war crimes trial since Nuremberg’ (1996 – 1997) 60 Albany Law Review 861.

477 Article 50 of the Wounded and Sick in the Field Convention, Article 51 of the Wounded, Sick and the Shipwrecked Convention, Article 130 of the Prisoners of War Convention and Article 147 of the Civilian Convention. Article 85 of Additional Protocol I further expands, develops and supplements the “grave breaches regime” established by the four Geneva Conventions.

478 Prosecutor v Tadic Case No. IT-94-1-AR72, para. 79. It should be noted that both the Geneva Conventions and the Additional Protocols avoid the use of the term ‘war crimes’.

479 For instance, all the Conventions grave breaches regime are phrased in more or less of the following words “Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or
Conventions prohibit the “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”

Finally, these three Geneva Conventions specifically prohibit appropriation of property. This is done in the grave breaches provisions of Article 50 of the Sick and Wounded in the Field Convention, Article 51 of the Sick, Wounded and Shipwrecked at Sea Convention and Article 147 of the Civilian Convention. These provisions prohibit the “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”

It has been conclusively argued that natural resources of a state involved in an armed conflict fall under the general definition and regulation of property rights in the Geneva Conventions and Additional Protocols. Accordingly, the rights and responsibilities of parties to a conflict fall to be determined under the relevant sections of these Conventions. Such rights and obligations differ depending on whether the army is an occupying power or not.

In tandem with the Hague Regulations, the Civilian Convention recognises the institution of military occupation, and seeks to regulate an occupying power’s exercise of military, legal and serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly”.

This phrase is adopted in virtually all the “grave breaches” sections of three Conventions, with the exception of the Prisoners of War Convention.

The ICRC Commentary explains that, to appropriate property as contemplated in the Civilian Convention, the enemy country must have it in its power by being in occupation of the territory where it is situated. See http://www.icrc.org/ihl.nsf/COM/380-600169?OpenDocument accessed on 14 April 2011.

Article 33 prohibits reprisals against property of protected persons in occupied territories; Article 53 prohibits destruction of public or private property unless absolutely necessary for military operations and Article 55 limits the right of requisitioning foodstuffs. Article 147 makes the extensive appropriation or destruction of property not justified by military necessity and carried out wantonly and unlawfully a “grave breach.”

This legal doctrine is supported by a number of prominent writers identified above (para 3.2.3) See further RD Langenkamp and RJ Zedalis ‘What happens to the Iraq oil? Thoughts on some significant, unexamined international legal questions regarding occupation of oil fields’ (2003) 14:3 European Journal of International Law 417, 421; G Dietze ‘The disregard of property in international law’ (1961 – 1962) 56 Northwest University Law Review 87, 96 – 104.

R Dufresne ‘Reflections and extrapolations on the ICJ’s approach to illegal natural resources exploitation in the Armed Activities Case’ (2008) 40 International Law and Politics 171, 202, explaining that “armed forces that merely secure the enclaves and transportation routes necessary for resource exploitation to take place arguably would not qualify as occupiers, which prevents them from claiming the legal capacity to preside over lawful resource exploitation”.

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administrative powers in such state of affairs. The Geneva Conventions recognise what is called *bellum occupatio*, generally known as belligerent occupation, which Gerson defines as the stage that follows the invasion stage, where a successful army establishes effective control of conquered territory and assumes quasi-governmental and administrative functions. It is during this phase of conflict, he says, that the Geneva Conventions rules on military occupation apply and not before. This therefore implies that the scope and ambit of the laws regulating belligerent occupation are limited to the post invasion stage. This is problematic in that, as illustrated in Chapter 2, the problems of irregular access, exploitation and appropriation of natural resources were witnessed during the anti-Mobutu invasion by the Kabila led AFDL forces in mid-1996. It was that control, exploitation and application of Congo’s vast mineral resources by Kabila during his march to Kinshasa that enabled him to finance his military operations. The fact that international humanitarian law confines itself to regulating the access, use and exploitation of natural resources only during the period of military occupation, and not before, makes it least helpful to resolve issues of resource management in African conflicts.

Aside from this, it should be stated that as a direct response to the barbarity of war witnessed in the Second World War, the Geneva Conventions and more particularly the Additional Protocols would have been expected to clearly and comprehensively expand on the provisions of pillage and appropriation of property to take account of the “cunningly camouflaged” means and methods of economic exploitation exposed during the war. The Conventions failed to do so and stuck with the language of the Hague Conventions before them. The Nuremberg Tribunal did not see the need to expand these provisions, consequently rejecting arguments by the defence that the

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485 Section III Article 42 – Article 78 of the Civilian Convention.
487 A Gerson ‘War, conquered territory and military occupation in contemporary international legal system’ 529.
488 A Gerson ‘War, conquered territory and military occupation in contemporary international legal system’ 529.
489 See Chapter 2.
Hague Regulations’ prohibitions on economic warfare could be outmoded by modern warfare and thus difficult to apply.\textsuperscript{490} The Tribunal stated that although there are some areas of uncertainty in the laws of war, there was nothing doubtful about the illegal nature of various acts of plunder and spoliation against the property in areas under the military occupation of Nazi Germany.\textsuperscript{491} The commentary of the International Committee of the Red Cross on pillage supports this position, arguing that pillage envisaged in Article 33 of the Geneva Civilian Convention and the Additional Protocol II concerns not only unauthorised pillage carried out through individual acts, “... but also organized pillage, the effects of which are recounted in the histories of former wars”.\textsuperscript{492}

Despite the detailed rules and jurisprudence of international humanitarian law regulating the access, management and exploitation of natural resources \textit{pendente bello}, this did not inhibit what the 2010 Mapping Exercise Report observed as the commission of “the most serious violations of human rights and international humanitarian law”.\textsuperscript{493} The reasons for this may lie in the nature of the conflict actors canvassed in Chapter Two, particularly the extent to which such the behaviour, acts and conduct of these actors during armed conflict are constrained by international humanitarian law. It is in this light that it becomes necessary to investigate the rights, responsibilities and obligations of an important conflict actor in the Congo conflict, namely armed rebel groups.

\textbf{3.2.3.3 Armed Rebel Groups}

By virtue of being armed opposition groups and willing to be recognised as such, armed rebel groups should qualify as subjects of international law and thus possess international legal personality.\textsuperscript{494} This does not however explain why they should be

\textsuperscript{490} This argument was made and rejected by the Nuremberg Tribunal in \textit{The Carl Krauch} Case, 48.
\textsuperscript{491} \textit{The Carl Krauch} case, 48.
\textsuperscript{492} \url{http://www.icrc.org/ihl.nsf/COM/380-600038?OpenDocument} accessed on 28 February 2011. The ICRC also opines that pillage is prohibited both in territories of a Party to the conflict or in occupied territories.
\textsuperscript{494} See A Cassese \textit{International Law} (2005) Oxford, 125. See also S Sivakumaran \textit{Binding armed rebels} 55 (2006) \textit{International and Comparative Law Quarterly} 369 – 394. The author points out (at 374) that “an armed opposition group that possesses an organized military force, an authority
bound by international customary and conventional humanitarian rules they did not explicitly sign, ratify or consent to. It has been argued that armed opposition groups are bound by customary international law since these rules do not depend upon signature or ratification to have binding effect. This would mean that armed opposition groups are bound by customary international humanitarian law and if their members commit serious violations of the rules of warfare, they should be held responsible in international law for such violations. The other argument is based on the principle of “legislative jurisdiction” that gives a state the exclusive competence to legislate for all its nationals within its territory; these nationals might include individuals, ‘state collectivities’ and those ‘collectivities’ that could challenge the state in future. Thus if a state is party to an international instrument and is bound by international law as a consequence, all its subjects are also bound without having to ratify the particular conventions at all. This means that armed opposition are bound by such international rules that would bind the state they are challenging.

Be that as it may, contemporary practise of international bodies, specifically organs of the United Nations such as the Security Council, illustrates that armed opposition groups are bearers of rights and responsibilities in international law. The current position is therefore that armed rebel groups are bound by international law in terms of the “legislative jurisdiction” concept, and where they have reached certain levels of mere banditry must have international legal personality.”

See L Zegveld Accountability of armed opposition groups 30. See also S Sivakumaran Binding armed rebels, 373 where the author considers that customary international law binds all entities that have personality under international law.

This position was affirmed by the Security Council through its various resolutions aimed at finding an appropriate accountability mechanism to address atrocities in the Former Yugoslavia. These resolutions include Security Council Resolution 764 (1992) and 771 (1992), as well as Reports of the Secretary General to the United Nations S/24657 and S/25274.

George Abi-Saab ‘Non-international armed conflicts’ in UNESCO International dimensions of humanitarian law (1988), 231. For a different view, see L Zegveld Accountability of armed opposition groups 26 – 32. The author’s view seems to be that it is not yet settled law that armed opposition groups are automatically bound by all rules of multilateral international humanitarian law treaties that they have not signed, ratified or consented to. His point seems to be that international law is developing in that direction.


organisational thresholds, demonstrate stability and effective control of territory. In armed conflict, they are legitimate parties to the conflict if they take part in it and as a result, are necessarily obliged to respect and act in compliance with international humanitarian law. It could therefore be asserted that all armed opposition groups that took part in the Congo conflict were subject to international humanitarian law, and should be made accountable if their conduct led to the serious violations of the rules of this legal regime.

It should however be noted that it is the individual members of armed rebel groups that become accountable for violations. Under international criminal law, liability is personal and not based on group membership and thus contemporary international criminal law does not regard the armed rebel organisation as a criminal organisation, or criminalize membership in such organisations per se. This remains so even if the collective group engaged in criminal behaviour throughout the period of the armed conflict. The statutes of the ad hoc criminal tribunals rejected group criminal liability, preferring to focus on “natural persons” and not on any other legal persons. This in itself is a departure from the Nuremberg Military Tribunal which was empowered to “declare that the group or organization of which the individual was a member was a criminal organization”.

States practise in respect of this subject however differs as states usually criminalise armed opposition groups that seek the overthrow of a sitting government by force. A practical example is Congo itself; in terms of the Congolese military law, membership in armed rebel organisations is a criminal offence. The military code further

500 See Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General (2005) para 172. The Report proceeded to hold the Justice and Equality Movement (JEM) and the Sudan Liberation Movement/Army (SLM/A) rebels accountable for violations of international humanitarian law.

501 See the reasons proffered by L Zegveld Accountability of armed opposition groups 55.

502 Article 6 of the ICTY statute and Article 5 of the ICTR statute limited the personal jurisdictional competence of each respective tribunal to natural persons. Article 1 of the statute of the Special Court restricts the competence of the tribunal to persons who bear the greatest responsibility” for international crimes.

503 Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (‘the London Agreement’) of August 8, 1945.

504 Article 136 – 139 of the Military Criminal Code.
criminalises “acts of armed rebellion”\textsuperscript{505} whilst some specific provisions of the ordinary criminal code recognises the offence of membership in armed rebel groups.\textsuperscript{506}

An interesting question is what rights in international law, if any, does armed rebel groups have to existing natural resources in conflict zones. Generally, answering this question demands an international law definition of \textit{ownership}. Such definition does not exist; the Nuremberg Military tribunal applied domestic property laws in determining whether Nazi officials had committed pillage in areas under their control during the Second World War.\textsuperscript{507} Ever since these cases, it would seem that the question as to who owns natural resources is left to domestic law, particularly in the area of mineral resources.\textsuperscript{508} In essence, this means that the outbreak of war does not make all immovable and movable property \textit{res nullius}; legal rights to property of the state and private individuals are not merely stripped off because there is a state of conflict. A state of war, it can thus be observed, freezes the \textit{status quo} in relation to property rights.

A further question relates to the definition of property itself. There is great need to fully explore whether natural resources can be encompassed within the normative framework of private property or public property, or property of \textit{sui generis} character, as far as international humanitarian law is concerned. As highlighted above, international humanitarian law recognizes private property\textsuperscript{509} and public property,\textsuperscript{510} sometimes also referred to as ‘State property’, and both types of property can either

\textsuperscript{505} Articles 91 and 92 of the Code.
\textsuperscript{506} See Articles 206 – 208 of the ordinary criminal code. Congolese Military Criminal Code (Article 173) provides for the jurisdiction of military courts to war crimes which are defined as “offenses against the laws of the Republic committed during armed conflict that are not justified by the laws and customs of war.” Since the laws and customs of war do not recognize membership in rebel organisations as a war crime, Congolese military courts may lack jurisdiction in prosecution for membership in rebel organisation. See generally M W Koso \textit{DRC: Military Justice and Human rights; an urgent need to complete reforms} (2010) OSISA.
\textsuperscript{507} \textit{U.S. v. Krupp}, 9 \textit{Trials of War Criminals} 1461.
\textsuperscript{509} For instance, see Article 46 and Article 56 Hague IV Convention and Article 53 of the 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Times of War.
\textsuperscript{510} Article 55 of Hague IV Convention and Article 53 of Fourth Geneva Convention.
have the form of moveable property or immovable property. From these provisions of treaty law and commentaries on conventional and customary international humanitarian law, existing legal doctrine has developed that confirms that the definition of property in international humanitarian law covers natural resources such as mineral and oil resources, including that existing in conflict zones or contested territories.

Congo’s constitutional history has always given ownership of natural resources to the state and also the concomitant right to dispose natural resources under its ownership. This old position has been carried into the 2006 Congo constitution which, for instance, confirms the state’s ‘permanent sovereignty over Congolese soil, sub-soil, waters and forests as well as maritime and airspace’. The modalities of the management of the State’s domain mentioned in the preceding sentence are determined by law. Further, the Congo Mining Code states that ‘the deposits of mineral substances, including artificial deposits, underground water and geothermal deposits on surface or in the sub-soil or in water systems of the National Territory are the exclusive, inalienable and imprescriptible property of the State. However, the holders of mining or quarry exploitation rights acquire the ownership of the products for sale by virtue of their rights.’ In essence therefore, Congo legal system

514 Article 9 of the Constitution of the Democratic Republic of the Congo.
entrenches state ownership of natural resources and the concomitant right of the state to dispose and alienate such property according to its laws.

As with all other domestic legislation, these provisions are without doubt anticipated to apply during peace. They can also apply during armed conflict particularly during military occupation where the occupying power is obliged to administer the occupied territory in terms of existing law. Ultimately, the Congolese legal position in relation to property rights would apply in determining the violation by armed rebel groups of international law relating to natural resources in conflict zones.

In view of the above analysis, it can be argued that any purported exercise of the right of ownership by non state actors such as armed rebel groups without the legal authority or consent to do so by the state is therefore outside the parameters of Congo’s law, and is accordingly unlawful in international law. The exploitation of natural resources, which as shown above, are the property of the state thus violates these legal principles and constitute unlawful acts under international humanitarian law.

3.2.3.4 Private Corporations and the law

The commercial and corporate interactions between armed rebel groups and private corporate entities for the purposes of enhancing illegal natural resource exploitation necessitates a brief examination of the legal rules that regulate the conduct of corporate entities in conflict zones. Hasten to say that the major treaty frameworks that regulate the waging of war did not directly anticipate the involvement of private corporate entities in the waging of war. Since their rules essentially seek to regulate

516 See Article 43 of the Hague Regulations which obliges the occupying authority to ensure and maintain “public order and safety, while respecting, unless absolutely prevented, the laws in force in the country”.

the means and methods of warfare and the protection of certain categories of persons and property during armed conflict, their focus was primarily state actors or those parties to the conflict that could qualify as belligerents during armed conflict. The multinational corporation is definitely not a state actor and thus has no competence to sign and ratify treaties, or become party to them as required by both the Hague and the Geneva Conventions. Further, the multinational corporation cannot qualify as a belligerent, and thus cannot be a party to armed conflict.

However corporations are not excluded from the ambit of international law applicable to host states. In most jurisdictions, corporations are legal subjects of host states and are thus bound by the domestic laws of that state, and such laws include those treaties that have been incorporated as part of the domestic legal arsenal of the host state. Treaties and conventions signed and ratified by the host state and incorporated into the domestic laws of such states directly bind and address corporations to the extent that the provisions in these treaties relate to the operations and activities of such corporations.

518 All the Hague and Geneva Conventions, as well as subsequent Protocols and international instruments recognize only the competence of state parties in their signature and ratification. See for instance Article 1 of the Hague Regulations, Common Article 1 of the Geneva Conventions and Additional Protocol 1.

519 Article 1 of the Hague Regulations stipulates criteria for belligerents that should be bound by “the laws, rights and duties of war”. Multinational corporations do not fit the description stipulated herein, even after adopting the most liberal interpretation of this Article.

520 The constitutions of some states specifically provide that treaties that are ratified automatically become part and parcel of that state’s law. On the other hand, other systems require ‘domestication’ of that treaty after ratification and this is usually by way of passing the treaty as a statute in that state, or incorporating its provisions in legislation, see I Brownlie Principles of Public International law 7th ed (2008) 31 – 34, highlighting the distinction between the monist and dualist states. In a dualist system, the domestic and international legal systems are two distinct legal areas. A ‘domestication’ of the contents of the treaty by a law is necessary for its incorporation into the domestic legal system. In contrast, in a monist system, the legal system does not perceive a distinction between domestic and international law, and therefore ratified treaties are directly incorporated into the domestic legal system without the need for any law of ‘domestication’. Congo falls in the monist category.

A number of important provisions exist in conventional international humanitarian law that apply to the economic regulation of the activities of multinational corporations during conflict. Under Hague law, private property is protected from confiscation, and the occupying power is under an obligation to administer the affairs of occupied land in accordance with existing laws and regulations. Article 43 of the Hague Regulations has been specifically interpreted to mean that an occupying power should not “allow an occupied territory to fester in a state of economic, social and political retardation created by the conflict from which occupation has resulted.” The injunction on the occupying power to restore public order and safety of civilian persons and civilian entities is however not absolute; it has been argued that the injunction is limited by the security needs of the occupant and the need for reconstruction or reformation.

These provisions are supplemented by Article 64 of the Fourth Geneva Convention, which stipulates that the “penal laws” of occupied lands shall remain in force, and the administrative justice apparatus should continue to function. It further states that the occupying power can take certain measures necessary to maintain orderly government and ensure its own security. This position makes it clear that during armed conflict, the occupying power is legally empowered to enforce certain measures that can impact on the activities of multinational corporations. The question that arises is what should happen if these entities deliberately fail to comply with any rules or existing laws during a period of conflict? Who should prosecute them and how?

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522 Article 46 of the Hague Regulations.
523 Article 43 provides “The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country” Article 55 of the Hague Regulations that stipulates that the occupying power shall act as an administrator and administer the property and estates under him in accordance with rules of usufruct. See also Article 2 and 3 of the Brussels Declaration of 1874, which contain similar provisions.
526 Although the Convention makes reference to penal laws, this is interpreted to refer to “the continuity of the legal system” and thus applies to the “whole of the law (civil law and penal law) in the occupied territory. See Commentary on the Fourth Geneva Convention, 335.
To answer this, it should firstly be noted that the Geneva Conventions necessarily require courts of law to continue functioning such that they would dispense justice when called to do so. The remnants of the Congo pre-war legal system, its institutions and administrative apparatus were thus responsible in the administration of justice in occupied areas. The fact that these institutions had collapsed and that there was a gap is not a defence to the culpable involvement of multinational corporations into the predatory Congolese war economy.

The case of *DRC v Uganda* (fully discussed below) provides some rough guide as to the fate of law breaking persons and private entities in occupied zones. In the judgment, the ICJ stated that an occupying power has the duty of vigilance to prevent criminal actions by private commercial entities, and that this duty entails an “obligation to take appropriate measures to prevent the looting, plundering and exploitation of natural resources in the occupied territory” by private persons in such occupied areas and not only by members of its military forces. Pronouncing on Uganda’s international liability, the Court held that such a failure by the occupying power to prevent the illegal traffic in natural resources through activities by its army and private persons renders it internationally responsible “for violating its obligation of vigilance in regard to these acts and for failing to comply with its obligations under Article 43 of the Hague Regulations of 1907 as an occupying Power in Ituri in respect of all acts of looting, plundering and exploitation of natural resources in the occupied territory”.

It is clear therefore that the occupying powers have a duty under international humanitarian law to take measures against corporations for acts of looting, plundering and trafficking of existing natural resources where such acts take place in

527 Article 64 recognises “the necessity for ensuring the effective administration of justice” and requires an occupying power to permit the continued functioning of courts and tribunals. To give effect to this provision, Article III of the Allied Control Council Law No. 10, 1945 provided that “Each occupying authority within its zone of occupation, shall have the right to cause persons within such zone suspected of having committed a crime, including those charged with crime by one of the United Nations, to be arrested ... (and) the right to cause all persons so arrested and charged . . . to be brought to trial before an appropriate tribunal ...”.
528 *Case concerning Armed Activities on the territory of the Congo (DRC v Uganda)* No. 116 of December 2005.
529 See the *Armed activities (DRC v Uganda)* case para 248.
530 *Armed activities (DRC v Uganda)* case para 250.
occupied territories.  

In areas that are not under occupation, corporations are expected to adhere to existing rules and regulations in their operations. However, mere breach of these laws might not immediately constitute serious breaches of international humanitarian law. The prosecution of multinational corporations for these minor breaches would be guided by local laws and regulations, despite having been committed in times of armed conflict.

There is limited jurisprudence on the criminal prosecution of private corporations, or corporate entities by occupying powers in areas under occupation for illegal natural resource exploitation activities. This is despite damning evidence illustrating the complicity of multinational corporations through deliberate facilitation and provision of the means and methods for illegal natural resource exploitation to either state or non-state actors not only for corporate profit, but to finance the military objectives of such groups. In Congo, such complicity bordered on intentional participation with multinational corporations prepared to take the risks of entering into convenient and beneficial relationships with state and non-state conflict actors with the full knowledge that their behaviour and commercial operations can foreseeably harm the integrity of social, political and economic institutions in areas affected by the conflict.


532 A number of cases before the Nuremberg Tribunal (cited below) clearly demonstrate this point. In one of the earliest cases on domestic criminal prosecution of corporations, *Anonymous Case* (No. 935), 88 Eng. Rep. 1518, 1518 (K.B. 1701), Lord Holt is quoted as stating that, “[a] corporation is not indictable, but the particular members of it are.” However, this case was not concerned with war crimes, or the errant behaviour of corporations during armed conflict. Accordingly, it is important as exemplification of state practise, which has been followed by various other countries besides the United Kingdom. See VS Khanna ‘Corporate criminal liability: What purpose does it serve?’ (1996) 109 *Harvard Law Review* 1477 – 1479.

533 A few cases for plunder and economic spoliation before the Nuremberg Tribunal demonstrate this. These cases include the *Krupp* case, the *Flick* case and the *IG Farben* case. For instance, in the *Krupp* case, in respect of the participation of Krupp industries, the IMT considered that “illegal acts of spoliation and plunder were committed by, and in behalf of, the Krupp firm in the Netherlands on a large scale, and that particularly between about September, 1944, and the spring of 1945, certain industries of the Netherlands were exploited and plundered for the German war effort, ' in the most ruthless way, without consideration of the local economy, and in consequence of a deliberate design and policy”.

A major problem is that where the multinational corporation enters into partnerships with an occupying power, there is no policing mechanism to supervise and regulate the commercial-cum-corporate relationship. In terms of international humanitarian law doctrine, the exploitation of existing natural resources should benefit the local population and the profits should not be used to finance the conflict. Further, the profits obtained should be used to fund the costs of military occupation and not for self-enrichment or externalisation to a foreign country. The fact that there are no standing institutions to oversee the legitimacy of corporate partnerships, agreements and financial relationships with warring parties means this could happen and go unpunished.

The relationship between the armed rebel group RCD Goma and the coltan trading company, Societe Miniere Grands Lacs (SOMIGL) exemplifies these weaknesses of international humanitarian law mechanisms. SOMIGL accepted its monopoly status from RCD Goma and exercised dominant trading powers, allowing it to monopolise coltan trade in Kivu to the exclusion of all other trading companies. In turn, SOMIGL forged relationships with two other multinational companies, Cogecom and Cogear that allowed SOMIGL to sell coltan to these two companies. These two would proceed to export the coltan to European markets, thus concealing the nexus between the original acquisitions of the coltan to the armed conflict, or the illegal nature of most economic activities in Eastern Congo when it was under occupation by Rwanda backed RCD Goma. There were no mechanisms to regulate the corporate relationships of these corporations, their production and trading activities as well as the extent of their dependence on local rebel groups to carry out their exploitation activities. There were further no institutions to oversee the manner in which rebel groups utilised the profits from RCD Goma’s financial relationships with SOMIGL and other corporations in their conflict zones.

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535 JG Stewart Corporate war crimes (2010) 60, para 97, observing that “non-renewable resources can be exploited by an occupying army, provided that the money from these sales is spent exclusively on the humanitarian needs of the local population”.

536 JG Stewart Corporate war crimes (2010) 60.

3.3 Challenges of International Humanitarian Law in Regulating Economic Exploitation during Conflict

As with general international law, it is clear that the widespread violations of international humanitarian law rules are not solely due to the inadequacies of the treaty provisions but other external factors as well. Some of these constraints include lack of a willingness to respect the rules, lack of means to enforce them and the uncertainty that exists as to the application of such rules in certain circumstances. These external constraints militate against effective enforcement and implementation of international humanitarian law. In relation to the issues of natural resources exploitation during the Congo conflict, such enforcement would have been crucial in the regulation of the exploitation of Congo’s natural resource, from defining the parameters of access, determining the legitimacy of the participants and actors, vetting the market and supervising the export of primary commodities to the prosecution of offenders.

There is thus a need to explore only the major problems with international humanitarian law that seemed to negate successful regulation and management of natural resources during the Congo conflict. The major constraints were evident at the few international platforms convened for the resolution of the issue of illegal natural resource exploitation during the Congo war. Explored in this section therefore are the challenges and problems deriving from the state centric basis of international law, the institutional weaknesses within primary global enforcement agencies and limitations in regional legal regimes and peace processes as dispute and crisis resolution mechanisms.

3.3.1 The Problem of State Responsibility in International Humanitarian Law

At its evolution, the fulcrum of international law revolved around the primacy of the state as the foremost actor on the international sphere. Whilst the emphasis on the state is being gradually diluted, modern humanitarian law is still critically centred on the state and its responsibilities. This chapter explores the problems and challenges of state responsibility in the context of international humanitarian law.

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538 JM Haeckerts and L Doswald –Beck  *Customary international humanitarian law* Vol 1, Part 1(2005) xxv (enumerating the major reasons for lack of respect and implementation of international humanitarian law).

on the state as its ultimate subject, as a holder of international rights and obligations and with the legal capacity to conclude treaties with other states.\textsuperscript{540} As demonstrated above, the fundamental responsibilities and obligations contained in customary and codified international humanitarian law are thus inevitably directed at states.\textsuperscript{541} The result of this is that states have constantly sought, almost exclusively, to rely on the principle of state responsibility as a basis for their claims in international law, even in cases where those general rules of state responsibility are either difficult to apply or inapplicable.\textsuperscript{542}

According to the principle of state responsibility, the conduct of persons or a group of persons will be considered an act of the State if it is established that such persons or groups of persons were acting on behalf of that state.\textsuperscript{543} Thus state responsibility is engaged when an internationally wrongful act of a State, consisting of an action or omission, is attributable to the State under international law and also constitutes a breach of an international obligation of the State.\textsuperscript{544} It should be emphasized that state responsibility is invoked against both international \textit{delicts} and what may be termed international crimes.\textsuperscript{545} The International Law Commission’s \textit{Articles on State Responsibility} (2001) distinguishes between general internationally wrongful acts and omissions by states (delicts) from “serious breaches of obligations under peremptory norms of general international law”.\textsuperscript{546} The Commentary to the ILC Articles identifies serious breaches under this category as including aggression,

\textsuperscript{540} Starke’s \textit{International Law} 11\textsuperscript{th} ed (1994) 50.
\textsuperscript{541} Almost all the multilateral treaties, protocols and conventions in humanitarian law are directed at states or “the High Contracting Powers”, as it were. According to the ICRC Commentary, this refers “to the Parties in a strict sense, i.e., such Parties as have given their consent to be bound by those treaties through ratification, accession or notification of succession. Nevertheless, this rule also applies, like the Conventions and the Protocol, to a Party to a conflict which, without being bound by one of such methods, accepts and applies these treaties.” The Commentary is available at \url{http://www.icrc.org/ihl.nsf/COM/470-750002?OpenDocument} accessed on 11 April 2011.
\textsuperscript{542} In the \textit{Tadic} case, the ICTY noted this problem, stating that the criteria for determining the liability of armed groups in humanitarian law is different “from the standards laid down in general international law, that is in the law of state responsibility, for evaluating acts of individuals not having the status of State officials, but which are performed on behalf of a certain State.” See \textit{Tadic case} 94 -1 –A para 90.
\textsuperscript{543} Modern international law of state responsibility is reflected in the International Law Commission (“ILC”) \textit{Articles on State Responsibility}. Article 1 of the ILC Articles on State Responsibility (2001) states that “Every internationally wrongful act of a State entails the international responsibility of that State.”
\textsuperscript{544} Article 2 of the ILC Articles on State Responsibility.
\textsuperscript{545} M Shaw \textit{International law} (2010) 807.
\textsuperscript{546} Article 40 of the ILC Articles on State Responsibility, 2001.
torture, slavery, apartheid and colonial domination. The non-exhaustive list does not however include natural resource crimes during armed conflict, although the Commentary states that other serious transgressions of international humanitarian law may qualify.

A number of scholars have argued that the latter category of breaches constitute international crimes for which a doctrine of state criminal responsibility should develop. However, despite considering this avenue in its earlier Draft Articles on State Responsibility, the ILC subsequently abandoned the idea altogether in its final text. The result is that the Articles create a state responsibility regime based on acts and commissions as international delicts and for which redress is in the form of compensation, satisfaction, restitution and other civil remedies instead of any regime of criminal punishment against states.

The extent of the applicability of state responsibility during armed conflict in relation to acts of looting, plunder and natural resource exploitation demonstrates critical limitations of the concept. These limitations were exposed in the International Court of Justice judgment in the Case concerning Armed Activities in the Territory of the Congo (DRC v Uganda) delivered in 2005.

547 See Commentary on Draft Articles on State Responsibility in Yearbook of the International Law Commission, 2001 p. 113. The Commentary states that the list of these breaches is not exhaustive.
548 M Shaw International Law (2010) 807; K Marek “Criminalising state responsibility” (1978 – 1979) 14 RBDI 460. O Triffterer ‘Prosecution of States for Crimes of State”(1996) 67 Revue Internationale de Droit Penal 341; A Nollkaemper ‘Concurrence between individual responsibility and state responsibility in international law’ (2003) 52 International and Comparative Law Quarterly 615; G Gilbert ‘The criminal responsibility of states’ (1990) 39 ICLQ 345 and various other sources mentioned in these texts. Whilst some of the writers make a strong case for the creation of a regime of state criminal responsibility for breaches of peremptory norms of general international law, the majority are agreed that although such a concept may be “juridically possible,” it is extremely “problematic” or “impractical” in view of other contemporary developments in international law.
550 Other writers have advocated for such a regime, see for instance O Triffterer ‘Prosecution of states for crimes of state’ (1996) 67 Revue Internationale de Droit Penal 341 – 364.
3.3.1.1 The DRC v Uganda Case

Congo instituted legal proceedings against Burundi, Rwanda and Uganda, claiming that these were aggressor states responsible for a number of violations of international law, international human rights law and international humanitarian law in its territory during the Congo conflict. Rwanda did not consent to the jurisdiction of the International Court of Justice, and the application against it did not take off. Congo discontinued its proceedings against Burundi upon failing the same jurisdictional hurdle, but reserved its “right to invoke subsequently new grounds of jurisdiction of the Court.” These developments demonstrate a crucial weakness of the concept of state responsibility; its lack of compulsory jurisdiction in international judicial proceedings. States need only refuse to consent to the ICJ jurisdiction to freeze proceedings against them by other states and leaving wronged state parties with limited and usually ineffectual legal options to pursue.

Ultimately, Congo was left to pursue its action against Uganda only. Among the claims made by Congo was that Uganda had engaged in the illegal exploitation of Congo’s natural resources, by pillaging its assets and wealth and failing to take adequate measures to prevent the illegal exploitation of natural resources by persons under their jurisdiction. This, Congo alleged, Uganda managed to carry

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552 See Application instituting proceedings filed in the Registry of the Court on 23 June 1999 Armed Activities on the territory of the Congo, DRC v Burundi; the application is available at this website http://www.icj-cij.org/docket/files/115/7127.pdf?PHPSESSID=736079cd9925dea46dc3a461215e7644 accessed on 20 November 2010.
554 See Case Concerning Armed Activities on the territory of the Congo (New Application, 2002) DRC v Rwanda Jurisdiction of the Court and Admissibility of the Application, Judgment of 3 February 2006. The ICJ ruled (para 128) that it has no jurisdiction to entertain the Application filed by the Democratic Republic of the Congo.
556 Armed Activities (DRC) case para 222.
out in alliance with a number of armed rebel groups which it created, supported and sponsored.\textsuperscript{557}

Upon exploring the claims and assessing the evidence adduced, the International Court of Justice made important findings that it used to reach a decision. Firstly, it concluded that there was no ample credible evidence that suggested Uganda had created any armed rebel groups whose actions could engage its international responsibility. Uganda had thus not created the Movement for the Liberation of Congo rebel group, which Congo had claimed was a puppet of Uganda and which it used in the illegal exploitation of Congo’s natural resources.\textsuperscript{558} The ICJ held that, accordingly, in no way could the MLC be held to be Uganda’s “organ of state” which it said is one of the tests for proving state responsibility.\textsuperscript{559} On this issue, the Court further declared that although Uganda supported the MLC by giving training and military support, the actions and omissions of this rebel group could not be attributed to the acts and omissions of Uganda.\textsuperscript{560}

Secondly, the ICJ found no evidence that suggested that the illegal exploitation of Congo’s natural resources was Uganda’s official governmental policy, or that this was the reason for Uganda’s military aggression in Congo.\textsuperscript{561} However, an important finding by the Court was that there was evidence that Uganda’s UPDF army was involved in looting, plundering and exploitation of Congo’s natural resources during the conflict. Further, it made the finding that the Uganda military authorities did not take any measures to put an end to such misdeeds, thus violating its duty of vigilance in international law.\textsuperscript{562}

In light of these important findings, the ICJ held that “… Uganda is responsible both for the conduct of the UPDF as a whole and for the conduct of individual soldiers and officers of the UPDF in the DRC. The Court further recalls (...) that it is also irrelevant

\textsuperscript{557} Armed Activities (DRC) case para 223.
\textsuperscript{558} Armed Activities (DRC) case para 160.
\textsuperscript{559} Armed Activities (DRC) case para 160.
\textsuperscript{560} Armed Activities (DRC) case para 160.
\textsuperscript{561} Armed Activities (DRC) case para 242.
\textsuperscript{562} Armed Activities (DRC) case para 242.
for the purposes of attributing their conduct to Uganda whether UPDF officers and soldiers acted contrary to instructions given or exceeded their authority.\textsuperscript{563}

Having declared this rule of international law, the Court ruled that “... the acts and omissions of members of Uganda’s military forces in the DRC engage Uganda’s international responsibility in all circumstances, whether it was an occupying Power in particular regions or not. Thus, whenever members of the UPDF were involved in the looting, plundering and exploitation of natural resources in the territory of the DRC, they acted in violation of the \textit{jus in bello}, which prohibits the commission of such acts by a foreign army in the territory where it is present.”\textsuperscript{564} It should be emphasized that the Court did not confine Uganda’s responsibility for illegal exploitation activities in areas under its military occupation or those acts by its military officers alone; it firstly extended the responsibility to any area where such acts were committed by the UPDF and also declared that in areas under its occupation, even acts by private persons were attributed to Uganda.\textsuperscript{565}

Finally, the Court declared that where its army officers were not implicated in illegal activities, Uganda was not responsible for illegal natural resource exploitation activities of armed rebel groups outside the area under its occupation (i.e. Ituri).\textsuperscript{566} This finding was made in view of the fact that the Court had earlier ruled that there was no evidence suggesting that Uganda had created such groups, although it provided them with training and military support.\textsuperscript{567} The essence of this finding is however that Uganda was not responsible for the illegal exploitation of natural resources outside areas under its occupation, and thus had not violated the international law duty of vigilance in as far as these areas were concerned.\textsuperscript{568}

\begin{footnotes}
\item[563] Armed Activities (DRC) case para 243.
\item[564] Armed Activities (DRC) case para 245.
\item[565] Armed Activities (DRC) case para 248.
\item[566] Armed Activities (DRC) case para 247.
\item[567] Armed Activities (DRC) case para 160.
\item[568] Armed Activities (DRC) case para 247.
\end{footnotes}
3.3.1.2 Comment: DRC v Uganda

This landmark judgment, which dealt with various other issues, exposes the limits of relying on the principle of state responsibility as a response to acts of looting, plunder and economic exploitation that took place during the Congo conflict. Firstly, the judgment showed how the principle is only directed at state actions and omissions, and not at the activities of entities such as corporate entities and most importantly armed rebel groups. The activities of these other entities are subsumed by the activities of the responsible state; illegal actions of these entities are thus attributed to that state if they were carried out in areas where such state was the occupying power, and if it is proved that the occupying power failed to regulate or prevent such illegal activities from taking place.\(^{569}\) It is thus clear that exclusive reliance on the principle of state responsibility would shield these entities from international legal scrutiny and their possible prosecution or payment of reparations to the injured state.

Secondly, the principle of state responsibility is inapplicable to activities carried out by the mentioned non-state entities outside territories under military occupation. The principle can only be invoked where a particular state is responsible. Consequently, the concept is not able to respond to the illegal natural resource exploitation activities of those entities that engage in illegal behaviour beyond areas where any state had territorial control or occupation.

Thirdly, the principle is difficult to apply to cover illegal natural resource exploitation activities of rebel groups allied to the occupying power but operating outside the occupied area. For the conduct of armed rebel groups to be attributed to the acts of Uganda, the Court adopted, without question, the rather strict test in the *Nicaragua Case*.\(^{570}\) In that case, the ICJ set a high threshold,\(^{571}\) stating that even “preponderant or decisive” participation by an outside power in the “... financing, organizing, 

\(^{569}\text{Armed Activities (DRC) case para 248.}\)


\(^{571}\text{See Tadic case ICTY 94 – 1 – A (15 July 1999) paras 115 – 145. The ICTY held that in the Nicaragua case, the ICJ adopted too rigid criteria for state responsibility, and for that reason, considered the case to be unpersuasive and unconvincing.}\)
training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the contras in the course of their military or paramilitary operations in Nicaragua.”

In the *DRC v Uganda* case, the ICJ stuck to the high threshold, making no effort to distinguish between the two cases, nor any attempt to pursue the reasoning of later judgments that had argued for a lower threshold on state responsibility such as the *Tadic* judgment. In the *DRC v Uganda case*, the ICJ also applied the ILC Articles on State Responsibility, albeit without discussion, stating that there was no probative evidence that the MLC had acted “on the instructions of, or under the direction or control of” Uganda in carrying out any other allegedly illegal activities.

It is easy to see that only occupying powers run the greatest danger of shouldering responsibility for illegal natural resource exploitation and thus breaching their obligations in international law. In light of this unfortunate position, states would likely become more discreet by not exercising sufficient control that would make them occupying powers, and increasingly relying on friendly armed rebel groups they did not create and that they do not control to establish patterns of cooperation. This was what the armies of Uganda and Rwanda sought to do, and consequently succeeded to some extent to evade the responsibilities that came with being occupying powers. The judgment thus demonstrated a lack of response to these tactics, despite states’ knowledge of this common practise, acknowledged by the ICTY in the *Tadic* case when it observed that:

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572 *Military and Paramilitary Activities in and against Nicaragua* para 115.

573 In this case, the ICJ had adopted a purposive approach targeted at widening the responsibility net so that states do not easily escape from responsibility. The ICJ (at para 117) argued that “...States are not allowed on the one hand to act *de facto* through individuals and on the other to disassociate themselves from such conduct when these individuals breach international law.”

574 *DRC v Uganda case* para 160. The wording are from Article 8 of the Articles on State Responsibility, which provides that “(t)he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct”.

575 R Dufresne ‘Reflections and extrapolation on the ICJ’s approach to illegal natural resource exploitation in the *Armed Activities* case’ (2008) 40 *International Law and Politics* 171, 212.
“States have in practice accepted that belligerents may use paramilitary units and other irregulars in the conduct of hostilities only on the condition that those belligerents are prepared to take responsibility for any infringements committed by such forces. In order for irregulars to qualify as lawful combatants, it appears that international rules and State practice therefore require control over them by a Party to an international armed conflict and, by the same token, a relationship of dependence and allegiance of these irregulars vis-à-vis that Party to the conflict.”

