

# Fighting the ‘resource wars’ in the Democratic Republic of the Congo: an exploratory diagnosis of the legal and institutional problems

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## INTRODUCTION

### **Africa’s conflict resource phenomenon**

For the past two decades, the quest by state and non-state actors to profit from war through illegal natural resource exploitation has raised economic and financial agendas to prominence in the waging of war on the African continent. The desire by conflict actors and private domestic, regional, and international networks to access, exploit, and control natural resource exploitation patterns in conflict areas, has mainly targeted extractive mineral resources in high demand on the global market.<sup>1</sup> This phenomenon has consequently redefined and reshaped the nature of armed conflict in Africa to which most major conflicts – such as the DRC’s war waged between 1998 and 2004, and the intermittent armed rebellions witnessed between 2004 and 2010 – bear testimony. As illustrated by the DRC’s wars, characterised by illegal natural resource exploitation, African wars have over the years followed different patterns and witnessed the involvement of an increasing number of different actors.

The major actors in these activities have ranged from armed rebel groups, *militias*, military and government officials, multinational and individual

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<sup>1</sup> For instance, the response by the United States Congress to this phenomenon has been to pass the Dodd-Frank Act (2010) ‘which directs the Commission to issue rules requiring certain companies to disclose their use of conflict minerals if those minerals are ‘necessary to the functionality or production of a product’ manufactured by those companies. Under the Act, those minerals include tantalum, tin, gold or tungsten. Congress enacted Section 1502 of the Act because of concerns that the exploitation and trade of conflict minerals by armed groups is helping to finance conflict in the DRC region and is contributing to an emergency humanitarian crisis’. See information on <http://www.sec.gov/news/press/2012/2012-163.htm> (last accessed 6 December 2013).

corporate entities, regional corporate networks, and private business individuals. It should be conceded that despite these various actors, armed rebels have been implicated in the most problematic forms of illegal resource exploitation. Their involvement in illegal mineral resource exploitation clearly contravenes natural resource exploitation legal regimes, and adversely affects resource use and management in Africa's conflict zones.<sup>2</sup> As demonstrated immediately below, regulating natural resource exploitation in Africa's conflict zones remains the greatest challenge facing African domestic and regional legal systems.

### **African conflicts and illegal natural resource exploitation**

It is difficult to refute that in the absence of a comprehensive institutional, political and legal response system, the conflict resource problem will continue to plague African economies whilst enriching individuals and economies beyond Africa. With their incidence highest in Africa, wars characterised by illegal natural resource exploitation have been responsible for irreversibly weakening local economies whilst further causing widespread human, political, and other economic costs to Africa society. Further, as these activities usually take place simultaneously with and under cover of war, they are relatively difficult to distinguish, demarcate, and subject to a sanctions regime.<sup>3</sup>

The consequences have been all too evident in collapsed social and economic systems and in increasing political instability.<sup>4</sup> In addition, such wars become increasingly more complex and generally more intractable in comparison to those waged in areas with relatively few natural resources.<sup>5</sup> As this happens, the conflict state remains economically impoverished. Moreover, with collapsed economic systems and increased insecurity, local

<sup>2</sup> There has not been a single accepted definition of the term 'illegal resource exploitation'. The definition adopted by the United Nations Security Council appointed *Panel of Experts on the Illegal Exploitation of Natural Resources and other Wealth of the DRC* (see UN Doc S/2001/357 par 14) was fiercely contested by politicians and scholars alike. See Grignon 'Economic agendas in the Congolese peace process' in Nest, Grignon & Kisangani *Democratic Republic of the Congo: economic dimensions of war and peace* (2006) 74–85 and also Security Council deliberations UNSC S/PV 4317 and S/PV 4318 available at:

<http://www.un.org/depts/dhl/resguide/scact2001.htm> (last accessed 10 December 2013).

<sup>3</sup> Juma 'The war in Congo: transnational conflict networks and the failure of internationalism' (2006) 10 *Gonzaga Journal of International Law* 97–101.

<sup>4</sup> Kisangani 'Legacies of the war economy: economic challenges for post-colonial reconstruction' in Nest et al n 2 above at 102.