This position of the international law of state responsibility, Dufresne argues, will consequently increase the likelihood of illegal natural resource exploitation activities by proxy or “independent” rebel groups and other networked private entities in unoccupied areas and no state will be held responsible for such irregular activities. The International Law Commission Articles of State Responsibility do not respond to this scenario either; they merely attribute conduct of armed rebel groups as the act of a state if that armed rebel group subsequently becomes the new government of the State, but is silent on what should happen if those armed rebel groups do not go on to become the new government.

In the DRC v Uganda case, Uganda’s international responsibility was pleaded because Uganda was held to be an occupying power in terms of international humanitarian law. For instance, the Court makes the conclusion that Uganda was the occupying Power in Ituri during the conflict and to that extent, was under an obligation to take all the measures in its power to maintain order in the occupied area as well as respect Congo laws in force in that area. The Court further stated that this obligation comprised the duty to secure respect for international law, including the applicable rules of international humanitarian law. It is thus immediately clear that state armies in the Congo conflict have a greater danger of being regarded as occupying powers and accordingly, could be responsible at international law for

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576 Tadic case ICTY 94 – 1 – A (15 July 1999) para 94.

577 R Dufresne ‘Reflections and Extrapolation’ 196. The author observes that the application of the duty of vigilance only in circumstances of military occupation “… may restrict international law’s ability to tackle the problem of illegal natural resource exploitation in conflicts where there is no occupation.”

578 Article 10 states that (t)he conduct of an insurrectional movement which becomes the new Government of a State shall be considered an act of that State under international law”.

579 Armed Activities (DRC) case para 178.

580 Armed Activities (DRC) case para 178.
illegal natural resource exploitation activities by other non-state entities in the occupied area.

There were various armed rebel groups whose control of territory was not sustained or permanent so as to amount to military occupation envisaged by the Hague Regulations. These groups nevertheless participated extensively in the illegal exploitation of Congo’s natural resources. International law bars these groups from participating in resource exploitation activities since the legal capacity to do so is only reserved to occupying powers by the Hague Regulations.  

The rationale for this is that the access to existing natural resources that is enjoyed by an occupying power is aimed at continuing orderly government; the exercise of that access and control of the resources of the country is for these purposes only as well as to meet the occupying forces’ own military needs. The activities of Congo’s armed rebels demonstrate that, seldom would militias and armed rebel groups participate in resource exploitation activities with the aim of applying existing resources to the social, economic and general well-being of provinces they dominate or subjugate. The fact that the concept of state responsibility provides no comprehensive remedy to activities of these entities which were so crucial in determining the course, nature and longevity of the conflict sums up the weaknesses of the state centric perspective of international humanitarian law in dealing with issues of unlawful natural resource exploitation during armed conflict.

3.3.2 Institutional Constraints

The United Nations Security Council (“the Security Council’) assumed an active role in attempting to diffuse the volatile situation created by the Congo conflict. Its direct involvement saw it enmeshed in the Congo conflict as early as 1999 before the signing of the Lusaka Peace Agreement by passing Resolution 1234 of 1999. As expected, it regarded the conflict as constituting “a threat to international peace,

582 This was the position of the United States: Department of State Memorandum of Law on Israel’s Right to Develop New Oil Fields in Sinai and the Gulf of Suez I.L.M Vol 16 No. 3 (May 1977) p. 733 - 753.
security and stability 583 in the Great Lakes Region, thereby justifying its involvement. The Resolution further called for a halt to hostilities, 584 the signing of a ceasefire agreement, 585 withdrawal of foreign forces 586 and non-interference in Congo’s internal affairs. 587 Since this Resolution, the Security Council has passed various other Resolutions on the situation in Congo with more condemnations and recommendations. As evidence of illegal exploitation of Congo’s natural resources began to emerge the Security Council took up this issue and included this subject in its later Resolutions, press statements, presidential statements and sessions.

The continually emerging evidence on illegal natural resource exploitation suggested that, in order to sufficiently inhibit illegal natural resource exploitation activities during the conflict, any enforcement agency needed to target not only state armies of Rwanda, Zimbabwe, Burundi, Uganda and Congo itself, but armed rebel groups and militias such as MLC, RCD, FLC, UPC and the Mai Mai whose international legal responsibilities are not clearly defined. Thus any action by an international enforcement agency such as the Security Council needed to contemplate compliance and monitoring systems that could be extended to the commercial and quasi-commercial activities of private capital or international and corporate entities. The structures and webs of these private local and international corporate entities were responsible for linking politico-military networks of exploitation to local businesses and multinational corporations. Further, enforcement recommendations from the Security Council necessarily needed to acknowledge the security and geopolitical challenges of the Great Lakes region. It has been shown previously how challenges of this nature in this region constantly make it inadequate to confine enforcement mechanisms only within the borders of Congo’s territory. 588

International supervision of points of exit needed to be supported by monitoring of

583 UN Security Council Resolution 1234 (1999) last paragraph of the preamble.
584 S/RES/1234 (1999) para. 3
entry points in neighbouring countries and end user states that provide a major international market for Congo’s primary products.

That Congo’s natural resources were illegally exploited and exported on large scale basis and outside the ambit of legal regulatory systems suggests that the enforcement framework contemplated by the Security Council struggled to guarantee solid enforcement in the above terms. An analysis of specific actions by the Security Council in respect of illegal exploitation of Congo’s natural resources illustrates the inherent constraints of this organ as an enforcement agency.

3.3.3. The Security Council, the Panel of Experts and Congo’s resource crisis

It should be noted that in view of the various international aspects raised by Congo’s illegal natural resource exploitation problem, a number of international institutions would have had jurisdiction to scrutinise the negative impacts of Congo’s resource theft and recommend deterrent actions. Some of the aspects of the Congo conflict impacted on international trade and commerce, human rights and international finance. Naturally, therefore, the international institutions and agencies in these fields would have moved to take preventive or corrective actions. In addition, or in lieu to taking corrective steps or tightening their supervisory responsibilities, these competent international institutions could have possibly adopted complementary measures to actions of other interventionist institutions. In contrast, however, only a few international agencies outside the United Nations system were able act, albeit with extremely limited success or impact to Congo’s resource exploitation problems.

589 Some of the international agencies that would have had jurisdiction are listed in the Final Report of Experts (UN Doc. S/2002/1146) and include the World Trade Organisation, GATT, SADC, Economic Commission for Africa and the World Customs Organisation. In another case, Congo argued its case before the 156th session of the International Civil Aviation Organisation in Montreal, Canada.

590 The Panel of Experts, for instance, provided tabular and graphical evidence on the international trade implications of illegal natural resource exploitation by Rwanda, Uganda and Burundi. For Uganda, see UN Doc. S/2001/357 paras 95 -98 Tables 1, Figure 1 and Table 2. For Rwanda, see Table 4, Figure 2, 3 and Figure 4.A.

591 A number of reports by the UN Secretary –General on the United Nations Organisation Mission in DRC (MONUC) have detailed the human rights abuses during the conflict. Between 1999 and 2010, the Secretary General had compiled thirty one such reports, focusing on a number of topical issues including human rights abuses. For the 2010 report, for instance, see http://www.un.org/ga/search/view_doc.asp?symbol=S/2010/164 accessed on 21 April 2011.

592 The possible role of the International Monetary Fund, the World Diamond Council and the World Bank was pointed by the Panel of Experts; see UN Doc. S/2001/1072 para 155 – 158.
Accordingly the various agencies of the United Nations found themselves burdened with the onerous roles of providing appropriate responses to Congo’s crisis. Consequently, these United Nations agencies sent out their delegations to conduct various fact finding missions in Congo. It would seem that once the Security Council became seized of the Congo crisis, other relevant agencies outside the UN effectively took backbencher seats even if they had the requisite technical expertise to provide better advice that could map and recommend the best way forward.

The first major step by the Security Council was to send a fact finding mission, the Panel of Experts on the Illegal Exploitation of Natural Resources and other forms of Wealth of the DRC, which produced detailed reports on Congo’s resource exploitation problems. In 2010, the United Nations Human Rights Office of the High Commissioner also produced a detailed Mapping Exercise Report detailing the sad tale of massive violations of human rights, international humanitarian law and international human rights law. These two bodies were also in addition to the United Nations Mission in the DRC (“MONUC”) which was established in terms of Security Council Resolution 1279 (1999). Whilst the significance of other UN documents on Congo is not doubted, it is submitted that the work of the Panel of Experts is important in the analysis of the possibility of international prosecution on the basis of responsibility for serious natural resource based war crimes.

The Panel of Experts was established by the Secretary General of the United Nations following a request to that effect by the Security Council. The Panel’s reports (see Chapter 2) made critical findings and recommendations, and appeared as if these preliminary moves would inevitably predicate and compel serious action


594 In June 2010, the Office of the High Commissioner for Human Rights produced a Mapping Exercise report documenting the most serious violations of human rights and international humanitarian law committed in Congo between 1993 and 2003. The contents of the Mapping Exercise Report have been discussed in detail in Chapter 2.


by the Security Council. Such action could include *pendente bello* indictments and possible criminal prosecution to put more pressure on identified individuals to halt their activities and push them to the peace negotiations table. The Panel of Experts had recommended these particular actions. For instance, paragraph 239 of its (S/2001/357) report provided that:

239. “The Panel recommends that the Security Council consider establishing an international mechanism that will investigate and prosecute individuals involved in criminal economic activities (…), companies and government officials whose economic and financial activities directly harm powerless people and weak economies”

In addition to this, the Panel recommended that the Security Council “consider establishing a permanent mechanism that would investigate the illicit trafficking of natural resources in armed conflicts so as to monitor the cases which are already subject to the investigation of other panels”. 597

There is no doubt that these two recommendations contemplated the creation of an international criminal institution to deal with identified perpetrators of illegal natural resource activities during the Congo conflict. This recommendation was obviously alive to the *Tadic* jurisdiction judgment that ruled that the Security Council is legally competent in terms of Article 41 of the UN Charter to establish an international criminal tribunal to try war crimes. 598 In addition, this recommendation may have been spurred by subsequent successful efforts of the Security Council in creation of international criminal tribunals for Rwanda, Sierra Leone, Yugoslavia and Cambodia. In relation to the second recommendation, the Panel of Experts probably contemplated a permanent international investigative agency that would have acted as a policing inspectorate targeting illicit traffic of primary materials in armed conflicts. Quite clearly, this suggestion clearly acknowledges, albeit implicitly, the recurrence of the problem of illegal natural resource exploitation in contemporary African conflicts and the continual emergence of similar exploitation patterns,

networks, tactics and perpetrators in each of these conflicts. Accordingly, the establishment of such a permanent investigative and policing mechanism would have bridged the existing gap and hopefully monitor the activities of notorious profit seeking predatory elements that have resurfaced in virtually all contemporary armed conflicts in Africa seen in the past two decades.

Contemporary analysis of Security Council actions may be more understandable if they firstly explore the national interests that were critical to its members and important in determining the route to take. Accordingly, various scholars have suggested that perhaps these national interests were paramount in the determination of the ultimate decisions to take regarding Congo’s illegal natural resource exploitation problem as well. That there were important national interests at stake and affecting the predeterminations of the permanent members is not without basis. The United States interests in Congo’s vast mineral wealth were not a secret, having begun during the Mobutu era and further exposed by a whistleblower in 2010. Among the list of natural resources critical to the US are cobalt mines in Congo. Nzongola-Ntalaja points out that the indifference of the United States to resource based aggression against Congo arises from its “parochial interests” that include maintaining access to these vast resources of Congo, selling arms and weapons of war and supporting Rwanda and Uganda to maintain that access.

The naked hypocrisy of the US, Nzongola-Ntalaja further observes, was further demonstrated by its continued giving of economic assistance to Rwanda and Uganda by way of US foreign aid and loans from the World Bank and the International Monetary Fund where US influence was pivotal in the ultimate decision

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599 See generally, L Juma ‘Shadow networks’ for a discussion on the interconnectedness and international nature of these networks. Juma makes the observation (at p.3) that the similarity of factors and actors that influence conflict phenomenon in Africa compels a presumption that these networks are also present in the war torn Great Lakes region.

600 G Nzongola Ntalaja The Congo from Leopold to Kabila 161.


603 G Nzongola-Ntalaja The Congo from Leopold to Kabila 233.
making processes.604 The actions of the US further demonstrated that it had little regard for the national feeling of the Congolese.605 Further, the United States was reported to have influenced the number and identity of multinational corporations from US implicated in resource exploitation by the Panel of Experts. Grignon observes that before the first Panel of Experts report was published, the US edited the first draft ‘to remove any mention of the role of the US government of firms in the conflict, in order to avoid embarrassing the US government”.606

During one of the Security Council session on Congo’s illegal natural resource exploitation problem, the US downplayed the issue and emphasized implementation of the Lusaka Peace Agreement as priority.607 The US representative, Mr Cunningham, who was also the Security Council President at the time stated that the most important ‘goal’ was implementing both the Lusaka Agreement and the Security Council resolutions and that it was the duty of the Congolese people to end criminal resource exploitation activities by building appropriate institutions to that effect.608

French interests were more political than economic although the economic interests were by no means minor.609 France wanted to assert its political influence in the Great Lakes region, where French was the lingua franca and most of the countries in the region have colonial links with France. Huliaras asserts that since the French failure to inhibit the Rwandan genocide in the mid 1990s, the French felt threatened by the increasing intervention of Britain and the US in this region and looked for any opportunity to reassert French dominance of Great Lakes politics and economic life.610 Although this remains a probable explanation,611 it is clear that the French

604 G Nzongola Ntalaja The Congo from Leopold to Kabila 234.
605 In one Security Council session (S/PV.417), the Congo representative exclaimed that “...We were outraged to hear that even yesterday Uganda was being praised by the Bretton Woods institutions when at the same time the report of the Panel of Experts, in paragraphs 187 to 190 (S/2001/357), shows how the systematic looting of Congolese resources has directly contributed to improving the balance of national accounts in that country and in Rwanda.”
607 UN Doc. S/PV.4317 (Resumption) 9 – 10.
608 UN Doc. S/PV.4317 (Resumption) 9 – 10.
involvement in Congo’s crisis went deeper than the moralistic cloak they came clothed in.

It is thus clear that international politics and economic considerations affected the nature of the solution to the problem of illegal natural resource exploitation in Congo. Francois Grignon questions the *bona fides* of the Security Council’s course of action after the publication of the reports, arguing that the Panel of Experts was no more than a pressure tool to put the governments of Zimbabwe, Rwanda and Uganda on the corner and force their withdrawal from Congo.\(^{612}\) The author further argues that the opening of the subject of illegal natural resource exploitation by France, United States and the United Kingdom was never transparent; it was an act of “hypocrisy” intended to apply pressure on Congolese actors whilst disguising the deep involvement of European and North American multinational corporations in natural resource exploitation.\(^{613}\) These claims are supported by the final reports of the Panel of Experts, for instance, that indicated that a number of European states identified as end user states or processing centres did not show a willingness to actively rein in the extra territorial unethical activities of their multinational companies. A major argument, for instance, advanced by some European states was that this issue should be tackled within the European Union’s trading policy; and that this policy might accommodate invitations to fight illegal traffic of Congo’s commodities albeit in ways that should not “hinder legitimate trade” in natural resources or “impose an excessive burden on countries participating in such trade”.\(^{614}\)

Amidst this background, the earliest actions of the Security Council was to condemn the criminal activities in various Resolutions\(^{615}\) with the intention of putting pressure on the governments of Rwanda, Zimbabwe, Uganda and Congo itself. The Panel of

\(^{611}\) For a critique of this theory, see JF Clark ‘Explaining Uganda’s intervention in Congo: Evidence and interpretations’ (2001) 39:2 *Journal of Modern African Studies* 261, 270. See also G Nzongola Ntalaja *The Congo From Leopold to Kabila* 162. The author quotes a French official stating that French interests in Zaire were long term and derived from Zaire’s “considerable natural resources.”


\(^{613}\) F Grignon “Economic Agendas” 69.

\(^{614}\) S/2002/1146 para 143.

Experts reports were discussed at various sessions of the Security Council, inviting debate between the aggressor countries and their opponents calling for their withdrawal from Congo. Once the political pressure aimed at foreign armies had been achieved and these armies began to gradually withdraw, the role of multinational companies continued to be ignored, despite revelations that they continued to be the link in the webs and chains of illegal exploitation that remained after departure of foreign armies.\(^{616}\) Regularly, the Security Council continued to pass a series of Resolutions condemning illegal exploitation of natural resources and calling on states to assist in the enforcement of the Resolutions.\(^{617}\) Ultimately the sum effect of these Resolutions was to widen and extend the mandate of MONUC\(^{618}\) and increase the scope and extent of its powers in relation to illegal exploitation of Congo’s natural resources.

The reluctance of the Security Council to assume a deeper role against multinational corporations demonstrates its limitations against international capital and its hypocrisy when such capital is domiciled in any country that is a member of the Security Council. The inaction is in sharp contrast to its actions against militias and armed rebel groups, whose involvement in illegal exploitation of Congo’s natural resources was also highly publicised. The most important action taken against these non-state armed actors was through Security Council Resolution 1493 (2003).

Among other issues, this Resolution called for an arms embargo against armed rebel groups involved in various breaches of humanitarian law, including illegal exploitation of Congo’s resources. To this effect, the Resolution demanded that,

> “all parties provide full access to MONUC military observers, including in ports, airports, airfields, military bases and border crossings, and requests the Secretary-General to deploy MONUC military observers in North and South Kivu and in Ituri

\(^{616}\) See UN Doc. S/2001/1146 para 150.

\(^{617}\) See for instance S/RES/1341 (2001) where the Security Council reaffirmed that it “… attaches the highest importance to the cessation of the illegal exploitation of natural resources” in Congo. Other Resolutions couched in the same terms included S/1376/2001, S/1457/2003, S/1499/2003 and S/1533/2004. The latter Resolution was more aggressive, giving MONUC (Article 3 and 4) sweeping powers of entry, inspection and seizure without prior notice on cargo carrying aircraft and carriage vehicles ad also ports, airports, airfields, military bases and border crossings.”

\(^{618}\) This was achieved through the following Resolutions, S/RES1341 (2001), S/RES1493 (2003) and S/RES1533 (2004) and S/RES1565 (2004).
and to report to the Security Council regularly on the position of the movements and armed groups and on information concerning arms supply and the presence of foreign military, especially by monitoring the use of landing strips in that region; \textsuperscript{619}

Further, the same Resolution also demanded that all states,

\begin{quote}
“take the necessary measures to prevent the direct or indirect supply, sale or transfer, from their territories or by their nationals, or using their flag vessels or aircraft, of arms and any related materiel, and the provision of any assistance, advice or training related to military activities, to all foreign and Congolese armed groups and militias operating in the territory of North and South Kivu and of Ituri, and to groups not party to the Global and All-inclusive agreement, in the Democratic Republic of the Congo.”\textsuperscript{620}
\end{quote}

Concerted efforts against armed rebel groups and militias were also continued through Security Council Resolution 1533 of 2004. This Resolution authorised MONUC to seize or collect arms and weapons identified after searches and inspections, and called upon all states to take appropriate action to end illegal natural resource exploitation of Congo’s natural resources.\textsuperscript{621} Various other Security Council Resolutions were passed condemning illegal natural resource exploitation activities by actors in the Congo war, and widening the powers of MONUC in response to these actions.\textsuperscript{622}

The onerous commitments placed upon MONUC by the Security Council seemed to suggest that only MONUC was better equipped to deal with this issue. The fact however is that, since its creation, MONUC suffered from serious human and financial resource constraints. Prunier notes that by 2001, MONUC had about 566 personnel (instead of the authorised 5,537) comprising of 26 soldiers, 111 local recruits (administrative and logistic) 205 expatriate UN civil servants and 218 military

\textsuperscript{619} Paragraph 19 of UN Security Council Resolution 1493 (2003).
\textsuperscript{620} See paragraph 20 of UN Security Council Resolution 1493 (2003).
\textsuperscript{621} See paragraph 4 and 7 of UN Security Council Resolution 1533 (2004), authorizing MONUC to undertake such operations and giving it additional powers to discharge its responsibilities.
\textsuperscript{622} Paragraph 5 of UN Security Council Resolution 1533 (2004).
observers. These numbers were grossly inadequate to handle and discharge the responsibilities across the vast expanse of Congo’s war fronts that extended beyond two million square miles. Implicitly acknowledging the incapacity of MONUC, other Security Council Resolutions turned to individual states, urging them to take action, possibly through governmental decisions, commissions of inquiry, courts martial, military manuals, laws and rules of engagement to combat illegal exploitation of natural resources. Generally, however, in post 2003 Resolutions, the Security Council effectively opted to be a back bencher in Congo’s economic exploitation crisis, opting to cede the front seat and give more enforcement and supervisory powers to MONUC while simultaneously ignoring MONUC’s fatal resource constraints and daunting challenges that it was facing in Congo.

It is clear from the above that apart from condemnation of illegal activities, the Security Council appeared to confine its role to achieving cessation of hostilities, rather than inhibiting certain violations of international humanitarian law. This is in tandem with its purposes of maintaining international peace and security in accordance with the United Nations Charter. In as far as illegal exploitation of resources of Congo is concerned, this organ only stepped in where these activities proved an obstacle to peace processes or led to the prolongation of armed conflict.

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623 G Prunier From Genocide to Continental War 249, using MONUC personnel figures and statistics to generally criticizing the early work of MONUC.
624 See E Roger ‘MONUC and the Challenges of peace implementation in the DRC’ 17 – 19 September 2003, ISS, Pretoria, available at http://reliefweb.int/sites/reliefweb.int/files/resources/9B50ED745B13CEEF2C1256DC100546026-iss-drc-19sep.pdf accessed on 09 March 2011. The writer reports (at para. 22) that “(e)nforcing the arms embargo instituted by the UN Security Council under resolution 1493(2003) is probably the most difficult task assigned to MONUC in sector 5, given its resources and the vastness and inaccessibility of the area”.
626 Peacekeeping, it has been argued, is very difficult in ethnic wars fought by loosely structured non state actors such as opportunistic rebel groups seeking profit from a war, see R Wedgwood ‘United Nations Peacekeeping and the Use of Force’ (2001) 5 Washington Journal of Law and Policy 69, 74.
In essence therefore, the Security Council has not done much in resolving Congo’s illegal natural resource exploitation crisis apart from blanket condemnations of violations of international humanitarian and human rights law. Adam Roberts castigates this stance, arguing that the emerging pattern in international humanitarian law is that a serious violation of established rules is followed by investigations or fact finding under UN auspices, then Security Council condemnation and calls for action, and then finally nothing happens.\textsuperscript{627} This evaluation is however rather harsh, especially considering that the Security Council is not an international policing or compliance mechanism that monitors violations of international humanitarian law by parties to conflicts.\textsuperscript{628} Considering the complex nature of the Congo conflict and the interconnectedness of the problematic issues that arose from it, there is little doubt that the Security Council bound to record limited success in tackling the problem of illegal natural resource exploitation through political means.

In view of the aforementioned challenges that faced the Security Council, it would seem that the only other alternative available to address economic agendas in the conflict was through the regional legal framework and the Congolese peace process.

\subsection*{3.3.4 Regional Politico-Legal Framework}

Congo is a member of the African Union (AU) and the Southern African Development Community (SADC), having joined these political and economic groupings in 1960 and 1997 respectively.\textsuperscript{629} Although the African Union has been able, at least in theory, to create a comprehensive regional human rights legal

\begin{footnotes}
\item[628] Enforcement tactics against armed rebel groups are fraught with difficulties, particularly in light of the fact that enforcement of humanitarian law has largely targeted states. For states in violation of humanitarian law, enforcement tactics by third states might include diplomatic pressure, retorsion or expulsion of diplomatic officials, public condemnation and denunciation as well as suspension of aid or imposition of sanctions. See A Roberts ‘The laws of war; problems of implementation in contemporary conflicts’ (1995 – 1996) 6 Duke Journal of Comparative and International Law 11.
\item[629] See the DRC country information on the African Union website http://www.au.int/en/member_states/countryprofiles accessed on 12 June 2011.
\end{footnotes}
regime, the same has not been achieved in the area of international humanitarian law. Thus, the spirit of cooperation, collective security and mutual assistance emphasized in the AU treaties has not led to collective efforts at regulating the conduct of armed conflicts on the continent. The AU’s Constitutive Act of 11 July 2000 is based on goals for peace, unity, economic cooperation and political development. In addition to this, the principles underlying the Constitutive Act are underlain by the same political and economic aspirations. Both the objectives and principles of the Constitutive Act are expressed in human rights and political language, clearly limiting their application in situations of armed conflict. There are however provisions that prohibit the use or threat of the use of force among member states and interference in the internal affairs of member states. However, the


631 Article 3 lists the objectives as
(b) Achieve greater unity and solidarity between the African counties and the peoples of Africa;
(b) Defend the sovereignty, territorial integrity and independence of its Member States;
(c) Accelerate the political and socio-economic integration of the continent;
(d) Promote and defend African common positions on issues of interest to the continent and its peoples;
(e) Encourage international cooperation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights;
(f) Promote peace, security, and stability on the continent;
(g) Promote democratic principles and institutions, popular participation and good governance;
(h) Promote and protect human and peoples’ rights in accordance with the African Charter on Human and Peoples’ Rights and other relevant human rights instruments;
(i) Establish the necessary conditions which enable the continent to play its rightful role in the global economy and in international negotiations;
(j) Promote sustainable development at the economic, social and cultural levels as well as the integration of African economies;
(k) Promote cooperation in all fields of human activity to raise the living standards of African peoples;
(l) Coordinate and harmonize policies between existing and future Regional Economic Communities for the gradual attainment of the objectives of the Union;
(m) Advance the development of the continent by promoting research in all fields, in particular in science and technology;
(n) Work with relevant international partners in the eradication of preventable diseases and the promotion of good health on the continent.

632 Article 4 (f) mentions as a principle “(t)he prohibition of the use of force or threat to use force among member states”.

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Constitutive Act is clear about the priorities of the AU; achievement of economic development, security and stability. An overall assessment of the AU’s legal framework can thus not miss these priorities and goals of the AU institutional and legal framework.  

There is no institutional framework specifically aimed at addressing issues arising during armed conflicts such as illegal natural resource exploitation, arms trading or illicit trafficking of primary commodities. With the African continent recording the highest incidents of resource funded armed conflicts since the turn of the millennium when the AU was established, it would have been expected that the AU would devise mechanisms and institutions to specifically respond to this. The high levels of predation that characterised the Congo conflict and the manner in which the natural resource exploitation based war economy thrived showed that the AU has no such response strategies. As a regional political institution in pursuit of strictly political and economic imperatives, the AU will constantly fail to be an appropriate institution to address the scourge of illegal natural resource exploitation during wars on the continent.

In comparison to the AU, the role of SADC has been more visible in Congo; its military intervention in defence of Kabila against Rwanda and Uganda was decisive. This is despite the fact that the SADC treaty is drafted in similar fashion as the AU Constitutive Act and with the SADC document prioritising socio-economic and political development and respect for human rights, rule of law and regional integration.

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633 Article 4(g) urges “non-interference by any member state in the internal affairs of another”.
634 See for instance CAA Packer and D Rukare “The New African Union and its Constitutive Act” (2002) 96 AJIL 365. The authors pointed at the formation of the AU that the importance of the Constitutive Act lay in its “symbolism” and as a signpost to “where Africa aspires to go.”
635 See for instance MR Rupiya ‘Zimbabwe’s Involvement in the Second Congo war’ in JF Clark (ed) African Stakes of the Congo War 95.
636 The SADC Treaty also contains a list of objectives (Article 5), principles (Article 4) and general undertakings of member states (Article 6). The SADC Treaty is available at http://www.sadc.int/index/browse/page/120#article4 accessed on 27 April 2011.
The need for stronger regional trade ties and links within SADC has to a larger extent determined the diplomacy of the bloc and its foreign policies. Thus other writers have explained that the rather speedy intervention of a group of SADC member states in the Congo can be explained from the desire to establish stronger trade and economic ties with Congo. Despite the *prima facie* good intentions of SADC member states that intervened, the SADC treaty nevertheless lacked provisions that would authorise them to address economic agendas during the Congo armed conflict. As a result, some intervening states such as Zimbabwe found themselves deeply involved in Congo’s natural resource exploitation activities outside the regulatory ambit of the SADC treaty. That their activities were outside the regulatory focus of the SADC treaty regime that authorised their intervention in the Congo conflict in the first instance illustrates the limitations of the SADC treaty in guarding against, and regulating unlawful economic behaviour of its intervening member states during armed conflicts.

A related development was an attempt within the Great Lakes region to tackle illegal natural resource exploitation activities in 2006. Owing to the widespread belief that the Congo conflict had a critical natural resources underbelly, the international community subsequently sponsored an International Conference on the Great Lakes in 2006 which ultimately led to the adoption of the Protocol against Illegal Exploitation of Natural Resources, 2006. Despite its background

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637 Joseph Kabila, the Congo President, commenting on the relationship with his allies within the SADC framework during the conflict stated that “(t)he relationship between the Democratic Republic of the Congo, Angola, Namibia and Zimbabwe in particular and the SADC region in general must be a good example of integration and southern African cooperation.” See UN Doc. S/PV.4317 (Resumption 1) 21.

638 See for instance M Nest ‘Ambitions, Profits and Loss: Zimbabwe’s Economic involvement in the DRC’ (2001) 100 *African Affairs* 469 – 490. The writer argues (at p.470) that Zimbabwe’s economic involvement in Congo “was a product of its historical experiences (Zimbabweans feeling that they had missed out on opportunities in Mozambique in the 1990s following their support of that government in its conflict with RENAMO) and general domestic economic decline (leading entrepreneurs to look to regional markets)....” For the same view, see also GN Ntalaja *The Congo from Leopold to Kabila* 239.

639 Zimbabwe however maintained the position that “the joint ventures and other operations of Zimbabwean companies in the Democratic Republic of the Congo are above board and are carried out under agreements with the Government of the Democratic Republic of the Congo and in compliance with the laws of that country.” See UN Doc. S/PV.4317 Resumption1) 21.


Further, despite being motivated by the resolve “to curb the illegal exploitation of natural resources in the Great Lakes Region and to take effective measures to prosecute and punish those responsible for such acts”, the Protocol is silent on the \textit{modus operandi} to achieve this end.\footnote{See last paragraph of the Preamble, where the states in the Great Lakes Region resolved “to put in place a legal framework to curb the illegal exploitation of natural resources in the Great Lakes Region and to take effective measures to prosecute and punish those responsible for such acts”.

\footnote{For instance Chapter II lists certain obligations of states and preventive measures and guidelines for states to follow in fighting illegal exploitation using domestic law.}

In essence therefore, the Protocol is a peace time document fundamentally directed at states and aimed at assisting national legal systems to establish relevant criminal laws that would safeguard natural resources.\footnote{For instance Chapter II lists certain obligations of states and preventive measures and guidelines for states to follow in fighting illegal exploitation using domestic law.} Although it is an offspring of the illegal exploitation of natural resources during Congo’s wars, the Protocol fails to provide any response mechanism to address the patterns of predation, corruption and illegal trafficking experienced during the conflict.

Apart from the general weakness of the substantive provisions, the Protocol also fails to create a regional policing mechanism to operate during peace and armed conflict, and act as an investigative agency in cases related to illegal exploitation of natural resources. It however promises the establishment of a regional mechanism aimed at “combating the illegal exploitation of natural resources” by instituting “accredited standards as regards natural resource exploitation and shall include provisions on certification of origin including labelling, monitoring, supervision,
verification and implementation, and as appropriate, capacity development and capacity building, with a view to ensuring the efficiency of such a mechanism. While such a mechanism might have proved vital, especially in guarding against illegal exploitation, trafficking and trading of natural resources during conflict, the noble commitments has never been put in practice.

It is thus inescapable to conclude that there is limited scope within African regional treaty based institutions to respond to specific challenges of armed conflict, particularly if such challenges have trans-boundary aspects and implications. The existing regional instruments consequently proved inadequate, or simply inappropriate in creating active institutional response mechanisms and appropriate regional legal regimes to address illegal exploitation and trafficking of natural resources from conflict zones.

3.3.5 The Congolese Peace Process

The Congolese Peace Process was a regional initiative and revolved around the Lusaka Ceasefire Agreement signed in August and September 1999 and facilitated by South Africa and Zambia. The major highlights of the Agreement were the call for immediate ceasefire, establishment of a Joint Military Commission to investigate post ceasefire violations, disarmament strategies against identified militias and armed rebel groups and also the withdrawal of foreign forces. Finally, the Agreement called for initiation of Congolese national dialogue and for this process to involve the major role players in Congo politics.

There are a number of important aspects of the Lusaka Agreement that impacted on illegal natural resource exploitation by all actors in Congo’s economic space. Firstly, the Agreement recognised the major rebel groups, RCD and MLC as well as their

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644 Article 11 of the Protocol.
646 Article 1 of the Lusaka Peace Agreement.
647 Article III paragraph 11b of the Lusaka Peace Agreement.
648 Provided in Chapter 9 of Annex “A” to the Ceasefire Agreement.
649 Provided in Chapter 4 of Annex “A” to the Ceasefire Agreement.
650 This is provided in Chapter 5 of Annex “A” the Ceasefire Agreement
backers, Rwanda and Uganda as parties\textsuperscript{651} to the Agreement. Burundi was not made party to the Agreement, which however recognised the governments of Congo, Angola, Zimbabwe and Namibia as parties. This means that these states were bound by the provisions of the Agreement and had to desist from violating commitments they entered into. This was important in that the Agreement committed the parties, for instance, to act against militias and foreign armed rebel groups.\textsuperscript{652} These groups included those fighting against the governments of Rwanda (ex- FAR and Interahamwe), Uganda (FDD, ADF and LRA) Angola (UNITA) and Sudan (WNBF, NALU and UNFRF II).\textsuperscript{653} As mentioned in the previous Chapter, these groups took advantage of the conflict situation to participate in various illegal activities in Congo including arms trade and attacks against foreign armies. Their behaviour had given Rwanda and Uganda added justification for continued military presence in Congo, thus maintaining a conflict situation which they used as a disguise to carry out illegal natural resource exploitation activities. Their expulsion or demilitarisation was thus indirectly important in the cessation of hostilities and in constricting both the space for, and limiting the number of actors carrying out illegal natural resource exploitation activities.

Nzongola-Ntalaja castigates the manner in which the Agreement accepted anti-Kabila rebel groups as parties to the Agreement with a seat at the table despite the same privilege not being extended to anti-Rwandese and anti-Ugandan rebel groups in Congo that had to be outlawed and disarmed.\textsuperscript{654} It was clear that the post Agreement period would enable Rwanda and Burundi to focus on maintaining their military positions in Congo and use this opportunity to exploit Congolese natural resources by proxy, using their rebel allies who were now in “official” control of mineral rich areas.\textsuperscript{655}

\begin{itemize}
\item \textsuperscript{651}Annex “C” to the Ceasefire Agreement defines ‘Parties’ as signatories to the Agreement.
\item \textsuperscript{652}See Article III paragraph 22 of the Lusaka Peace Agreement.
\item \textsuperscript{653}Chapter 9 of Annex “A” to the Ceasefire Agreement.
\item \textsuperscript{654}G Nzongola-Ntalaja The Congo From Leopold to Kabila 234.
\item \textsuperscript{655}For instance, Rwanda subsequently relied on subtle and systematic networks of natural resource exploitation facilitated by its grip on its puppet rebel groups such as RCD Goma and \textit{Armee nationale congolaise}. See UN Doc. S/2002/1146 para 16.
\end{itemize}
A second aspect of the Peace Agreement was its direct and indirect effect on the political and military position of the major protagonists in the Congo conflict. By recognizing the major armed rebel groups as a party to the conflict, the Agreement effectively legitimized their occupation of Congolese territory, their exercise of quasi-governmental administrative functions in areas under their occupation and most importantly their resource exploitation activities in areas they occupied. As noted by Grignon, the Agreement’s acknowledgment of the political existence of rebel groups at both regional and national levels “legalised the partition of the country into three distinct zones and enabled the rebels to legitimately claim that they both officially represented their part of the country and had the authority to administer and exploit their zone.”\(^656\) This position was without doubt counterproductive to efforts aimed at combating illegal exploitation of Congolese natural resources at the hands of these groups.

A disturbing aspect was that, nowhere in the Lusaka Peace Agreement were economic agendas of the conflict directly or indirectly acknowledged, or sought to be addressed. Neither did the Lusaka Agreement seek to target the influence of other non-combatant and non-state networks that were deeply involved in illegal natural resource exploitation. As the International Crisis Group observed, the agreement overlooked these other set of powerful individuals and networks that transcended state borders.\(^657\) It should however be noted that political settlements seldom accommodate non-political actors on the agenda of peace processes since such settlements are mainly negotiated by states or political parties for purposes of peace and stability.\(^658\) Bassiouni observes that a sad consequence of this is that in such processes, international criminal justice concerns are “bartered away for political

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\(^{656}\) F Grignon ‘Economic agendas in the Congolese peace process’ in M Nest et al The DRC 71.


\(^{658}\) The major reason for this lies in the inconclusive debate on how to balance various interests and demands of peace and justice in a post-conflict situation. This debate will be explored in detail in later chapters. For a general overview of this, see L Huyse ‘Justice after transition: On the choices successor elites make in dealing with the past’ (1995) 20:1 Law and Social Inquiry 51.
The Congo post-conflict settlement was no exception. In the pursuit for peace at all costs, the negotiators omitted to prioritise the need for criminal justice mechanisms against identified entities, individuals and networks involved in illegal natural resource exploitation activities.

It would seem that there had been no agreement among the major parties to the conflict that at the time of negotiating the Lusaka Peace Agreement, economic exploitation activities were an integral aspect of the war. As shown in the previous Chapter, the governments of Rwanda, Uganda and Zimbabwe had fiercely denied their possible economic motivations and agendas in the Congo conflict. This naturally meant that political negotiations in the peace processes steered away from dealing with this unsettling and contentious subject. To this extent, the Lusaka Peace Agreement could not directly address the illegal forms of economic exploitation during the conflict, seemingly relegating this issue to be dealt with in the Inter-Congolese Dialogue (“ICD”), pursuant to Chapter 5 of Annex “A” to the Lusaka Agreement. However, despite a number of mainly political power sharing agreements, the ICD itself proved an inappropriate forum to address the economic agendas of the Congo conflict. Thus throughout its summits, the ICD theoretically appeared to be mandated to address the issues of economic exploitation but in reality, the vague general commitments made by the parties in pursuant to the ICD’s resolutions were never implemented.

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660 It should however be admitted that, by 1999 when the Lusaka Peace Agreement was adopted, illegal natural resource exploitation activities might have been minimal and still to be investigated by any fact finding commissions.
661 The official versions of these denials were given by the representatives of these governments in the Security Council during its 4317th meeting. See UN Doc. S/PV.4317.
662 The Lusaka Peace Agreement has been heavily criticised, particularly in light of post Agreement events. One author, for instance, labeled the Agreement “a façade”. See G Prunier From genocide to continental war (2009) 226.
664 F Grignon ‘Economic Agendas in the Congolese Peace Process’ 63, 77 -78. The author (p77) comments that as with previous political agreements, the All Inclusive Agreement did not seriously intend to impact on patterns of illegal natural resource exploitation which continued unabated, or establish active monitoring and compliance systems to combat same.
665 For a detailed critique see International Crisis Group The Inter-Congolese Dialogue: Political Negotiations or Game of Bluff? 16 November 2001, available at http://www.crisisgroup.org/~/media/Files/africa/central-africa/dr-congo/The%20Inter-
3.4 Conclusion

This chapter took off to investigate the international humanitarian law framework that is applicable against illegal exploitation of natural resources during armed conflict. A brief historical context explored showed that, in ancient times, various forms of economic and natural resource exploitation were recognised as acceptable characteristics and consequences of war. The prohibitions on looting, plundering and pillage coincided with the earliest instruments aimed at constraining the conduct of hostilities in general. Throughout the analysis, it was shown that the corpus of international humanitarian law developed to have clear and comprehensive rules that sought to regulate the means and methods of warfare and that further sought to protect particular categories of persons and property during war. Most importantly, however, it has been argued that the fact that the enforcement mechanisms and institutional responses of international humanitarian law are often difficult to apply in complex multidimensional warfare such as the Congo conflict means that their weight, utility and value is diminished.

It was also argued that international humanitarian law has its own unique features that generally derive from its international law roots. Whilst there are a number of constraints to its enforcement as a result of this, it was observed that the greatest challenge that makes its enforcement difficult is its state centric praxis. Consequently, a strict emphasis on state based principles and concepts such as state responsibility limits its scope, particularly its applicability to non-state conflict actors and other international private entities that would have gained access to economic and natural resource spaces of conflict states.

In addition to obvious limitations in scope and substance of international humanitarian law, it was also demonstrated that the alternative enforcement mechanisms that are based on the UN Security Council prescriptions have their own inherent constraints. The major challenge identified in relation to UN Security Council approaches was the prioritisation of national interests in political decision making. In

Congolesi20Dialogue20Political20Negotiation20Game20Bluff.ashx accessed on 2 April 2011.
relation to the Congolese natural resource exploitation problem, it was shown how such international politicking critically determined and possibly undermined the course of action to take and the outcome of approaches aimed at tackling illegal natural resource exploitation activities of the Congo conflict.