<sup>5</sup> See Collier 'Doing well out of war: an economic perspective' in Berdal & Malone (ed) *Greed and grievance: economic agendas in civil wars* (2000) 102–104.

populations are often forced to seek refuge in neighbouring states.<sup>6</sup> From a human rights perspective, illegal resource exploitation patterns can be shown to lead to extreme abuses such as forced labour, mass murder, torture, rape, extortion, kidnapping, forced prostitution, abduction, sexual violence, and environmental destruction.<sup>7</sup>

In addition, the way in which illegal natural resource exploitation has been conducted during conflicts and periods of political instability, has led to capital flight from Africa and illicit financial flows to developed countries in the North. This illicit capital flight adds to other forms of illegal transfer of African wealth from the continent, and despite concerted efforts to examine the volume and impact of illicit capital and financial flows, comprehensive response mechanisms are yet to be established.<sup>8</sup>

It is no secret that African economies are adversely affected by illegal resource exploitation. There have long been calls for the establishment of an international agency to investigate criminal financial and natural resource exploitation patterns arising from wars fought on African soil. For instance, in 2002 the massive illegal natural resource exploitation during the DRC war persuaded the Panel of Experts on the Illegal Exploitation of Natural Resources and other Forms of Wealth of the Congo<sup>9</sup> to recommend that the Security Council '... consider establishing an international mechanism that will investigate and prosecute individuals involved in criminal economic

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<sup>6</sup> 'Global Witness Report lessons unlearned: how the UN must do more to end natural resource fueled conflicts' (January 2010) available at: [http://www.globalwitness.org/media\\_library\\_detail.php/919/en/](http://www.globalwitness.org/media_library_detail.php/919/en/) (last accessed 2 February 2010).

<sup>7</sup> See Global Witness Report: *War and the Militarisation of mining in Eastern Congo* (July 2009). See also Human Rights Watch report: *The curse of Gold; DR Congo* (2005) available at: <http://www.hrw.org/reports/2005/drc0505> (last accessed 5 December 2013).

<sup>8</sup> One very recent initiative by African states has been the establishment of a panel to determine illicit financial flows from the continent resulting from criminal activities such as illicit natural resource trafficking and smuggling. At the forty fourth session of the Economic Commission for Africa ('ECA'), held in Addis Ababa on 28–29 March 2011, the African Union Conference of Ministers of the Economy and Finance and ECA Conference of African Ministers of Finance, Planning and Economic Development passed resolution 886 (XLIV) under the heading *Illicit financial flows* of which the essence was to seek ways to eliminate or address illicit financial flows from Africa to other continents. In summary, this resolution called for the assessment and examination of the nature, level and patterns of illicit financial flows from Africa, encouraged increased awareness of illicit financial flows and the need to reduce these flows through cooperation and collaboration among African member states.

<sup>9</sup> Panel of Experts on the Illegal Exploitation of Natural Resources and other Forms of Wealth of the Congo, appointed pursuant to UNSC Presidential Statement S/PRST/2000/20 of June 2000.

activities ... whose economic and financial activities directly harm powerless people and weak economies'.<sup>10</sup> Further, the Panel of Experts recommended that the Security Council should '... 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'.<sup>11</sup>

Quite clearly, these mechanisms are critical in view of the disturbing recurrence of the illegal natural resource exploitation phenomenon in contemporary African conflicts and the continual emergence of similar exploitation patterns, networks, tactics and perpetrators in each of these conflicts.<sup>12</sup> The establishment of permanent investigative and policing mechanisms would bridge an important gap and, it is hoped, monitor the activities of notorious profit-seeking predators which have resurfaced in contemporary African wars over the past two decades.

Most importantly, the pursuit of conflict resources by conflict actors such as armed rebels has become a critical factor in the massive commission of heinous war crimes and crimes against humanity during war. The nexus between natural resource exploitation activities, the commission of war crimes, and the persistence of armed conflict was carefully analysed in a Mapping Exercise Report by the Office of the High Commissioner for Human Rights during 2010<sup>13</sup> This report analysed three situations in which natural resource exploitation-linked atrocities took place:

- first, atrocities committed by parties to the conflict in the context of struggles to gain access to and control the richest areas of the DRC;
- secondly, atrocities committed by parties to the conflict during their long-term occupation of economically rich areas in the DRC; and
- thirdly, atrocities committed in conflicts funded and fuelled by the huge profits generated by unlawful natural resource exploitation activities.<sup>14</sup>

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<sup>10</sup> UN Doc S/2002/357 par 239.