From the arguments pursued in this chapter, it is not difficult to conclude that international humanitarian law faces an uphill task to respond to emerging and problematic phenomena that characterise contemporary armed conflicts in Africa, such as the issue of illegal natural resource exploitation. Despite the fact that its rules are comprehensive and time tested, their usefulness is always under spotlight in these complex conflicts distinguished by the various local, regional, state and non-state conflict actors and also “invisible” transnational criminal networks all connected by the desire to profit from war. The crippling enforcement shortcomings might provide the basis for supporting a paradigm shift from international humanitarian law responses to other more coercive international legal institutional regimes that could curtail, constrain and curb illegal natural resource exploitation activities during armed conflict.
CHAPTER FOUR: CONGO AND INTERNATIONAL CRIMINAL JUSTICE

4.1 Introduction

The serious institutional limitations of international humanitarian law provides necessary impetus to support the use of a more coercive legal regime that can comprehensively constrain conflict actors responsible for illegal natural resource exploitation in conflict zones. In view of the trans-boundary nature of these activities and collapsed domestic legal institutions in war zones, the preferred legal regime should necessarily be characterised by international legal jurisdictional power. Most importantly, this regime should strive to shape the behaviour of conflict actors implicated in unlawful and predatory economic practises, thus ultimately inhibiting conflict actors from engaging in unlawful natural resource exploitation activities during armed conflict.

It is asserted that a legal regime which possesses a sufficiently coercive international jurisdiction that could possibly constrain contemporary forms of unlawful natural resource exploitation is the international criminal law regime. The international criminal law normative system focuses, not on the state, but on individual perpetrators, thus prioritising individual criminal responsibility for serious international crimes.\footnote{Although the testimony for this new stance was in the mushrooming of international criminal tribunals after the Cold War, in reality, the Nuremberg Tribunal of 1945 charted this new course when it declared that, “crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced; see France et. al. v. Goering et al 22 IMT 411, 466 (International Military Tribunal 1946).} However, despite this important quality and also the fact that this legal regime meets a number of standards needed to attack illegal natural resource exploitation, there remains need for a sound basis for supporting the use of international criminal law for this purpose.

There has been a morass of scholarly opinions on the practical justifications for international criminal law in general, and its capacity to confront unlawful natural resource exploitation activities during armed conflict in particular. This Chapter establishes the particular justification for the use of international criminal law to respond to unlawful natural resource exploitation activities of armed rebel groups.
during armed conflict. It further reviews the debate on the capacity of international criminal justice to meet the expectations of conflict-torn societies that fall victim to serious violations committed in the context of conflicts centred upon the desire to control and exploit existing natural resources in conflict zones. In particular, the analysis will focus on the debate centred on the capacity of international criminal justice to contribute to post-conflict social repair and reconciliation, or address the role of multinational corporations and external states in unlawful natural resource exploitation activities.

The final segment of this Chapter explores the various issues that have emerged from Congo’s relationship with the International Criminal Court. This segment initially sketches the direction taken by international criminal justice in Congo before undertaking an analysis of relevant issues that have emerged from Congo’s association with the International Criminal Court, such as the impact of African politics and the Rome Statute state cooperation regime on the quest for international criminal justice against armed rebel groups in Congo.

4.2 International crime and punishment

Any theoretical basis for the use of international criminal law to confront any criminality should be based on the role and function of criminal punishment in international society. Such a basis should, for instance, highlight the purposes and goals of criminal punishment in society, and clarify whether such goals and purposes can be suited to responding to particular problematic phenomena. For instance, such a basis should respond to why criminal punishment for illegal natural resource exploitation activities during armed conflict may not be domesticated by any particular state, including the loci criminis.\textsuperscript{667} In addition, particular interests and values that the international criminal process is designed to protect whilst fighting such forms of criminality should be elucidated. For instance, can the need to prevent natural resources from unlawful exploitation activities during armed conflict be regarded as advancing particular interests and values of international criminal

justice? Can it be argued that the international community has an interest in illegal natural resource exploitation activities not occurring during armed conflict? Thus, any theoretical basis should elucidate the fundamental rationale for subjecting unlawful natural resource exploitation to the international criminal process. Responses to these questions will disclose whether the international criminal process can be justified because it criminalises illegal natural resource exploitation activities per se, or it attaches criminality to these activities merely because they are central in the commission of more abhorrent and offensive international crimes. As one author puts it, the essence of the justification should provide answers to two basic questions, firstly "(w)hy criminalize at all?", and secondly, "why criminalize internationally"?668

To start with, studies on the philosophy of criminal punishment have focussed on the domestic scene – the state, and not the international society.669 International criminal justice institutions and processes have accordingly followed the form and method of domestic criminal justice systems.670 Consequently the functions and objectives of the criminal process in both systems are essentially co-extensive.671 Further, the social basis for criminal punishment in domestic society has often been co-extended to the international arena.672 However, according to Bassiouni the “convergence of

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670 T Farer T Farer ‘Shaping agendas in civil wars: Can international criminal law help’ in in M Berdal and DM Malone (ed) Greed and Grievance: Economic Agendas in Civil Wars (2000), lamenting the problems that comes with extrapolating the social purposes of penal sanctions from the domestic plane to the international level.

671 See I Tallgren ‘The sensibility and sense of international criminal law’ (2002) 3 European Journal of International Law 561, 565 – 566, observing that “It generally seems to be taken for granted that whatever objectives and justifications work – or are supposed to work – on the national level should also, without any extra effort, cover the decisions and actions taken by states in concert.”

672 See T Farer ‘Shaping agendas in civil wars: Can international criminal law help’ in in M Berdal and DM Malone (ed) Greed and Grievance: Economic Agendas in Civil Wars (2000). The author states that “(b)elief about the potential efficacy of penal sanctions as vehicles for enforcing international law is a fairly straightforward extrapolation from the collective appreciation of law enforcement at the national level".
shared moral and social values” among domestic legal systems as a result of harmonisation of the major global legal systems means that international law significantly manifests the general aspirations of citizens in individual states.\footnote{ MC Bassiouni ‘Perspectives of international criminal justice’ (2010) 50:2 \textit{Virginia Journal of International Law} 269, 271.} This ultimately resolves the disparity between the purposes of criminal punishment in domestic and international society.

That said, a number of approaches have been used to explain the social function of criminal punishment in society, and these include the deontological and the consequentialist approach.\footnote{ See J Cockayne ‘Corporate criminal liability under international criminal law: three hidden truths’ (2008) 6 \textit{Journal of International Criminal Justice} 953. See also M Drumbl \textit{Atrocity, punishment and international law} (2007) 6; RA Duff \textit{Punishment, Communication and Community} (2003) Oxford University Press, 3. For a critique of the purposes of international criminal justice, see generally I Tallgren ‘The sensibility and sense of international criminal law’ (2002) 3 \textit{European Journal of International Law} 561, 565 – 566.} The deontological approach views the criminal system as a moral and ethical system that influences the morality of the social subject.\footnote{ J Cockayne ‘Corporate criminal liability under international criminal law: three hidden truths’ (2008) 6 \textit{Journal of International Criminal Justice} 953.} Under the deontological approach, the target is the values in a person and thus the overriding objective of the criminal process is to influence the attitudes, beliefs, behaviour and actions of social actors. This approach accordingly views the criminal process as a moral system that shapes and influences the behaviour of social actors. In relation to this research, the criminal process would be seen as critical in influencing and shaping the behaviour of conflict actors such as armed rebel groups in Congo’s natural resource spaces during conflict situations.

Another approach, consequentialism, justifies punishment “only if it brings some consequential good”\footnote{ RA Duff \textit{Punishment, Communication and Community} (2003) Oxford University Press, 3.} as one writer asserts, this approach “treats criminal law as a particular species of social regulation, designed to control specific forms of social behaviour because of their potentially and significantly problematic consequences.”\footnote{ J Cockayne ‘Corporate criminal liability under international criminal law: three hidden truths’ (2008) 6 \textit{Journal of International Criminal Justice} 953.} Under consequentialism, the criminal process is justified only if it has a “contingent or instrumental contribution to an independently identifiable
good”.

In terms of the consequentialist approach, criminal punishment can achieve a consequential good through deterrence, incapacitation and rehabilitation. This approach is forward looking since criminal punishment is aimed at positive future benefits, for instance, the eradication of unlawful natural resource exploitation activities in future conflicts or the incapacitation of conflict actors from engaging in such activities during conflict situations.

Criminal punishment has also been justified from a retributivist perspective; that punishment is justified only if it is deserved. Thus punishment is justified in terms of its “intrinsic justice as a response to crime.” Further, under this, retribution is the justifying purpose of a system of punishment. Applied to this research, criminal punishment against armed rebel groups will be justified by the sole reason that these groups committed the criminalised activities, and not on the basis of some particular benefit to society. The retribution approach might be too narrow a justification for criminal punishment of Congo’s armed rebel groups whose punishment might need to accomplish various objectives whilst serving a broader social purpose for Congolese local communities.

The jurisprudence of the ad hoc tribunals has been fundamentally guided by these theoretical justifications of criminal punishment. For instance, in *Prosecutor v Rutaganda*, the ICTR declared that upon conviction, the sanction imposed by the Tribunal “must be directed, on the one hand, at retribution of the said accused … and over and above that, on the other hand, at deterrence.” Further in *Prosecutor v Blagoje Simic et al*, the ICTY stated that the jurisprudence from the precedents guiding it “emphasises deterrence and retribution as the main general sentencing

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681 RA Duff *Punishment, communication and community* (2003) 19. The author proceeds to state (at 19 – 20) that under retributivism, “the justificatory relationship holds between present punishment and past crime, not between present punishment and future effects.”
683 Case No. ICTR 96-3, February 1999, para 456.
685 Case No IT-95-9 (ICTY, October 2003), para 1059.
factors”.

Other hybrid and mixed tribunals such as the Special Court of Sierra Leone and the Cambodia Chambers have also followed an essentially similar pathway. For instance, the Extra Ordinary Chambers in the Courts of Cambodia have emphasised the need for retribution as a major goal of criminal punishment.

The Special Court of Sierra Leone has taken the lead from the ICTY, stating that “deterrence and retribution” are the primary objectives. Apart from emphasizing particular justifications, the international tribunals have acknowledged the usefulness of other practical and theoretical justifications for the criminal process in legal jurisprudence. Whilst all these approaches might serve as a basis to justify criminal punishment in general, they neither provide the critical answer to why criminalise unlawful natural resource exploitation, nor respond to the question of why criminalise it internationally. The following part seeks to address these two questions, that is, why criminalise unlawful natural resource exploitation during armed conflict and why the use of international criminal law (as opposed to domestic criminal law) to address the illegal natural resource exploitation phenomenon.

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686 See para 1059. See also Prosecutor v. Babić, IT-03-72-S, ICTY, Trial Chamber, Sentencing Judgement, 29 June 2004, para. 45, stating that the “deterrent effect of punishment consists in discouraging the commission of similar crimes” and that the primary effect “is to turn the perpetrator away from future wrongdoing (special deterrence), but it is assumed that punishment will also have the effect of discouraging others from committing the same kind of crime under the Statute (general deterrence)”.


688 The Prosecutor v M Fofana and Kondewa Case No.SCSL-04-14-A (‘the CDF case’) para 532; see also The Prosecutor v Sessay, Kallon and Gbao Case No.SCSL-04-15-T para 13, opining that the “punishment of the offence must also adequately reflect the revulsion of the international community to such conduct, and denounce it as unacceptable”.


4.2.1 International criminal punishment and illegal natural resource exploitation

One of the bases for criminalizing illegal natural resource exploitation can be explained from a strictly international humanitarian law perspective. The fact that illegal natural resource exploitation targets essentially civilian property that cannot be categorised as *munitions de guerre* means such activities violate the fundamental rules of the laws of war. As elucidated in Chapter Two, the laws of war entrenched in the various conventions and international instruments target protection of civilians, casualties and victims of conflicts, prisoners of war and civilian property.\(^690\) In addition, this body of law seeks to regulate the means and methods of combat in war.\(^691\) Thus, illegal natural resource exploitation targets civilian, not military objects and further, cannot be regarded as a legitimate method of combat. That such activities constitute a violation of the laws of war that should be punished is therefore beyond doubt. International criminal law institutions exist as a direct response to such violations and the fact that international humanitarian law institutions cannot adequately respond to their commission. As observed by one writer, international criminal law ensures that the protections guaranteed under international humanitarian law are translated into practice and that potential offenders are made to pay the price for violations.\(^692\)

The need for punishment for illegal natural resource exploitation activities rises higher particularly in circumstances when the national economies of affected conflict states are critically reliant and dependent on existing natural resources. Congo exemplifies this situation, with its vast natural resource endowment constantly at the centre of conflict and thus failing to contribute to meaningful national economic development. As highlighted in Chapter Two, despite this huge economic worth, Congo was ranked among extremely impoverished and economically failed states.\(^693\) Whilst it is true, as shown in Chapter Two, that underdevelopment, poverty and

\(^690\) This is the substantive basis of the 1949 Geneva Conventions and their 1977 Additional Protocols.  
\(^691\) See the Hague Conventions and various weapons conventions thereafter.  
\(^693\) Chapter Two, para 2.1.1
economic malaise in Congo are not created by illegal natural resource exploitation alone, there is little doubt that the illegal exploitation of natural resources during Congo’s cyclical wars critically contributes to perpetuating a miserable under-development status quo. Enforcing the international humanitarian law protections through the criminal process could guarantee the safety and lawful beneficial exploitation of existing natural resources in conflict zones, thereby securing these vital natural resources for much needed economic development.

Further, for Congo the millions of lives lost in armed conflicts that ultimately revolve on economic profiteering and conflict entrepreneurship justifies the use of the most coercive international legal regime. Acknowledging these fundamental justifications, Bassiouni argues that, in such circumstances, international criminal justice

“… is a necessary step in the rehabilitation of failed states and the reconstruction of states devastated by conflict. It is the first stage toward rebuilding sustainable justice systems capable of delivering justice services to society and ensuring that the rule of law controls governance issues.”

It has further been argued that the criminalisation of illegal natural resource exploitation activities can be justified on the basis of the seriousness of the harm posed by such activities, and the extent to which such harm damages society. By this argument, the more serious and damaging the particular criminality is to society, the higher the need to address it through the criminal process. It has been shown that during the Congo war, illegal natural resource exploitation activities ceased to be perceived as mere ecological harms since they consequently evolved to become

694 The increasing practise of seeking to make war a business is in contrast to Kant’s argument that war and legitimate trade are mutually exclusive, see I Kant Towards perpetual peace in P Kleingeld (ed) Rethinking the Western Tradition (2006) 92. Kant writes that “It is the spirit of trade, which cannot co-exist with war”.


696 See for instance L May Crimes against Humanity: a normative account (2005) on the ‘harm principle’. This principle justifies the international criminalisation of certain crimes on the basis that such crimes are “public wrongs” that harm the political community. See however criticism of this approach M Renzo ‘A criticism of the international harm principle’ (2010) 4 Criminal Law and Philosophy 267.
serious sources for heinous war crimes and crimes against humanity. Eventually, it became inescapable that unlawful natural resource exploitation activities were central to the commission of unimaginable atrocities in Congo. The nexus between natural resource exploitation activities and continuation of armed conflict was apparent. For instance, the Mapping Exercise Report analysed three situations in which natural resource exploitation linked atrocities took place, namely (a) atrocities committed by parties to the conflict in the context of struggles to gain access to and control the richest areas of Congo, (b) atrocities committed by parties to the conflict during their long term occupation of economically rich areas in Congo, and (c) atrocities committed in conflicts funded and fuelled by the huge profits generated from unlawful natural resource exploitation activities. A consequence of this is that the protracted Congo war, saw a death toll of approximately three million people, with more than two-and-a-half million people being driven from their homes. The vicious macro and micro-conflicts, contested upon the motivation of controlling and exploiting existing natural resources, played a significant part in contributing to these damaging consequences. Criminalisation of illegal natural resource exploitation activities, it can be argued, could possibly influence the incidence of commission of such activities and reduce the high death tolls and consequently the general damage to Congo society.

The next issue to resolve is why internationalize the criminal process and remove it from the jurisdiction of the victim state. As made clear in Chapter Two, the enormity of the task that faced post-conflict justice Congo in view of the compromised judicial, legal and security institutions during the transitional phase spurred the move for internationalizing the necessary criminal process. Most frequently, the incapability and unavailability of domestic criminal justice systems in states experiencing conflict

697 F Megret ‘The problem of an international criminal law of the environment’ (2011) 36:2 Columbia Journal of Environmental Law 195, 209 (arguing that international criminal law is decidedly anthropocentric; where harm to human beings is direct and easy to prove, this human rights oriented regime is triggered).
The collapse of Congo’s social, legal, security and administrative institutions during the Congo war created a huge vacuum that needed to be filled. International criminal justice was necessary to plug the gap created from the collapsed and extremely compromised judicial and criminal justice systems, thus exerting considerable pressure on the implicated persons. This could directly

700 See discussion of Article 17 of the Rome Statute of the ICC in Chapter Five. Article 17 sets the criteria for admissibility of cases before the International Criminal Court. This provision enables assessment of the effectiveness of national criminal justice systems in prosecuting war crimes. The Rome Statute permits a test based on ‘unwilling’ and ‘unable’ preconditions to determine the preparedness and effectiveness of criminal justice systems in prosecuting international crimes. Thus, if a state manifests an unwillingness or inability to prosecute illegal natural resource exploitation activities during the conflict, the ICC Prosecutor can take over the duty to prosecute the case.

701 L May Crimes against Humanity: a normative account (2005) 68.

702 L May Crimes against Humanity: a normative account (2005) 68 – 70.

703 L Dickinson ‘The promise of Hybrid Courts’ 97 (2003) European Journal of International Law 295, where the writer discourages (at 304) “purely local accountability mechanisms” for their perceived “little impact on the application and development of substantive norms criminalizing mass atrocities in transitional countries”.

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influence the involvement of these persons in prevalent criminal activities and possibly affect their propensity to commit further criminality.\textsuperscript{704}

A further critical limitation that militates against Congo’s criminal justice system would be its restricted \textit{ratione personae} jurisdiction; its criminal jurisdiction would have been limited to Congolese defendants and pursuing persons no longer resident in Congo is always bound to be a hard task. There was little doubt that war-torn Congo would have faced difficulties in issuing internationally executable arrest warrants, initiating extradition processes and carrying out investigations beyond its borders. Further, for Congo, an associated justification was the state of political conditions and political commitment to aggressively pursue persons implicated in war crimes such as illegal natural resource exploitation activities.\textsuperscript{705} The inclusive government structure meant that former foes and allies found themselves at the helm of Congo politics and seeking the prosecution of any member thereof would be tantamount to ‘rocking the boat’ or carrying out a witch hunt.\textsuperscript{706} Accordingly, internal political arrangements militated against the use of domestic criminal justice and justified international criminal process.\textsuperscript{707} These setbacks should however be balanced against the benefits that domestic criminal justice brings to affected societies.\textsuperscript{708}

\begin{itemize}
\item \textsuperscript{704} W Burke – White ‘Complementarity in practise’ 589 (on the effect of exposing leaders of armed groups to criminal sanctions).
\item \textsuperscript{705} See Chapter Three para 3.3.5. The Lusaka Peace Accord had recognised the legitimacy of certain armed rebels’ control and occupation of Congo’s territory and subsequently incorporated the armed rebel leaders in Congo’s inclusive government.
\item \textsuperscript{706} See \textit{Prosecutor v Dusko Tadic’}, Case No (IT-94-1-AR72), \textit{Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction} (2 Oct 1995) para 58, where the Court defended the primacy of international criminal justice over national courts on the basis that using domestic jurisdiction would create “a perennial danger of international crimes being characterized as ‘ordinary crimes’. . ., or proceedings being ‘designed to shield the accused’, or cases not being diligently prosecuted,” and also that this could “defeat the very purpose of the creation of an international criminal jurisdiction, to the benefit of the very people whom it has been designed to prosecute”. See ‘Victor’s Justice’ below.
\item \textsuperscript{707} Various commentators have concluded that national criminal jurisdictions are inappropriate as a response to commission of grave breaches or serious violations of international humanitarian law. See A Cassese ‘On the current trends towards criminal prosecution and punishment of breaches of international humanitarian law’ (1998) 9 \textit{European Journal of International Law} 2, 5. However, for a contrasting view, see MA Drumbl \textit{Atrocity, punishment and international law} (2007) 120 - 128.
\item \textsuperscript{708} Some scholars however recognize the importance of domestic criminal justice systems, and particularly advocate for the infusion of local culture and customs in international prosecutorial strategy, see primarily DM Crane ‘White man’s justice: applying international justice after regional third world conflicts’ (2005 – 2006) 27 \textit{Cardozo Law Review} 1683.
\end{itemize}
4.2.2 The Rome Statute and philosophy of criminal punishment

The jurisprudence of the *ad hoc* tribunals seemed to give prominence to deterrence and retribution,\(^{709}\) with a little emphasis on other objectives of criminal punishment.\(^{710}\) The Rome Statute has, at least in theory, sought to adopt a unique jurisprudential framework, although it has not shied from using the precedents of the *ad hoc* tribunals as guidelines, particularly in sentencing. However, it can be argued that the Rome Statute has not fundamentally departed from the philosophy followed by the *ad hoc* tribunals on the purposes of criminal punishment. For instance, the Preamble of the Rome Statute states that the States Parties to this treaty are “determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes” and that the ICC was established “to these ends and for the sake of present and future generations.” Clearly, the prevention focus can be read as promoting the deterrence objective prioritised by the *ad hoc* tribunals.

Further, under its preamble, the Rome Statute’s philosophy is shaped by fundamental aspirations, namely, the need to confront “unimaginable atrocities that deeply shock the conscience of humanity” and the necessity of punishing the commission of “grave crimes that threaten the peace, security and well-being of the world”.\(^{711}\) The treaty further affirms the need for punishment on the reason that the “most serious crimes of concern to the international community as a whole must not go unpunished”.\(^{712}\) This retribution focus is not very dissimilar from the philosophical focus of the ad hoc tribunals and should, together with retribution, be accepted as underlying a justification for the use of the Rome Statute based international criminal justice system. The major question is whether this jurisprudential and philosophical

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\(^{709}\) Prosecutor v Blagoje Simic *et al* Case No IT-95-9 (ICTY, October 2003), para 1059, quoting various prior cases before the ICTY and stating that the jurisprudence from the precedents “emphasises deterrence and retribution as the main general sentencing factors.” See also the *Krstic* IT-98-33ST (Aug. 2001) par. 693; Prosecutor v Musema ICTR-96-13-T -96 (Jan. 2000) par 986.

\(^{710}\) In Prosecutor v Rutaganda Case No. ICTR 96-3, February 1999, para 456, declaring that upon conviction, the sanction imposed by the Tribunal “must be directed, on the one hand, at retribution of the said accused … and over and above that, on the other hand, at deterrence.

\(^{711}\) See Preamble to the Rome Statute of the International Criminal Court, paragraph 2 and 3.

\(^{712}\) Preamble to the Rome Statute, paragraph 4.
focus can provide the basis for using the Rome Statute framework to confront illegal natural resource exploitation activities of armed rebel groups during armed conflict.

The fact that illegal natural resource exploitation activities are of serious concern to the international community may not be doubted. The serious nature of these activities has been extensively explored in Chapter Two. Indeed, it has been shown that these activities were at the centre of Congo’s war economy and directly financed the Congo conflict in many ways. The huge contribution of these activities to the Congo conflict, to the perpetration of other war crimes and to general insecurity and volatility in the Great Lakes region means that these activities endangered the lives and dignity of vast population groups, their livelihoods and ultimately their existence. In this vein, Congo’s illegal natural resource exploitation activities breached the international interests in peace and security, two fundamental international interests that form the basis of the post-1945 international system. As with other war crimes, the criminal punishment for perpetrators of these activities is a duty owed “to humanity and to the prevention of future victimisation” and failure to do so constitutes “a betrayal of … human solidarity with the victims of conflicts” against whom humanity owe that duty. Accordingly, international criminalisation is justified by the fact that the illegal natural resource exploitation activities were not only domestic criminal acts, but serious war crimes that were a driver of international armed conflict. The conflict had far reaching peace and security implications not only in the Great Lakes region but also for Africa.

The basis for the criminalisation of unlawful natural resource exploitation activities during armed conflict can also be based on the reason that such activities

713 See Chapter Two.
714 It can be argued that the maintenance of peace and security are the cornerstone of the United Nations system and this objective characterized the international system since the end of the second World War, see for instance AC Arend ‘The UN and the New World Order’ (1992 – 1993) 81 Georgetown Law Journal 491, (arguing that between 1945 and 1990, the international system was fixated on attaining the objectives of maintaining peace and security as obligated in the UN Charter).
716 BVA Roling ‘The Law of War and the National Jurisdiction since 1945’ in Hague Academy of International Law, Collected Courses (1960) II, 354 (Leyden: AW Sijthoff 1961). Roling advises that, “For the very reason that war crimes are violations of the laws of war, that is, of international law, an international judge should try the international offences. He is the best qualified.”
contributed to serious crimes that ‘shock the conscience of humanity’, which is another aspiration of the Rome Statute.\textsuperscript{717} These crimes included mass murder, mass rape, recruitment of child soldiers and destruction of villages among others. However, despite their serious nature, unlawful natural resource exploitation activities may not be categorised as crimes against humanity per se. Crimes against property such as pillaging can only be categorised as war crimes and might not be described as shocking the conscience of humanity.\textsuperscript{718}

Another basis however exists for international criminalisation of activities such as illegal natural resource exploitation under the Rome Statute. As mentioned above, the other fundamental aspiration of the Rome Statute is that it seeks the punishment of perpetrators implicated in the commission of “grave crimes that threaten the peace, security and well-being of the world.” The peace and security paradigm of international criminal justice has always been widely acknowledged,\textsuperscript{719} for instance, the establishment of international criminal tribunals in the former Yugoslavia and in Rwanda by the United Nations Security Council acting under its Chapter VII powers is one such instance.\textsuperscript{720} Throughout the Congo conflict, the United Nations Security, MONUC and various other United Nations mandated agencies\textsuperscript{721} condemned unlawful natural resource exploitation activities and their role in the continuation of the Congo conflict. The first report of the Panel of Experts made damning conclusions about the impact of unlawful natural resource exploitation to peace and security in Congo, stating that the Congo war had “become mainly about access, control and trade” of particular mineral resources and that the networks and cartels

\textsuperscript{717} This view of the Rome Statute is shaped, to an extent by the jurisprudence of its predecessors such as the Nuremberg Tribunal, the ICTR and the ICTY. See for instance The Prosecutor v Tadic Case No. IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, paras 56– 59, (mentioning that the creation of the ICTY is rendered necessary by the shocking quality of the crimes committed in the former Yugoslavia).

\textsuperscript{718} Law Reports of Trials of War Criminals Selected and Prepared by the United Nations War Crimes Commission Vol X, The IG Farben and Krupp Trials, p.41- 42 (stating that, “the other particulars of plunder, exploitation, and spoliation, as charged in paragraphs C, D, E, and F of Count II of the Indictment, will be considered only as charges alleging the commission of war crimes.”)

\textsuperscript{719} See U.N Doc. S/Res 827 (1993), where the Security Council considered that in the particular circumstances of the former Yugoslavia the establishment of the International Criminal Tribunal for the former Yugoslavia “would contribute to the restoration and maintenance of peace.”


\textsuperscript{721} See Chapter Three, paras 3.3.3
consequently represented “the next serious security problem in the region.” The Panel of Experts proceeded to make a ringing endorsement of the function of international criminal justice in the achievement of peace and security in Congo, recommending that the United Nations Security Council should establish “an international mechanism that will investigate and prosecute individuals involved in criminal economic activities … whose economic and financial activities directly harm powerless people and weak economies.” Accordingly, the essence of this was that the international criminal justice system could be perceived as capable of directly contributing in the restoration of peace and security in Congo’s conflict zones where armed warfare was centred upon the desire to control and exploit existing natural resources. A theory or practical foundation justifying the use of international criminal law against unlawful natural resource exploitation can, in the least, be considered and defended from this perspective.

Ultimately, it could be argued that to some extent, the Rome Statute philosophy provides a basis for the international criminalisation of unlawful natural resource exploitation. The Statute itself, as highlighted in Chapter One, lists three war crimes that could encompass the conduct of “illegal natural resource exploitation” as used in this work. These war crimes are “pillaging”, “seizure of enemy property” not demanded by military necessity and “extensive … appropriation of property” not justified by military necessity and carried out wantonly and unlawfully. By including these crimes in the treaty, the Statute acknowledges their seriousness and the overarching need to subject the perpetrators to international criminal punishment. As will be shown in the next Chapter, the provisions of the Rome Statute on these war crimes could be applied to test the legality of the various forms of illegal natural resource exploitation illustrated in Chapter Two.

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724 See Chapter One paragraph 1.6.
725 Article 8(2) (b) (xvi) and Article 8 (2) (e) (v) prohibits “pillaging a town or place, even when taken by assault” in international armed conflict and non-international armed conflict respectively.
726 Article 8 (2) (b) (xiii) and Article 8 (2) (e) (xii) criminalises the destruction or seizure of enemy property unless such destruction or seizure is imperatively demanded by the necessities of war in international and non-international armed conflict respectively.
727 Article 8(2) (a) (iv) prohibits in international armed conflict, the “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”
728 This is the subject of Chapter Five.
It is however asserted that, in relation to Congo, international criminal justice could be expected to achieve three fundamental objectives related to addressing unlawful natural resource exploitation activities. Firstly, such a course had to impact on the incidence of massive human rights violations committed in the context of conflicts centred upon the desire to control and exploit existing natural resources in conflict zones. As shown in Chapter Two, millions of people’s lives were affected as conflict actors and militant groups scrambled for Congo’s vast natural resources without respect for the lives, dignity and other human rights of the victims and local populations. Secondly, international criminal law had to constrain, and thus shape the economic practices and behaviour of armed groups that were in occupation of Congo’s economically rich areas, mainly for purposes of natural resources exploitation. Finally, international criminal law had to encourage armed groups to move towards negotiations for political settlement and peace, thereby halting unlawful natural resource activities that financed and enhanced their capacity to commit further violence. It is argued that, apart from international criminal law, other applicable international legal regime could struggle to satisfactorily address the illegal natural resource exploitation phenomena and achieve the above objectives. That said, it becomes necessary to explore the nature of Congo’s association with international criminal justice, and thereafter, the implications for such relationship.

### 4.3.1 Congo and the ICC framework

Despite serious allegations of human rights abuses throughout the 1990s, the first major contact between Congo and international criminal justice was in 1998 following the release of the *Report of the Secretary General’s Investigative Team charged with investigating serious violations of human rights and international humanitarian law in DRC*. Among the recommendations made by this team was the use of the International Criminal Tribunal for Rwanda to prosecute persons accused of committing serious violations of human rights and humanitarian law between 1993

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and 1998. The hostility of the Congo state to this process was never in doubt and no further action was taken in terms of the recommendations of the *Investigative Team* before the outbreak of the Congo conflict.

Following Congo’s signature and ratification of the Rome Statute, the ICC Office of the Prosecutor proceeded to issue six arrest warrants against Congolese suspects on charges of committing various war crimes and crimes against humanity between 2002 and 2010. A related investigation by the Office of the Prosecutor pertained to a referral of a situation by the Central African Republic in December 2004 and led to the issuing of an arrest warrant against a prominent Congolese armed rebel leader, Jean Pierre Bemba Gombo. On 14 March 2012, the Trial Chamber of the International Criminal Court delivered its first ever judgment against one of the Congolese accused persons, Thomas Lubanga Dyilo. The ICC proceeded to sentence Lubanga Dyilo to fourteen years imprisonment, deducting six years therefrom, being the period the accused person had spent in ICC custody.

It is observed that the ICC judgment against Lubanga Dyilo is the first ever final judgment against an armed rebel personality by the International Criminal Court, and therefore important in examining the general impact of international criminal justice institutions to the commission of war crimes by armed rebel groups. Thus, although Lubanga Dyilo did not face charges related to plunder or unlawful natural resource...
exploitation activities during the Congo conflict, the judgment sheds light on the promises and pitfalls involved in the application of international criminal law against armed rebel groups at the centre of particular criminal activities committed during armed conflict. Further, the important value of the indictments against leaders of Congolese armed rebel groups should not be underestimated; the arrest warrants mentioned above were all issued against Congolese armed rebel chiefs who played a critical role in the instigation, complexity and longevity of the Congo conflicts. These indictments, for instance, against prominent armed rebel group leaders such as Bemba, had the added potential of constraining illegal natural resource exploitation acts by the rank and file of armed rebel groups, thus crucially impacting on the incidence of such acts. In addition, the focus on the leaders of armed rebel groups had the potential of compelling them to move towards peace overtures, thus limiting the predatory behaviour of their subordinate members that were in occupation of Congo’s economically rich areas.

Apart from this, the increasing association of the Congo state and the International Criminal Court inevitably stimulated interest in illegal activities by all conflict actors involved such as armed rebel groups. Such raised awareness of the crimes being committed by these groups, the impunity their members enjoyed and their local and regional alliances, corporate networks and international ties impacted on the general behaviour and conduct of armed rebel groups and consequently the incidence of the commission of war crimes such as illegal natural resource exploitation activities. This meant that the ICC presence in Congo was felt not only in the formal corridors of power but even across belligerent militant groups that constantly stoked the fires of the Congo conflict.

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736 Thomas Lubanga Dyilo was charged and found guilty of the war crimes of enlisting and conscripting of children under the age of 15 years and using them to participate actively in hostilities. See the verdict *Situation in the DRC: The Prosecutor v Thomas Lubanga Dyilo, Judgment pursuant to Article 74 of the Statute ICC-01/04-01/06*.

737 These will be explored in later parts of this Chapter.

738 Bemba, the MLC leader was at the centre of Congo’s illegal natural resource exploitation allegations, see paragraph 2.3.2.2 in Chapter Two above.

739 W Burke White ‘Complementarity in practise: The ICC as part of a system of Multi Level Global governance in the DRC’ (2005) 18 Leiden Journal of International Law 564 – 565, on the impact of the ICC to leaders of Congo’s armed rebel groups.
A significant number of critics, however, still question the actual potential of international criminal justice against organised militant groups responsible for pillaging and plundering of natural resources in conflict zones. For instance, doubt is cast on the capacity of international criminal justice to deliver on its general expectations, particularly its capacity to regulate the social norms and behaviour of militant groups such as Congo’s armed rebel groups. Critics thus question the capacity of international criminal justice to influence social norms of conflict actors such as Congo armed rebel groups, particularly where such groups have accepted and internalised the “captivating” albeit illegal ‘norms’ as a matter of necessity for their own survival. For Congo, this would translate into doubting the potential of international criminal law institutions to fundamentally alter or transform the social attitudes, practises and economic behaviour of Congo’s armed rebel groups that are shaped by illegal natural resource exploitation acts characterising Congo’s cyclical periods of armed violence. The question is therefore to what extent can the international community place faith in international criminal law and its institutions.

It is asserted that such scepticism has not eclipsed the hope and faith in the potential of international criminal law. For instance, upon studying trends and patterns of the impact of international criminal justice against armed rebel groups in Congo, Burke-White observed that:


743 M Drumbl Atrocity, punishment and international law (2007) 29 (analyzing the psycho-social factors that are more responsible for shaping the behavior of armed groups in conflict situations).

744 Upon summarising views of psychological and sociological scholars, M Drumbl supra, concludes (at p.30) that in situation of collective commission of international crimes, it may be that those “who commit extraordinary international crimes may be the ones conforming to social norms whereas those who refuse to commit the crimes choose to act transgressively”.

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“Since the establishment of the ICC, many rebel leaders have left the field and joined the peace process in Kinshasa, Congo’s capital. Though crime statistics are imperfect and often unavailable, anecdotal evidence suggests that violence in the Ituri province has decreased since 2003. Admittedly, crimes have not ceased altogether and war criminals still live in impunity. But a sense of change is afoot. It may never be possible to show a causal relationship between the Court and decreased violence, but the comments of Lubanga, Ciribanya and others suggest the ICC may be playing an important part in this process.”

There are therefore conflicting viewpoints on the potential of international criminal law against armed groups such as Congo’s armed groups. Some scepticism against this legal regime has also been seen as arising from international criminal law’s propensity to ignore the “special circumstances of the criminality in question” and its difficulty “in affecting the behaviour of potential criminals”. These arguments, particularly as they relate to armed groups, points to the increasing importance of armed groups in international law. The critical issue is whether international law is sufficiently influential to the acts and norms of these militant groups. In the next sections, this work specifically addresses the debate on the capacity of international criminal justice to address the multiple, competing and divergent interests that arise in confronting the illegal natural resource exploitation activities of armed rebel groups in Congo. It will be shown that the contrasting viewpoints are necessary in

746 I Tallgren ‘Sense and sensibility in international criminal law’ (2002) 13 EJIL 571. See also M Druml supra, who (p. 32) points that “[i]gnoring or denying the uniqueness of the criminality of mass atrocity stunts the development of effective methods to promote accountability for mass criminals”.
developing international criminal justice formulae that can effectively constrain the illegal natural resource exploitation behaviour and practises of armed groups during armed conflicts.

4.3.1.1 International criminal justice and expectations of Congolese society

An underlying basis for the faith in international criminal justice is its ability to meet the expectations of both the international and domestic constituency that have an interest in the fight against impunity. Critics of international criminal justice have however cast doubt on the capacity of this normative framework to respond to the expectations of affected local communities, thereby questioning its inability to effectively spearhead social change as domestic legal systems do. A related allegation is that the international criminal justice system does not resonate with the expectations of particular societies to the same extent as domestic criminal justice systems, and that the aspirations of international criminal justice do not readily co-exist or coincide with those of domestic society.

It is admitted that in ideal situations, effective domestic legal systems are usually “embedded” in local institutions and therefore, in theory, appear more responsive to prevailing domestic crisis. Thus, still theoretically, Congo’s domestic legal system is expected to be characterised by a necessarily close relationship with the ideas, aims and purposes of Congo society such that it reflects the prevailing intellectual,

748 See for instance DM Crane ‘White man’s justice: applying international justice after regional third world conflicts’ (2005 – 2006) 27 Cardozo Law Review 1683 (questioning (p1685) whether the current form of international criminal justice is the kind of justice sought by victims of third world conflicts); M Druml Atrocity, punishment and international law (2007) CUP, 124 (on the need for criminal punishment to resonate with local populations); I Tallgren ‘The sensibility and sense of international criminal law’ (2002) 3 European Journal of International Law 561 (on the possible inability of international justice to take account of “the uniqueness of the criminality of mass atrocity”).
751 See for this view, M Druml Atrocity, punishment and international law (2007) CUP, 150.
social, economic and political currents of the time. In that state, Congo’s legal system and institutional framework could directly be useful in combating the illegal natural resource phenomenon. In Chapter Two, I have however shown the weaknesses and challenges that crippled Congo’s judicial system during Mobutu’s rule. Accordingly, in practical terms, it might not be necessarily true that domestic legal institutions are more effective in responding to domestic crisis, more-so in situations of war when such critical institutions are collapsed and heavily compromised. During periods of conflict, Congo’s domestic legal system had been significantly suppressed and thus appeared highly unable to respond to wartime criminality and other kinds of criminal deviance that comes with war.

In addition, international criminal justice, even in terms of the Rome Statute is not aimed at driving social change in the same way as domestic legal institutions are expected to do. This is because, firstly, international legal institutions cannot be construed as seeking to permanently replace or suppress domestic legal systems. As testimony, the Rome Statute’s complementarity regime emphasizes the importance of national domestic legal systems in addressing crimes listed in the Statute, specifically stating that the ICC framework “shall be complementary to national criminal jurisdictions.” The success of the International Criminal Court, according to the ICC Prosecutor, will not be measured by the number of cases before the ICC but “[o]n the contrary, (by) the absence of trials before this Court, as a consequence of the regular functioning of national institutions”. This means national legal systems provide the major response to domestic expectations and crisis; these institutions drive the social change agenda where they are able to

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752 This idea is based on the reason that ideally, the institution of law moves at the same pace as the society it seeks to regulate or govern. S Vago Law and society (1981) Prentice Hall, 3. See also RD Sloane ‘The expressive capacity of international punishment: the limits of the national law analogy and the potential of international criminal law’ (2007) 43 Stanford Journal of International Law 39, 48, stating that “systems of criminal law presuppose their value to one or more communities, in the case of national criminal justice systems, to the community of that state’s citizens.”


754 For instance, the Preamble recalls that ‘it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”. See Chapter 4 on admissibility and complementarity.

755 Article 1 of the Rome Statute.

effectively discharge this responsibility. Consequently, the focus of international criminal justice objectives will be confined to appropriately giving primacy to “transnational penal interests” over local interests. International criminal justice can thus play a subsidiary, albeit contributory role in the ordering of Congolese society. A combination of both the domestic and the international legal regimes, it is hoped, could ensure that economic exploitation of Congo’s resources does not constantly evade legitimate regulatory frameworks, or create highly informal economies of scale that engender patterns of unlawful natural resource exploitation, particularly during cycles of armed violence.

4.3.2 Punishing corporate complicity

The complicity of private corporate entities in the illegal exploitation of Congo’s natural resources during the conflict necessitates the exposure of such entities to a constraining legal regime. Some of the direct involvement of private corporate entities in the illegal natural resource exploitation activities of the Congo conflict has been examined in Chapter Two. The question is to what extent can international criminal justice disrupt the interactions between armed rebel groups and expose persons running such corporations to criminal punishment?

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757 See for instance M Drumbl Atrocity, punishment and international law (2007) CUP, 125, observing that “(t)he value of punishment will increase to the extent that it resonates with local populations, is internalized in ravaged communities, and can form a coordinated part of post-conflict transition instead of competing with other transitional justice mechanisms.” However see P Akhavan ‘Justice in the Hague, Peace in the former Yugoslavia? A commentary on the United Nations War Crimes Tribunal’ (1998) 20 Human Rights Quarterly 737, 740, commenting that it is inappropriate to regard “the ICTY as a panacea for all the ills of the former Yugoslavia”.

758 RD Sloane ‘The expressive capacity of international punishment: the limits of the national law analogy and the potential of international criminal law’ (2007) 43 Stanford Journal of International Law 39, 57 arguing that this is because “from a moral, institutional, and legal perspective, it more accurately and appropriately captures the values that punishment by international tribunals can realistically serve”.

759 E Ehrlich The fundamental principles of the sociology of law (1975) New York, Arno Press, 24 (“the law is an ordering”. See also DD Field ‘Magnitude and Importance of Legal Science’ in SB Presser and JS Zainaldin (eds) Law and Jurisprudence (1995) St Paul Minn, West Publishing, 713 (“(w)here there is no law there can be no order”.

760 WM Reisman ‘Legal responses to genocide and other massive violations of human rights’ (1996) 59 Law and Contemporary Problems 75, 79, argues that international criminal justice measures should therefore not be dispensed with as they can only augment, not substitute other economic, developmental and social strategies designed to restore order in society after war; that it should be one component of a broader strategy towards safeguarding international human rights.

761 See for instance para 3.2.3.4
The massive influence of multinational corporations in the economic life of developing states, more-so, conflict-torn states by aligning themselves with dominant conflict actors in such areas has raised concern. The activities of these entities in war economies and their clandestine interactions with important conflict actors has engendered debate about the best way to constrain their activities such that they do not contribute to the commission of serious violations of international humanitarian law by conflict actors. There is therefore no doubt that the quest for justice in Congo ought to directly address the illegitimate interactions between armed rebel groups and corporate entities.

Corporate complicity arose from the willingness of private corporate entities to trade with armed rebel groups, thereby establishing various economic relationships. The ultimate consequence was the externalization, trafficking and illicit exploitation and movement of Congo’s natural resources outside Congo through informal channels. Further to this, the direct exchange of precious minerals such as gold, diamonds, coltan and cobalt between armed rebel groups and private corporations for profit, and through the facilitation of corporations lacked any legitimacy. These transactions automatically enhanced armed rebels’ destructive capacity, consequently increasing the incidence of unlawful natural resource exploitation activities and the perpetration of related war crimes.

In sum therefore, private corporations operating in Congo

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764 To recap, more than sixty foreign companies were identified in the reports of the Panel of Experts as importing mineral resources from Congo through various sources directly linked to the major protagonists of the Congo conflict, including armed rebel groups. A lesser number of corporations directly forged relationships with dominant armed rebel groups in Congo’s conflict zones mainly for the purposes of facilitating illegitimate commercial transactions UN Doc. S/2002/1072 Part IV. See also J Cuvelier and T Raeymaekers ‘Supporting the war economy in DRC: European companies and the coltan trade’ An IPIS Report, Jan 2002.

765 Generally, it appears that it is either the Congo state or an occupying power that has the task of regulating the activities of multinational corporations within its borders in times of either war or peace, using existing legislation. For Congo since 1997, the regulatory framework was founded upon the
during the conflict critically influenced illegal natural resource exploitation activities by armed rebel groups, enhanced the militarization of such exploitation and impacted on the incidence of war crimes committed in the context of armed violence centred on the need to exploit natural resources. The question that arises is how can private corporate entities, major accomplices to the unlawful natural resource exploitation activities of armed rebel groups be exposed to international criminal sanctions?

Under the Rome Statute, the International Criminal Court has no criminal jurisdiction over non-natural persons such as multinational corporations, or their subsidiary or affiliate companies. The fact that the Rome Statute's criminal jurisdiction is addressed to "natural persons" means that only the officers or business representatives of corporations could be prosecuted under the Rome Statute framework. Further, the individual criminal responsibility of the accused individual suspects is not determined on the basis of their mere association with the corporate entity under whose employment they carried out illegal natural resource exploitation activities. The fact that individual criminal responsibility is personal, not collective entails that the criminal liability of corporate executives would be assessed with respect to their individual participation in illegal natural resource exploitation activities. More often than not, however, such individual participation in illegal activities might not reach the threshold required to constitute war crimes under the Rome Statute.

Legislative Decree of 1997 and 1998, the Transitional Constitution of the DRC of 2003 (prior to the Congo Constitution of 2006). All these supreme laws similarly provided for ratification of international treaties as sufficient for such treaty to be binding Congolese law. Such laws are thus the major source for specific substantive and procedural obligations for multinational corporations operating within Congo’s borders. For a discussion of the general difficulties in prosecuting corporate entities, see PI Bloomer 'Accountability of multinational corporations: the barriers presented by concepts of the corporate juridical entity' (2001) 24:297 Hastings International and Comparative Law Review 297.

Article 25 (1) of the Rome Statute states: “The court shall have jurisdiction over natural persons pursuant to this Statute”.

See the rationale for this in WA Schabas ‘Enforcing international humanitarian law: Catching the accomplices’ (2001) 83 International Review of the Red Cross 439, 453 (“although commission of war crimes is usually conducted through a corporate shell rather than through individual names of the perpetrators, prosecutors seek to pierce the corporate shell and get at the individuals behind it.”)

These principles derive from Nuremberg cases such as United States v. Krauch et al., (IG Farben), 8 Trials of War Criminals 1081 p.1153. See also JG Stewart Corporate war crimes: Prosecuting the pillage of natural resources (2010) 77, ("... there is little doubt that the traditional approach to prosecuting commercial actors for international crimes involves dispensing with the corporate entity and assessing whether individual business representatives satisfy requirements for regular modes of liability such as aiding and abetting, instigating or direct perpetration").
Can this personal jurisdictional hurdle of the Rome Statute shut the door for imposing international criminal sanctions within the ICC framework against corporations? The Rome Statute does not make provision for a punitive sanctions regime against non-natural entities such as corporations.\textsuperscript{769} However, the ICC is competent in terms of Article 75 of the Rome Statute “to establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation”.\textsuperscript{770} It can be argued that in determining the “scope and extent” of damages possibly payable by convicted persons in terms of this section, the Court can incidentally implicate the corporations used by these persons to conduct such illegal activities.\textsuperscript{771} For instance, the ICC can go as further as to identify and implicate the specific corporations involved in the unlawful access to, exploitation, trafficking of Congo’s natural resources during the conflict.\textsuperscript{772} However, this might not be enough; although the ICC can implicate corporations in passing judgments against members of armed rebel groups, the fact remains that it is not empowered to impose criminal sanctions on such implicated multinational corporations.

\textsuperscript{769} For a detailed discussion of this subject, see also LJ van den Herik ‘Corporations as future subjects of the International Criminal Court: an exploration of the counterarguments and the consequences’ in C Stahn and LJ van den Herik (eds) Future perspectives of international criminal justice (2009) 350 – 368.

\textsuperscript{770} The provision states “The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.”

\textsuperscript{771} In the Lubanga judgment, the ICC on the basis of the doctrine of “control over crime” implicated a number of co-perpetrators who had acted with the accused person in the perpetration of charged offences. It is important to note that the co-perpetrators were natural persons over which the ICC had jurisdiction, and the ICC could possibly prosecute them at any given time if it so wished. Although, the ICC has no jurisdiction over a corporation, the ICC could still implicate it as a co-perpetrator. The doctrine does not require the co-perpetrator to be a natural person. See Situation in the DRC: Prosecutor v Thomas Lubanga Dyilo, Judgment pursuant to Article 74 of the Rome Statute ICC 01/04-01/06 paras 920 – 933 and paras 972 – 1018.

\textsuperscript{772} In the Lubanga judgment supra, the International Criminal Court specifically identified the major co-perpetrators (Floribert Kisembo, Bosco Ntaganda, Chief Kahwa Panga Mandro, Rafiki Saba Aimable, and other senior FPLC commanders, including commanders Tchalogonza, Bagonza and Kasangaki), see ICC 01/04-01/06 paras 1019. However, although the ICC seems to have no problems in identifying co-perpetrators, the International Criminal Justice follows a different approach, particularly in relation to state claims, see Case concerning armed activities on the territory of the Congo: DRC v Uganda No. 116, Judgment of 19 December 2005. In this case, the ICJ stuck to the position that “it is not precluded from adjudicating upon the claims submitted to it in a case in which a third State “has an interest of a legal nature which may be affected by the decision in the case”, provided that “the legal interests of the third State which may possibly be affected do not form the very subject-matter of the decision that is applied for” (quoting from Certain Phosphate Lands in Nauru (Nauru v. Australia) Preliminary Objections, Judgment I.C.J. Reports 1992, pp. 250-262, para. 55.).
ICC has no power to order implicated corporations to pay punitive damages since these corporations would not be parties before it. The only source of hope would be the manner in which the ICC would develop the reparation principles in the Rome Statute. 773

4.3.2.1 The Nuremberg Legacy

Apart from this, however, private corporations are not completely immune from legal sanction. The precedents from the Nuremberg International Military Tribunal recognise the binding nature of the laws of war on individuals responsible for the running of entities such as multinational corporations. 774 Thus, according to the Nuremberg Tribunal, the laws of war are “no less binding on private individuals than upon government officials and military personnel,” 775 and “officers, directors, or agents of a corporation participating in a violation of law in the conduct of the company’s business may be held criminally liable individually therefor.” 776 The Tribunal’s specific views on multinational corporations were that, “when the corporation itself is forbidden to do an act, the prohibition extends to the board of directors and to each director, separately and individually.” 777 In essence therefore, the Nuremberg Tribunal rejected the notion of putting corporations per se to trial but specifically sanctioned targeting the directors of the corporation for criminal prosecution. 778

The Nuremberg Trials also entrenched the globally recognised approach of discarding the corporate “veil” of the corporation in order to expose individual officers and directors of the corporation to the ordinary modes of criminal liability for direct or

773 See ‘International criminal justice and Reparations’ below.
774 See for instance Trial of Frederick Flick and Five Others (Flick), 6 Trials of War Criminals, p. 1190-1193 (hereafter Flick Case); U.S. v. Krupp, 9 Trials of War Criminals, p. 1375.
775 The Krupp case, p 1375.
777 The Krupp case, p150.
778 L Zegveld The accountability of armed opposition groups in international law (2002) 56, argues that “While the Nuremberg Charter recognized for the first time the possibility of individual criminal responsibility under international law based on membership in a criminal group, it did not empower the International Military Tribunal to hold organizations as such criminally responsible. Indeed, the primary aim of this Tribunal was not to criminalize organizations, but to convict individuals against whom other evidence might be lacking.”
indirect perpetration of illegal natural resource exploitation activities.\textsuperscript{779} As one writer puts it, although commission of war crimes is usually conducted through a corporate shell rather than through individual names of the perpetrators, prosecutors seek to pierce the corporate shell and get at the individuals behind it.\textsuperscript{780} In the \textit{IG Farben} case, the Tribunal also confirmed the principle that criminal responsibility is personal and not based on membership in a group, by stating that, individual criminal “responsibility does not automatically attach to an act proved to be criminal merely by virtue of a defendant’s membership in the Vorstand (Board)” and that the corporate structure cannot be utilized “to achieve an immunity from criminal responsibility for illegal acts” which an officer of the corporation “directs, counsels, aids, orders, or abets.”\textsuperscript{781}

The lesson from the Nuremberg Tribunal precedents is therefore that corporations could, through their officers and executives, be exposed to international criminal sanctions. Directors and senior management personnel of corporations fulfil the subjective and objective elements of crime if these officers actually sanctioned, authorised and directed the carrying out of such illegal activities.\textsuperscript{782} In reality therefore, the criminal liability of corporate representatives is determined by assessing the activities of the corporation and the individual participation of the key officials of corporations in the criminal activities. The rationale behind this is that,

“... corporations act through individuals and, under the conception of personal individual guilt ..., the Prosecution to discharge the burden imposed upon it ..., must establish by competent proof beyond a reasonable doubt that an individual defendant was either a participant in the illegal act or that, being aware thereof, he authorized or approved it.”\textsuperscript{783}

If the corporation’s object and purpose was the active acquisition, commercialisation, trafficking and export of natural resources outside the existing legal regulatory

\textsuperscript{779} See also JG Stewart \textit{Corporate war crimes} (2010) 77,(“there is little doubt that the traditional approach to prosecuting commercial actors for international crimes involves dispensing with the corporate entity and assessing whether individual business representatives satisfy requirements for regular modes of liability such as aiding and abetting, instigating or direct perpetration”).

\textsuperscript{780} WA Schabas ‘Enforcing international humanitarian law: Catching the accomplices’ (2001) 83 International Review of the Red Cross 439, 453.

\textsuperscript{781} United States v. Krauch et al (IG Farben), 8 Trials of War Criminals 1081 p.1153.

\textsuperscript{782} See discussion of subjective and objective elements of applicable crimes in Chapter 5, para 5.4.

\textsuperscript{783} \textit{The IG Farben and Krupp Trials (Krauch Case) Law Reports of Trials of War Criminals}, Vol X p.52.
framework, the specific responsibility and participation of the directors of the corporation is scrutinised. The acts that are scrutinised are not only those carried out in violation of criminal law, but those acts that breached civil and administrative regulations as well. Accordingly, the case has to be based on the fact that senior management personnel systematically and deliberately authorised and sanctioned illegal natural resource exploitation activities during the Congo conflict in contravention of prescribed administrative and governance processes. Further, it is necessary to demonstrate that such corporate representatives individually participated in the formulation, implementation and supervision of illegal natural resource exploitation strategies and methods in the territory of Congo during the conflict.

Thus, although the illegal natural resource exploitation activities were carried out by the corporate entity in the name and for the benefit of the corporation, a “piercing” of the corporate veil is done in order to identify the specific persons who gave the directions and sanctioned criminal activities. As considered by the Nuremberg IMT, “(when) the corporation itself is forbidden to do an act, the prohibition extends to the board of directors and to each director, separately and individually.” The criminal liability attaches even when it is shown that the corporation’s officers, agents and employees acted within the scope of their employment duties and with intent to benefit the corporation. Thus, the liability attaches to this class of defendants despite the fact they carried out the illegalities for “organizational”, not personal ends, and despite the fact that key decisions to embark on the illegal course were being “supported by operational and organisational subcultures, contingencies and priorities”.

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784 According to one view, “illegality by corporations and their agents differs from the criminal behavior of the lower socio-economic class principally in the administrative procedures which are used to in dealing with the offenders.” See E Sutherland White-Collar Crime (1949) New York, Dryden Press.
785 In the IG Farben case (p.11320), the Nuremberg IMT defined “pillage” as where “private individuals, including juristic persons, proceed to exploit the military occupancy by acquiring private property against the will and consent of the former owner.”
786 The Krupp case, Trial of War Criminals, p.150.
787 A number of states including USA recognise corporate criminal liability on the basis of the principle of “vicarious liability” to attribute responsibility for actions of company employees to the corporation. See for instance G Fletcher Basic concepts of criminal law (1998) 190.
4.3.2.2 The Rome Statute individual criminal responsibility regime

The specific modes of criminal liability for directors and senior executives of corporations are well provided under Article 25(3) of the Rome Statute, which provides that:

(3) In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.

There are a number of pertinent issues raised by this article. The first paragraph recognises three primary forms of criminal liability under direct commission viz; direct perpetration, co-perpetration and perpetration through the “instrumentality” of another person.

4.3.2.2 (i) Perpetration

If the corporation’s object and purpose was the active acquisition, commercialisation, trafficking and exportation of natural resources outside the existing legal regulatory framework, the specific responsibility and participation of the directors of the corporation is scrutinised. In such case, the corporation, through its directors could

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789 It has been argued that the criminal liability of corporate representatives is provided for in Article 25(3) of the Rome Statute; see for instance A Clapham ‘The complexity of international criminal law: Looking beyond individual responsibility to the responsibility of organisations, corporations and states’ in R Thakur and P Malcontent (eds) From sovereign impunity to international accountability (2004) 233, 239; A Kambos ‘Article 25: Individual criminal responsibility’ in O Triffterer Commentary on the Rome Statute of the International Criminal Court: Observer’s Notes (1999) 479.

790 Commentators argue that this form of criminal liability should not be confused with what is generally known as “joint criminal enterprise”. See G Werle International criminal law (translated, Volkerstrafrecht) (2003) Mohr Siebeck Publishers.

be characterised as having directly perpetrated illegal natural resource exploitation activities. It has been suggested, correctly in my view, that the acts that are scrutinised are not only those carried out in violation of criminal law, but those acts that breached civil and administrative regulations as well. Accordingly, the cases have to be based on the fact that senior management personnel systematically and deliberately authorised and sanctioned illegal resource exploitation activities during the Congo war in contravention of prescribed administrative and governance processes. Further, it is necessary to demonstrate that such corporate representatives individually participated in the formulation, implementation and supervision of illegal resource exploitation strategies and methods in the territory of Congo during the conflict.

It is further asserted that the criminal liability of senior executives attaches even when it is shown that such officers and agents acted within the scope of their employment duties and with intent to benefit the corporation. Further, the liability attaches to this class of possible defendants despite the fact they carried out the illegalities for “organizational”, not personal ends, and despite the fact that key decisions to embark on the illegal course were being “supported by operational and organisational subcultures..., contingencies and priorities”.

There is the question of what is likely to happen if the corporation disowns the illegal activities, or if it is proved that the directors did not act in the name of the company or for its benefit. Ordinarily, the failure by a corporation to ratify or sanction particular activities by its personnel may expose such individuals to prosecution on the basis that they directly committed natural resource exploitation offences for their own benefit. In such cases, the criminal liability of such persons is on the basis of direct

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792 According to one view, “illegality by corporations and their agents differs from the criminal behavior of the lower socio-economic class principally in the administrative procedures which are used to in dealing with the offenders.” See E Sutherland White-Collar Crime (1949) New York, Dryden Press.
793 In the IG Farben case (p.11320), the Nuremberg IMT defined “pillage” as where “private individuals, including juristic persons, proceed to exploit the military occupancy by acquiring private property against the will and consent of the former owner.”
794 A number of states including USA recognise corporate criminal liability on the basis of the principle of “vicarious liability” to attribute responsibility for actions of company employees to the corporation. See for instance G Fletcher Basic concepts of criminal law (1998) 190.
perpetration in terms of Article 25 (3) (a) that provides for liability to persons who commit crimes as individuals.\(^{796}\) Thus directors of corporations involved in plunder during the conflict can be prosecuted for direct commission of illegal exploitation of natural resources if they carried out such activities for personal gain and without a mandate from the corporations that employed them.

### 4.3.2.2 (ii) Co-perpetration

The directors of a corporation can also be criminally liable under co-perpetration for their collective contribution to the corporation’s illegal natural resource exploitation activities during the Congo conflict. Under this form of criminal liability, it could be proved that there was a “functional division of criminal tasks”\(^{797}\) among the directors for the purposes of carrying out the “common plan” of illegal resource exploitation activities.\(^{798}\) As one scholar stated, “joint commission or co-perpetration entails both an objective element, which is a contribution to the physical commission of the crime, and a subjective element, an agreement between the co-perpetrators, which can be named a common plan, or purpose, or design.”\(^{799}\) In the *Lubanga* case, the ICC explained that the objective elements for this form of criminal liability is the physical contribution to the crime while the subjective element is the carrying out of the physical tasks with the shared intent to commit the criminal activities in question.\(^{800}\)

The ICC has further stated that co-perpetration is better described in terms of an emerging doctrine of “joint control over crime”.\(^{801}\) In terms of this concept, there is “an essential division of essential tasks for the purpose of committing a crime between two or more persons acting in a concerted manner” and “none of the

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797 K Ambos “Article 25: Individual criminal responsibility” 479.
798 G Werle “Individual criminal responsibility in Article 25 ICC Statute” 962. The author explains that “the *actus reus*, the contribution rendered by each co-perpetrator must be essential to the realization of the common plan. As the co-perpetrator bears the same responsibility for the crime as the direct perpetrator or the perpetrator-by-means, the co-perpetrator’s involvement in the commission of the crime has to be of similar weight in bringing about the criminal result.”
800 The Prosecutor v Thomas Lubanga Dyilo, Situation in the DRC: Decision on the confirmation of charges ICC-01/04-01/06 para 326-329. See also The Prosecutor v Germain Katanga and Martin Ngudjolo Chui Decision on the confirmation of charges No ICC-01//04-01/07 para 478 – 488.
801 The Prosecutor v Thomas Lubanga Dyilo ICC No. 01/04-01/06 para 342 – 354.
participants has overall control over the offence because they depend on one another for its commission (and) they all share control because each of them could frustrate the commission of the crime by not carrying out his task.” The objective elements are the existence of a common plan or agreement between two or more persons and coordinated essential contribution by each co-perpetrator resulting in the realisation of the objective elements of the crime. The subjective elements of intent and knowledge also apply.

Applied to corporations and corporate representatives in Congo, a number of scenarios can be imagined. Firstly, the individual members of a board of directors of a corporation are co-perpetrators if they passed board resolutions authorising the corporation to illegally acquire, traffic, externalize and trade natural resources in Congo during the war. Secondly, these individual members remain criminally liable if they did not physically carry out these illegal exploitation activities, but lower ranked employees carried out their mandate expressed in the resolution. In terms of the joint control over crime, the board is jointly responsible for such formulation and implementation of illegal resource exploitation policies carried out through subordinate officers of the company. Accordingly, directors in implicated corporations would be individually criminally liable for their essential contribution and shared intent embodied in the resolutions they passed authorising illegal resource exploitation activities by the corporate entities they worked for during the Congo conflict.

4.3.2.2 (iii) Commission through the Instrumentality of Corporations.

The Rome Statute recognises that a person can commit a crime “through another person, regardless of whether that other person is criminally responsible”. This liability involves the use of an intermediary, or a second person by the indirect perpetrator or mastermind of the crime to commit the offence. It has been considered that in most cases, the master mind or the “hintermann” is a person with a superior position over the “intermediary” who would be in a subordinate position.

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802 The Prosecutor v Thomas Lubanga Dyilo ICC No. 01/04-01/06 para 342.
803 Lubanga case paras 338 – 344.
804 Lubanga case para 352.
In the same vein, another view is that this form of criminal liability is similar to “ordering” provided in Article 25 (3) (b) since ordering is actually “a form of commission through another person”.

Individual persons working for corporations in Congo could thus be criminally liable for using the company as a front to commit pillage and other forms of unlawful access, exploitation and trading of Congo’s natural resources during the conflict. Although the Rome Statute recognises only natural persons for the purposes of criminal jurisdiction, it is argued that the corporation would fit the description of “a person that could commit a crime but cannot be criminally responsible in terms of Article 25 (3) (a).

It has been suggested that Article 25(3)(a) of the ICC Statute “indirectly implicate corporations as it may provide for individual criminal responsibility for committing a crime through the instrumentality of a corporation.” Thus the use of the corporate structure by the directors or senior management of corporations operating during the Congo conflict to engage in otherwise illegal activities does not exonerate them for direct criminal liability under this provision.

4.3.2.2 (iv) Aiding, abetting and assisting

Another relevant form of criminal liability expressed in Article 25 (3) is the facilitating the commission, or attempted commission of a crime through aiding, abetting or assisting and this includes provision of the means for commission of crime. It

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807 K Ambos “Article 25: Individual criminal responsibility” 480. G Werle “Individual criminal responsibility in Article 25 ICC Statute” (964) shares the same view, observing that “conduct that warrants individual responsibility for the crime as a perpetrator-by-means has always been punishable in international criminal law, at least as planning, ordering or instigating the crime.


809 In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
should be remarked that this provision assumes existence of a principal perpetrator of the crime. It is thus clear that the *aider or abettor* is an accomplice to a crime perpetrated by another.

The ICTY jurisprudence on this form of liability sheds light on the meaning and elements of this mode of liability. In the *Tadic* case, the Tribunal explained that in this scenario, “the aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime” and this support has a “direct and substantial contribution to the commission of the crime.”\(^810\) The *actus reus* therefore is the practical assistance that has a substantial effect.\(^811\) Further, this kind of accomplice liability does not necessarily require presence at the scene of crime.\(^812\) The ICTY also stated that the requisite mental element in this form of liability is “knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal.”\(^813\) Accordingly, the accomplice does not need to share the mental elements possessed by the perpetrator.\(^814\)

There are two possible interpretations as to who is likely to be the principal perpetrator in the case of corporations. In war zones, corporate complicity can arise if the corporation assists a party to the conflict in the commission of war crimes.\(^815\) Thus, the supply of technical, technological or physical materials and resources by a corporation can amount to aiding, abetting or assisting if, without such resources, the assisted party would not have been able to commit the crimes in question. In one important case, the *Krstic* case,\(^816\) the ICTY had an opportunity to explain the nature

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\(^{810}\) *Tadic case* IT-94-1 A, Judgment of 15 July 1999, para 229.

\(^{811}\) G Werle “Individual criminal responsibility in Article 25 ICC Statute” 969. The author is of the view that “the wording of Article 25(3)(c) does not require that the assistance has a substantial effect on the commission of the crime. However, within the ICC Statute’s framework of modes of participation, it is reasonable to interpret the *actus reus* of assistance in this way.”

\(^{812}\) *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-T, 10 Dec. 1998, paras. 190-249.

\(^{813}\) *Tadic* case, para 229.

\(^{814}\) See *Furundzija* case para 236.

\(^{815}\) A Cassese *International criminal law* (2003) 188, defining aiding and abetting as the participation in the commission of a crime by provision of assistance even without sharing the criminal intent.

of complicity of a commander who avails resources for use in the commission of genocide. The ICTY stated that;

“Krstic was aware that the Main Staff had insufficient resources of its own to carry out the executions and that, without the use of Drina Corps resources, the Main Staff would not have been able to implement its genocidal plan. Mr Krstic knew that by allowing Drina Corps resources to be used he was making a substantial contribution to the execution of the Bosnian Muslim prisoners. Although the evidence suggests that Radislav Krstic was not a supporter of that plan, as Commander of the Drina Corps he permitted the Main Staff to call upon Drina Corps resources and to employ those resources. The criminal liability of Mr Krstic is therefore more properly expressed as that of an aider and abettor to a joint criminal enterprise to commit genocide, and not as that of a perpetrator. This charge is fairly encompassed by the indictment, which alleged that Radislav Krstic aided and abetted in the planning, preparation or execution of genocide against the Bosnian Muslims in Srebrenica.”

This case is important in relation to corporations since it explicitly recognises the possible use of the resources of an accomplice for the commission of crime by a perpetrator. Corporations in Congo are therefore complicit for providing technical resources, equipment and materials for use in illegal resource exploitation activities by third parties, such as armed rebel groups or other conflict actors. However, the knowledge of the end use of the resources will always be necessary as mens rea before corporate representatives can be prosecuted. It should be reiterated here that the corporation is simply implicated; it is the individual participation of directors and executives of that corporation that is scrutinised and that is subject to criminal prosecution for aiding and abetting.

A further important aspect clear from the Krstic judgment is that a person can be criminally liable for aiding, abetting or assisting in a joint criminal enterprise. Thus a person is regarded as having assisted in the commission of a crime where he contributes significantly to the execution of a common plan or agreement between

817 Krstic case, para 137.
818 In the Krstic case, the defendant was aware of the criminal result that the resources were required for, and this was held to be of critical importance.
two or more persons with the knowledge that the common plan is to commit war crimes.

The problem with this form of liability arises with regards to proof of the mental elements. In the *Zyclon B gas* case the accused directors successfully pleaded ignorance of the end use of poison gas used in mass extermination in concentration camps.\(^{819}\) Under the Rome Statute, such pleas of ignorance could succeed if the directors argue that they lacked knowledge that their provision of certain commodities or materials could be used in the commission of war crimes. This argument is however rejected by one commentator who states that “establishing knowledge of the end use should generally be less difficult because of the scale and nature of the assistance”, i.e the intense publicity about war crimes made known in documents of the United Nations and international non-governmental organizations as well as the media.\(^ {820}\) It is however admitted that not all ordinary trade transactions can be read to constitute substantial contribution to the commission of war crimes and corporate complicity must be distinguished from legitimate ordinary commercial activities.\(^ {821}\)

### 4.3.2.2 (v) Other ways of Contributing to crime

The Rome Statute also recognises that there might be other ways of contributing to the commission, or attempted commission of crime by a group of persons acting with a common purpose.\(^ {822}\) This form of liability has been categorised as “residual” and not primary, and is meant for other forms of participation not covered in other paragraphs of the Article.\(^ {823}\) For this, it requires that (i) the contribution be intentional, and that it be made with the aim of furthering the criminal activity of the group, and (ii) that it be made in the knowledge of the intention of the group to commit crime.\(^ {824}\)
The application of this provision might entail that individual members of a board of directors can be criminally liable for intentionally contributing in certain ways to the illegal activities of the corporation. The mere participation in the acquisition, exploitation and export of natural resources in furtherance of a resolution by the board could constitute the *actus reus*, whilst the intention to participate suffices as *mens rea*.\(^{825}\)

In sum therefore, it is clear that the ICC’s lack of jurisdiction over the corporate entity is cured by the emphasis on individual criminal responsibility that could encompass senior members of the corporation. Accordingly, although this legal position might need more development,\(^{826}\) it is hereby argued that the provisions could be sufficiently inhibitive of corporate complicity in unlawful natural resource exploitation activities, particularly those forms that arise from the relationship between armed rebels and private corporations in conflict zones.

**4.3.3 International criminal law and reparations**

The fact that illegal natural resource exploitation activities essentially entail the unlawful appropriation, seizure or dispossession of natural resources during armed conflict would suggest the need for redress mechanisms not to pursue punishment only, but the reparations for, or return of plundered natural resources or their equivalent value. It has consequently been observed that the traditional aim of the criminal justice process, being punishment of the accused, is more concerned with society’s needs, (incapacitation and deterrence) than with addressing the harm suffered by victims through the unlawful conduct of perpetrators.\(^{827}\) Resultantly, the argument continues, the criminal justice process has taken insufficient account of, and therefore inadequately responds to the needs of the victim, the character of the harm done to that victim and the complexity of the harm done by the impugned

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825 See *Furundzija* case para 249.
A regime of reparations, which has been absent in previous international criminal justice processes, would have gone a long way towards repairing some of the dispossession, forcible appropriation and seizure of natural resources from affected entities or local communities. Indeed, international criminal justice becomes more practically useful if it accommodates within itself aspects of reparations as opposed to specifically focussing on retribution and deterrence.

For Congo, focusing on effective reparations regimes could result in depriving Congo’s armed rebel kleptocracy of its ill-gotten wealth and applying the proceeds to recompense the Congo state for reconstruction of broken communities. Further, it could be argued that a focussed reparations regime could also possibly undermine conditions that constantly sponsor the formation and survival of armed rebel groups at the expense of the population and the country’s economic development. However, to compel armed rebel groups to reparations processes presupposes that these groups continue to exist in post-conflict periods. There is general perception that most armed rebel groups disband or are eliminated after the cessation of conflict and it would be impractical to pursue them and demand any form of reparations.

The statutes of the ad hoc tribunals provided for the “return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners”. The lack of mechanisms to achieve this and the cursory treatment of this issue in the statutes and jurisprudence of the ad hoc tribunals reveals the lack of

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830 Chapter Two, para 2.1.2.
831 The practicality of such a course is however not guaranteed; see J Kleffner ‘The collective accountability of organized armed groups for system crimes’ in A Nollkaemper (ed.) System Criminality in International Law (2009) Cambridge 2009, 255, arguing that “the possibility of claiming reparations for the injury caused [by organized armed groups] has thus far remained, in the main, a theoretical one”.
832 JO MacCalpin ‘Historicity of a crisis’ in JF Clark (ed) African stakes of the Congo war 48. The author observes that Congo’s postcolonial regimes gave priority to regime survival at the expense of functional political and economic systems.
833 L Zegveld The accountability of armed opposition groups in international law (2002) 156.
834 Article 24 (3) of the ICTY Statute and Article 23(3) of the ICTR Statute.
seriousness given to reparations by the ad hoc tribunals.\textsuperscript{835} If the same regime were to prevail under the Rome Statute criminal jurisdiction, it could be argued that victims would not be able to achieve compensation for their losses arising from unlawful natural resource exploitation of armed rebel groups. It should therefore be asked to what extent has the Rome Statute framework addressed this anomaly and how practicable can the relevant provisions of the treaty be applied against Congo’s armed rebel groups?

4.3.3.1 The Rome Statute and Reparations

One of the most progressive features of the Rome Statute is the Court’s power to develop reparation principles, to make reparations orders and to order the forfeiture of the proceeds of crime for the benefit of victims.\textsuperscript{836} Additionally, the Rome Statute creates a Trust Fund through which the Court may make reparation awards which can independently provide material support to victims.\textsuperscript{837} The Statute further obliges state parties to give effect to reparation orders made by the Court.\textsuperscript{838} The importance of the Rome Statute reparations regimes was underscored by the ICC in the \textit{Lubanga Dyilo Arrest Warrant} case, where the Pre-Trial Chamber commented that the reparations regime under the Rome Statute is a ‘unique’ and ‘key’ feature of the Statute and the success of the Court ‘is, to some extent, linked to the success of its reparations system.’\textsuperscript{839}

There are three forms of reparations specifically listed under the Rome Statute, namely restitution, compensation and rehabilitation. However, the list is not exhaustive; the International Criminal Court has held that other forms of reparations were

\textsuperscript{835} See for instance EC Gilliard ‘Reparations for violations of international humanitarian law’ (2003) 85:851 \textit{International Review of the Red Cross} 529, 535 arguing that “although a responsibility to make reparation would be a natural consequence of the fact that organized armed groups are bound by international humanitarian law”, in relation to Rwanda, “to date, such responsibility has taken the form of individual criminal responsibility of violators before the International Criminal Tribunal for Rwanda.”

\textsuperscript{836} See the whole of Article 75 of the Rome Statute. Article 75 (1), provides that “[t]he Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.”

\textsuperscript{837} International Criminal Court Rules of Procedure and Evidence, Rule 98(5).

\textsuperscript{838} Article 75 (5).

\textsuperscript{839} \textit{Situation in the DRC: The Prosecutor v Thomas Lubanga Dyilo, Decision on the Prosecutor’s Application for an Arrest Warrant}, Article 58, No. ICC01/04 – 01/06, 10 February 2006, para 136.
that are symbolic, transformative or preventative are also encapsulated within these provisions of the Rome Statute.\footnote{Situation in the DRC: The Prosecutor v Thomas Lubanga Dyilo; Decision establishing the principles and procedures to be applied to reparations: ICC-01/04-01/06, 07 August 2012, para 222.}

Article 75(4) empowers the Court to use measures under Article 93 (paragraph 1) of the Statute in order to promote the objectives of reparations under the Statute. In terms of Article 93, the Court can oblige state parties to comply with requests for assistance in respect of orders made by the Court. Most importantly, Article 93(1) (k) stipulates that state parties shall, in accordance “with procedures of national law”, comply with requests by the Court and provide certain forms of assistance in relation to investigations or prosecutions. These forms of assistance include “[t]he identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties.” Related to this provision is Article 109 that provides for the enforcement of fines and forfeiture measures. In terms of this Article, “state parties shall give effect to fines or forfeiture measures ordered by the Court without prejudice to the rights of bona fide third parties, and in accordance with the procedure of their national law”. Finally, state parties shall take measures to recover the value of the proceeds, property or assets ordered by the Court to be forfeited, without prejudice to the rights of \textit{bona fide} third parties.\footnote{Case No ICC-01/04-01/06, 07 August 2012.}

The ICC found an opportunity to clarify, expand and develop principles on reparations as stated in the Rome treaty in \textit{Situation in the DRC: The Prosecutor v Thomas Lubanga Dyilo; Decision establishing the principles and procedures to be applied to reparations}.\footnote{See http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/democratic%20republic%20of%20the%20congo?lan=en-GB 20/10/2011.} The case revolved around possible reparations for victims of the war crime of enlisting and conscripting children under the age of 15 years into the ranks of an armed rebel group led by Lubanga Dyilo.\footnote{Situation in the DRC: The Prosecutor v Thomas Lubanga Dyilo; Decision establishing the principles and procedures to be applied to reparations: ICC-01/04-01/06, 07 August 2012, para 222.} The ICC had already convicted and sentenced Thomas Lubanga, and proceeded to convene separate
hearings for reparations. The kind of victims anticipated were those covered under Article 85 of the ICC Rules, and according to the Court, included “direct and indirect victims, including the family members of direct victims; anyone who attempted to prevent the commission of one or more of the crimes under consideration; and those who suffered personal harm as a result of these offences, regardless of whether they participated in the trial proceedings.” Further, the ICC held that reparations were based on the need to reconcile victims and perpetrators, address underlying injustices and avoid replicating discriminatory practises that predated the commission of the crimes. Notwithstanding the grandiose nature of the occasion, the Trial Chamber was quick to point out that the “principles relating to reparations and the approach to be taken to their implementation … are limited to the circumstances of the present case.

In developing the reparations principles, the ICC relied on numerous provisions of both hard and soft law. Given prominence were also academic writings and other soft law sources such as the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law. Further, the Court borrowed heavily from principles of

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843 See Situation in the DRC: The Prosecutor v Thomas Lubanga Dyilo: Judgment pursuant to Article 74 of the Statute para 1360.
844 Situation in the DRC: The Prosecutor v Thomas Lubanga Dyilo: Decision establishing the principles and procedures to be applied to reparations para 194.
845 Decision establishing the principles and procedures to be applied to reparations: Case No ICC-01/04-01/06, 07 August 2012 paras 192 – 193. The Chamber did not, however, elaborate on the meaning of this, thus a literal interpretation would be preferred.
846 Decision establishing the principles and procedures to be applied to reparations: Case No ICC-01/04-01/06, 07 August 2012 para 20, where the ICC acknowledged that this was the first ever reparations decision by a Chamber of the International Criminal Court.
847 Decision establishing the principles and procedures to be applied to reparations: Case No ICC-01/04-01/06, 07 August 2012, para 181. The Chamber further held that the Lubanga reparations “decision is not intended to affect the rights of victims to reparations in other cases, whether before the ICC or national, regional or other international bodies.”
reparations from various national legal systems and established international legal regimes such as international human rights law.\textsuperscript{849}

There is the question of who could be classified as a victim under the Rome Statute. This question is important in light of state ownership of natural resources under Congo’s constitutional framework and legal system. Further, it is important in light of the argument in Chapter Two that the ultimate victim of illegal natural resource exploitation activities was the Congo national economy, thus the Congo state. A reparations system that permits the state to claim reparations would go a long way in repaying that state for loss incurred from criminal activities.

The language of Article 75 on reparations presupposes that individual persons would be the victims of various forms of injury at the hands of a state, and could therefore claim damages or reparations from that state.\textsuperscript{850} It has also been argued that legal persons can claim reparations, seemingly against a state, under the Rome Statute reparations regime.\textsuperscript{851} One of the arguments posed for this is that the victims of certain crimes, particularly those under Article 8 of the Rome Statute, are legal persons and could accordingly be considered victims under the Rome Statute reparations framework.\textsuperscript{852} This interpretation fails to indicate whether or not a state can be considered a ‘victim’ under the Rome Statute. Further, it fails to shed light on

\textsuperscript{849} The jurisprudence was on reparations from the International Covenant on Civil and Political Rights, the Inter-American Convention on Human Rights and the European Convention on Human Rights. The African Commission on Human and Peoples’ Rights has also begun to develop jurisprudence on reparations; see for instance, Achutan (on behalf of Banda) and Amnesty International (on behalf of Orton and Vera Chirwa) v. Malawi, African Commission on Human and Peoples’ Rights, Communication Nos. 64/92, 68/92, 78/92 (1995), para 12.