<sup>11</sup> UN Doc S/2002/357 par 240.

<sup>12</sup> Juma 'Shadow networks and conflict resolution in the Great Lakes region of Africa' (2007) 1 *African Security Review* discussing the interconnectedness and international nature of these networks. Juma makes the observation (at 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.

<sup>13</sup> *Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the DRC between March 1993 and June 2003* (August 2010).

<sup>14</sup> See 2010 *Mapping Exercise Report* pars 726–727.

A consequence of this is that the protracted DRC war saw a death toll of approximately three million people, with a further two-and-a-half million being driven from their homes.<sup>15</sup> The vicious macro and micro-conflicts, including those aimed at controlling and exploiting existing natural resources, played a significant part in contributing to these devastating consequences. It can therefore be argued that addressing the resource-curse syndrome in conflict areas, could possibly influence conflict resolution efforts, affect the incidence of illegal natural resource exploitation, reduce the high death tolls, and generally alleviate the damage arising from war in conflict torn societies.

This article examines the conflict resource debacle as witnessed during the Democratic Republic of the Congo's conflict (the DRC conflict) between 1998 and 2004.<sup>16</sup> Indeed, patterns of illegal resource exploitation have emerged in subsequent armed rebellions in the DRC. However, it is the 1998–2004 conflict that not only provides the starkest illustration of the challenges posed by illegal resource exploitation during wars in Africa, but also highlights the greatest need for authoritative domestic and regional responses to address the problem.

### **The DRC's armed rebels and illegal natural resource exploitation**

The military success recorded by Kabila's *Alliance des Forces Democratiques pour la Liberation du Congo-Zaire* (AFDL) in its march to 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 the DRC's natural resources. As with Mobutu, Kabila was not blind to the economic potential of the DRC's natural resources and the role they could play in achieving his personal objectives. He therefore used the DRC's natural resources, and in particular mineral resources, to finance his war – initially against Mobutu's regime, and later against Rwanda, Uganda, and Burundi and the armed rebel groups they supported. It can also be argued that the way in which Kabila appropriated and applied the DRC's

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<sup>15</sup> Amnesty International DRC: *Our brothers who help kill us: economic exploitation and human rights abuses in the east* (April 2003) 3, on the human toll and cost of the DRC conflict.

<sup>16</sup> 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 1998 when Kabila installed himself the President of the newly christened Democratic Republic of the 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 Turner *The Congo wars: conflict, myth and reality* (2007).

natural resources during the march to Kinshasa, was an inspiration for his future enemies – the DRC armed rebel groups. The top armed rebel chiefs who later led vicious military campaigns against Kabila, learned just how easy it was to exploit the DRC's vast natural resources to finance their rebellions.<sup>17</sup>

During the 1998 armed rebellions, armed rebel groups consequently proceeded to exploit natural resources to fund their military objectives and accumulate huge profits for both military purposes and personal gain. It can be strongly contended that it is therefore not the ubiquity and prominence of these armed groups in contemporary African conflicts that currently enlarge their footprint in international law,<sup>18</sup> but also the way in which they have fuelled and added complexity to the problematic phenomenon of conflict resources in the DRC and the Great Lakes region as a whole. Consequently, it is now difficult to contest the fact that in many instances, illegal natural resource exploitation activities are central to the formation, sustenance, and proliferation of splinter rebel groups and the subsequent sophistication of conflict management and resolution efforts. Certain writers argue, however, that the initial involvement and emergence of armed rebel groups in ongoing conflict situations is not premised on the need to control or illegally exploit existing natural resources.<sup>19</sup> They claim that the initial agendas of various rebel formations only evolved with time to include economic motives as central to their militarism.<sup>20</sup>

The inescapable truth is that the continuous state of conflict in the DRC benefitted armed rebels immensely. Between 1998 and 2004, and in a number of poignant armed rebellions that have taken place between this period and 2012, these groups have perpetuated and exacerbated prevailing conflict patterns that were, among other features, distinguished by the illegal exploitation and misapplication of the DRC's natural resources to advance military objectives. Further, it has been claimed that the failure swiftly to

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<sup>17</sup> Turner n 16 above at 40.