\textsuperscript{850} See DL Shelton and T Ingadottir ‘The International Criminal Court reparations to victims of crimes (Article 75 of the Rome Statute and the Trust Fund’ (1999) CIC, New York University, paras 3, where the writers argue that “[t]he designation of a “victim” is an international legal question and at a minimum includes the individual whose right or freedom has been violated. It generally is not necessary for the victim to be a national or resident of the defendant state. When the victim is deceased or the injury has consequences for other persons, third parties also may be characterized as victims of the violation.’ It was reported that as of March 2011, a total of 176 individuals from Congo had applied for reparations in respect of the Lubanga cases and other cases before the ICC; see generally R Carranza ‘Reparations and the Lubanga case: learning from transitional justice’ Briefing; International Centre for Transitional Justice, April 2012.


whether state owned companies and private companies that were despoiled of their extracted mineral resource stocks by armed rebel groups could also apply for reparations upon conviction of members of armed rebel groups.

The lack of clarity is cleared by the ICC Rules of Procedure and Evidence which settles the matter by defining ‘victims’ as:

(a) … natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court
(b) …. organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.\(^{853}\)

While the first category of persons raises no controversy, Rule 85(b) is less so. In clarifying on the true extent of this rule, the Trial Chamber held that pursuant to Rule 85(b), reparations can be granted to legal entities, and these include non-governmental, charitable and non-profit organisations, statutory bodies including government departments, companies, telecommunication firms, institutions and other partnerships.\(^{854}\) The inclusion of government departments in the list of examples would suggest that a government department could apply to be considered a victim under the Rules. However, such department should prove that it has sustained direct harm to its property and that property fits the description in the Rule. It would appear that institutions such as the Department of Natural Resources cannot claim loss or direct harm of natural resources since they are restricted to showing harm only to property of a religious, educational, scientific or charitable nature. For this reason, it could be observed that the Rome Statute reparations framework did not contemplate governmental departments responsible for natural resource exploitation and management as possible claimants under its reparations regime.

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\(^{853}\) Rule 85 of the ICC Rules of Procedure.

\(^{854}\) See *Decision establishing the principles and procedures to be applied to reparations: Case No ICC-01/04-01/06*, 07 August 2012, para 197.
This position means that a state, upon proving that it is either an organization or institution, could only apply for reparations in respect of the kinds of property specified in Rule 85 (b) of the ICC Rules of Procedure. The list excludes despoiled natural resources and this effectively excludes the Congo state and private corporations from applying for reparations based on wartime unlawful natural resource exploitation activities. Natural persons can however apply as is clear from the rule.

The narrow definition of ‘victims’ further precludes the Congo state from claiming reparations from the Victims Trust Fund established in terms of Article 79 of the Rome Statute ‘for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims’. Reparations are only ordered against the convicted person, not against the group that he represented. The Court can thus not order an armed rebel group to pay reparations or to have its financial assets or proceeds confiscated even where the leader of that armed rebel organization has been convicted.

From the above discussion, it is clear that contemporary international criminal justice, embodied by the Rome Statute, is moving towards integrating aspects that are materially beneficial to victims of war crimes. The developing regime is however more focused on compensating individual persons since states are precluded from the definition of ‘victims’ in the Rome Statute’s rules. However, this positive development of international criminal law cannot be missed. As the Trial Chamber

855 Article 79 of the Rome Statute; see further Rule 98 of the ICC Rules of Procedure and Evidence.
856 See however R Dubai ‘Closing the gap: symbolic reparations and armed groups’ (2011) 93:883 International Review of the Red Cross 783. The author view is that it seems the lack of a reparations regime for armed groups is a “blind spot” in international law.
857 See MC Bassiouni ‘The permanent International Criminal Court’ in M Lattimer and P Sands (ed) Justice for crimes against Humanity (2003) 203. The author observes that “even though the individual offender’s acts can be attributed to the state, an order of reparations cannot be imposed on the state.”
858 Accordingly, it can be argued that the Congo state has to rely on other international mechanisms outside the framework of international criminal law to seek compensation. These international tribunals include the International Court of Justice (see DRC v Uganda) and the African Commission on Human and People’s Rights. In a case brought by Congo before the ACHPR, (Communication 227/99 DRC/Burundi, Rwanda and Uganda) the Commission ruled that, “adequate reparations be paid, according to the appropriate ways to the Complainant State for and on behalf of the victims of the human rights by the armed forces of the Respondent States while the armed forces of the Respondent States were in effective control of the provinces of the Complainant State, which suffered these violations”.

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itself noted, unlike previous forms of international criminal justice, the Rome Statute framework has introduced “a system of reparations that reflects a growing recognition in international criminal law that there is a need to go beyond the notion of punitive justice, towards a solution which is more inclusive, encourages participation and recognises the need to provide effective remedies for victims.”

It should be noted that the development of a reparations regime under contemporary international criminal law can only complement the twin pillars of deterrence and retribution that props this legal regime. It is argued that war crimes characterised by unlawful appropriation, forcible seizure and pillaging of property such as natural resources should be addressed by a regime that seeks repayment to victims of losses. It is argued that such a reparation regime effectively acknowledges and consequently secures the previously lost economic and/or financial interest in commodities such as natural resources. There is therefore a rationale for this trajectory of international criminal law which might become even more pronounced and more beneficial for victims of war crimes in the near future. Finally, the increasing application of the Rome Statute reparations regime is likely to lead to the development, and thus enrichment of existing war crimes discourse, a trajectory that can only be more pronounced in the prosecution of war crimes such as illegal natural resource exploitation that are characterised by dispossession of property.

4.4 Victor’s Justice

The Rome Statute has introduced several aspects that remove possible interference of concerned governments in the decisions of against whom, how and when to institute criminal proceedings. Further, in theory, the Rome Statute framework is insulated against the use or abuse of its criminal jurisdiction by dominant political parties against weaker foes in the periods following armed conflict.

It should be acknowledged that it was absolutely necessary to introduce such progressive guarantees in the Rome treaty in view of the general criticism that international criminal justice is nothing more than acts of vengeance or victor’s

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859 Decision establishing the principles and procedures to be applied to reparations: Case No ICC-01/04-01/06, 07 August 2012, para 177.
justice against the vanquished.\textsuperscript{860} For instance, in his opening address at the trial of Nazi war criminals, the US Prosecutor Robert H. Jackson had admitted that the “nature” of Nazi crimes was “such that both prosecution and judgment must be by victor nations over vanquished foes”.\textsuperscript{861} Ever since its Nuremberg birth, international criminal justice had struggled to shirk this criticism. The general form of international criminal justice pursued by the \textit{ad hoc} tribunals did not appear to pursue a discernibly distinct path either.\textsuperscript{862}

Targeting Congolese armed rebel groups for prosecution and sparing similarly implicated members from Kabila’s party in government could be perceived as symptomatic of victor’s justice. Laurent Kabila had strongly resented any criminal justice against members of the AFDL accused of massive human rights abuses and violations of international humanitarian law by the United Nations appointed \textit{Investigative Team} in 1998.\textsuperscript{863} Ironically, in 2004, it was Joseph Kabila’s government that referred the Congo situation to the ICC Prosecutor’s Office. Subsequently, the Office of the Prosecutor conducted investigations in Congo and eventually issued warrants of arrest against five prominent members of armed opposition groups.\textsuperscript{864} These developments do not however hide the fact that Joseph Kabila’s ascension to the helm of Congolese politics followed after Laurent Kabila’s \textit{Alliance des Forces Democratiques pour la Liberation du Congo – Zaire} triumph against Mobutu’s regime in 1997. During its march to Kinshasa in 1996 and 1997, the AFDL committed

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\item See for instance, I Tallgren ‘Sense and sensibility in international criminal law’ (2002) 13 \textit{EJIL} 571 (questioning the moral authority and legitimacy of international criminal law to the targeted groups and individulas); H Arendt \textit{Eichmann in Jerusalem: A Report on the banality of evil} (1994) (questioning the acceptability of post Second World international criminal justice to Nazi defendants). See also J Meernik ‘Victor’s justice or the law? Judging and punishing at the International Criminal Tribunal for the Former Yugoslavia’ (2003) 47:2 \textit{Journal of Conflict Resolution} 140, exploring the aspects of victor’s justice in relation to criminal justice delivered by the ICTY.
\item See \textit{Opening Address for the United States, opening the American case under Count I of the Indictment}, delivered by Justice Robert H. Jackson, Chief of Counsel for the United States, before the Tribunal on 21 November 1945
\item J Meernik ‘Victor’s justice or the law? Judging and punishing at the International Criminal Tribunal for the Former Yugoslavia’ (2003) 47:2 \textit{Journal of Conflict Resolution} 140. For instance, the writer asks whether “international criminal trials [are] legalistic exercises that cloak a victor’s justice, or can such courts reach decisions that are fair and impartial?”
\item \textit{UN Doc. S/1998/581 Report of the Secretary General’s Investigative Team charged with investigating serious violations of human rights and international humanitarian law in DRC.}
\item Thomas Lubanga Dyilo ICC-01/04-01/06, Germain Katanga and Mathieu Ngudjolo ICC-01/04-01/06, Bosco Ntaganda ICC-01/04-02/06 and Callixte Mbarushimana ICC-01/04-01/10. The cases are at http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0104/ accessed on 21 August 2011.
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massive violations of international human rights law, war crimes and crimes against humanity, including illegal natural resource exploitation. \(^{865}\)

Further, it is beyond doubt that the access to Congo’s vast mineral resources by the originally weak AFDL led by Laurent Desire Kabila explains its rapid rise and ability to match and defeat Mobutu’s national army. \(^{866}\) It was also observed in previous Chapters that integral to the success of the AFDL was the massive revenue it generated from exploitation of mineral resources and its sale of state controlled mineral concessions in areas it had seized from Mobutu’s control. \(^{867}\)

Kabila himself stood to gain much by the removal of political opponents from Congo’s politics. Kabila’s opponents in the post Sun City inclusive government had been implicated in various war crimes and illegal natural resource exploitation activities after the Congo had ratified the Rome Statute. \(^{868}\) Kabila’s own party members had been similarly implicated in the commission of human rights abuses and unlawful natural resource exploitation activities. However, most of the accusations related to the period prior to 2002 before Congo had adopted the Rome Statute. The fact that neither Kabila nor the ICC seriously considered prosecuting suspected AFDL personalities using either Congo’s justice system or the ICC framework could be viewed in the least as unfair.

4.4.1 Rome Statute safeguards

In terms of Article 15, the ICC Prosecutor’s *proprio motu* decision to initiate investigations is not taken lightly, or under any form of external influence from any third party. S/he uses information obtained “from States, organs of the United

\(^{865}\) See UN Doc. S/1998/581, *Report of the Secretary General’s Investigative Team charged with investigating serious violations of human rights and international humanitarian law in the DRC*, page 6 “Conclusion”. See also Chapter Two.

\(^{866}\) Chapter Two.

\(^{867}\) Chapter Two; see also M Nest et al *The DRC 22*.

\(^{868}\) Burke-White ‘Complementarity in practise’ (569) points that Bemba and Ruberwa were among the most likely to be investigated or implicated by ICC action and their preference were to keep the ICC out of Congo at all costs. Kabila’s political opponents could however easily have reformed the criminal justice system since in terms of the Sun City peace agreements, they controlled a number of key governmental portfolios including Justice, Finance, Budget, Foreign Affairs, and Defence, Demobilization and Demilitarization thus “giving them authority over domestic judicial reform and potential leverage points to control domestic prosecutions”.

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Nations, intergovernmental or non-governmental organizations, or other reliable sources before such decision is taken.\textsuperscript{869} Further, the Prosecutor’s decision to prosecute is subjected for review by the Pre-Trial Chamber that would either grant\textsuperscript{870} or refuse to grant the requested authorization to continue investigations.\textsuperscript{871} The absolute independence enjoyed by the Office of the Prosecutor coupled with judicial oversight over the exercise of his discretion provides sufficient insulation from the interference of interested or concerned states.\textsuperscript{872}

In addition, Article 53 (1) of the Rome statute provides safeguards to the Prosecutor against undue influence before commencing investigations. In terms of Article 53(1), the Prosecutor is obliged to consider three issues before proceeding to investigate: (a) whether the information available to him provides a “reasonable basis” to believe that a crime has been committed (b) whether the case would be admissible under Article 17 and (c) whether there are no substantial reasons to believe that any investigations would not be in the interests of justice.\textsuperscript{873} Admissibility of cases under Article 17 depends critically on whether or not the crimes are of “sufficient gravity to justify further action by the Court.” The Office of the Prosecutor has highlighted that to meet the “sufficient gravity threshold”, it considers “the scale of the crimes, the nature of the crimes, the manner of their commission and their impact.”\textsuperscript{874} In terms of Article 53 (2), the Prosecutor may not initiate prosecution proceedings if he reaches a determination that there is no sufficient basis to proceed if it appears that such prosecution “is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrators, and his or her role in the alleged crime”.\textsuperscript{875}

\textsuperscript{869} Article 15(2) of the Rome Statute.
\textsuperscript{871} See Article 15 (4) - (5) of the Rome Statute.
\textsuperscript{872} There has been a great deal of literature concerning the independence of the Prosecutor’s office from influence by either states or international organisations. However, the concern raised here is the unfettered discretion of the Prosecutor, not his susceptibility to external influence; see for instance JR Bolton ‘The risks and weaknesses of the International Criminal Court from America’s Perspective’ (2001) 64:1 Law and Contemporary Problems 167. The author comments (at p. 173 – 174) that “the supposed “independence” of the prosecutor and the court from “political” pressures (such as the Security Council) is more a source of concern than an element of protection.”
\textsuperscript{873} Article 53 (1) of the Rome Statute.
\textsuperscript{875} Article 53 (2) (c) of the Rome Statute.
terms of this provision, the ‘interests of justice’ requirement is critical in determining whether or not to proceed with prosecution. The Office of the Prosecutor however opines that the presumption is in favour of investigation and prosecution, whilst stating that only in exceptional circumstances will the Office conclude that it is not in the interests of justice to proceed with an investigation or prosecution. Whatever decision the Prosecutor would have taken regarding this is open for review by the Pre-Trial Chamber on its own initiative or at the request of either “the state making the referral” or the United Nations Security Council. Further, even when the prosecutor-initiated investigation or the state party referred situation meets all the jurisdictional requirements, the case must additionally meet the gravity threshold provided in article 17(1) (d) of the Rome Statute before the prosecutor intervenes.

Accordingly, it is the Prosecutor that decides which persons to investigate, arrest, indict and prosecute, not the concerned state. In reality, nothing could have barred the Prosecutor’s office from investigating and indicting members of Kabila’s AFDL.

A discomforting issue is the potential of Congo’s domestic criminal justice to be used against political foes and spare implicated persons serving the ruling elite. Congo’s post-independence political system had this propensity. The 2006 Congo Constitution guaranteed judicial independence, separation of powers and respect for the law. In reality however, there are few political safeguards to restrain the Kabila regime from using the domestic criminal justice institutions to pursue wartime enemies. It would appear that Kabila himself has opted to balance the search for

876 The OTP has reasoned that under the interests of justice ‘test’ “the Prosecutor is not required to establish that an investigation or prosecution is in the interests of justice. Rather, he shall proceed with investigation unless there are specific circumstances which provide substantial reasons to believe it is not in the interests of justice to do so at that time”, see ICC Office of the Prosecutor Policy Paper on the Interests of Justice, September 2007, para 3.
878 Article 53 (3) (a) – (b).
879 A case will be held inadmissible by the Court if “(t) he case is not of sufficient gravity to justify further action by the Court.”
881 See for instance The Mapping Exercise Report (2010), para 932, observing that although various constitutions and laws contain provisions aimed at guaranteeing judicial independence, “courts and tribunals have always suffered from interference from the executive, in violation of the principle of the separation of powers.”
justice with the need to consolidate peace, thus sending mixed signals against army generals with exposed criminal backgrounds. However, in light of the general shocking nature of war crimes and crimes against humanity that characterised the Congo conflict, the focus in Congo would be on the more horrendous crimes such as mass rape and mass murder at the exclusion of illegal natural resource exploitation. Ultimately, the choice of suspects for Congo war crimes justice is likely to be determined by this crucial factor of the gravity and nature of the war crimes committed and by the caprices of the ruling political elite.

4.5 The politics of international criminal justice

4.5.1 Congo, African politics and the ICC

A number of developments have emerged from Africa’s association with the ICC and these have significantly impacted on Africa’s commitment in fighting impunity. In confronting war on the continent, African states, through the African Union, feel that they have a deeper role to play in shaping African politics and determining Africa’s relations with international institutions such as the International Criminal Court. On the other hand, the International Criminal Court has sought to ignore the regional political dynamics within the African Union, insisting on complete independence from international politics. In 2007, the Office of the Prosecutor confirmed this approach by releasing a policy paper stating that despite the Rome Statute legal framework


885 See ICC Office of the Prosecutor Policy Paper on the Interests of Justice, September 2007, para 1 (stating that “the interests of peace … fall within the mandate of institutions other than the Office of the Prosecutor”. See also reaffirming this view, the statements by the newly sworn ICC Prosecutor, Fatou Bensoda, The City Press ‘ICC won’t bow to politicians’ available at http://www.citypress.co.za/Columnists/ICC-wont-bow-to-politicians-20120609 accessed 20/07/2012, (stating that “… we should not be guided by the words and propaganda of a few influential individuals whose sole aim is to evade justice but – rather – we should focus on, and listen to the millions of victims who continue to suffer from massive crimes”).

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necessarily impacting on conflict management efforts, “any political or security initiative must be compatible with the new legal framework insofar as it involves parties bound by the Rome Statute.” Thus, whilst the ICC sought to push for the prosecution of Congo armed rebels chiefs indicted by the ICC, the AU supported a conflict resolution approach that sought to consolidate Congo’s hard earned peace. Indeed, during Congo’s political transition, a number of former leaders of armed rebel groups were incorporated in the consequent inclusive government and received pardons or amnesties for their crimes during the war. In 2009, Joseph Kabila, the Congo President declared his support for peace over justice in Congo, stating that,

“Justice that will bring out war, turmoil, violence, suffering and all that, I believe we should say: let's wait, let's do away with this for the time being. For me, the priority right now is peace. […] We haven't forgotten that he [Bosco Ntaganda] is wanted by the justice system. But at the same time, we are telling the justice system that you are not going to be in place in the Congo if and when war breaks out.”

The African Union has supported this peaceful co-existence policy of Kabila with former armed rebel officials, meaning that he has continental political support. Kabila’s government has clearly chosen the path supported by the AU, leaving no

887 Jean Pierre Bemba, leader of the MLC enjoyed official immunity since he had been incorporated into the Congo government, first as a Vice President, then Senator in 2007, see generally The Prosecutor v Jean Pierre Bemba Gomba, Decision on the confirmation of charges available at http://www.icc-cpi.int/iccdocs/doc/doc699541.pdf accessed 16/03/2012; Situation in the Central African Republic, Prosecutor v Jean Pierre Bemba Gombo Case No. ICC-01/05-01/08. The other armed rebel leader facing charges before the ICC, Bosco Ntaganda, leader of the CNDP was incorporated into the Congolese national army, FARDC, see http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200206 ICC%200104%200206?lan=en-GB accessed on 16 March 2012.
889 Kabila’s policy has however not been a permanent one. In April 2012, he called for the arrest of Bosco Ntaganda who had chosen to form a rebellion against Kabila’s Congo government, see BBC ‘Congo’s Terminator: Kabila calls for Ntaganda arrest’ 11 April 2012 available at http://www.bbc.co.uk/news/world-africa-17683196 accessed 12/04/2012, with Kabila stating Ntaganda would be prosecuted in Congo, not at the ICC where he stood accused of war crimes.
890 Such support is shown in the actions by the AU vis – a vis Omar Al Bashir warrant, where the AU expressed that the indictment had “unfortunate consequences on the delicate peace processes underway in the Sudan” and that the indictment “continues to undermine the on-going efforts aimed at facilitating the early resolution of the conflict in Darfur”. See Sirte Declaration, Decision on the meeting of African States Parties to the Rome Statute of the ICC, Doc. Assembly/AU/13 (XIII), paras 2 and 3.
doubt that international criminal justice aspirations have been overshadowed by domestic and continental politics in the aftermath of the Congo conflict.

African heads of states\footnote{With a few exceptions, for instance Botswana; see ‘Botswana stands by the ICC’http://www.gov.bw/en/News/Botswana-stands-by-the-International-Criminal-Court/- accessed 12/04/2012.} have further resented the application of the principle of universal jurisdiction to fight impunity on the continent.\footnote{See Assembly of the African Union 13\textsuperscript{th} Ordinary Session 1 – 3\textsuperscript{rd} July 2009 Sirte: \textit{Decision on the Abuse of the Principle of Universal Jurisdiction}, Doc Assembly/AU/11 (XIII), para 4} Under this principle, courts of any state have jurisdiction over a criminal offence despite the place of its commission, nationality of the suspect or victim or any other nexus between the crime and the prosecuting state.\footnote{R Cryer et al \textit{International criminal law and procedures} 2\textsuperscript{nd} ed (2010) 50 – 51.} Thus, other countries with effective criminal justice systems could prosecute suspected members of armed rebel groups for illegal natural resource exploitation activities committed during the Congo conflict. The AU’s concern is that non-African states “blatantly” abuse this principle by issuing indictments against African leaders and personalities.\footnote{Doc Assembly/AU/11 (XIII), para 4.}

It should be stated that the Rome Statute framework does not require states to exercise universal criminal jurisdiction over crimes under the jurisdiction of the International Criminal Court.\footnote{R Cryer et al \textit{International criminal law and procedures} 2\textsuperscript{nd} ed (2010), 59 where the authors observe that the Rome Statute does not even mention the principle of universal jurisdiction, and that states may only exercise universal jurisdiction “based on the position of customary international law”.} The Statute does not however preclude states from passing legislation and prosecuting war crimes committed in other foreign states.\footnote{CK Hall ‘Universal jurisdiction: New uses for an old tool’ in M Lattimer and P Sands (ed) \textit{Justice for crimes against humanity} (2003) 53, arguing that although the Rome Statute does not explicitly provide for universal jurisdiction or require states to exercise it, the Preamble of the Statute affirms the need for state parties to combat international crimes domestically and through international cooperation.} Other states could therefore exercise universal jurisdiction to prosecute members of armed rebel outfits implicated in illegal natural resource exploitation activities during the Congo war on the basis of their national legislation.\footnote{One of the earliest, cases on this principle was the Israel \textit{Eichmann} case (1968) 36 ILR 5. A number of states have now enacted legislation enabling them to prosecute for war crimes and other crimes committed by non-nationals outside their borders, eg the UK’s War Crimes Act 1991, near similar legislation in Germany, Switzerland and Belgium. See also A Cassese \textit{International criminal law} (2003) 284 – 298, remarking (at 298) that in general, states are unwilling to prosecute foreign nationals accused of war crimes for “fear of meddling in the domestic affairs of other States”.} There seems to be no obstacle that can stop willing states that ratified and domesticated the Rome Statute
from doing this. The major question is whether African states, particularly important states in the Great Lakes region, accept the exercise of universal jurisdiction against leading African personalities implicated in war crimes.

African politicians have consequently become increasingly critical of Western interests and agenda with the ICC, particularly in the Congo post-conflict era. The major sources of discomfort include the ICC’s seemingly exclusive focus on Africa, its seeming bias on justice in lieu of peace in Africa and the controversy surrounding the indictment of the Sudanese head of state, with Sudan not party to the Rome Statute framework. African states expressed their misgivings against the ICC at both the twelfth and thirteenth ordinary session of the Assembly of the African Union held in Ethiopia and Libya in 2009. The African Union indicated, firstly that the ICC framework was hostile to peace processes and conflict resolution efforts initiated under the auspices of the African Union. Secondly, the African Union expressed dissatisfaction with its relationship with the ICC and took a collective action not to cooperate with Article 98 agreements relating to the immunity of the Sudanese President. In a separate Communique, the African Union further proceeded to castigate the abuse of the principle of universal jurisdiction, “particularly by some non-African states”, and expressed deep concern that ‘indictments have continued to be issued in some European states against African leaders and personalities”. Subsequently, the African Union mooted the establishment of an African criminal court and passed a decision to request the AU Commission “in consultation with the

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898 See ‘AU Chairman: ICC singles out African leaders’ 21 April 2011 available at http://foreignpolicyblogs.com/2011/04/21/au-chairman-icc-singles-out-african-leaders/ accessed on 19 November 2011. The then Chairperson of the AU Commission, Mr Jean Ping stated that by seemingly targeting Africa and not other locations of mass atrocities, the ICC was working unfairly.


900 Other scholars actually believe that the indictment and possible prosecution of Bashir will bring peace, not further turmoil to Sudan; see DM Crane ‘Back to the future: reflections on the beginning of the beginning: international criminal law in the 21st century’ (2008- 2009) 32 Fordham International Law Journal 1761 (predicting (p1767) that as with the Taylor case, “the indictment of President el- Bashir of the Sudan for similar crimes will eventually bring peace also to Darfur”).

901 In the Sirte Declaration (Doc Assembly AU/13 (XIII), the AU noted (at para 3) with “grave concern the unfortunate consequences that the indictment has had on the delicate peace processes underway in The Sudan and the fact that it continues to undermine the on-going efforts aimed at facilitating the early resolution of the conflict in Darfur”.

902 See Doc. Assembly AU/13 (XIII), para 10.

African Commission on Human and People’s Rights and the African Court on Human and People’s Rights to examine the implications of the Court being empowered to try serious crimes of international concern such as genocide, crimes against humanity and war crimes, which would be complementary to national jurisdiction and processes for fighting impunity.”

In August 2010, a draft report and draft legal instrument that incorporated the directives and suggestions for amendment of the relevant AU Protocols were submitted to the AU Commission’s Office of the Legal Counsel (OLC), together with proposed amendments to the existing Protocol. Validation workshops were held for suggestions, debate and considerations of the drafts. Subsequently, both the draft report and draft legal instrument were amended, incorporating directives and suggestions from the workshops. However, despite these initial efforts, the draft instruments have not been brought before a meeting of Ministers of Justice and Attorneys General for approval. Thereafter, the draft instruments should still be placed before the Executive Council for forwarding to the Assembly of Heads of State and Government and finally before the Assembly of States for adoption and signature. Only after this process is complete can the reality of an African criminal court materialise.

It is asserted that Africa’s misgivings against the ICC are essentially political rather than economic; it is not clear whether different misgivings would have arisen had the ICC’s focus centred on economic related issues such as illegal exploitation and externalisation of African natural resources to foreign states during armed conflict.

904 See Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction, Doc Assembly/AU/3(XII), paragraphs 9, and Decision on the meeting of African State Parties to the Rome Statute of the ICC, Doc Assembly/AU/13/XII, paragraph 5.
906 The last meeting of the AU Assembly of State Parties was held on 24 July 2012, and ended with the Peace and Security Council releasing a Communique that ignored the issue of the African Court and focussed on reviewing the situation in Darfur and the activities of the African Union United Nations Hybrid Operation in Darfur, see Communiqué accessed on 08/10/2012 http://www.au.int/en/sites/default/files/psc%20comm%20%20darfur%20328%2024%2007%202012
Such a scenario would have shed light on Africa’s perceptions on the role of international private corporations, armed rebel groups and external states in illegal natural resource exploitation during armed conflict. Most importantly, such a scenario would have shed further light on Africa’s views on the use of international criminal law institutions, particularly the International Criminal Court, to prosecute illegal natural resource exploitation activities. However, there is no doubt that these developments clearly illustrate how international criminal justice on the continent remains tied to politics.\textsuperscript{908} Illegal natural resource exploitation activities can thus be dealt with only if they can be fit into mainstream continental politics. In the event that this fails to happen, there is a high likelihood that international criminal justice aimed against illegal natural resource exploitation will suffer diminished continental political support.

4.6 The UN Security Council, the ICC and State Cooperation

As illustrated in Chapter Three, the United Nations Security Council played a critical role addressing Congo’s illegal natural resource exploitation crisis.\textsuperscript{909} Its role in the management and resolution of problematic aspects arising out of the Congo conflict began as early as the outbreak of the Congo war, thus before the establishment of the International Criminal Court. With the advent of the ICC, there is no doubt that these two institutions needed to relate with each other in order to confront the massive violations of human rights and commission of other war crimes during the conflict. Such relationship did not exist until 2004 when the United Nations and the International Criminal Court signed the Negotiated Relationship Agreement,\textsuperscript{910} which entered into force on 22 July 2004. This is in terms of Article 2 of the Rome Statute, which provided for an agreement to govern the relationship between the two institutions.

\textsuperscript{908} This is echoed in DM Crane ‘Back to the future: reflections on the beginning of the beginning: international criminal law in the 21st century’ (2008- 2009) 32 Fordham International Law Journal 1761 observing (p1766) that despite the legal nature of the international criminal process, “political and diplomatic expediency with a glaze of reality win the day.”

\textsuperscript{909} See Chapter 3.

international organizations. Notably, the work of the Security Council appointed Panel of Experts, which ended with the last report in 2003, effectively pre-dated both Congo’s referral of its national situation to the ICC Prosecutor as well as the UN - ICC relationship agreement.

Following this landmark agreement, the nature of the assistance rendered by the Security Council to the ICC following the referral of the Congo situation to the ICC still remained unclear. The basis for this uncertainty seems to be the absence of any clear approach between the ICC and the Security Council for the prosecution of war crimes suspects. The Security Council was thus confined to using its findings to exert political and diplomatic pressure through Resolutions, for instance, that prescribed restrictive measures or sanctions against implicated members of armed rebel groups facing charges before the ICC. A number of these Resolutions condemned atrocities and illegal exploitation of natural resources in Congo, identified the major actors and participants in the war crimes and also called for the prosecution of implicated persons and groups. The cumulative effect of the Resolutions was to exert pressure on implicated armed rebel groups, making them international pariah. The success rate of these Resolutions was significant, with some actions eventually resulting in freezing of their foreign assets, travel restrictions, capture and detention by other countries and eventually, their gradual

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911 Article 2 states that “The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf.”
912 The Negotiated Agreement is lacking in this aspect. Besides Article 87 of the Rome Statute, there are no other provisions in the treaty that could be used as a basis for a mutually beneficial relationship between these two institutions. In the Tadic case No 94-1-A, para 51, the ICTY stated that it had to rely on the Security Council as an enforcement mechanism in the event of non-compliance. Some early optimists hoped that the relationship between the Security Council and the ICC would be “complementary”; see V Gowlland – Debbas ‘The relationship between the Security Council and the projected ICC’ (1998) 3 Journal of Armed Conflict Law 97. However see M Bergsmo ‘The jurisdictional regime of the International Criminal Court (Part II, Articles 11 – 19’) (1998) 6 European Journal of Crime, Criminal Law and Criminal Justice 29, 41, observing that the Prosecutor needs the Security Council’s coercive powers in order to work effectively.
914 For instance, on 27 May 2008, the Pre-Trial Chamber of the International Court dealing with the case of Jean Pierre Bemba, a suspected Congo war criminal, wrote a letter to the Portuguese government requesting it to identify, trace, freeze and seize the assets of Bemba, albeit for purposes of paying for his Counsel services. This information was obtained from the ICC website, at http://www.icc-cpi.int/iccdocs/PIDS/publications/BembaEng.pdf accessed on 07 August 2011.
To an extent therefore, the UN Security Council was able to discharge its mandate of the maintenance of international peace and security, a responsibility which, it has been argued, embraces the prevention of impunity for certain international crimes.

Apart from exerting pressure on implicated conflict actors and perpetrators of serious international crimes, the Security Council had to play an important role in encouraging state and non-state parties to the ICC to cooperate with the Court for its own effectiveness and in order for the Security Council to fully discharge its own responsibilities under the UN Charter. State cooperation was critical in the pursuit of implicated perpetrators of illegal natural resource exploitation who could move freely within the Great Lakes region, Europe or Asia to enhance their international alliances and benefit from the linkages within the international economic system. It could be argued that where individual states classify implicated persons, such as armed rebel leaders as persona non grata, their ability to smuggle, export, traffic and externalize illegally exploited natural resources would be diminished.

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915 Notable Congolese senior leaders of armed opposition groups who have been captured or arrested owing to international stigmatization and indictments includes Thomas Lubanga Dyilo, Bosco Ntaganda and Calliste Mbarushimana, see the arrest warrants for these people on [http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0104/](http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0104/) accessed on 12 July 2011. Another armed rebel leader is also Laurent Nkunda arrested in a joint Congo –Rwandan military initiative in 2009, see ‘Laurent Nkunda, Congo rebel general arrested’ The Sunday Times, January 23, 2009 available at [http://www.timesonline.co.uk/tol/news/world/africa/article5571394.ece](http://www.timesonline.co.uk/tol/news/world/africa/article5571394.ece) accessed on 02 August 2011.

916 Article 24 of the UN Charter provides: “In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf”.

917 See N Jain ‘A separate law for peacekeepers: The clash between the Security Council and the ICC’ (2005) 16:2 EJIL 239. See also The Prosecutor v Tadic (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) 02 October 1995 paras 28- 48. At para. 44, the ICTY held that “we are of the view that the Security Council was endowed with the power to create this International Tribunal as a measure under Chapter VII in the light of its determination that there exists a threat to the peace.”

Under the Rome Statute, only member states have a general obligation to cooperate; non-state parties can only cooperate upon “invitation”. 919 These non-state parties might need to be legally pressured into cooperating with the Court in the absence of a specific international obligation to do so, and the Security Council is better placed to exert the required pressure. However, it appears that there are no legal grounds that would enable the Security Council to exert pressure against non-party states, at least from a Rome Statute perspective. It can however be asked whether the Security Council can be permitted by other treaties or customary international law to oblige non-party states to cooperate with the ICC.

It has been suggested that the UN Security Council can legally compel non-state parties to cooperate with the ICC, 920 and derives the legal authority to bind every member state of the United Nations from Article 25 of the United Nations Charter. 921 Under this provision, the Security Council could pass a Resolution requiring state parties to the UN Charter to cooperate with any institution, including the International Criminal Court. In essence, this would be giving the Security Council the legal basis required to complement the work of the ICC, albeit outside the framework envisaged by both the Rome Statute drafters and the Negotiated Agreement. It could be argued that the Security Council is able to compel states to cooperate with the ICC in pursuit of its peace and security maintenance mandate under the UN Charter and the ICC has no legal grounds to restrict it from doing so. 922

919 Article 87 (5) (a) of the Rome Statute provides: “The Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis”.
920 Z Wenqi ‘On cooperation by states not party to the ICC’ 91.
921 Z Wenqi ‘On cooperation by states not party to the ICC’ 91. Article 25 of the UN Charter provides: “The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”
922 See N Jain ‘A separate law for peacekeepers: The clash between the Security Council and the ICC’ (2005) 16:2 European Journal of International Law 239, 253, where the author comments that “[w]hile the ICC, by the terms of its constitutive instrument, is an independent international organization, it cannot, by virtue of the principles of treaty law restrict the operation of the UN Charter. Thus, any restriction placed on the authority of the Security Council which has been entrusted with the primary responsibility of maintaining international peace and security under the UN Charter through the terms of the Rome Statute is controversial.”
To exacerbate the problem of non-party states, three members of the Security Council, namely Russia,\(^923\) China and the US are not parties to the Rome Statute. The Security Council is bound to be accused of hypocrisy if it encourages other non-party states within the Great Lakes region to cooperate with the ICC where some of the Security Council’s most powerful members are not party to this institution. That these important members tend to prioritize economic and political interests over international justice concerns before deciding whether to act or not means that the Security Council members could lack sufficient political will to take action complementing the ICC in the investigation and prosecution of illegal natural resource exploitation activities of armed rebel leaders and their corporate accomplices.\(^924\) In reality, the UN Security Council members have appeared reluctant to support and encourage the prosecution of corporations and corporate executives from their own nations.\(^925\) Indeed, in relation to the Congo conflict, the Security Council appeared to lack interest in adopting coercive and aggressive recommendations by the Panel of Experts against corporations, where these would have been implicated as trading with armed rebel outfits.\(^926\) The consequence is that because of the Court’s reliance on state cooperation, having the world’s most powerful countries “with the most widely spread military and greatest intelligence capability” outside the ICC framework detracts heavily from the ICC’s full potential to address trans-boundary illegal natural resource exploitation activities of armed rebel groups.\(^927\)

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\(^923\) Russia has signed, but not ratified the Rome Statute while China actually voted against the Rome Statute in 1998. China has not signed the treaty. Information obtained from [http://www.icc-cpi.int/Menus/ASP/states+parties/](http://www.icc-cpi.int/Menus/ASP/states+parties/) accessed on 02 December 2011.


\(^925\) See Chapter Two, see also F Grignon ‘Economic agendas in the Congolese peace process’ in M Nest et al *The DRC* 71.


\(^927\) BN Schiff *Building the International Criminal Court* 180. For instance, in the discussion of Congo’s illegal natural resource exploitation activities, the US representative, Mr Cunningham, who was also the Security Council President supported the implementation of the Lusaka Agreement that ignored natural resource exploitation issues, stating that it was the duty of the Congolese people to end criminal resource exploitation activities by building appropriate institutions to that effect; see UN Doc. S/PV.4317 (Resumption) 9 – 10.
It should however be pointed out that the Security Council played a crucial role in generating awareness of the role played by illegal natural resource exploitation activities in the Congo conflict.\textsuperscript{928} Through investigations and reporting\textsuperscript{929} of the phenomenon, the Security Council gradually tightened the screws against implicated persons, particularly armed rebel groups. In essence, the Security Council sought to use the results of its investigations as a basis to exert pressure on, and marginalize leaders of armed rebel groups implicated in illegal natural resource exploitation activities.\textsuperscript{930} Some of its Resolutions, as shown in Chapter Three, prohibited giving of financial and military assistance to Congo armed rebel groups in order to restrict their movements within Congo whilst further empowering MONUC to search and seize ports, military bases, airports, airfields and border crossings, to report on the movements of armed rebel groups and information on their arms supply.\textsuperscript{931} It is hoped that the relationship between the ICC and the United Nations Security Council be further developed such that a mutually beneficial regime that encourages state cooperation be in place in the interests of effectively addressing war crimes with trans-border aspects such as illegal natural resource exploitation activities.

4.7 Conclusion

The nature and manner of illegal natural resource exploitation activities experienced during the Congo conflict demands the use of an institutional framework that can effectively punish perpetrators of such acts whilst guaranteeing lawful exploitation of such resources. In theory, this clearly justifies the use of international criminal law to address the illegal natural resource exploitation phenomena. Apart from its coercive potential that could constrain particular actors in conflict, this legal regime can also shape conflict behavior and further mediate between the multiple, competing and divergent interests of affected local communities and the international community.

\textsuperscript{928} See Chapter 3, paragraph 3.4.2 (‘Institutional Constraints’).

\textsuperscript{929} The specific mandate of the Security Council appointed Panel of Experts was reporting and collecting information on all illegal natural resource exploitation activities in Congo and providing an analysis of the links between illegal natural resource exploitation and continuation of the conflict, see UNSC Presidential Statement S/PRST/2000/20, June 2, 2000.


\textsuperscript{931} UN Doc. S/1493/2003 para 18.
This legal regime can further influence the social norms and predatory practices of militant armed groups in natural resource spaces in conflict states. Thus despite debate on the use of international criminal law, its full potential is yet to be realised and this could be done by its increasing use where it is necessary.

This Chapter has argued that there is a basis that international criminal justice can directly or incidentally achieve the desired goals if it is chosen to address the conflict-resource nexus. The various issues explored in this Chapter allude to the reality that the current framework is workable and could achieve its overarching goals through constant application of the provisions of the Rome Statute over time. By its application, it can augment and complement vital efforts designed to address the criminal activities engendered by natural resource financed warfare, thereby guaranteeing peace, human security and safety in those parts of Africa ravaged by cycles of resource-centred armed violence.  

932 For the view that international criminal justice can augment efforts to resurrect war torn societies, see, The Secretary General: Report of the Secretary General, the Rule of Law and Transitional Justice in Conflict and Post-conflict Situations UN Doc. S/2004/616, August 23, 2004 highlighting some of the various mechanisms that could be adopted in post-conflict transitional phases to rebuild devastated communities.
CHAPTER FIVE: INTERNATIONAL CRIMINAL RESPONSIBILITY OF ARMED REBEL GROUPS

5.1 Introduction

The Rome Statute provides a legal framework for the prosecution, by the International Criminal Court, of persons responsible for committing serious international crimes. Congo’s armed rebel groups were identified as some of the most important non-state conflict actors responsible for the illegal exploitation of Congo’s natural resources. This chapter analyses, on the basis of the Rome Statute, the individual criminal liability of members of armed rebel groups involved in illegal natural resource exploitation activities during the Congo conflict. The foundation for such an analysis, laid in Chapter Two, is that armed rebel groups played (and will possibly continue to play) a critical role in illegal natural resource exploitation activities during the Congo conflict and by exposing them to international criminal sanctions, can such criminal behaviour be possibly deterred or checked in the future. These persons deliberately took advantage of the prevailing conditions of the Congo conflict in order to maximize their unlawful access to Congo’s resources; indeed their illegal practises and the manner in which they carried them out was critically influenced by the existence of the Congo conflict. This chapter is thus an application of the legal provisions, concepts, principles and procedures in the Rome Statute against the conduct of members of armed rebel groups implicated in illegal natural resource exploitation activities witnessed during the Congo conflict.