<sup>18</sup> See for instance, Zegveld *The accountability of armed position groups in international law* (2002); Sivakumaran 'Binding armed opposition groups' (2006) 55:2 *International and Comparative Law Quarterly* 369–394; La Rosa & Wuerzner 'Armed groups, sanctions and the implementation of international humanitarian law' (2008) 90/870 *International Review of the Red Cross* 327–341; Clapham 'Human rights obligations of non-state actors in conflict situation' (2006) 88/863 *International Review of the Red Cross* 491–523.

<sup>19</sup> Nest *et al* n 2 above at 129; Ntalaja *The DRC from Leopold to Kabila* (2002) 229.

<sup>20</sup> *Addendum to the Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the DRC* (S/2001/1072).

achieve military success to advance their political objectives and the subsequent cost of waging the war, necessarily compel led armed rebel groups to seek means and methods of financing their military campaigns through the DRC's natural resources.<sup>21</sup> On the basis of this necessity, their occupation of the DRC's territory and their involvement in illegal exploitation of its natural resources, appear to be a matter of survival. However, in so doing, their activities directly bolstered the fulcrum of the DRC's conflict economy,<sup>22</sup> in as far as they engaged in and facilitated illegal natural resource exploitation activities by various other actors during the war.

The nature of armed rebel influence on the DRC's natural resource space was explored in detail by the Office of the High Commissioner for Human Rights in 2010. The OHCHR produced a detailed 'Mapping Exercise Report' in which it was noted 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.<sup>23</sup> Further, other armed rebels sought to take control over the administrative machinery of the provinces and areas they controlled and occupied, which would enable 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 mineral resources, the heavier the militarisation of natural resource exploitation.<sup>24</sup> This phenomenon 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, clear that rebel groups contributed to the illegal exploitation of the DRC's natural resources during the war in three major ways. First, major rebel groups were implicated in requisitioning, extortion, excessive

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<sup>21</sup> Klaire *Resource wars: the new landscape of global conflict* (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 money for arms and ammunition, rebel commanders naturally seek to gain control over territories containing valuable resources.'

<sup>22</sup> The concept of war economy has been widely discussed by Keen 'The economic functions of violence in civil wars' Adelphi Papers 320, IISS, 1998.

<sup>23</sup> *Mapping Exercise Report* par 734.

<sup>24</sup> *Id* at par 737.

taxation, smuggling, confiscating, and trafficking mineral resources from mining companies and mineral stockpiles, warehouses, and storage facilities located in areas under their occupation.<sup>25</sup> Secondly, prominent personalities in the leadership of these rebel groups established businesses, corporate contacts, and international ties with foreign networks with the objective of exchanging mineral resources for arms, cash, weapons and other valuable commodities.<sup>26</sup> Finally, the rebels contributed to illegal natural resource exploitation by maintaining a conflict situation that justified the continued presence of foreign armies on DRC's soil.<sup>27</sup> By pointing to 'the state of war' situation created by armed rebels in the DRC between 1998 and 2001, foreign armies justified and took advantage of their military presence to participate in the economic exploitation of the DRC's mineral resources.

The question, therefore, is how best to deal with the predatory involvement of armed rebel groups in illegal resource extraction? Apart from purely military means that should end with the defeat of armed rebel groups, the international criminal justice route can be discussed as one of the possible options.

#### **International criminal justice and the DRC's armed rebel groups**

During the DRC's conflict, the prosecutor of the International Criminal Court (ICC) identified a number of armed rebel group leaders as being involved in the commission of war crimes. This focus on the leaders of armed rebels and other armed rebel personalities by the ICC, provides an interesting context for analysing the role of international criminal justice institutions in addressing the conflict resource phenomenon in the DRC.

The ICC has pursued several armed rebel personalities – particularly from the DRC – following the DRC's ratification of the Rome Statute on 11 April 2002.<sup>28</sup> For example, the office of the prosecutor issued six arrest warrants against the DRC suspects on charges of committing various war crimes and

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<sup>25</sup> Amnesty International: *DRC: our brothers who help kill us* 13–15.

<sup>26</sup> Raeymaekers 'Network war: an introduction to Congo's privatised war economy' *IPIS* (2002) 26–28.

<sup>27</sup> UN Doc S/2001/1072 pars 56–60.

<sup>28</sup> Available at:  
<http://www.icc-cpi.int/Menus/ASP/states+parties/African+States/Democratic+Republic+of+the+Congo.htm> (last accessed 17 December 2013).



crimes against humanity between 2002 and 2010.<sup>29</sup> A related investigation involved a referral of a situation by the Central African Republic (CAR) in December 2004, and led to the issuing of a warrant of arrest for a prominent DRC armed rebel leader, Jean Pierre Bemba Gombo.<sup>30</sup> On 14 March 2012, the ICC Trial Chamber delivered its first ever judgment against one of the DRC accused, Thomas Lubanga Dyilo,<sup>31</sup> and imposed a sentence of fourteen years' imprisonment.<sup>32</sup> The appearance of these persons before the ICC provides a slight opportunity to assess the impact of international institutional processes on armed rebel groups, particularly the effect such processes have had on the capacity of these groups to abuse the DRC's natural resources in catalysing the conditions, creation, sustainment, and termination of conflict in the DRC.

The actual potential of the international criminal justice system and its possible impact on the behaviour, social attitudes, and beliefs of organised militant groups responsible for serious crimes during conflicts such as the DRC war is contentious.<sup>33</sup> Some scholars cast doubt on the capacity of the international criminal justice system to deliver on its general expectations,<sup>34</sup> or its capacity to regulate the social norms and behaviour of militant groups such as armed rebel groups,<sup>35</sup> particularly where the groups are seen to have accepted and internalised the 'captivating', albeit illegal, conduct as a matter

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<sup>29</sup> See 'situations' at: <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200104/situation%20index?lan=en-GB> (last accessed 10 November 2013).

<sup>30</sup> See case information at: <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200105/situation%20icc-0105?lan=en-GB> (last accessed 10 November 2012).

<sup>31</sup> *Situation in the DRC: the Prosecutor v Thomas Lubanga Dyilo, judgment pursuant to article 74 of the Statute ICC-01/04-01/06* (hereinafter the *Lubanga Judgment*).

<sup>32</sup> Six years of this duration were deducted from the fourteen years the accused had already spent in the custody of the ICC. The *Lubanga Judgment* 10 November 2013.

<sup>33</sup> Arendt *Eichmann in Jerusalem: a report on the banality of evil* (1994); Damaska 'What is the point of international criminal justice' (2008) 83 *Chicago-Kent Law Review* 329; Reisman 'Legal responses to genocide and other massive violations of human rights' (1996) 59 *Law and Contemporary Problems* 75; Fletcher & Weinstein 'Violence and social repair: rethinking the contribution of justice to reconciliation' (2002) 24/3 *Human Rights Quarterly* 5.

<sup>34</sup> Damaska n 33 above. Fletcher & Weinstein n 33 above at 10 (questioning the relevance of international criminal law to social repair and reconciliation.)

<sup>35</sup> See generally, Tallgren 'The sense and sensibility of international criminal law' (2002) 13 *EJIL* 561 (doubting the effect of criminal sanctions on armed groups); Wuerzner 'Armed groups, sanctions and the implementation of international humanitarian law' (2008) 90/870 *International Review of the Red Cross* 2008, 327–341 (for a similar view).

of necessity for their own survival.<sup>36</sup> For the DRC, this would translate into contesting the potential of international criminal law institutions fundamentally to alter or transform the social attitudes, practices, and economic behaviour of armed rebels, which behaviour has constantly characterised these groups during various cycles of the DRC conflicts.

As a fact, therefore, the cases against Lubanga<sup>37</sup> and various other armed rebel suspects before the ICC, shed light on the promises and pitfalls involved in the application of international criminal law against armed rebel groups involved in the conflict-resource arena. Not to be underestimated, is also the important value of the other criminal justice processes available to the ICC against armed rebel chiefs active in the Great Lakes region who played a critical role in the instigation, complexity, and longevity of the DRC conflicts. The indictments, for instance, of prominent armed rebel group leaders such as Bemba, potentially constrain other criminal activities such as 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 has the potential of compelling them to move towards peace, so limiting the predatory and other criminal behaviour of these groups during their vicious grip on areas which are generously endowed with natural resources.