In the legal analysis, this Chapter is aware of the distinction maintained by the Rome Statute between crimes committed in international armed conflict\(^933\) and those committed in non-international armed conflict\(^934\). This thesis will deal with the applicable provisions based on the reality, explored in Chapter Two, that the Congo conflict was fought on three levels; the macro level pitting states, the meso level characterised by intrastate wars featuring the Congo state and armed rebels and also armed rebels against each other, and the micro level represented by internal

\(^{933}\) Article 8(2) (b) of the Statute.  
^{934}\) Article 8(2) (c) and (e) of the Statute.
conflicts within armed rebel groups, or militias.\textsuperscript{935} Illegal natural resource exploitation activities flourished under the hostile conditions created by the war and fought on these different levels. In light of this, it becomes extremely difficult to establish the specific type of armed conflict in which particular natural resource exploitation activities were carried out. Accordingly, whilst the distinction in the Statute might serve some purposes, for the purposes of this Chapter it will only be dwelt upon where it adds critical value in the application of the Rome Statute to the illegal natural resource exploitation activities of members of Congo’s armed rebel groups.

5.1.1 The Rome Statute and Armed Rebel Groups

The legal status of a militant group implicated in the commission of war crimes does not absolve its individual members from criminal responsibility under international criminal law.\textsuperscript{936} In terms of the Rome Statute, the International Criminal Court has criminal jurisdiction over natural persons, not groups of natural persons.\textsuperscript{937} It is therefore not the legal status of the group, but the actions of its individual members that determines their criminal responsibility or otherwise under the Rome Statute legal framework. In addition, it is the role and status of such persons in such organisations that might assist in the determination of the nature of individual criminal liability appropriate for different members of such groups.\textsuperscript{938} The international legal status of armed rebel groups will only be considered if it assists in

\textsuperscript{935} See, for instance, the characterisation of the Congo armed conflict by the ICC in The Prosecutor v Thomas Lubanga Dyilo, Preliminary Chamber I, decision of 29 January 2007 (ICC-01/04-01/06), paras 200-237.

\textsuperscript{936} See France et. al. v. Goering et. al 22 IMT 411, 466 (Int’l Mil. Trib. 1946) (“crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.” See also Report of the International Commission of Inquiry on Darfur to the UN Secretary General pursuant to Security Council Resolution 1564 of 14 September 2004, Geneva, 25 January 2005, paras 172 – 174, stating that members of armed rebel groups are bound by relevant rules of customary and conventional international law.

\textsuperscript{937} Article 1 of the Rome Statute specifies that the International Criminal Court “shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions.” Article 25 clarifies the definition of persons, stating that the ICC “shall have jurisdiction over natural persons pursuant to this Statute”.

\textsuperscript{938} The International Criminal Court has, in recent decisions, emphasised the need to differentiate the nature of criminal liability applicable for persons who carry out different tasks in furtherance of the commission of serious crimes, see Situation in the Democratic Republic of Congo: The Prosecutor v Germain Katanga and Martin Ngudjolo Chui No. ICC-01/04-01/07 paras 519 – 526.
the determination of criminal responsibility for unlawful natural resource exploitation activities during the war under the Rome Statute. These issues will be explored later in this Chapter.

However, it is reiterated that, as with the ad hoc tribunals, the Rome Statute’s criminal jurisdiction is confined to ‘natural persons’. Article 25 (1) stipulates that only ‘natural persons’ can be prosecuted for their individual actions, and not for their membership of a group or for the collective activities of that group. In view of this, it is clear therefore that only individual officials and members of armed opposition groups would be prosecuted for war crimes. These implicated personalities would be prosecuted for their individual actions, even if such actions were done on behalf, or on the authority, of the armed rebel group as a whole.

### 5.2 Identifying the Suspects

Under the Rome Statute, only certain cases are admissible while other cases are left for national criminal justice systems. This system works effectively in the Congo case where there are bound to be too many defendants from former armed rebel groups.

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939 Further, the international legal personality of armed rebel groups can be important for other purposes such as the determination of penalties by the ICC under Article 77 of the Rome Statute. Article 77 provides for a raft of possible penalties upon conviction, one of which is the “forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.” Offshore accounts of Congo armed rebel groups opened from sales and exports of illegally exploited natural resources could be frozen, attached and forfeited to Congo upon proof that the proceeds originated from sales of natural resources illegally exploited from Congo during the conflict. Accordingly, the conviction of members of an armed rebel groups by the ICC should be sufficient to found the legal basis for proceedings aimed at the forfeiture and recovery of liquid and illiquid assets belonging to the group and their return to Congo using the Congo domestic legal system.

940 Article 25 (1) of the Rome Statute states that “The court shall have jurisdiction over natural persons pursuant to this Statute”.

941 It has been pointed that, at Nuremberg, the purpose for declaring some German organisations and groups to be criminal organisations were threefold, namely (i) to outlaw certain organisations the purpose of which was military government or occupation (ii) to punish membership of criminal organisations such as the SS, and (iii) to control the assets of such criminal organisations; see L Zegveld Accountability of armed opposition groups (2002) 55.

942 It has been argued that in theory, a leader of an armed opposition group could be held responsible for the war crimes of others subordinate to him in terms of the combined effect of Articles 1 (4), that recognises wars of national liberation and 96 (3) of Additional Protocol 1, that requires the leadership of a national liberation movement to declare being bound by the Protocol. However, Additional Protocol 2 that deals with internal armed conflicts does not have such a provision. Further, in practice, the scenario contemplated in Article 96 (3) is highly unlikely to happen. See F Kalshoven and L Zegveld Constraints on the waging of war (2001), 142.

943 Article 17 of the Rome Statute.
groups. The question is which type of defendants should be chosen as appropriate for prosecution in order to effectively send the right signal to perpetrators of illegal natural resource exploitation activities.\footnote{Situation in the DRC, Decision on the Prosecutor’s Application for Warrants of Arrest, para 55.}

The issue of admissibility is governed under Article 17 of the Rome Statute that renders a case inadmissible where;

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
(d) The case is not of sufficient gravity to justify further action by the Court.

In \textit{Situation in the DRC, Decision on the Prosecutor’s Application for Warrants of Arrest}\footnote{Situation in the DRC, Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58 ICC-01/04-196.} the ICC Pre-Trial Chamber interpreted Article 17 as empowering the ICC to target only the senior leaders who bore the greatest responsibility in perpetrating war crimes. In that case, the Pre-Trial Chamber opined that “...only by concentrating on this type of individual can the deterrent effects of the activities of the Court be maximised because other senior leaders in similar circumstances will know that solely by doing what they can to prevent the systematic or large-scale commission of crimes within the jurisdiction of the Court can they be sure that they will not be prosecuted by the Court.”\footnote{Situation in the DRC, Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58 ICC-01/04-196.} Applying this reasoning, the focus of the ICC would be on senior and other important figures in armed rebel groups who bear the greatest responsibility for illegal natural resource exploitation activities and other war crimes.

\footnote{The practise of the \textit{ad hoc} criminal tribunals had been to streamline their focus and target a certain group of perpetrators while leaving the rest to domestic criminal and transitional justice systems or other processes. The eventual result was that the \textit{ad hoc} tribunals had to target persons who bear the greatest responsibility, while leaving cases of lesser gravity to the domestic criminal justice system. For the ICTY, the strategies were introduced by Security Council Resolutions 1503 (2003) and 1534 (2004), which targeted the completion of trial activities at first instance by the end of December 2008 and the completion of the appeals by the end of 2010.}
However, the “seniority” reasoning and interpretation was rejected by the Appeals Chamber of the ICC which declared that the Pre-Trial Chamber had imposed a rigid standard primarily based on top seniority and that this could guarantee neither retribution nor prevention but could hamper the preventive and deterrent role of the ICC.\textsuperscript{947} In the Appeals Chamber’s view, the targeting of senior leaders automatically sends a wrong signal that only this class of superiors is targeted by the ICC.\textsuperscript{948}

The Appeals Chamber position does not provide a solution to the problem of the possibility of too many defendants, such as is the position with regard to the Congo situation.\textsuperscript{949} Be that as it may, the Office of the Prosecutor has consequently followed a two tiered practical approach to deal with this situation; “(o)n one hand, it will initiate prosecutions of the leaders who bear most responsibility for the crimes,” whilst on the other “it will encourage national prosecutions for the lower-ranking perpetrators, or work with the international community to ensure that the offenders are brought to justice by some other means.”\textsuperscript{950}

For Congolese war crimes, this would entail the ICC targeting those leading members of armed rebel groups and \textit{militias} most responsible for illegal natural resource exploitation activities. However the ICC would need to design a special test that should be met before a person’s illegal natural resource exploitation activities could be construed in superlative terms. Ideally, the rest of the defendants would have to be dealt with by the Congolese national criminal justice system at such time it would be able to handle such cases. However, after years of conflict the Congo national criminal justice system and various state security, judicial and political systems have faced serious institutional and infrastructural challenges that continually hampered the delivery of justice. Such institutional malaise adds more

\textsuperscript{947} See \textit{Situation in the DRC: Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber 1 entitled “Decision on the Prosecutor's Application for Warrants of Arrest, Article 58” No. ICC-01/04 of 13 July 2006, para 78 – 80.}

\textsuperscript{948} See \textit{Situation in the DRC Judgment on the Prosecutor’s Appeal para 78.}

\textsuperscript{949} See Chapter Two.

\textsuperscript{950} See Office of the Prosecutor: \textit{Paper on some policy issues}, September 2003, 3. This approach was also considered a practical truism by the then Chief Prosecutor of the Special Court of Sierra Leone, see DM Crane ‘White man’s justice: applying international justice after regional third world conflicts’ (2005 – 2006) 27 \textit{Cardozo Law Review} 1683 (pointing out (p1684) that, “At the international level, ‘greatest responsibility’ should be the standard for personal jurisdiction.”
difficulty to efforts by international justice institutions aimed at addressing illegal natural resource exploitation activities that had commenced with the coming of the war.

5.2.1 Unwillingness and Inability

In view of institutional collapse during the period of the armed conflict, Congo’s justice system had to substantially rely on international mechanisms and necessary infrastructure in order to deliver a modicum of justice. This could prop state security systems and plug the existing criminal justice institutional gap until such time when these systems can stand on their own feet and be used to expose implicated members of armed rebel groups to criminal justice.

The Rome Statute responds, under Article 17(2), to the reality of institutional malaise characterising Congo during the armed conflict and the transition. This provision is meant to specifically assess the effectiveness of national criminal justice systems in prosecuting war crimes. In practise, the Rome Statute adopts a test based on ‘unwillingness’ and ‘inability’ preconditions to determine the preparedness and effectiveness of criminal justice systems in prosecuting international crimes. Thus, if the Congo state manifested either an unwillingness or inability to prosecute particular cases during the conflict, the referral of its situation to the ICC could be justified.

With respect to “unwillingness” the Office of the Prosecutor has developed “indicia” used to determine this, and this include use of tactics and policies by the state for the purpose of “shielding” perpetrators from justice, and the factors to determine

\footnote{This is canvassed in Chapter 2.}

\footnote{Article 17 (2) states:}

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.
shielding has been held to include delay tactics,\(^{953}\) systematic erosion of independence of the judiciary,\(^{954}\) partiality of investigators, prosecutors, adjudicating authorities and other relevant state agencies.\(^{955}\) Also pointed were linkages between perpetrators and judges, and between authorities and suspected perpetrators.\(^{956}\)

In relation to “inability”, the precondition of “total or substantial collapse or unavailability of (the) national judicial system” required in the Rome Statute\(^{957}\) should be evidenced by lack of necessary personnel, judges, investigators, prosecutors, and lack of judicial infrastructure and of substantive or procedural penal legislation. The systematic obstruction by uncontrolled elements can also render the system “unavailable”, as do amnesties and immunities.\(^{958}\)

There is no doubt that post war Congo’s criminal and military justice system manifested the symptoms of “inability”, making a referral to the ICC the most viable option. The previous Chapters have already demonstrated that these factors were characteristic of Congo’s political and criminal justice throughout the conflict,\(^{959}\) thus ruling out the possibility of credible criminal justice processes during the war. Further, owing to delicate political arrangements in the inclusive government after 2003, it was highly unlikely that the Congo state would sustain high profile prosecutions of senior military and political leaders of either the ruling coalition or armed opposition groups.\(^{960}\) Any legal proceeding against this high level group of

\(953\) According to the Experts Paper (p3), the delay can be investigative or prosecutorial and unjustified in comparison to normal delays in the national system with similar complexity.

\(954\) This can be lack of independence of the judiciary and investigating and prosecutorial authorities and also lack of transparency in appointments and dismissals of these officials.


\(957\) Article 17 (3) provides that:

3. “In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.”


\(959\) See Chapter Two.

\(960\) W Burke White ‘Complementarity in practice: The ICC as part of a system of Multi Level Global governance in the DRC’ (2005) 18 Leiden *Journal of International Law* 564 – 565. The author echoes this, observing that “… the primary political actors have a strong incentive to position themselves for
persons would have had far reaching implications in Congo’s dual search for peace and justice. By taking the decision to refer its situation to the ICC, the Congo government could buy itself breathing space to capacitate local political, security, judicial and legal institutions necessary for it to focus in the near future on low level war crimes suspects whilst the ICC pursued prominent suspects who bore the greatest responsibility in the commission of war crimes.

5.3 War Crimes Constituting Illegal Natural Resource Exploitation

As highlighted in Chapter One, illegal natural resource exploitation activities can be prosecuted under three specific war crimes in the Rome Statute, namely “seizure of property”, “pillaging” and “extensive appropriation of property” not justified by military necessity and carried out wantonly and unlawfully. These three crimes fall under the category of “war crimes” in the Rome Statute. In terms of the Rome Statute, the criminal jurisdiction of the International Criminal Court is activated only when such crimes meet the threshold that they were “committed as part of a plan or policy or as part of a large scale commission of such crimes”.

Applied to the Congo case, there is no doubt that the manner in which the major armed rebel groups engaged in illegal natural resource exploitation activities in Congo (illustrated in Chapter 2) demonstrate that such activities were part of a carefully orchestrated plan or policy to finance their military operations. Their electoral victory by undermining the position of other parties to the peace agreement. Given that many of the key political actors are implicated in international crimes, criminal justice offers a powerful mechanism to discredit enemies and reshape the domestic political landscape. The potential implications of a criminal indictment by national or international courts are significant.

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961 See Chapter One, paragraph 1.4.
962 Article 8 (2) (b) (xiii) and Article 8(2) (e) (xii) criminalises “seizing the enemy’s property unless such ... seizure be imperatively demanded by the necessities of war”.
963 Article 8(2) (b) (xvi) and Article 8 (2) (e) (v) prohibits “pillaging a town or place, even when taken by assault”.
964 Article 8(2) (a) (iv) prohibits the “appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”
965 Article 8 (1) of the Rome Statute. See ICC Office of the Prosecutor: Response to communications concerning the situation in Iraq, 10 February 2006, available at www.icc-cpi.int/organs/otp/otp_com.html accessed on 20 August 2011, arguing that the threshold in Article 8(1) “is not an element of the crime, and the words “in particular” suggest that this is not a strict requirement. It does, however, provide Statute guidance that the Court is intended to focus on situations meeting these requirements.”
966 See Chapter Two. See also GN Nzongola The Congo from Leopold to Kabila 236.
activities were not spontaneous acts of opportunism; in contrast, they were carefully planned as part of the military strategy of armed groups. To that extent, it can be argued that the nature in which these activities were committed meets the threshold laid in Article 8(1) of the Rome Statute.

It is further argued that in relation to natural resource crimes during the Congo conflict, Article 8(1) assists in distinguishing small scale opportunistic isolated acts from large scale, serious and well planned criminal behaviour that constitutes war crimes. This distinction means small scale ordinary criminality would be left to the domestic criminal justice system whilst the International Criminal Court assumes jurisdiction over those war crimes contemplated in the Rome Statute.

5.3.1 Framing the Charges

The charge sheet that indicts identified senior commanders and leaders of armed opposition groups should provide a solid foundation for their individual criminal responsibility. In addition to identifying the person, the charge sheets should contain general allegations aimed at establishing the context in which the war crimes were committed. It should thus identify the armed conflict in which the accused person was involved, his membership of an armed opposition group and the extent of participation of that group in the armed conflict. Most importantly, the indictment should establish a nexus between conduct of the accused person and the armed conflict. Accordingly, the general allegations should include a brief history of the formation of the armed opposition group and its entry into the armed conflict, its \textit{modus operandi} in achieving military objectives during the conflict and the respective roles, functions and responsibilities of its leaders and members in accomplishing its political and military goals. In addition to this, the international humanitarian law obligations of the armed opposition group, and the international responsibilities of its...

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967 See R Cryer et al \textit{An introduction to international criminal law and procedure} (2010) 2nd ed 288, asserting that “Article 8(1) is rather an indicator to the ICC as to how it ought to exercise its jurisdiction; namely to focus its resources not on isolated war crimes but on the most serious situations.”

968 The ICC Elements of Crime (under Article 8, War Crimes) explicitly require the offending conduct to have been committed “in the context of and associated with” an armed conflict.
leaders and members should be highlighted in relation to the particular crimes they are charged with.

Moreover, the allegations ought to specify the area in which the armed rebel group operated and the manner in which it was involved in illegal natural resource exploitation activities in those areas. The details in this part should include the dates, targeted resources, modes of acquisition and exploitation, commercialisation, trading, transportation and export. In theory, these aspects should sufficiently describe the nexus between the military operations of the armed opposition group and the economic life of the areas they controlled, as well as the impact of the economic activities to the economic well-being of the areas under their subjugation. In illustrating these details, the allegations should continually highlight the role, functions and contribution of the accused persons to the formulation, implementation and supervision of the group’s economic, military and administrative policies. Most importantly, the allegations should state that the accused persons were either *de jure* or *de facto* vested with either supreme legislative, administrative and/or executive authority and thus accordingly responsible for the execution of the group’s rules, commands and directives.

### 5.4 Fulfilling the Elements of Crimes.

#### 5.4.1 General

Under the Rome Statue, the Prosecution has to demonstrate both the (subjective) mental elements and the objective (physical) elements of the war crimes in the indictment. Article 30 of the Rome Statute outlines the mental elements, and states that a person’s criminal responsibility and liability for punishment for any listed crime arises only if the material elements are committed with intent and

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969 Article 9 of the Rome Statute provides that elements of crimes to be adopted under the Article "shall assist the Court in the interpretation and application of articles 6, 7 and 8." For the reason that they are made to “assist the Court” it has been opined that the Elements of Crimes are useful for interpretation of the war crimes and not as strictly binding upon the Court; see K Dormann ‘War Crimes under the Rome Statute of the ICC, with a special focus on the negotiations on the Elements of Crimes’ in A von Bogdandy R Wolfrum (eds) *Max Planck Yearbook of United Nations Law* (2003) 7 350.
knowledge. Further, a person’s intention is determined according to his conduct and appreciation of the consequence; if he meant to engage in that conduct and meant to cause the consequence or was aware the consequence would occur, he is judged to have had the intention. Knowledge is presumed if there was awareness of a circumstance, or that a consequence will occur.

The mental intent of members of armed rebel groups can also be inferred from the use to which they applied the exploited natural resources. Thus in terms of legal doctrine, the members of armed rebel groups have the requisite mental intent if (i) they use the proceeds from the sale of natural resources to purchase arms or finance the conflict (ii) the proceeds are used to financially benefit political and military elites, or (iii) when the proceeds are repatriated to a foreign country or region beyond the state of acquisition.

The Prosecution is also required to establish two elements common to all war crimes including pillage, unlawful seizure or appropriation of property. These are that:

(i) The conduct took place in the context of and was associated with an (international) armed conflict.

(ii) The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

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970 Article 30 (1) of the Rome Statute requires both intent and knowledge conjunctively and not disjunctively. The legal value of the elements of crime is disputed, although most scholars assert that the language of Article 9 suggests that the “elements themselves are to be used as an interpretive aid and are not binding upon the judges,” see K Dormann (with contributions by L Doswald-Beck and R Kolb) Elements of war crimes under the Rome Statute of the International Criminal Court (2003) ICRC 8.

971 Article 30 (2) (a).

972 Article 30 (2) (b).

973 The court can infer the mental intent of the accused persons from the surrounding circumstances. See K Dormann Elements of War Crimes (2003) 33.

974 These principles derive from Article 55 of the Hague Regulations that essentially allows the occupying army to exploit natural resources for the benefit of the local population, and not for enrichment of the occupying forces. See, for more analysis, RD Langenkamp and RJ Zedalis ‘What happens to Iraq oil?’ (2003) 14 European Journal of International Law 417, 432. See also JG Stewart Corporate war crimes (2010) 58 – 61.

5.4.2 In the context of and was associated with an armed conflict

Judging by the specific provisions used to charge particular persons, the Prosecutor is required to establish whether the illegal natural resource exploitation activities in question occurred in the context of and was associated with either an international armed conflict or non-international armed conflict, which ever would be the case. In the Katanga and Ngudjolo case the ICC endorsed an earlier view that this element is fulfilled “when the alleged crimes were closely related to the hostilities”. The ICC also adopted the reasoning of the ICTY in the Tadic case that “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”. Further, it has been held that “the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator’s ability to commit (the crime), his decision to commit it, the manner in which it was committed or the purpose for which it was committed.” It should also be shown that “the perpetrator acted in furtherance of or under the guise of the armed conflict ... to conclude that his acts were closely related to the armed conflict.”

As shown previously, there is no debate that illegal natural resource exploitation activities that are subject of this thesis were manifest during such “a resort to armed force” between States or “protracted violence” between governmental authorities and various organized armed groups, or between such groups during the Congo conflict.

In the Bemba Confirmation of Charges case, the ICC Pre-Trial Chamber followed a simplistic approach in determining the existence of the armed conflict in

976 The Prosecutor v Germaine Katanga and Mathieu Ngudjolo Chui; Decision on the confirmation of charges. ICC No. ICC 01/04-01/07 para 380. The Katanga case followed the early view of the ICC in The Prosecutor v Lubanga Dyilo ICC-01/04-01/06-803-tEn, para. 288.
977 Katanga case para 381 (quoting from the Tadic case para 68).
980 Situation in the DRC: The Prosecutor v Jean Pierre Bemba Gombo Decision pursuant to Article 61 (7) (a) and (b) of the Rome Statute No. ICC 01/05-01/08.
Consequently the Court reached a verdict that an armed conflict existed by considering direct evidence from witness statements and testimonies, facts not disputed by both the Defence and the Prosecution and facts that were in the public knowledge through reports by non-governmental organisations and United Nations human rights protection agencies in Congo. In addition to identifying the Congo armed conflict in which the accused members of armed rebel groups were involved, the unlawful natural resource exploitation activities should be particularised. Most importantly, the indictment should establish the nexus between conduct of the accused persons connected to natural resource exploitation and the Congo conflict. The Prosecution also need to prove that the accused persons had knowledge that their unlawful natural resource exploitation activities were being made possible by the prevailing conditions of the Congo conflict.

5.4.3 Awareness of factual circumstances that established the existence of an armed conflict

The question here is whether individual members of Congo’s armed rebel groups accused of illegal natural resource exploitation activities needed to be aware of the factual circumstances that led to the existence of the Congo conflict when they carried out such acts. Although there appear to be no settled position answering this inquiry, the ICC seems satisfied with the explanation of this requirement in the elements of crimes; that “there is no requirement for awareness by the perpetrators of the facts that established the character of the conflict as international or non-international.” It however would seem that it is sufficient to show that the members

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981 See The Prosecutor v Bemba case supra, paras 240 – 242.
of armed rebel groups appreciated the nexus between their illegal natural resource exploitation activities and the prevailing conditions of the Congo conflict.986

5.4.4 Elements of Specific Crimes

With respect to the war crime of unlawful seizure of property,987 the Pre-Trial Chamber of the ICC in *The Prosecutor v Katanga and Ngudjolo Chui*, observed that the requisite “attack” giving rise to the seizure should not only be directed at military objectives alone, but even in cases “when it targets” civilian property.988 Under this war crime, it should further be proven that the members of armed rebel groups seized certain property that is protected from seizure under the international law of armed conflict and that the property belonged to the Congo state.989

The ICC further reiterated that the property in question “must belong to individuals or entities aligned with or with allegiance to a party to the conflict adverse or hostile to the perpetrator.”990 The unlawful exploitation, seizure and trafficking of Congo’s natural resources by armed rebel groups fighting against the Congo state during the conflict would satisfy this precondition. Further in terms of Article 30, the *mens rea* for this offence is the armed rebels’ intention to seize the property and their knowledge that their actions will cause the seizure of Congo’s natural resources.991

In addition to the objective elements for pillage,992 the Prosecutor should prove *mens rea*. For the *mens rea* of pillage, the form of intention needed is *dolus directus*; that

986 See *The Preparatory Committee, Working Group on Elements of Crimes: Outcome of an Inter-sessional meeting of the Preparatory Commission for the International Criminal Court held in Siracusa from 31 January to 6 February 2000, PCNICC/2000/WGEC/INF1*, 9 Feb. 2000, 6. The Siracusa Report specifically stated that, “For War crimes, no mental element as to the context will be listed”. See also K Dormann “War Crimes under the Rome Statute of the ICC” 362, stating that the third paragraph of the Introduction to Article 8 Elements of Crimes “seems to suggest that the perpetrator need only know the nexus”.
987 Article 8 (2) (b) (xiii) and Article 8(2)(e)(xii).
989 See Elements of Crimes for Article 8 (2) (b) (xiii).
990 *The Prosecutor v Katanga and Ngudjolo* No. ICC-01/04-01/07 para 31. See Elements of Crimes for this war crime as well (paragraph 2).
991 See *The Prosecutor v Katanga and Ngudjolo* No.ICC -01/04-01/07 para 315.
992 The objective elements of crime for pillage are that:
- The perpetrator appropriated certain property.
the aim and object of the implicated members of armed rebel groups was to carry out such unlawful natural resource exploitation activities ("the prohibited conduct") or to bring about the criminal consequence.\textsuperscript{993} Dolus indirectus – that the accused persons did not aim to bring the unlawful consequence, but foresaw the certainty of it coming about – may also be sufficient.\textsuperscript{994} Most importantly however, a special form of intention, dolus specialis is a prerequisite in the war crime of pillage; the Prosecutor has to prove that the accused members of Congo’s armed groups carried out unlawful acts of physical appropriation of Congo’s natural resources with intent to deprive the Congo state and private entities of the property, and secondly that the physical appropriation was carried out with the intent to utilise the appropriated natural resources for private or personal use.\textsuperscript{995}

Further, in relation to the mental intent necessary in the commission of pillage, it should be demonstrated that members of armed rebel groups purposefully acquired the natural resources unlawfully and without any form of consent from the Congo state.\textsuperscript{996} The actual exploitation can be committed by any member of the armed rebel group, from the senior commanders or through agents and lowly ranked subordinates. In France v Roechling, an appointed official was convicted of pillage for seizing steel plants and tonnes of steel from mines given under his authority by German occupying authorities.\textsuperscript{997} Applying the ratio in this case, the exploitation of natural resources by Congo’s puppet armed rebel groups in areas occupied by

- The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use.
- The appropriation was without the consent of the owner

\textsuperscript{993} J Burchell and J Milton Principles of criminal law (2006), 461. The author observes that terms used to describe the form of intention in international criminal law, specifically the Rome Statute are “not dissimilar” from those found in South African law.

\textsuperscript{994} The Prosecutor v Germaine Katanga and Martin Ngudjolo para 331.


\textsuperscript{996} France v. Roechling, 14 Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, app. B. (1949), pp. 1117–1118.

\textsuperscript{997} France v. Roechling supra 1117 - 1118.
foreign armies would constitute pillage even if the occupation authorities purported to grant such groups the authority for such resource exploitation activities.\textsuperscript{998}

In the \textit{Bemba Confirmation of Charges} case, the Pre-Trial Chamber explained that “pillaging a town or place pursuant to article 8(2) (e) (v) of the Statute entails a large-scale appropriation of all types of property, public or private, movable or immovable property and which goes beyond mere sporadic acts of violation of property rights,” and that the Elements of Crimes do not require such property to be of a certain monetary value.\textsuperscript{999}

These principles directly apply to the unlawful natural resource exploitation activities by armed groups of the Congo conflict. The Congo state made various protestations against the plunder of its natural resources by armed rebel groups allied to foreign governments during the Congo conflict. Further, the fact that the Congo state was at war with some of these armed groups would seem sufficient to nullify any claims of consent to exploit such resources. The Lusaka Agreement however introduced an interesting scenario by acknowledging the rights of some of Congo’s armed rebel groups to the political and economic administration of those areas under their control.\textsuperscript{1000} Following the 2002 inclusive government arrangements, State administrative functions were shared between Kabila’s Kinshasa government and armed rebel groups controlling other parts of Congo, such as RCD Goma and MLC.\textsuperscript{1001} Indeed, the governments of Rwanda and Uganda proceeded to recognise the legitimacy of the control of territory and exercise of governmental powers by these armed rebel groups. This meant that armed rebel groups validly exercised...

\textsuperscript{998} See JG Stewart \textit{Corporate war crimes} (2010) 68, stating that the authority granted by a foreign (occupying) government or armed rebel group to acquire existing natural resources does not lend legality to the acts of unlawful appropriation.
\textsuperscript{999} \textit{The Prosecutor v Jean Pierre Bemba Gombo Decision pursuant to Article 61 (7) (a) and (b) of the Rome Statute} No. ICC -01/05 – 01/08, 15 June 2008, para 317.
\textsuperscript{1000} See Article III of the Lusaka Peace Accord. Article III essentially distributes state administration functions to three political groups in Congo, namely the government of Congo, the armed opposition groups (MLC and RCD) and the unarmed opposition. Article III (para. 18) suggests that during the conflict, no single political group had the sole right to administer the Congo state whilst making it clear that such a scenario was the goal for the future. For a critique, see F Grignon ‘Economic agendas in the Congolese peace process’ in M Nest et al \textit{The DRC} 71.
\textsuperscript{1001} See both the Lusaka Ceasefire Agreement and the Global and Inclusive Agreement on Transition in the DRC signed in Pretoria, 16 December 2002. While the Lusaka Accord recognised “parallel” political administrations by the major armed rebel groups, the All Inclusive Global and Inclusive Agreement shared governmental power among Kabila’s government and former armed rebel groups.
quasi state administrative functions over subjects and entities in their area. For instance, the new rebel authorities granted various authorisations to natural resource exploitation firms operating in conflict zones. This aspect brings into question the legitimacy of authorisations or forms of consent given by armed rebel groups to private firms to engage in natural resource exploitation activities.

5.4.4.1 Consent

Under international law, only legitimate governmental authorities can grant authorisations to private entities for natural resource exploitation as provided by the domestic laws of that state. According to the International Law, only legitimate governmental authorities can grant authorisations to private entities for natural resource exploitation as provided by the domestic laws of that state. Accordingly, parties to a conflict in unlawful control of territory cannot legitimately exercise such powers. The practise of international tribunals has been to regard as invalid and illegal all activities of the controlling power if the presence of such a party in that area is unlawful and a violation of international law. In the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) case, the ICJ found the presence of a state actor in another state as unlawful under international law and proceeded to declare all economic and political activities of that state in such area as consequently illegal. Further, the Court ruled that the declaration of illegality does not absolve the state actor of its obligations under international law.

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1002 This principle derives from a state’s permanent sovereignty over its natural resources. International customary law has generally recognised the right of states to exercise permanent sovereignty over their own natural resources. This right is expressed as a principle of international law in General Assembly Resolution 1803 (XVII) of 14 December 1962 and also in the Declaration on the Establishment of a New International Economic Order (General Assembly Resolution 3201 (S.VI) of 1 May 1974) and the Charter of Economic Rights and Duties of States (General Assembly Resolution 3281 (XXIX) of 12 December 1974). See further JG Stewart Corporate war crimes (2010) 39 on the right of states to dispose of their natural resources.


1004 See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, Advisory Opinion of 21 June 1971, I.C.J. Reports, (1971), where the ICJ regarded as invalid and illegal the acts of a foreign administration that were not carried out for humanitarian purposes.

1005 Legal Consequences for States of the Continued Presence of South Africa in Namibia supra paras 117 – 120.

1006 Legal Consequences for States of the Continued Presence of South Africa in Namibia supra paras 117 – 120.
The war crime of pillage requires proof of lack of consent by the rightful owners, usually the state or other private persons to undertake the natural resource exploitation. Such consent can be in the form of licenses, authorisations, approvals, or rights to exploit certain natural resources. In the case of Congo’s mineral resources, private entities had an obligation to operate under the mining laws of Congo. As highlighted previously, the ownership of mineral resources in Congo is vested in the State. To that extent, it is the State that can grant mining rights to private parties through authorizations, licenses and other administrative forms of granting natural resource exploitation rights. In carrying out this, the Congo state regulates the mining industry through national legislation, regulations issued by the Congo parliament and the DRC executive branch. The main pieces of legislation of general application in this regard are the Mining Code (adopted in 2002) and the ancillary Mining Regulations, adopted in 2003. The Minister of Mines is responsible for issuing licences, concessions and other authorisations for prospecting, exploration and mining.

Using the above principles, only legitimate and recognised armed groups that were signatories to the Lusaka Agreement and that were in effective occupation of Congo territory could grant authorisations to private entities for natural resource exploitation. In principle, these armed rebel groups were required to respect, enforce and implement these laws. On the other hand, private persons and natural resource

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1007 In terms of the ICC Elements for the war crime of pillage, the Prosecutor has to prove, inter alia that “The appropriation was without the consent of the owner”.
1008 In terms of legal doctrine, courts assess ownership of natural resources based on the laws applicable within the country at war. See C McCarthy ‘The paradox of the international law of military occupation: sovereignty and the reformation of Iraq’ (2005) 10:1 Journal of Conflict and Security Law 43, arguing that the US occupation authorities had no right in international law to institute drastic legislative and institutional reforms that contrasted with Iraq’s fundamental ownership laws in respect of oil exploitation. See also JG Stewart Corporate war crimes (2010) 39, stating that in determining the pillage of mineral resources, the practice is to revert to the domestic law governing mineral rights.
1009 See Chapter Three paras 3.2.3.3 (p113 -114).
1010 See provisions of the Mining Code Law No. 007/2002. Article 58 of the 2005 Constitution of Congo now reads; “All Congolese have the right to enjoy the nation’s wealth. The State has a duty to redistribute it equitably and to guarantee the right to development.”
1011 The Mining Code was enacted by Law No. 007/2002 on the 11th of July 2002 (the Mining Code). The implementing measures of the Mining Code are provided by the Mining Regulations, enacted by Decree No. 038/2003 on the 26th of March 2003.
1012 Article 5 of the Mining Code reads: “[a]ny person of Congolese nationality is authorized to engage in artisanal exploitation of mineral substances in the National Territory, provided that he is the holder of an artisanal miner’s card, issued or granted by the relevant government entity in accordance with the provisions of the present Code.”
exploitation entities that failed to comply with this legislative framework were in breach of the law. These legitimate armed rebel groups could further pass new laws to regulate access, exploitation and management of natural resources in areas under their occupation. ¹⁰¹³

On the other hand, for other groups, the general position is that concessions and authorisations they gave to private natural resource exploitation entities had no legal validity. ¹⁰¹⁴ The exercise of control by these groups is contested and accordingly, their claim to exercise of quasi-state administrative power is disputed. Their access to Congo’s natural resources is unlawful and their authorisations to private entities are of neither legal force nor effect.

5.5 Applicable Modes of Individual Criminal Liability

Individual members of armed rebel groups contributed differently to the actual perpetration of illegal natural resource exploitation activities during the Congo conflict. In principle, the differential contribution to the eventual commission of criminal activities necessitates a distinction of the modes of criminal responsibility that attaches upon such individuals. Article 25 of the Rome Statute acknowledges the differential contribution to commission of war crimes and accordingly provides for a regime that recognises distinct modes of individual criminal liability.

The four major modes of criminal liability are (i) perpetration and co-perpetration ¹⁰¹⁵ (ii) ordering, soliciting or inducing ¹⁰¹⁶ (iii) aiding, abetting or otherwise assisting, ¹⁰¹⁷ and finally (iv) common purpose liability. ¹⁰¹⁸ Although Article 25 does not indicate the level of criminal responsibility to be attached at each level, Werle suggests that the distinction of these levels of participation establishes “a value oriented hierarchy of

¹⁰¹³ C McCarthy ‘The paradox of the international law of military occupation: sovereignty and the reformation of Iraq’ (2005) 10:1 Journal of Conflict and Security Law 47, observing that an occupant could legislate; the question is not whether it can legislate but the extent to which the occupant’s ‘factual capacity to institute reformation constrained by obligations in international law’.
¹⁰¹⁴ See JG Stewart Corporate war crimes (2010) 64, para 102. See also the IG Farben case 1134 – 1148.
¹⁰¹⁵ Article 25 (3) (a).
¹⁰¹⁶ Article 25 (3) (b).
¹⁰¹⁷ Article 25 (3) (c).
¹⁰¹⁸ Article 25 (3) (d).
participation in a crime under international law". By this reasoning, perpetration or commission would be the highest degree of individual criminal responsibility while participation in group crimes would be the lowest or weakest.

Applied to members of armed rebel groups of the Congo conflict, a number of factors determine the mode of criminal responsibility likely to attach on accused persons. These include the rank and status of accused individuals and the manner in which the particular illegal natural resource exploitation activities were done.

5.5.1 Perpetration and Co-perpetration

This mode of criminal liability would attach to those persons who directly participated in the unlawful natural resource exploitation activities and whose conduct satisfy the necessary elements for pillage, unlawful appropriation and seizure of property in the Rome Statute. With particular reference to armed rebel groups, this mode of liability captures all individual members involved in the physical appropriation, forcible acquisition and other forms of unlawful natural resource exploitation activities during the Congo conflict. Thus persons who, for instance conducted and participated in the actual acquisition, appropriation, transportation, trafficking and trading of Congo’s natural resources would be caught under this primary mode of liability.

5.5.2 Co-per perpetration and Senior Commanders

The careful planning and supervision of the illegal natural resource exploitation activities was done by senior members and commanders of armed rebel groups, ostensibly for military reasons. Thus the leadership of such armed rebel groups such as the MLC and RCD were implicated in such activities for both private gain and military reasons. In order to clearly reflect the nature and extent of the individual criminal responsibility of leaders and commanders of armed rebel groups, the

1019 G Werle ‘Individual Criminal Liability in Article 25 of the ICC Statute’ (2007) 5 Journal of International Criminal Justice 953 – 975, 957. The author argues (at 957) that from a teleological perspective, the jurisprudence from the ICTY suggests that distinguishing modes of participation in a statute is an indicator of the degree of individual guilt.

1020 See however The Separate Opinion of Judge Adrian Fulford in Situation in the DRC: The Prosecutor v Thomas Lubanga Dyilo, Judgment pursuant to Article 74 of the Rome Statute No: ICC01/04-01/06, 14 March 2012, paragraph 8, disregarding this approach.
practise of the ICC has been to regard them either as principal perpetrators or co-
perpetrators in the commission of an offence. This would ensure that they possess the highest degree of guilt possible and also differentiates the nature and degree of their guilt from that of their subordinates.

The ICC has developed, as a species of co-perpetration in Article 25 (3) (a), the doctrine of “joint control over crime” in order to target the collective contribution of senior commanders and leaders of armed rebel groups.

The doctrine was first explored and applied in the Lubanga Confirmation of Charges case and endorsed in the Lubanga judgment by the ICC delivered on 12 March 2012. This judgment, in obiter, also pronounced the law on co-perpetration that could be applied in the prosecution of illegal natural resource exploitation crimes. Firstly, the ICC stated that under the control over crime approach, the principals to a crime are not limited to those who physically carry out the objective elements of the offence but also include individuals who might be absent from the scene of the crime but nevertheless continue to control or mastermind its commission because they decide whether and how the offence will be committed. Armed rebel chiefs directly involved in the planning, masterminding and execution of various operations whose objects included the illegal acquisition and exploitation of Congolese natural resources can thus be prosecuted under this mode of liability. Their control of such

1021 In the Bemba case, the Pre-Trial Chamber held (at para 350) that “criminal responsibility under the concept of co-perpetration requires the proof of two objective elements: (i) the suspect must be part of a common plan or an agreement with one or more persons; and (ii) the suspect and the other co-perpetrator must carry out essential contributions in a coordinated manner which result in the fulfilment of the material elements of the crime.”

1022 The objective elements of co-perpetration are the existence of a common plan or agreement between two or more persons and the coordinated essential contribution by each co perpetrator resulting in the realisation of the objective elements of the crime. The objective elements include the fulfilment of the objective elements of the crime and mutual awareness and mutual acceptance of the joint plans and their object. See also Katanga case para 485 - 494, Bemba case para 346 – 368.

1023 See Prosecutor v Lubanga Dyilo No. 01/04-01/06 para 338; Katanga case para 488, Bemba case para 346 – 358. In the Lubanga case, the ICC emphasized that it accepts this approach as a method of distinguishing between the criminal liability of a principal from that of an accessory.

1024 Prosecutor v Lubanga Dyilo No. 01/04-01/06 para 338.

1025 Situation in the DRC: The Prosecutor v Thomas Lubanga Dyilo, Judgment pursuant to Article 74 of the Statute ICC-01/04-01/06.

1026 Prosecutor v Lubanga Dyilo para 330. The Trial Chamber went on to state (at para 342) that under this mode of liability, “although none of the participants has overall control over the offence because they all depend on one another for its commission, they all share control because each of them could frustrate the commission of the crime by not carrying out his or her task”.

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criminal activities was not in doubt and their absence from the “crime scenes” (i.e. the actual places where illegal natural resource exploitation activities were done) did not diminish that control or the degree of their participation.

In the Lubanga Confirmation of Charges case, the Pre-Trial Chamber listed the objective elements of co-perpetration under joint control over crime as, (i) the “existence of an agreement or common plan between two or more persons”; and (ii) the “coordinated essential contribution made by each co-perpetrator resulting in the realisation of the objective elements of the crime.” It can be inferred that the mutual planning and cooperation by armed rebel chiefs and their commanders and their shared intent in engaging in unlawful natural resource exploitation activities can be read as constituting a common plan among these persons to commit the crimes in question.

The subjective elements for co-perpetration based on joint control over crime are that (i) “the suspect and the other co-perpetrators must all be mutually aware of the risk that implementing their common plan may result in the realisation of the objective elements of the crime”; and (ii) the suspect must be aware of the “factual circumstances enabling him or her to jointly control the crime.” It is argued that the armed rebel chiefs and commanders were all mutually aware of the risks involved in undertaking the operations that resulted in their illegal natural resource exploitation activities. The numerous battles fought to secure resource rich areas and the heavy militarization of resource exploitation zones suggested an increased awareness by the leadership of Congo’s various rebel groups of the risks involved and illegality of

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1027 Prosecutor v Lubanga Dyilo para 343. The Chamber also observed that participation in the commission of a crime “without coordination with one’s co-perpetrators falls outside the scope co-perpetration within the meaning of Article 25 (3) (a) of the Statute.”

1028 Para 346. The Lubanga Judgment declared that the agreement need not be explicit; it “can be inferred from circumstantial evidence.” See Lubanga Judgment para 988.

1029 In the Lubanga Judgment, the Trial Chamber declared that the agreement need not be explicit; it “can be inferred from circumstantial evidence.” See Lubanga judgment para 988.

1030 Para 366. In the Lubanga Confirmation Decision, it was further held that it was sufficient to prove (i) that the co-perpetrators have agreed: (a) to start the implementation of the common plan to achieve a non-criminal goal, and (b) to only commit the crime if certain conditions are met; or (ii) that the co-perpetrators (a) are aware of the risk that implementing the common plan (which is specifically directed at the achievement of a noncriminal goal) will result in the commission of the crime, and (b) accept such outcome.”
such activities. Further, these persons were clearly aware of the conditions of armed conflict that existed in Congo during this period that enabled them to perpetrate such crimes.

Whilst adhering to the Pre-Trial Chamber’s reasoning, the Trial Chamber further proceeded to state that the prosecution need to establish that the “common plan included a critical element of criminality, namely that, its implementation embodied a sufficient risk that, if events follow the ordinary course, a crime will be committed.” The looting of stockpiles of mineral resources from state owned companies, the requisitions demanded from private companies and the forcible seizure of mineral resources from small scale traders and artisanal miners by armed groups illustrated in Chapter Two clearly included the elements of criminality or embodied sufficient risk in the commission of the crimes in question.

Finally, the Pre-Trial Chamber stated that “co-perpetration based on joint control over the crime requires that all the co-perpetrators, including the suspect, be mutually aware of, and mutually accept, the likelihood that implementing the common plan would result in the realisation of the objective elements of the crime.” Applied to Congo’s rebels, and as observed by various humanitarian organisations, there was little doubt about the intentions of the armed rebel groups in Congo’s natural resource space. It was clear that the leadership of armed groups sought to finance their military operations and enhance their military advantage through controlling the exploitation and trading of existing natural resources. Their military strategies, plans and operations were carefully implemented to realize this and other objectives during the Congo conflict. Accordingly, these persons were mutually aware, and mutually accepted that in carrying out their illegal natural resource exploitation plans, they would be meeting the elements necessary in the commission of such crimes.

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1032 Lubanga Judgment para 988.
1033 Lubanga judgment para 984.
5.5.3 De Jure and De Facto Commanders

The Rome Statute makes specific provision for the responsibility of both de jure and de facto commanders and civilian superiors of armed rebel groups. In terms of Article 28, a distinction is made between military commanders and persons acting as such on one hand, and civilian leaders of these groups who have a superior-subordinate relationship with lower level subordinates. This provision fully covers the state of affairs within Congo’s armed rebel groups. The reference to military commanders in the Article should cover actual commanders of regular state armies, whilst reference to persons acting as such targets those commanders in armed rebel groups. Thus commanders of armed rebel groups in Congo are not able to claim that they were not lawfully appointed commanders; it would be sufficient under the Rome Statute to show that in planning and implementing illegal natural resource exploitation methods, they acted as de facto commanders exercising control over subordinate armed groups.

In the Bemba case, the ICC set out the elements necessary in proving criminal responsibility under Article 28 and these include;

(a) The suspect must be either a military commander or a person effectively acting as such;
(b) The suspect must have effective command and control, or effective authority and control over the forces (subordinates) who committed listed crimes
(c) The crimes committed by the forces (subordinates) resulted from the suspect’s failure to exercise control properly over them;
(d) The suspect either knew or, owing to the circumstances at the time, should have known that the forces (subordinates) were committing or about to commit one or more of the crimes; and

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1034 Article 28 (a) provides: “A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces; where,

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

1036 The Prosecutor v Bemba ICC-01/05-01/08 para 407.
(e) The suspect failed to take the necessary and reasonable measures within his or her power to prevent or repress the commission of such crime(s) or failed to submit the matter to the competent authorities for investigation and prosecution.

The degree of criminal responsibility for military superiors has generally been differentiated from that of their subordinates, who are regarded as low level perpetrators. The general approach taken by the ICC in recent cases before it has been that a person’s blameworthiness increases “in tandem with a rise in hierarchy: the higher in rank or farther detached the mastermind is from the perpetrator, the greater that person’s responsibility will be”. The eventual effect of this is that persons in command positions within armed rebel groups found in the Congo conflict and implicated in illegal natural resource exploitation activities bear more criminal responsibility for such activities in comparison to the ordinary foot soldiers that physically perpetrated the criminal offences in obedience to orders.

It can be argued that both Article 25 and Article 28 clearly define the criminal liability of both commanders and subordinate members of armed rebel groups. It truly reflects and captures the behavioural organisation and modus operandi of armed rebel groups that featured in the Congo conflict and engaged in illegal natural resource exploitation activities. By providing an appropriate level of criminal responsibility for each class of perpetrators along the chain of command, both these Articles can be interpreted as sending a powerful message to war criminals at all levels. For the commanders, the systematic nature of the unlawful natural resource exploitation activities necessarily suggested high levels of long term planning, preparation and strategizing on their part for which they should be held responsible.

The Rome Statute however does not provide for the criminal liability on the basis of planning or preparation of unlawful activities that constitutes war crimes, unlike the

1037 The Prosecutor v Germaine Katanga and Martin Ngudjolo para 503.
1038 See The Prosecutor v Germaine Katanga and Martin Ngudjolo para 503. The ICC went on to accept the principle of “control over an organized apparatus of power” as a means of attaching individual criminal liability to senior leaders and commanders of military organisations. See also the Prosecutor v Lubanga Dyilo No. 01/04-01/06 para 338 where the Pre-Trial Chamber stated that took a view different from that of the ad hoc tribunals and considered that the Rome Statute “embraces” the control over crime approach implicit in Article 25 (3) (a).
Be that as it may, the Rome Statute provides for responsibility on the basis of ordering, soliciting or inducing the commission of a crime which occurs, or is attempted. Thus, commanders and leaders of Congolese armed rebel groups could be criminally liable for ordering or inducing subordinates under their command and authority to commit illegal natural resource exploitation activities. Further to this, the Statute recognises criminal responsibility of a person who “aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission”. It has however been argued that Article 25 (3) (a) that criminalises commission of a crime “through another person” could be interpreted to encompass planning, ordering or instigating. Such perpetrators have been described as perpetrators-by-means. It could be argued that the fact that leaders and commanders of armed rebel groups did not personally carry out the activities, but used the agency of other people and their subordinates does not exonerate them from liability as they could be prosecuted as committing crimes through other persons.

Leaders and commanders of armed rebel groups in the Congo conflict typically carried out careful planning and supervision of their natural resource exploitation activities. They however delegated the implementation of their plans and strategies to low level subordinates. By committing crimes through the agency of subordinates, these persons can definitely be held criminally liable as perpetrator-by-means envisaged in Article 25 (3) (a) of the Rome Statute. Even though the role played by these subordinates was critical, it was the planning, preparation and instigation by their superiors that made the illegal natural resource exploitation activities of the Congo conflict successful, large scale and profitable.

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1039 Article 7(1) of ICTY statute, Art 6(1) of ICTR statute and SCSL statute all make provision for individual criminal responsibility for those who aided and abetted in the planning, preparation or execution of an international crime.
1040 Article 25 (3) (b) of the Rome Statute.
1041 Article 25 (3) (c) of the Rome Statute.
1042 Gerhard Werle ‘Individual criminal responsibility in Article 25 ICC Statute’ 964. The author points that “conduct that warrants individual responsibility for the crime as a perpetrator-by-means has always been punishable in international criminal law, at least as planning, ordering or instigating the crime.”
1043 See R Cryer et al Introduction to international criminal law and procedure 364.
5.6 Possible Legal Defences

5.6.1 The *Tu Quoque* Defence

It has been shown elsewhere in this thesis that the allegations of illegal natural resource exploitation activities were not limited to armed rebel groups alone. Kabila’s close associates and members of Congo’s government were heavily implicated in misapplication of existing mineral resources for personal or private gain. A person invoking the defence of *tu quoque* claims that his actions and omissions are justified since such actions are similar or reflect the actions of the State at the time of the unlawful conduct; he thus rebuts the charges against him by claiming that the State cannot prosecute him since the State behaved in a similar culpable manner as the accused.\textsuperscript{1044} Once it is proved that the conduct of Congo state officials were done in the name of the Congo state,\textsuperscript{1045} indicted senior army commanders and political leaders of armed rebel groups would be tempted to point fingers to the unlawful natural resource exploitation activities of such state officials in rebuttal of allegations against them.

Since this defence seeks to bar the State from proceeding with prosecution, it is likely to be difficult to apply in an international criminal tribunal which is not created by any single state, and where the “*dominus litis*” is not a State. The ICTY rejected the competency of such a defence as a bar to allegations of violating international humanitarian law, holding that it is “irrelevant because it does not tend to prove or disprove any of the allegations made in the indictment against the accused.”\textsuperscript{1046} Accordingly, it has been argued that the ICC should similarly reject the defence of *tu*

\textsuperscript{1044} See M Scharf and A Kang ‘Errors and missteps: Key lessons the Iraq Special Tribunal can learn from the ICTY, the ICTR and SCSL’ (2005) 38 *Cornell International Law Journal* 911, 935 – 938.\
\textsuperscript{1045} The indicted armed rebels have to allege and prove that the state official carries out such unlawful natural resource exploitation activities for personal gain, and not on behalf of the state. It is impossible for the accused persons to allege that the Congo state committed pillage of its own resources since, as will been argued earlier, such allegations will not meet the necessary requirements to constitute war crimes.\
\textsuperscript{1046} Prosecutor v. Kupreskic Case No. IT-95-16; *Decision on Evidence of the Good Character of the Accused and the Defense of Tu Quoque*, Judgment of February 17, 1999, 3.
quoque on the basis of the *erga omnes* character of international humanitarian law norms that makes the defence inapplicable in war crimes law.\textsuperscript{1047}

### 5.6.2 Official Immunities and Congo's Post-Conflict politics

The Global and Inclusive Agreement on Transition in Democratic Republic of Congo signed in 2002 introduced an inclusive form of government in Congo and added further complexity into Congo's multi-party politics.\textsuperscript{1048} A direct consequence of implementing the terms of the Agreement was that eventually, a number of leaders of armed rebel groups took up posts in the inclusive government, headed by Joseph Kabila as President with four Vice Presidents, two of these from major opposition parties.\textsuperscript{1049} The Congo transitional government was in fact drawn from the 500-member National Assembly and the 120-member Senate.\textsuperscript{1050} Cabinet posts were eventually shared roughly across these political parties with no single party claiming outright control of government. For instance in terms of Annex 1 para A (4) of the Global Inclusive Agreement, seven ministries and four deputy minister posts were allocated to each of the four entities being, the Kabila party, RCD, MLC and the political opposition. Further, two ministries and two deputy minister posts had to be allocated to each of the RCD-ML, RCD-N and Mai-Mai.\textsuperscript{1051}

\textsuperscript{1047} E van Sliedregt 'Defences in international criminal law' in a paper presented at the *Convergence of Criminal Justice Systems: Building Bridges Bridging the Gap Conference*, The International Society for the Reform of Criminal Law, 17th International Conference, 25 August 2003, 23. The author proceeds to state that the defence "seems an outdated and controversial plea. It seems unlikely that the ICC would apply the defence under Articles 31(3) and 21(1) of its Statute."

\textsuperscript{1048} See for instance International Crisis Group: *The Inter-Congolese Political Dialogue: Political dialogue or political bluff?* Africa Report No 37, 16 November 2001. For instance, the ICG observes that Kabila's government felt that "since the rebel movements were born in Rwanda and Uganda it would be more sensible to negotiate with their backers rather than with the RCD or MLC directly."

\textsuperscript{1049} Chapter V (1) (D) k provides that "the government shall consist of the President of the Republic, the vice presidents, the ministers and deputy ministers. The ministerial portfolios shall be allocated among the elements and entities involved in the Inter-Congolese Dialogue under the conditions and according to the criteria set out in Annexe 1 to this Agreement."

\textsuperscript{1050} In terms of the Annex para B (1) the major political entities, being the government, the RCD, the MLC, the political opposition and the civil society each obtained ninety four ministerial posts, with the RCD –ML getting fifteen, RCD-N securing five and the Mai-Mai obtaining ten seats in the 500 member National Assembly. Regarding the Senate, the five major entities obtained twenty two seats each, with the RCD –ML receiving only four, the RCD –N getting two and the Mai Mai obtaining four seats.

\textsuperscript{1051} Annex 1 para A (6) of the Global Agreement. Two ministries and three deputy minister posts were further allocated to the civil society component of Congo politics (See para 5 of Agreement).
Important ministries were thus roughly distributed, with for instance the control of a number of key governmental portfolios including Justice, Finance, Budget, Foreign Affairs, and Defence, Demobilization and Demilitarization in the hands of Kabila’s political opponents.\textsuperscript{1052} Even as late as 2005, Congo’s national politics still reflected the enmity witnessed during the years of war. In view of this delicate political background of the inclusive governmental arrangement in Congo, former political enemies were compelled to co-exist and share political power amidst deep rooted animosity, suspicion and distrust.

A corollary of the inclusion into government of leaders of armed opposition groups was their assumption of official immunity as government representatives. Since some of these persons were heavily implicated, the fact that they were now serving government ministers endowed them with official immunity. The question to ask then is to what extent would the referral to the ICC enable Congo to override this major immunity obstacle and expose perpetrators of illegal natural resource exploitation activities to international criminal justice?

Article 27 of the ICC statute deals with the immunity of government officials from criminal prosecution for crimes stated in the Rome Statute. The article respectfully provides that the “official capacity” of government officials “shall in no case exempt a person from criminal responsibility … nor shall it, in and of itself, constitute a ground for reduction of sentence.”\textsuperscript{1053} The Statute further provides that immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, “shall not bar the Court from exercising its jurisdiction over such a person.”\textsuperscript{1054}

This provision is a clear anticipation of any form of post-conflict governmental structures, such as Congo’s inclusive government, with the potential of shielding war crimes suspects from international prosecution. Accordingly, inclusion of war crimes suspects in such structures and their consequent acquisition of national or

\textsuperscript{1052} W Burke –White ‘Complementarity in practise: The ICC as part of a system of Multi Level Global governance in the DRC’ (2005) 18 Leiden Journal of International Law 557,569.

\textsuperscript{1053} Article 27 (1).

\textsuperscript{1054} Article 27 (2).
international privileges can no longer act as a special procedural bar to international prosecution. In theory and practise, this provision therefore specifically prevents Congolese governmental officials from all parties from escaping justice notwithstanding their participation in the post-conflict inclusive government created by the peace processes.

Moreover, this provision explicitly overrides the conventional and customary international law rules that recognise the immunity of governmental officials from criminal prosecution when such personalities are still in office. The treaties overridden include the Vienna Convention on Diplomatic Relations, 18 April 1961, the Vienna Convention on Consular Relations, 24 April 1963 and the New York Conventions on Special Missions, 8 December 1969.

The International Court of Justice, in a case involving a Congolese government official, cleared any misconception about the question of immunities in contemporary international criminal law. In the Arrest Warrant Case, the ICJ stated that:

“... an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VI1 of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention.”

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1055 The defence of official immunity to charges of war crimes had previously been rejected by the Nuremberg International Tribunal of 1945, which pointed out that “The principle of international law which, under certain circumstances, protects the representative of a State cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment...” See Judgment of the International Military Tribunal (Nuremberg) 41 (1947) AJIL 172, 221.
1056 Article 32.
1057 Adopted on 24 April 1963.
1058 Article 21 provides that “The Head of the Government, the Minister for Foreign Affairs and other persons of high rank, when they take part in a special mission of the sending State, shall enjoy in the receiving State or in a third State, in addition to what is granted by the present Convention, the facilities, privileges and immunities, accorded by international law.”
1059 Case Concerning the Arrest Warrant of 11 April 2000 (DRC v Belgium), February 14, 2002.
1060 Case Concerning the Arrest Warrant of 11 April 2000 (DRC v Belgium), February 14, 2002 para 70. This position is supported by various scholars, see for instance A Cassese ‘When may senior state officials be tried for international crimes: Some comments on the Congo v Belgium case’ (2002)
The ICJ proceeded to state, albeit in obiter, that a former government official may be prosecuted for acts committed during his or her period of office in a private capacity. The importance of this is that former members of Congolese armed rebel groups who assumed governmental posts and positions but implicated in unlawful natural resource exploitation activities cannot hide under the veil of official immunities and escape criminal responsibility for such conduct and activities. This position remains so even if they perpetrated such crimes in the name and under the authorization of their former armed rebel groups.

Finally, from a domestic criminal justice perspective, this position precludes the enactment of legislation in Congo that recognises the defence of official immunity, or its use as a special jurisdictional bar against prosecution from the domestic criminal courts. This principle is even more applicable to Congo where its monist legal system recognises the superiority of ratified international instruments over domestic legislation.

5.6.3 The Defence of Superior Orders

To what extent can officers of armed rebel groups plead the defence of superior orders upon being charged of involvement in illegal natural resource exploitation activities under the Rome Statute? More than a century has passed since the time this defence was of unquestionable legal validity. In 1945, this defence was rejected by the Nuremberg Military Tribunal largely on the basis of moral...
arguments.\textsuperscript{1065} Although the \textit{ad hoc} tribunals endorsed the Nuremberg position, the Rome Statute took a slightly different approach, accepting the defence on the condition that (i) the person was under a legal obligation to obey (ii) the person was ignorant of the unlawfulness of the order, and (iii) the order was not manifestly unlawful.\textsuperscript{1066}

It can be argued that the defence of superior orders exists for middle level to low level members of armed or military organisations that have an organised military hierarchy; it is thus difficult to claim for senior military personalities who issue orders or high ranking officials who formulate policies or issue directives.

The fact that the person who is given the order should be “under a legal obligation to obey orders” means this defence is difficult to raise in the context of armed rebel organisations. There is no clear meaning that can be attached to “legal obligation” in this instance. For instance, should recourse be had to domestic law or international law? Unlike most domestic legal systems, international law extends recognition to armed rebel groups.\textsuperscript{1067} It is not clear, however, whether the rudimentary rules of international law pertaining to armed rebel groups would recognise the legality of orders within these actors. On the other hand, orders within armed rebel groups cannot be given in terms of national legislation, since no legal system grants recognition to armed rebel groups.\textsuperscript{1068} In relation to armed groups, obedience to superior orders can thus not be based on domestic law of the conflict state.

In practice, low ranking subordinates comply with orders and directives on the basis of military training, indoctrination and internal disciplinary methods of the armed rebel organisation.\textsuperscript{1069} At best, some of the more organised groups passed their own

\textsuperscript{1065} Nuremberg IMT Judgment 41 (1947) AJIL 172, 221.
\textsuperscript{1066} Article 33 (i) (a) – (c).
\textsuperscript{1067} See Common Article 3 to the Geneva Conventions (discussed in para 3.2.2.2) that recognises “each Party” to a non international armed conflict as bound by its provisions, and also Additional Protocol II to the Geneva Conventions that essentially regulates non international armed conflicts. See also L Zegveld \textit{Accountability of armed opposition groups in International law} (2002) 9.
\textsuperscript{1068} See C Garraway ‘Superior orders and the International Criminal Court: Justice delivered or justice denied’ (1999) 836 \textit{International Review of the Red Cross} 785.
\textsuperscript{1069} For instance, the FRPI and the FNI armed rebel groups used violent training and indoctrination methods to instill discipline and ensure that orders from superiors were carried out; see The \textit{Prosecutor v Katanga and Ngudjolo} case paras 543 – 548.
“laws” to regulate the activities of structures they created.\textsuperscript{1070} Such laws did not however inhibit Congo armed rebel group members from engaging in unlawful exploitation of natural resources in areas they controlled and where they acted as \textit{de facto} governing authorities. Further, such laws clearly violated the provisions of the constitutional and legal system of the state caught in the conflict.\textsuperscript{1071} It can thus be argued that there could not be any “legal obligation to obey” since the constitutional system of the Congo state did not validate the legal framework instituted by these armed rebel groups.\textsuperscript{1072} Consequently, all orders given within armed rebel organisations are bound to be unlawful from the perspective of domestic law, making this defence possibly non-existent to this group.\textsuperscript{1073}

The other two requirements recognise the criminal nature of obedience to superior orders if there was knowledge of their unlawfulness, or awareness of their manifest unlawfulness.\textsuperscript{1074} Accordingly, to escape criminal liability, subordinate officers need to lack knowledge of the unlawfulness of an order, or its manifest illegality. By coming up with this provision, drafters of the Rome Statute clearly accepted that superior orders can actually be given that are either unlawful or manifestly illegal.\textsuperscript{1075}

These other two conditions presuppose a degree of knowledge of the laws of war by the armies involved. For Congo, there are claims that the actual armed forces making up the military wing of most armed rebel groups lacked any formal training,

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{1070} The MLC under Jean Pierre Bemba was constituted in terms of the \textit{Statuts du Mouvement de Liberation du Congo}, a law signed by the MLC leadership in June 1999. This law created the political and military wings of the MLC and further creates various executive and senior military posts to carry out the MLC functions, \textit{The Prosecutor v Jean Pierre Bemba} ICC 01/05 – 01/08, paras 451 – 455.
\item\textsuperscript{1071} See for instance the MLC’s \textit{Statuts du Mouvement de Liberation du Congo}, a law signed by the MLC leadership in June 1999, creating various political and military structures within the MLC.
\item\textsuperscript{1072} The same rule could apply even to those organised and highly advanced groups such as factions that occupied parts of Congo and shared political administrative power with the Kabila’s Kinshasa government. However, if these armed rebel groups applied and implemented Congo’s national law, the orders issued to subordinate officers could be considered in different light.
\item\textsuperscript{1073} Different legal considerations could however apply to armed groups recognized by the 2002 Lusaka Peace Agreement, which acknowledged sharing of state administration functions between the Congo government and rebel groups party to the ceasefire negotiations. See Annex A, Lusaka Agreement, Chapter 6. In the UN debates on the Congo conflict (UN Doc. S/PV. 4317) Uganda in particular, claimed that sixty percent of Congo territory was in the hands of armed rebels whilst only a mere forty percent was under the Congolese government in Kinshasa.
\item\textsuperscript{1074} Article 33 (1) (b) and (c).
\item\textsuperscript{1075} For a criticism, see P Gaeta “The defence of superior orders: the Statute of the ICC versus customary international law” (1999) 10 \textit{EJIL} 172, 190.
\end{enumerate}
\end{footnotesize}
indoctrination and education into the laws of war. Most of the recruits might have participated in previous regional conflicts characterised by even more brutality. The culture of unbridled violence witnessed during the Congo conflicts generally exemplifies the true picture of conflict in the Great Lakes region. From a socialisation point of view, the cycles and prevalence of internecine warfare and particularly brutal methods of waging warfare have an obvious impact on the mentality of the social groups that participate in such conflicts as soldiers, militias or members of armed rebel organisations. The brutal socialization of recruits, their internalisation of military norms, values and behavioural patterns enhance compliance even with patently unlawful orders. Thus, appreciation of the criminality of their actions and methods of rules of warfare is consequently minimal. It could be argued that their actions owe much to this ruthless conflict-minded mentality than to compliance with superior orders from organised military hierarchies. In view of this, it can be argued that this group of perpetrators necessarily lack sufficient appreciation of the criminal nature of their military tactics; they have followed brutal orders over a long period of time that in their minds, such orders can neither be regarded as unlawful nor manifestly illegal.

5.6.4 Military Necessity

To what extent can indicted members of armed rebel groups justify their pillaging, seizure and appropriation of Congo’s natural resources on the basis of military necessity? The defence of military necessity is recognised in the Rome Statute, albeit not as a general defence but as a justification if it is incorporated in some

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1076 See for instance the Lubanga case, (para 50 -54) where the recruits were children whose “training” included exposure to brutal and criminal actions during the conflict.

1077 G Nzongola –Ntalaja The Congo from Leopold to Kabila (2002) 215. The author comments that on the African continent, no region is comparable to the Great Lakes region in terms of “political strife, loss of life and social dislocation during the last 40 years”.

1078 R Haer, L Banholzer and V Ertl ‘Create compliance and cohesion: how rebel organisations manage to survive’ in Small wars and insurgencies (2011)22:3, 419 (emphasizing the significance of antisocial norms and training methods in shaping behaviour of armed militant groups and the decreased importance of the formal legal system in influencing social activity).


1080 See R Cryer et al An Introduction to international criminal law and procedure (2010) 2nd ed 419. The authors point to the role of culture, propaganda and common knowledge in the appreciation of what is manifest illegality.
crimes in the Statute. Article 8(2)(a)(iv) expressly prohibits extensive destruction and appropriation of property, “not justified by military necessity and carried out unlawfully and wantonly”. Article 8 (2)(b)(xiii) criminalises the destruction or seizure of the enemy property unless such destruction or seizure “is imperatively demanded” by the necessities of war.

The defence of military necessity has been interpreted to sanction “measures which are indispensable for securing the ends of the war”\textsuperscript{1081} or that permit a belligerent to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life and money.\textsuperscript{1082} In view of this, it can be seen that military necessity can be raised to justify military strategies or operations that were carried out for reasonable military objectives but that, in ordinary cases fall foul to the laws of war.

A possible way to determine whether or not military tactics that violate the laws and customs of war can be justified in terms of military necessity is to analyse the military advantage that sought to be gained by adopting them.\textsuperscript{1083} The military advantage sought should be understood from a general military sense. Military necessity thus does not exist to exonerate acts committed in violation of the laws of war for private gain or the enrichment of a few individuals as was the case in Congo. Further, on the same principle, it can never be claimed to shield commanders and other politico-military personalities from criminal liability for engaging in organised looting, smuggling, exportation and trading of Congolese natural resources outside the context of their military operations.

Certain Congolese rebel groups allied with foreign military personnel and business entities to externalise illegally acquired natural resources for purely private gain, and not for military purposes. Moreover, most of the acquisition and exploitation of

\textsuperscript{1081} E van Slidgret ‘Defences in international criminal law’ 25.
\textsuperscript{1082} Trial of Wilhem List and Others, United States Military Tribunal, Nuremberg 8th July 1947, Case No 47 (“the Hostages Trial”), cited in Law Reports of Trials of War Criminals, Vol 8 (1949) 66.
\textsuperscript{1083} Trial of Wilhem List and Others 68. In this case, the defence of military necessity was accepted as justifying scorched earth policy by German forces under attack from the Russian army during the Second World War. In reaching its decision, the Military Tribunal found out that there was evidence that the scorched earth policy prevented the Russians from following up the retreating Germans although the Russians themselves had planned on doing so.
existing natural resources took place away from the battlefield, not as a part of military operations but as part of a large scale systematic policy of profiting from the prevailing state of conflict. Finally, the profits obtained from the illegally acquired natural resources such as mineral resources were used to engage in more illegal actions such as exchange for arms, torture, attacks on civilians, pillaging and other human rights violations not necessary to win any battle or the war. A direct consequence of these actions was the sustaining of the conflict situation in violation of UN resolutions calling for its cessation and the Lusaka peace process that called for demilitarisation, demobilisation and disarmament. In view of this, it would thus be difficult for members of armed rebel groups implicated in illegal natural resource exploitation to successfully claim military necessity in defence to charges of pillaging, appropriation and seizure of private and public property during the Congo conflict.

5.6.5 The State Cooperation regime of the Rome Statute

Due to the trans-boundary nature of some forms of illegal natural resource exploitation such as illegal smuggling and trafficking of natural resources, there is great need for cooperation from other states in the investigation of these crimes. Indeed, the absence of an effective international regime of state cooperation could potentially hinder and obstruct various international criminal justice processes such as investigations. The Rome Statute imposes a general obligation for state parties to “cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.” Further to this, the Statute encourages States to ensure that their national laws allow for the forms of cooperation provided for in the Statute. Thus, a state party should not plead that its domestic legal and constitutional framework precludes it from cooperating with the ICC, particularly where it has ratified the Rome Statute.

Provisions for state cooperation acknowledge the ICC Prosecutor’s critical reliance on the assistance and goodwill of member states, and the practical difficulties likely to be met in investigating crimes, gathering, collecting and securing evidence and

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1084 Article 86 of the Rome Statute
1085 Article 88.
compelling witnesses to testify. This difficulty would specifically apply especially to resource crimes that could be technical and difficult to track. As highlighted in the reports of the Panel of Experts, illegally acquired and exploited mineral resources were flown from Congo into transit countries and finally into end user states in Europe, North America or Asia.\textsuperscript{1087}

The Rome Statute specifies forms of assistance and cooperation, and these include the identification and whereabouts of persons or the location of items, the taking of oral and physical evidence and the production and the preservation of evidence of and reports, the questioning of suspects, the service of documents, including judicial documents, facilitating the voluntary appearance of certain persons before the Court, the temporary transfer of persons, the examination of places or sites, the execution of searches and seizures.\textsuperscript{1088} An important provision calls for the “identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties”.\textsuperscript{1089} It could be argued that this provision could be tested against offshore accounts opened by senior members of armed rebel groups.\textsuperscript{1090} The immediate application of this provision would cripple the financial clout of these groups and affect their capability to commit war crimes or inhibit them from funding their illegal natural resource exploitation activities. However, conversely, such measures could motivate these groups to commit more natural resource crimes in order to find a source for financing their military operations.

It is clear that the Rome Statute envisages a higher level of cooperation from states. Such cooperation might entail getting technical information about the trading and production activities of implicated companies owned by leaders of armed rebel groups outside Congo. This might generate problems as states are likely to resist

\begin{footnotes}
\textsuperscript{1087} See for instance UN Doc. S/2002/1146 paras 139 – 144.  \\
\textsuperscript{1088} Article 93 (1) (a) – (l).  \\
\textsuperscript{1089} Article 93 (1).  \\
\textsuperscript{1090} Individual countries such as Switzerland and the US have not shied away from freezing assets of persons implicated in international crimes. For instance, in November 2012, the US Office of Foreign Assets Control sought to freeze a number of accounts of Congo armed rebel personalities implicated in the commission of war crimes and crimes against humanity, see for instance US Department of State: “Treasury designates Congolese Militant leader” available at http://www.treasury.gov/press-center/press-releases/Pages/tg1763.aspx accessed on 13 November 2012.
\end{footnotes}
pressure that requires them to provide incriminating evidence against personalities and entities that could be important in their economies. Concerned states might even regard onerous demands under the Statute as inordinately intrusive into the domain of their internal affairs.

Further, considering the multinational identity of the major armed rebel groups in the Congo conflict, as well as their ability to circulate within the Great Lakes region and abroad with ease, the ICC might need cooperation and assistance from non-party states in order to find the suspects or for evidence. Ordinarily the nature and extent of cooperation by non-state parties depends on political considerations, rather than the interests of justice. The political clout of senior leaders of armed rebel outfits makes investigation a delicate political game especially where these persons enjoy the protection of foreign states.\textsuperscript{1091} The fact that some states were reported to have refused to cooperate with the Panel of Experts\textsuperscript{1092} imply that these countries might also lack the enthusiasm to cooperate with the ICC for various reasons. Moreover, the unending hostility between Congo and its other neighbours such as Rwanda,\textsuperscript{1093} Uganda and Burundi is likely to complicate any requests for cooperation. To exacerbate this, the Rome Statute provisions on state cooperation are addressed at state parties alone and this can be problematic.\textsuperscript{1094} States that are not party to the treaty can only cooperate or provide assistance upon an invitation to do so by the

\textsuperscript{1091} For instance, a number of armed rebel groups, such as MLC, RCD Goma, RCD ML, enjoyed favourable political relations with neighbouring Rwanda, Burundi and Uganda. At the height of political tensions within the Great Lakes region, these states would not readily submit to requests from Congolese officials without a fight, notwithstanding the support that Congo received from the international community, See for instance MPO Rodriguez ‘The FDLR as an obstacle to Peace in the DRC’ (2011) 23:2 Peace Review 177.

\textsuperscript{1092} See Panel of Experts Report UN Doc. S/2002/1146 paras 139 – 144. At para 139, the Report states “The Panel submitted questions to all 11 countries and held substantive discussions with government representatives from five. The Panel enquired about relevant legislation, investigations into the flow of the commodities, measures taken to curb those flows, other possible action to be taken and those Governments’ needs for assistance. Four of the 11 countries — the Republic of the Congo, Mozambique, the United Republic of Tanzania and Zimbabwe — declined to respond.”

\textsuperscript{1093} The most recent manifestation of mistrust between Congo and Rwanda concerned the conflict between the Congo government forces and the armed rebel group led by Bosco Ntaganda in 2012. A United Nations accused Rwanda of aiding Ntaganda and supplying him with troops to fight Kabila. See \url{http://www.nytimes.com/2012/05/29/world/africa/un-says-rwandans-recruited-to-fight-in-congo.html} accessed on 29 May 2012.

Court, which invitation they could decline. 1095 Non-state parties can however cooperate if the UN Security Council referred the case to the ICC Prosecutor and the UN Security Council explicitly mentions in the Resolution that the concerned non-state party is required to cooperate with the Court. 1096 There is bound to be controversy if this route is taken, with three powerful members of the UN Security Council itself not party to the Rome Statute.

One of the legal arguments raised by the African Union concerning state cooperation is based on Article 98 of the Rome Statute. 1097 Under this Article, the ICC is precluded from proceeding with a request for surrender or assistance from any state against a person from that state who enjoys diplomatic immunity “unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.” 1098 The essence of this Article is that the ICC work depends on the cooperation of those third states where the suspect enjoys diplomatic immunity in his country. 1099 Such cooperation is granted in form of a waiver of immunity. Accordingly, third states have a right to refuse such cooperation when they feel that it would require them to act against their international law obligations. 1100

1095 Article 87 (5) of the Rome Statute reads: “The Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis.”

1096 Situation in the Darfur, Sudan: In the case of the Prosecutor v Omar Hassan Ahmad Al Bashir Decision on the Prosecution’s Application for an Arrest Warrant No. ICC-02/05-01/09 paras. 240 – 247. At para 247, the Pre-Trial Chamber declared that the Sudan government’s obligation, pursuant to United Nations Security Council Resolution 1593, was to cooperate fully with and provide any necessary assistance to the Court and that this had to prevail over any other obligation that bound the State of Sudan pursuant to any other international agreement.


1098 Article 98 (1) provides “The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.”

1099 JD van der Vyver ‘Prosecuting the President of Sudan: A dispute between the AU and the ICC’ (2011) 11:2 African Human Rights Journal 683.

1100 African states used this provision to refuse cooperation requests by the ICC in handing over Omar Al Bashir, the President of Sudan to the ICC after the ICC issued a warrant of arrest against Bashir. See Assembly of the African Union, Decision on the meeting of African states parties to the Rome Statute of the International Criminal Court (ICC), Doc. Assembly/AU/13(XIII), Assembly/AU/Dec.245(XIII), adopted by the Thirteenth Ordinary Session of the Assembly in Sirte, Libyan Arab Jamahiriya, 3 July 2009 , para10.
Apart from the above position, more problems are likely to arise in the event of powerful states, such as the United States, refusing to cooperate with the ICC in its pursuit of Congolese war crime suspects accused of illegal natural resource exploitation activities. The United States, for instance entered into bilateral immunity agreement with Congo whose terms prohibited the US or Congo from surrendering or transferring “current or former Government officials, employees (including contractors), or military personnel or nationals of one Party” to the ICC. In effect, the agreement would shield possible accomplices of American nationality who would have, for instance, assisted (aided and abetted) armed rebel outfits in the unlawful acquisition, exploitation and trafficking of Congo’s natural resources and also in the commission of other crimes within the jurisdiction of the ICC.

These issues clearly pose a challenge to the quest for justice against armed rebel groups and other war crimes suspects implicated in the illegal natural resource exploitation activities of the Congo conflict. The actions of the US would no doubt have a negative impact on the pursuit of war criminals and the quest for justice where international crimes are committed in weak states such as Congo.

5.7 Complementarity and Congolese Criminal Justice

Article 1 of the Rome Statute stipulates that the International Criminal Court “shall be complementary to national criminal jurisdictions”. This means that even in the case of Congo, the ICC has to operate as a complement to Congo’s domestic justice system. The Office of the Prosecutor (OTP) explained that this approach focuses on

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1101 For instance, French authorities were responsible for the arrest of a Congolese rebel official in Paris, Callixte Mbarushimana after request for cooperation in the arrest and surrender of the suspect was notified to the French authorities by the Registrar of the ICC on 30 September 2010; see case information sheet at http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc01040110/press%20releases/pr581 accessed on 07 August 2012.

1102 Congo agreed to a reciprocal bilateral immunity agreement with the United States on 19 March 2003. Article 2 of the BIA prohibited both the US and Congo from permitting the surrender or transfer “by any means” of nationals of either party to the ICC “for any purpose” and also the surrender or transfer by any means to any other entity or third country, or the expulsion of persons from either country to a third country for the purposes of surrender or transfer to the ICC.

a policy that encourages and facilitates states with fully functional criminal justice systems “to carry out their primary responsibility of investigating and prosecuting crimes”. The work of Congo’s domestic criminal justice system is therefore required to assist in the prosecution of the great number of low level war crimes suspects implicated in illegal natural resource exploitation activities during the conflict.

The ratification of the Rome Statute by the Congo government motivated Congo to reform its war crimes laws in order to align it with contemporary trends in international criminal law. In fact, the reforms were induced by three critical factors; first, there was a class of possible defendants in the Congo inclusive government who hoped to convince the international community that domestic criminal justice processes could appropriately respond to serious violations of humanitarian law during the Congo war. This would possibly shield them from ICC scrutiny since the ICC gives primacy to national courts where the criminal justice system is functional. Secondly, Congolese war crimes law was outdated; it was represented by military and criminal codes that were difficult to apply in cases of serious and clear violations of international humanitarian law. The new government thereby sought to institute these reforms as a direct way of responding to the perpetration of mass atrocities against its citizens during the conflict, and also to demonstrate a serious commitment to its international obligations subsequent to ratifying the Rome Statute.

The Congo government, however, did not immediately proceed to domesticate the Statute through legislation. The Rome Statute automatically became law in Congo by

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1105 The Rome Statute was signed by the DRC on 8 September 2000 and the “Legislative Decree no. 003/2002 authorising the ratification of the Rome Statute of the International Criminal Court” was issued by the President of the Republic on 30 March 2002. Congo proceeded to deposit the ratification instruments with the ICC on 11 April 2002. See Avocats sans Frontieres ‘Case Study: The ratification of the Rome Statute of the ICC by the courts of the DRC’ 10; see also http://www.icc-cpi.int/asp/statesparties/countryandid=5.html accessed on 20 January 2012.

1106 See generally Avocats sans Frontieres ‘Case Study: The ratification of the Rome Statute of the ICC by the courts of the DRC’ 2009.