It is clear, then, that the increasing role of the ICC after 2006 culminated in increased awareness of the conflict-resource problem during the DRC war. Consequently, this raised awareness cast the spotlight on the crimes committed in pursuit of natural resources and the impunity enjoyed by conflict actors involved. This means that the ICC processes may have an important impact not only in the formal corridors of power, but most importantly, also within the rank and file of armed groups which constantly stoke the fires of conflict in the Great Lakes region.<sup>38</sup>

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<sup>36</sup> Drumbl *Atrocity, punishment and international law* (2007) 29 (analysing the psycho-social factors that are more responsible for shaping the behaviour of armed groups in conflict situations).

<sup>37</sup> Thomas Lubanga Dyilo was charged and found guilty of the war crimes of enlisting and conscripting of children under the age of fifteen and using them to participate actively in hostilities. See the *Lubanga Judgment* n 31 above.

<sup>38</sup> 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 DRC's armed rebel groups.

Apart from the promises of the ICC regime, recent developments in the relationship between African politics and the ICC detract from the achievements of the ICC regime in dealing with armed rebel groups. The cooling of the African Union-ICC ties resulting from the Sudanese Al Bashir and Kenyan cases has cast doubt on the extent to which Africa can rely on the ICC system. Most African states have not hidden their disappointment with the ICC framework, and have evidenced this by expressing lack of faith in the fairness of the ICC prosecutor.<sup>39</sup> The re-emergence in the DRC of a new set of armed rebel groups between 2008 and 2012, such as the M23, and the involvement of armed rebel leaders such as Bosco Ntaganda in the illegal exploitation of natural resources to fund war campaigns in Eastern Congo,<sup>40</sup> could be seen as resulting from the diminished threat of international criminal law against these groups. These developments mean that existing international criminal justice alternatives might not be a panacea for the illegal resource exploitation phenomenon. At best, therefore, the international criminal justice route could be pursued in tandem with other institutional mechanisms and systems which are targeted at dealing with illegal war economies and the conflict-resource debacle. One important institutional framework that has proved important in tackling the DRC's conflict-resource crisis, is the United Nations (UN) system.

## **CONFLICT RESOURCES AND THE UNITED NATIONS SYSTEM**

### **The UN Security Council Responses**

The DRC conflict-resource crisis sucked in the UN system, and moved the UN Security Council (UNSC) to take a number of important actions. Early efforts at a ceasefire culminated in the signing of the Lusaka Peace Agreement in 1999. This followed UNSC resolution 1234 of 1999 which identified the DRC conflict as constituting 'a threat to international peace, security and stability'<sup>41</sup> in the Great Lakes region, thereby justifying its involvement. This resolution further called for a cessation of hostilities,<sup>42</sup> the

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<sup>39</sup> See Business Day 'AU move leaves ICC relations in tatters' 14 October 2013, available at: <http://www.bdlive.co.za/africa/africanews/2013/10/14/au-move-leaves-icc-relations-in-tatters> (last accessed 15 October 2013); see also Sunday Mail 'AU puts ICC to the knife' 12 October 2013 available at: [http://www.sundaymail.co.zw/index.php?option=com\\_content&view=article&id=38905:africa-puts-icc-to-the-knife&catid=37:top-stories&Itemid=130#.UL63jd\\_8LVI](http://www.sundaymail.co.zw/index.php?option=com_content&view=article&id=38905:africa-puts-icc-to-the-knife&catid=37:top-stories&Itemid=130#.UL63jd_8LVI) (last accessed 16 October 2013).

<sup>40</sup> See for instance UN Doc S/2012/843 and MPO Rodriguez 'The FDLR as an obstacle to peace in the DRC' (2011) 23/2 *Peace Review* 177.

<sup>41</sup> UN Security Council Resolution 1234 (1999) last paragraph of the preamble.

<sup>42</sup> S/RES/1234 (1999) at par 3.

signing of a ceasefire agreement,<sup>43</sup> the withdrawal of foreign forces,<sup>44</sup> and non-interference in the DRC's internal affairs.<sup>45</sup> More resolutions followed on the situation in the DRC with more condemnations and recommendations, rather than concrete and practicable programmes of action.