1107 W Burke –White ‘Complementarity in practise’ 569.

the act of ratification. As highlighted earlier, the Congo legal system follows a monist approach;\textsuperscript{1109} international treaties apply directly and assume the force of law upon the formal act of ratification.\textsuperscript{1110} The Congo government, through its Ministry of Justice, has mooted passing a Rome Statute Implementation law which currently stands as a draft bill.\textsuperscript{1111}

5.7.1 Congo War Crimes Law

Congo’s war crimes law is expected to specifically address the historic nexus between armed conflict and vicious contests for control of natural resources during such conflicts. An investigation of Congo’s war crimes law suggests this to be a huge task, and highlights its limitations to respond to the phenomenon of illegal natural resource exploitation during armed conflict. The military justice system in Congo is responsible for the punishment of international crimes such as war crimes, genocide, crimes against humanity and aggression.\textsuperscript{1112} The nature, content and structure of this system have continually shifted over time. In essence, the exclusive jurisdiction for war crimes in Congo has always resided with the military courts. The military courts could thus prosecute both civilians and members of the armed forces as well as insurgents, foreign persons and other persons accused in the commission of serious violations of international humanitarian law.\textsuperscript{1113} Until 2003, the major pillars of Congolese war crimes law were the 1972 Military Justice Code\textsuperscript{1114} for offences

\textsuperscript{1109} D Zongwe, F Butendi and PM Clement ‘The Legal system and research of the DRC: An overview’ para 2 http://www.nyulawglobal.org/globalex/Democratic_Republic_Congo1.htm accessed on 12 August, 2011. In a war crimes case, the Songo Mbayo case, the military tribunal relied on Article 215 of the Congo constitution which stipulated that ratified international treaties have higher authority than domestic law, see Tribunal militaire de garrison of Mbandaka, Auditeur militaire c. Lt Eliwo Ngoy et consorts, RP 084/2005 of 12 April 2006.


\textsuperscript{1111} The draft bill (French version) is reproduced in Maxi du Plessis and Lee Stone The Implementation of the Rome Statute of the ICC in African countries para 8.2.3.


\textsuperscript{1113} D Zongwe, F Butendi and PM Clement ‘The Legal system and research of the DRC: An overview’ para 2.

\textsuperscript{1114} The Military Justice Code was established by Decree Law No. 72/060 of 25 September 1972.
committed before 25 March 2003, and the Military Criminal Code\textsuperscript{1115} and Military Judicial Code\textsuperscript{1116} of 18 November 2002 for subsequent crimes.

The 2002 Codes were a slight improvement from their 1972 predecessors particularly in the definition of war crimes, which extended it to mean a violation of both the Congolese codes that is also a violation of the laws and customs of war.\textsuperscript{1117} The problem with this position is that it is limited; a war crime under international criminal law may not be prosecuted under Congo law if it is not a violation of Congo’s military codes. A more positive aspect is that the Congo military codes extends the \textit{ratione personae} jurisdiction of the military courts to cover a wider class of perpetrators of war crimes, and these include individuals above eighteen years, members of the uniformed forces (armed forces and the police) and civilians employed in these organisations.\textsuperscript{1118}

In terms of Article 112 of the Military Judicial Code, the jurisdiction of the military courts extends to prisoners of war, members of armed rebel groups and civilian persons who provoke, assist or instigate members of the armed forces to commit serious violations of war crimes. Further, the jurisdiction of the military courts is extended to cover those military forces in the service of the enemy or allies of the enemy where they commit offences against a Congolese national, a foreigner or a refugee.\textsuperscript{1119} In addition to this, this jurisdiction is also activated if such offences are to the detriment of the property of any protected class of persons or any national corporation.\textsuperscript{1120} Using these provisions, members of armed rebel groups implicated in unlawful natural resource exploitation activities can be prosecuted.

In relation to illegal natural resource exploitation activities, Article 64 of the Military Judicial Code makes organised looting a war crime whilst Article 65 also criminalises

\begin{footnotesize}
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  \item \textsuperscript{1115} As established in terms of the Law No. 24-2002 of 18 November 2002.
  \item \textsuperscript{1116} The Military Judicial Code was passed in terms of Law No. 23/2002 of 18 November 2002.
  \item \textsuperscript{1117} See Article 172 of the Military Judicial Code.
  \item \textsuperscript{1118} Article 73 of the Military Judicial Code.
  \item \textsuperscript{1119} Article 174 of the Military Judicial Code.
  \item \textsuperscript{1120} Article 174.
\end{itemize}
\end{footnotesize}
looting during armed conflict.\textsuperscript{1121} In relation to armed opposition groups \textit{per se}, Article 91 and 92 criminalises acts of armed rebellion. Article 132 criminalises misappropriation of objects seized during wartime whilst Article 192 prohibits, and makes it an offence the confiscation of commodities accompanied by torture.

Another important feature of the Military Code is that it recognises three levels of individual criminal responsibility, namely perpetrators and co-perpetrators, accomplices and perpetrators of attempted crimes.\textsuperscript{1122} This means that Congo’s military courts can adopt the interpretation of the ICC on the nature of the criminal liability of persons falling under such categories. Further Article 163 of the Military Criminal Code removes the defence of official immunity for state officials as a counter to charges of war crimes, while Article 175 of this Code defines the parameters for the responsibility of superiors.\textsuperscript{1123}

It has been highlighted that whilst Congo’s war crimes law appear substantively progressive, its practical implementation is not guaranteed especially during the period of the armed conflict or the transition to peace. Inherent institutional challenges mentioned previously and political pressures affect the quality of justice and this consequently detracts from the potential of domestic law to break the nexus between armed conflict and unlawful natural resource exploitation activities. A few cases briefly discussed below and adjudicated by the Congo domestic courts attest to these practical difficulties.


\textsuperscript{1122} Article 5 provides for perpetrators and co-perpetrators, Article 6 for accomplices and Article 4 for perpetrators of attempted crimes. In terms of Article 5, those covered include those who “those who executed the crime or who cooperated directly in its execution; - those who, through any action, provided support for its execution, and without which the crime could not have been committed; - those who, through offers, gifts, promises, threats, abuses of authority or power, conspiracy or reprehensible deception, directly caused the crime; - those who, through speeches given at meetings or in public places, or through stated proclamations, either written, printed or not, and sold or distributed, or through drawings or symbols, directly caused its perpetration, without detriment to the sentences that may be applicable by decrees or orders against the authors of criminal provocation, even in cases where such provocation is of no effect.”

\textsuperscript{1123} The Article provides that “When a subordinate is prosecuted as the main perpetrator of a war crime and his or her hierarchical superiors cannot be investigated as co-perpetrators, they are considered accomplices if they tolerated the criminal actions of their subordinate.”
5.7.2 Important Domestic cases

Since 2003, a number of important cases have been adjudicated before the Congo courts in all the main provinces of Congo. However, neither do the cases specifically focus on natural resource exploitation crimes in any detail nor involve the prosecution of members of armed rebel groups. This notwithstanding, these cases shed much light on Congo’s criminal justice system that is expected to complement the work of the ICC. Most importantly, since the chosen cases involved members of the military implicated in the commission of war crimes, they set some benchmarks that could be important in the prosecution of members in militaries of armed rebel groups accused of illegal natural resource exploitation activities.

The most important cases include the Songo Mboyo case, the Mbandaka Mutinies case, the Lifumba-Waka case, the Kilwa case, the Blaise Mbongi case and the Walikale case. Most of these cases dealt with such prevalent war crimes and crimes against humanity such as mass rape, sexual violence and sexual crimes, torture, mass murders, kidnapping and abduction and recruitment of child soldiers. The Songo Mboyo case concerned commission of various war crimes including looting by the Congolese armed forces and only a few officers were convicted. In the Mbandaka case, Congolese military courts relied substantially on international criminal law and directly applied the provisions of the Rome Statute over and above the provisions of the national Military Penal Code. Further, where the provisions of the Military Codes were unclear, the courts showed a willingness to seek clarity from, and embrace the position of the Rome Statute.

1126 RPO86–RP 101.
1127 RMP 064/AMS/SHOF/06.
1129 RP no. 018/RMP212/PEN/2006, Bunia.
1131 See Sixteenth report of the Secretary-General on MONUC (S/2004/1034), para. 52 – 60.
1132 In the Mbandaka Mutinies case, the court observed a conflict between the definitions of war crimes and crimes against humanity in the Congolese codes and differentiated this inconsistency with the clarity in the Rome Statute. See Affaire Mutins de Mbandaka, 20 June 2006, 16.
A few cases dealt with indiscriminate looting of civilian property, burning, destruction and theft of personal effects, homes and fields. It would however appear that there were no cases that specifically dealt with the involvement of armed rebel groups in the organised plunder of Congo’s mineral resources. Although there is consequently no specific decisions relating to economic predatory activities from the local military courts, the war crimes jurisprudence from the other cases sheds light on the extent to which Congolese war crimes law can deal with serious violations of international humanitarian law as well as the capacity of the system to deal with such crimes. Regarding this, it would seem that Congolese war crimes is increasingly becoming responsive but its implementation has some distance to go before the justice system can satisfactorily deal with widespread commission of war crimes during war, particularly those war crimes that are technical in investigation and prosecution such as organised plunder and illegal natural resource exploitation activities of armed rebel groups. Accordingly, it becomes difficult for such a compromised justice system to necessarily complement the work of the International Criminal Court.

5.8 Conclusion

The criminal jurisdiction framework created by the Rome Statute epitomises mankind’s greatest commitment in the quest to confront serious crimes committed by man. In this Chapter, it has been shown that members of armed rebel groups are subject to prosecution in terms of international criminal law, specifically under the criminal jurisdiction framework provided in the Rome Statute. It has further been shown that despite the fact that the legal discourse on war crimes identified as illegal natural resource exploitation is currently narrow and developing, the existing legal doctrine still provides a useful legal foundation to support the prosecution of persons implicated in illegal natural resource exploitation under the Rome Statute. Indeed the

1133 The Milobs (“military observers) case involved the looting of personal and professional equipment belonging to MONUC military observers. In the Songo Mboyo case, charges included looting of houses by ex MLC militias now belonging to the FARDC in Songo Mboyo.
1134 Songo Mboyo case, Lifumba Waka case, the Kilwa case and the Blaise Mbongi case.
1135 See for instance the assessment by the UNHCR Mapping Exercise Report, paras 889 – 890. For instance commenting on the Songo Mbayo trial, the Report observed (at para 863) that “this trial also illustrates the difficulties inherent in using the military judicial process to deal with crimes committed by the military's own troops”.

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relevant provisions of the Rome Statute are progressive and open to flexible interpretations. It can thus be argued that consistent application of the evolving discourse will eventually expand the jurisprudence in this area, add flesh to undefined crimes in the Rome Statute and shed more light on the criminal nature of illegal natural resource exploitation. It would also, it is hoped, widen the legal appreciation of the elements of crimes and most importantly provide guidance on how the various contemporary forms of these crimes can be dealt with under the Rome Statute framework.

Ultimately, it can be concluded that the reliance on existing precedents and legal doctrine developed since Nuremberg trials is a necessary step in the progressive definition and understanding of war crimes characterised as illegal natural resource exploitation and in the application of the Rome Statute legal framework to respond to such criminal activities.
CHAPTER SIX: CONCLUSION

6.1 Introduction

This chapter makes a ‘closing statement’ on the use of the Rome Statute based international criminal justice system to confront illegal natural resource exploitation activities of armed rebel groups during armed conflict. To do this, it is divided into three sections. The first section is a brief outlay of the purpose of the thesis and the ground covered from investigating, exploring and analysing the main issues and ideas motivating this work. The second section outlines the lessons that can be drawn from exploring the application of international criminal law to confront the Congo illegal natural resource exploitation phenomenon. The final section highlights how the major arguments in this thesis adds a nuanced view to the general understanding of the nature and implications of international criminal justice against armed rebel groups implicated in illegal natural resource exploitation in Africa’s conflict zones.

6.2 Purpose

This thesis sought to demonstrate, through the lens of the Congo conflict, the necessity and application of the international criminal law framework in confronting the illegal natural resource exploitation phenomenon during armed conflict in Africa. The purpose for this has been to motivate the need for current war crimes jurisprudence to pay more attention to illegal natural resource exploitation activities and acknowledge their seriousness especially in African wars. It is the view of this thesis that the focus of current jurisprudence is biased on war crimes considered more horrendous and more egregious such as mass murder, indiscriminate killings and sexual violence. By seeking to investigate the application of international criminal law to illegal natural resource exploitation activities of armed rebel groups, this thesis can therefore be seen as expanding the currently limited international criminal law jurisprudence such that it provides a better appreciation of war crimes identified under the term ‘illegal natural resource exploitation’. Moreover, it is hoped
that this exercise can be considered as making an incremental contribution to existing knowledge on the overall impacts of illegal natural resource exploitation to the endangerment of human security and safety in Africa, to the commission of those crimes seen as more horrendous, and ultimately to the complexity of efforts aimed at alleviating human suffering that characterises natural resource financed warfare.

In pursuing this overarching purpose, this work took off on the assumption that the quest by conflict actors, such as armed rebel groups, to profit from war through illegal natural resource exploitation activities is at the centre of the commission of serious human rights violations as well as the complexity and longevity of African conflicts. A further underlying assumption was that international criminal law can constrain the acts and behaviour of various conflict actors that constitutes illegal natural resource exploitation during armed conflict. On the basis of these assumptions, this work proceeded to explore Congo’s illegal natural resource exploitation crisis, observing that such phenomenon led to serious violations by parties to the conflict involved in armed contests to gain control of Congo’s richest areas and subsequently in order to establish and defend their occupation of such economically rich territories. Ultimately, this thesis has made a call for punishment of conflict actors, such as armed rebel groups, for engaging in armed conflicts that were essentially funded and fuelled by the huge profits generated from unlawful natural resource exploitation activities. Such a call is also seen as an appropriate response to the illegal predatory acts and behaviour of armed rebel groups that participate in armed violence and are thus responsible for massive death tolls, internal displacement, refugee crises, destruction of property and other damage to Congo society.

6.3 Summary

From the very beginning, this thesis sets out by illustrating that the tight connection between Congo politics and economics, and thus between the control of national wealth and the claim to national political power in Congo lies at the centre of Congo’s natural resource exploitation crisis particularly during times of armed conflict. As shown in Chapter Two, such a nexus between power and natural resource control has provided the stage for bitter political contestation between government and
armed rebel outfits. The major mineral resources that have fuelled and funded the ensuing armed violence are located in Congo’s geologically rich provinces and include gold, diamonds, copper, cobalt, uranium, tantalum, tin, coltan, zinc and silver. The value of such precious natural resources has over the years lured external actors into Congo’s economic and natural resource space at the slightest sign of political instability. This thesis has further demonstrated that, apart from this, the participation of foreign criminal elements in Congo’s natural resource exploitation system was also facilitated by Congo’s pre-war socio-economic context, characterised as highly informalised, privatised and corrupt. Such a context, it was asserted, heavily compromised the administrative, security and justice institutional frameworks that are so indispensable in fighting organised criminality. It was thus concluded that the administrative and institutional malaise before the war made these critical institutions victims of the impunity they were designed to combat.

The thesis proceeded, in Chapter Three, to examine the regulation of natural resource exploitation during armed conflict in international humanitarian law, thus exploring the nature of the applicable rules and their limits in scope and substance and further exposing the inherent strengths and weaknesses of this legal regime. In this chapter, armed rebel groups were depicted as particularly capable of exploiting the various grey areas in international humanitarian law in order to carry out illegal exploitation of natural resources under cover of the bedlam of war. Enforcement constraints that militate against effective implementation of international humanitarian law against armed rebel groups were exacerbated by the presence in Congo’s war economy of other state and non-state conflict actors such as foreign armies and armed rebel groups, transnational criminal networks and indigenous and foreign private corporations all united in their quest to make business out of a raging war. There were various armed rebel groups whose control of territory was not sustained or permanent as to amount to military occupation but participated extensively in the illegal exploitation of Congo’s natural resources. The finding made in relation to this is therefore that, despite the significantly comprehensive state of the international humanitarian law framework, its implementation in complex multidimensional armed conflicts such as the Congo conflict is fraught with huge challenges.
In view of the critical shortcomings faced by the international humanitarian law framework in addressing illegal natural resource exploitation during the Congo conflict, Chapter Four proceeds to make a case for the use of international criminal law against conflict actors responsible for illegal natural resource exploitation activities during armed conflict. In order to demonstrate that this is possible, this work examined the potential of international criminal law to combat illegal natural resource exploitation by armed rebel groups during war. This Chapter thus explores the various interesting debates arising out of the ‘leap of faith’ in the international criminal process and its potential to combat acts and behavior that constitutes illegal natural resource exploitation activities by armed rebel groups during armed conflict.

The adoption of the Rome Statute and its ratification by Congo gives impetus to the argument that the international criminal law regime it establishes could provide a far more appropriate response to Congo’s illegal natural resource exploitation phenomenon. Chapter Four thus advocates for, and defends the use of the international criminal law regime against members of armed rebel groups implicated in illegal natural resource exploitation activities during armed conflict. It was argued in this Chapter that the major premise for this is founded on the potential of this international legal regime to confront and curb criminal economic practices of armed rebel groups whilst simultaneously mediating the multiple, competing and divergent interests of both Congolese society and the international community. It was consequently observed that despite the fact that the Rome Statute based international criminal law regime is still an evolving scion of international law with most of its provisions yet to be tested, this does not dilute its potential as possibly one of the most effective international legal regimes particularly important in guaranteeing the lawful exploitation of existing natural resources in conflict zones as well as the safety and security of civilian local communities in the vicinity of such areas.

In Chapter Five, this work proceeded to apply the legal provisions, concepts and principles of the Rome Statute to assess the individual criminal responsibility of members of armed rebel groups implicated in illegal natural resource exploitation activities during the Congo conflict. This particular route was followed on the basis
that the Rome Statute legal framework has universal criminal jurisdiction over natural persons for listed crimes and therefore provides the best possible individual criminal jurisdictional framework to prosecute illegal natural resource exploitation activities of armed rebel groups during armed conflict. This Chapter further observed that, before any application of the law to particular impugned conduct is made, there is great need to demonstrate that illegal natural resource exploitation activities violate international criminal law and hence should be punishable under this legal regime. Accordingly, this thesis proceeded to demonstrate that the conduct and behaviour of armed rebel groups that was defined as illegal natural resource exploitation constitutes war crimes under the Rome Statute.

The application of the Rome Statute against members of armed rebel groups is particularly explored in light of the additional fact that there is extremely limited, if any, jurisprudence and precedents that shed light on the applicability of the Rome Statute legal framework in the prosecution of members of armed rebel groups for committing illegal natural resource exploitation activities that constitute war crimes. To this extent, the specific application of the treaty’s individual criminal responsibility regime against members of armed rebel groups attempted in this thesis is done in order to contribute to the currently limited jurisprudence on the applicability of international criminal law to armed rebel groups for illegal exploitation activities. In addition to the application of the Rome Statute provisions, this Chapter further explored the major legal hurdles inherent, and defences provided within the Rome Statute legal framework. Ultimately, from an analysis of these issues, the conclusion is that notwithstanding the legal hurdles, the application of this international penal system is possible and should be done as a measure that could constrain the commission of illegal natural resource exploitation activities by armed rebel groups in times of armed conflict.

In sum, this thesis clearly argued that the Congo conflict provides an appropriate context of exploring an interesting social phenomenon and analysing diverging issues of both international humanitarian law and international criminal law. As evident throughout this work, an analysis of Congo’s natural resource exploitation crisis, the legal rights, duties and obligations of armed rebel groups and the debates
and academic interest on the applicable legal regimes shows that issues involved within this two tier framework are complex and potentially vast. As a consequence of investigating and exploring these issues, a number of lessons can be drawn in relation to the application of international legal regimes to illegal natural resource exploitation activities of armed rebel groups during the Congo armed conflict.

6.4 Lessons and Conclusions

6.4.1 International Humanitarian Law and armed rebel groups

One of the most important lessons is that the state-centric origin of the international humanitarian law normative framework makes its institutional responses unable to satisfactorily address the illegal predatory practises of armed rebel groups (and other non-state actors) in control of natural resource rich territories during armed conflict. The conventional and treaty based norms of this legal regime were hinged on one hand, on the faith in states punishing their armed forces for violations and on the other, on attributing legal responsibility to states for wrongful conduct or violations by its armed forces in foreign conflict zones or occupied territories. In response to this originally narrow focus of international humanitarian law, new treaty regimes and scholarly commentary gradually led to the reconceptualising of its fundamental basis and philosophy. Eventually, a more nuanced interpretation of international humanitarian law has achieved the ultimate goal of broadening the focus of this legal regime to encompass more prevalent forms of contemporary warfare and the various categories of conflict actors. Consequently, the emerging legal doctrine now sheds much light on the legal liability of armed rebel groups for serious violations under international humanitarian law whilst further capturing the continually shifting landscape of modern warfare. Further, it was asserted that the development of this legal regime has consequently expanded its scope and parameters such that it now covers a broader spectrum within its ambit and also captures contemporary forms of war crimes.

Most critically, the existing corpus of international humanitarian law resolves the contested issue of access to, ownership and exploitation of natural resources in conflict areas as well as the duty of occupying states in the regulation and
management of natural resource exploitation activities in such areas. It further clarifies the position of armed rebel groups in *de facto* occupation of natural resource rich conflict areas and their legal rights, responsibilities and obligations in relation to existing natural resources under international law. Ultimately, an analysis of the international humanitarian law framework applicable to illegal natural exploitation by armed rebel groups during Congo conflict clearly shows that these militant groups were in breach of various rules of this regime and thus subject to the institutional framework aimed at responding and addressing such violations.

This notwithstanding, an investigation of the behaviour of armed rebel groups and state armies involved in illegal natural resource exploitation during the Congo conflict clearly showed that despite clear international duties and responsibilities in international law, states and armed rebel groups are unlikely and unwilling to prosecute their own armed forces for crimes related to illegal natural resource exploitation. The analysis of the principle of state responsibility through the *DRC v Uganda* case illustrated the limitations of this principle when applied against the wrongful conduct of states and puppet rebel groups implicated in illegal natural resource exploitation in foreign territories. For instance, states and armed rebel groups continue to commit illegal natural resource exploitation activities under various ruses, thus disguising their illegal acts and evading their international legal obligations. The profits and gains from such activities means armed rebel groups are becoming increasingly ready to circumvent or deny the application of international humanitarian law against their illegal conduct and activities in conflict zones.

This thesis therefore finds that international and national mechanisms within international humanitarian law remain difficult to activate against illegal exploitation of natural resources by armed rebel groups during armed conflict. As shown in Chapter Two, the predatory economic practises of armed rebel groups during the Congo conflict continued seemingly unabated despite increasing efforts to inhibit these groups and other conflict actors from engaging in illegal natural resource exploitation practises. Further, the predatory behaviour of implicated armed rebel groups did not cease despite the implementation of multidimensional approaches aimed at holding accountable those persons responsible for such acts.
The dearth of watertight international humanitarian law institutions to respond to the illegal natural resource exploitation activities in Congo only led to a growing international interest in the phenomenon. It is however unfortunate that the international interest is yet to inspire the strengthening of applicable international legal mechanisms and institutions that should deal with this phenomenon. A consequence for this, illustrated by the Congo conflict, is that existing international humanitarian law mechanisms have yielded far too little impact on the ground in places of conflict and in the lives of affected population groups. Thus, even though continued development and refinement of applicable rules might lead to a more complete normative framework that applies to a broader class of subjects, the real impact of this legal regime to affected population groups and to the deeply entrenched behaviour and predatory practises of armed rebel groups in conflict zones will remain either insignificant or negligible.1136

6.4.2 International criminal justice and armed rebel groups

This work makes useful insights into the extent to which international criminal law institutions could be applied to militant social groups alienated to the state and ordinarily existing outside the realm of formal regulatory systems of that state. The application of international criminal law against Congo’s armed rebel groups provides an opportunity to test the potential of this coercive international normative legal system in shaping conflict behavior, inhibit anti-social activities and consequently mitigate social distress that accompanies armed violence. Focussing on seemingly incorrigible belligerents, the thesis takes a ‘leap of faith’ in the efficacy of this legal regime to tackle the huge challenge of combating illegal, albeit deeply entrenched conflict behaviour of perennial conflict actors in control of natural resource rich territories in a conflict state.

The ‘leap of faith’ in international criminal law is based on the argument that consistent use and reliance on, not premature abandonment of, international criminal law institutions will eventually create an enforceable and effective normative

framework at international level that could curb criminal economic behavior during armed conflicts. It is therefore respectfully asserted that despite some scholarly doubts,\textsuperscript{1137} a consistent application of international criminal law to address illegal natural resource exploitation activities of armed rebel outfits could lead to the much needed development of respect for international law in general, and international criminal law institutions in particular.

This development of a publicly respected normative framework, it is argued, would possibly provide a source of hope for African states whose domestic and regional institutions have clearly struggled to address criminality that feeds from war or political instability.\textsuperscript{1138} Thus, perceived challenges inherent in the international criminal law normative framework and explored throughout this thesis have not been perceived as permanently detracting from the potential worth and necessity of this legal regime.\textsuperscript{1139} Accordingly, while this work is aware of the challenges inherent in the use of international criminal law to confront illegal natural resource exploitation activities in war torn African societies, there is no way it doubts that with time, its institutions could be increasingly effective and thus proving to be the greatest guarantors of justice, prosperity, economic development and human security for Africa’s future generations.\textsuperscript{1140}

\textsuperscript{1139} See N. Biggar ‘Do not be so sure invading Iraq was immoral’ Financial Times (London) 11 March 2010, 9, who observed that it is acceptable “to be inconsistently responsible than to be consistently irresponsible”. There is also the case of the arrest warrant of Omar Al Bashir issued by the Prosecutor International Criminal Court. In May 2012, the African Union, fiercely opposed to Al Bashir’s indictment, was forced to change venue from Malawi to Ethiopia when the Malawi President had sought to block the attendance of Omar Al Bashir. See “Ethiopia to host AU summit after Al Bashir Malawi row” available at http://www.bbc.co.uk/news/world-africa-18407396 accessed on 12 June 2012.
\textsuperscript{1140} This hope and faith in international criminal law is also shared by a number of scholars, including the former Chief Prosecutor of the Special Court of Sierra Leone, see DM Crane ‘Back to the future: reflections on the beginning of the beginning: international criminal law in the 21st century’ (2008-2009) 32 Fordham International Law Journal 1761 (stating that the International Criminal Court is “the beginning of a beginning” and that it illustrates that the Nuremberg spirit has not seen a quiet death).
The coercive framework of international criminal law has further been defended on the basis that it could play a crucial role in shaping the agendas of actors during armed conflict. By constraining illegal economic behaviour, international criminal law could regulate, and thus shape the economic practises and behaviour of armed rebel groups such as those that were in control of Congo’s economically rich areas for purposes of illegal natural resource exploitation. This argument is made owing to the reality that wars such as the Congo conflict do not usually occur because of the desire to illegally exploit natural resources and other wealth in conflict zones. It was observed that economic interests did not, per se, cause the Congo wars; it was the deep rooted geopolitical and socio-economic factors that ignited the war.\textsuperscript{1141} Economic interests developed as a function of the Congo war, not its powder keg even though economic motives often outweighed other factors in fuelling on-going conflicts. International criminal law institutions, it is therefore asserted, can be relied to shape the agendas of parties to a conflict by ensuring that the original motivations behind such conflicts do not evolve to encompass the desire to engage in other unlawful acts such as illegal natural resource exploitation activities.

6.4.3 The Rome Statute and illegal natural resource exploitation

By restricting itself to the individual criminal responsibility regime of the Rome Statute framework, this thesis proceeded on the assumption that international criminal law can influence the behaviour and conduct of armed rebel groups in occupation of natural resource rich areas for purposes of natural resource exploitation. In exploring this angle, this work sought to interpret and apply the Rome Statute provisions to show that the conduct and behaviour of armed rebels is encompassed within the elements of the war crimes of ‘seizure of property’, ‘pillaging’ and unlawful appropriation of property’ in Article 8 of the Rome Statute.

In addition, this thesis showed that the varied degrees and modes of individual criminal liability specified within the Rome Statute can be interpreted and applied to capture the acts of different categories of members of armed rebel groups who participated in illegal natural resource exploitation in different ways. Thus, the

\textsuperscript{1141} See Chapter Two.
treaty’s provisions applies against the acts of armed rebel group leaders, chiefs of staff and military commanders as well as the conduct of junior field officers, subordinates and other personalities in the lower ranks of these groups. It is asserted that, by interpreting and applying the Rome Statute’s individual criminal responsibility regime against rank and file members of armed rebel groups, this work has demonstrated that international criminal law can adequately meet the challenge of illegal natural resource exploitation in Africa’s conflict areas.

Further, this work has demonstrated that the interpretation of the treaty’s provisions can be done in order to criminalise quasi-commercial relationships and interactions between armed rebel groups and private corporate entities that enhanced illegal natural resource exploitation activities by armed rebel groups. The use of international criminal law to disrupt these relationships in this way could be seen as necessary in the efforts to sever the ‘dialectic nexus’ between armed conflict and the quest to profit from existing natural resources, thus further diminishing the incidence of related war crimes and the general damage to local populations groups resident in conflict areas.

Finally, this work has illustrated how the Rome Statute complementarity regime can be applied to support and revitalize domestic criminal justice institutions, thus quickening necessary reconstruction and revitalisation of judicial and legal institutions in conflict societies. In relation to Congo, this specific feature of the International Criminal Court meant Congo’s domestic criminal justice system would pursue some of the suspects implicated in serious violations of the laws of war. Thus, for Congo, the complementarity principle in the Rome Statute could thus enable its domestic criminal justice system to stand on its own feet whilst gradually benefitting from the jurisprudence of the International Criminal Court.1142

To demonstrate this, it has been shown that, apart from a number of challenges that often typify post-conflict justice systems, Congo’s war crimes justice system has

1142 For instance, in the Mbandaka case (RPO86–RP 101), Congolese military courts relied substantially on international criminal law and directly applied the provisions of the Rome Statute over and above the provisions of the applicable national Military Penal Code.
appeared very receptive to the jurisprudence of the International Criminal Court. This progressive development of Congolese war crimes law is in itself critical in the development of effective juridical norms necessary to combat organised crime and particularly problematic phenomena during periods of armed violence. It is the view of this thesis that without such effective legal norms and supporting institutional infrastructure, there is little guarantee for the future protection of natural resources in conflict zones and also for human security and safety to vulnerable communities exposed to armed violence funded and fuelled by natural resource exploitation.

Ultimately, it can thus be argued that the real worth of the Rome Statute lies in the progressive interpretation and application of its provisions to capture contemporary forms of international crimes such as those that constitute illegal natural resource exploitation activities. Further to this, an active role of the International Criminal Court, as complemented by domestic war crimes courts can diminish the incidence of conflicts fought for the control and occupation of natural resource rich conflict areas and the attendant commission of massive violations of human rights and international humanitarian law.

6.4.4 The Rome Statute framework and conflict resolution

It has been illustrated that the Rome Statute penal framework clearly impacts on conflict resolution efforts and thus its institutional responses should find accommodation in conflict resolution efforts. For Congo, this becomes critical considering the contribution of the issue of illegal natural resource exploitation by armed conflict actors in the negotiation for ceasefire agreements. As demonstrated in Chapter Four, the negotiation of most ceasefire agreements to be informed by the peace versus justice debate, that is, whether to seek the criminal prosecution of conflict actors implicated in war crimes and consequently extend the duration of the war, or grant perpetrators of war crimes an amnesty that would end the war and bring to an end the commission of war crimes. This work therefore

1143 See Chapter Five paras 5.7.2.
1144 See Chapter Two, paras 3.3.5
asserts that options for pursuing criminal justice against implicated conflict actors, such as members of armed rebel groups, must be accommodated in necessary political overtures that encourage the achievement of peace. The implementation of the criminal prosecution option should be weighed against the need to cultivate and give peace a chance. However, this should not mean that the option of pursuing criminal prosecution is totally discarded in peace agreements. Unfortunately for Congo, giving peace a chance eventually meant incorporating members of armed rebel groups into Congo’s post-conflict government of national unity and ignoring their wartime atrocities.\textit{1146}

It was observed in Chapter Three that the provisions of the Lusaka Peace Accord skirted the prosecution of armed rebel groups and explicitly recognized the legitimacy of the occupation of Congolese territories by such groups, their exercise of quasi-governmental administrative functions in areas under their occupation and most importantly the legitimacy of natural resource exploitation activities of these groups in areas they controlled. The treaty largely ignored both the serious violations of human rights by armed rebel groups and the importance of economic agendas in instigating human rights abuses and other war crimes during the Congo conflict.\textit{1147} The preceding chapters illustrated that the implications of such course to the quest for justice are damaging, arguing, in Bassiouni words, that rejecting criminal justice in peace accords means that impunity is always the political price paid to secure peace whilst the rights of victims of war crimes are only important as far as they can be used as “objects of political trade-offs”.\textit{1148} It is therefore affirmed that peace treaties that seek to end armed conflicts characterised by extensive natural resource exploitation activities should directly address the exploitation of natural resources by conflict actors in control of resource rich territories. Such ceasefire agreements could explicitly recognize the illegality of such activities in international humanitarian law and include provisions to the effect that the conduct of

\textit{1146} See Chapter Three para 3.3.5  
\textit{1147} See Chapter Three para 3.3.5 for a critique of the peace agreement.  
such activities in the period after signing of such agreements constitutes a breach of the treaty and expose the violators to criminal sanctions. This approach would be in tandem with the African Union’s belief that Rome Statute based international criminal justice should be helpful in fostering peace and contributing to political processes on the ground designed to secure and consolidate that peace.\footnote{1149}

6.4.5 Complementary institutional reformation

A last word is necessary on the need for complementary institutional reforms in Congo necessary in the fight against illegal natural resource exploitation. In this vein, it is asserted that any system of government that Congo embraces must ensure that the tight connection between politics and economics is realigned such that political power contests are not predicated upon access to and control of the country’s natural resources.\footnote{1150} Once this is done, political instability will not mortally implicate the economic system nor compromise its integrity. Throughout this thesis, it has been illustrated that Congo’s economic system has always been tied to Congo’s politics and the effect this has had on political stability is damaging.

It is further asserted that severing the tie between economics and politics could mean that the progress of Congolese society is not measured nor characterised by political contestations centred on the control of natural resources. This thesis has demonstrated that Congo’s successive post-independence political systems were hinged on state control of natural resources. Thus, the more that control was claimed, exercised and demonstrated, the more political power was entrenched. In many ways, this entrenchment of political power through control over natural resources was a source of protest and political grievances. Armed rebel groups

\footnote{1149} The AU has reiterated that it supports an approach that combats impunity whilst simultaneously “promoting democracy, rule of law and good governance throughout the continent, in conformity with the Constitutive Act of the African Union”; see Assembly/AU/Dec.245 (XIII) Rev.1 Decision on the meeting of African states parties to the Rome Statute of the International Criminal Court, adopted at the 13\textsuperscript{th} Ordinary Session of the AU Assembly in Sirte, Libya.

\footnote{1150} See for instance CBC News ‘Congo rebels take Goma airport near UN base’ November 20, 2012 available at http://www.cbc.ca/news/world/story/2012/11/20/congo-goma-m23-rebels.html accessed on 20 November 2012 (stating that “analysts and country experts say the real reason for the rebellion is over control of Congo’s vast mineral riches, a good chunk of which is concentrated in North province, where Goma is located, and South Kivu contain one of the highest concentrations of tin, tantalum and tungsten mines, minerals that are used in computers, mobile phones and digital cameras.”
consequently regarded the contesting of state’s control and ownership of natural resources particularly during armed conflicts as one of the direct ways of wrestling state political power from the government of the day. This tactic was adopted by Laurent Kabila in toppling Mobutu’s government, and also by armed rebel groups that subsequently challenged Kabila’s ascension to power. 1151 Accordingly, it could be asserted that a realignment of the politics – economics relationship could deprive emergent armed rebel groups the opportunity of using unlawful economic activities to gate crash their way into Congo’s political government. International criminal law could complement such realignment by sanctioning the aggressive pursuit of leaders of armed rebel groups responsible for illegal natural resource exploitation during armed conflicts by the ICC Prosecutor. This in itself could send a strong message to the leadership of armed rebel groups in Congo that such activities invite criminal prosecution, not political involvement in post-conflict governmental structures.

There is thus little doubt that it is a matter of necessity for post-conflict reconstruction efforts in Congo to prioritize rebuilding those structures and institutions that expeditiously curb natural resource externalisation and that disrupt illegitimate economic interactions and relationships. This could be done by institutional reformation, particularly of those institutions in the economic, financial, security and natural resource governance sectors. As remarked by Le Billon, there is need for “deep” democratisation processes that build robust checks and balances and consolidate state legitimacy and capacity. 1152 Such institutions should disrupt the coincidence between poor natural resource governance and conflict. Further, such institutional systems should negate the conditions that engender corruption, rent seeking behaviour and other kinds of highly informalised and privatised economies of scale. Consequently, these systems should be able to eradicate the unlawful means and methods that enable private parties and entities to evade formal legal, fiscal and financial systems once they gain access to Congo’s natural resource space. The state security systems should carry out prompt investigations of criminal conduct by corporate entities involved in natural resource exploitation in order to

1151 See Chapter Two.
improve compliance. Such investigations could focus on money laundering, arms trafficking and externalisation of precious mineral resources.

These actions should ordinarily be complemented by adequate supervision, registration, licensing, inspection monitoring processes at various critical levels and points. In order to succeed however, the institutions aimed at achieving this should be backed by necessary commitment from political authorities at both local and national levels.

It should be noted that by 2012, the Congo state had instituted significant reforms in order to rebuild a society and economy devastated by years of brutal warfare.\textsuperscript{1153} The major challenge is to ensure that these institutions work effectively, transparently and with the necessary political support both locally and internationally. This challenge is a big ask not only for Congo but also for most African states that boast of having excellent laws but whose provisions remain paper tigers. Without implementation, these laws and policies remain weak and unhelpful in ensuring the success of public and private institutions established to combat activities that contribute to rent seeking behaviour, corruption, fraud and consequently illegal natural resource exploitation in times of political stress.

6.5 Conclusion

The illegal exploitation of natural resources have become the most appealing mode of ‘commerce’ to state and non-state conflict actors especially in Africa’s resource rich conflict zones. This phenomenon is not novel to international society; it is as old as the history of war itself but has continued to reinvent and re-adapt itself to suit prevailing conditions. To both existing and future legal regimes therefore, the challenge is how to effectively deal with a phenomenon that is constantly shifting, to illegal natural resource exploitation activities that are continually appealing to a greater number of conflict entrepreneurs and thus becoming increasingly difficult to detect, trace and consequently regulate. The Congo illegal natural resource exploitation crisis illustrated the various ruses by private and public entities used to

\textsuperscript{1153} See Congo government and public administration system on \url{http://www.presidentrdc.cd/} accessed on 10 August 2012.
engage in these activities, and there is no doubt that such disguises will continue being employed and redeveloped by such entities to evade their legal responsibilities and obligations under international law. It might thus be added that existing and future legal regimes face the additional challenge of identifying these new ruses by state and non-state conflict actors meant to disguise their illegal resource exploitation activities from international scrutiny.

In recent times, the Congo conflict continue to provide not only the grimmest illustration of the dialectic nexus between war and illegal natural resource exploitation in African civil wars but also the portrait of this nexus as posing one of the greatest threats to regional peace and security on the African continent. The impact on socio-economic development, the deepening poverty and economic distress experienced by affected communities and victimized population groups in resource rich conflict areas is hard to justify. Further, the massive loss of human life and other serious human rights abuses associated with the quest to profit from war strike at the very soul of African society. The challenge for the international humanitarian law framework is therefore to strengthen the existing institutional framework in order to expeditiously respond to the commission of these activities and thus curtail the extent of damage to affected communities.

The application of the Rome Statute based international criminal law regime in this research has demonstrated that the international criminal prosecution of armed rebel groups is not only possible but desirable in the quest to combat the illegal natural resource exploitation scourge in war-prone parts of Africa where this phenomenon is rampant. However, the long term aspiration is the continued development and broadening of the existing war crimes discourse such that its jurisprudence appropriately acknowledges the seriousness of illegal natural resource exploitation activities and further captures the varied contemporary forms of these activities in modern warfare within its ambit. It is hoped that the development of such war crimes discourse will create a normative framework that could ultimately shape the behavior of conflict actors such as armed rebel groups in conflict zones, thus curtailing their propensity to engage in illegal natural resource exploitation acts.
The application of the international criminal legal system to curtail the illegal natural resource exploitation activities of armed rebel groups opens the door for the use of its provisions and institutions against similar behavior of other conflict actors in those African wars that are funded and fuelled by profits and revenue from illegal natural resource exploitation activities. For Africa, this means international legal institutions could consequently prove critical not only in addressing illegal natural resource exploitation phenomena but also in contributing to the achievement of human safety and security, conflict resolution and ultimately economic development for generations to come.