The signing of the Lusaka Peace Accord did not bring a permanent end to the war. After 2001, evidence on illegal natural resource exploitation piled up and suggested that, in order adequately to inhibit such activities during the conflict, any enforcement agency would need to target not only state armies of Rwanda, Zimbabwe, Burundi, Uganda, and the DRC itself, but also the armed rebel groups. Further, the links between armed rebel groups and international, regional, and indigenous business corporations would have to be scrutinised. Therefore, it was critical for the UNSC Council actions to involve compliance and monitoring systems that would be able to scrutinise the pseudo-commercial relationships between armed rebel organisations and domestic or international private capital or similar commercial entities. It could be argued that the structures and webs that developed between armed rebel groups and private indigenous and international corporate entities were responsible for linking politico-military networks to local businesses and multinational corporations. Accordingly, enforcement measures by the UNSC would necessarily need to acknowledge the insecurity and geo-political challenges of the Great Lakes region which exacerbated the illegal resource exploitation problem. The reason for this is simply that irregular resource exploitation patterns in this region constantly make it inadequate to confine enforcement mechanisms to the borders of DRC only.<sup>46</sup> International supervision of points of exit need to be supported by adequate monitoring of entry points in neighbouring countries and end-user states which provide a major international market for the DRC's primary products. The fact, however, remains that the DRC's natural resources were illegally exploited and exported on a large scale and outside the ambit of legal regulatory systems. This means that any enforcement framework contemplated by the international community would have to

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<sup>43</sup> *Id* at par 4.

<sup>44</sup> *Id* at par 4.

<sup>45</sup> *Id* at par 1.

<sup>46</sup> The UN Security Council has noted security challenges arising from the geopolitical dynamics of the Great Lakes region on many occasions; see for instance 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* and also UN Doc S/1998/1096 *Final Report of the International Commission of Inquiry* (Rwanda).

address this huge challenge. An analysis of specific actions taken by the UNSC in respect of illegal exploitation of the DRC's natural resources illustrates these inherent constraints facing the UNSC in its attempts to confront the problem.

### **The Panel of Experts and the DRC's conflict-resource problem**

One of the major steps to have been taken by the UN Security Council to address the plundering of the DRC's natural resources was to establish and send the Panel of Experts on the Illegal Exploitation of Natural Resources and other Forms of Wealth of the DRC, which compiled detailed reports on the DRC's natural resource exploitation problems.<sup>47</sup> In 2010, the UN Human Rights Office of the High Commissioner also released a detailed Mapping Exercise Report outlining the sad tale of massive violations of human rights, international humanitarian law, and international human rights law.<sup>48</sup> These two bodies were supplementary to the UN Mission in the DRC (MONUC) established in terms of UNSC resolution 1279 of 1999.<sup>49</sup> Whilst the significance of other UN documents on the DRC is not doubted, it is submitted that the work of the Panel of Experts is more important in the analysis of the possibility of international prosecution of implicated conflict-resource drivers on the basis of responsibility for serious natural resource-based war crimes.

The reports of the Panel of Experts made critical findings and recommendations, and it appeared that these preliminary moves would inevitably predicate and compel serious action by the UNSC. This action could include *pendente bello* indictments and possible criminal prosecution to increase the pressure on identified individuals to stop their activities and push them to the peace negotiation table. In reality, the series of resolutions continued to condemn the illegal exploitation of natural resources, and

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<sup>47</sup> The Panel was created pursuant to various UN Security Council Resolutions such as S/RES 1279/2000; see *Reports of the United Nations Panel of Experts on the Illegal Exploitation of Natural Resources and other forms of wealth of the DRC* (UN Doc S/2001/357 (12 April 2001), UN Doc S/2002/565 (May 22, 2002), UN Doc S/2002/1072 (13 November 2001), UN Doc S/2002/1146 (16 October 2002) and UN Doc S/2003/1027 (28 October 2003).

<sup>48</sup> 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*.

<sup>49</sup> See <http://www.un.org/en/peacekeeping/missions/monuc/> for background information on MONUC, its mandate and the scope and limit of the mandate.

called on states to assist in their enforcement.<sup>50</sup> Ultimately, these resolutions both broadened and extended the mandate of MONUC<sup>51</sup> and increased the scope and extent of its powers in relation to the illegal exploitation of DRC's natural resources. It is important to acknowledge that the UNSC assumed a deeper role against armed rebel groups whose involvement in the illegal exploitation of DRC's natural resources had been highly publicised by the Panel of Experts. The most important action taken against these non-state armed actors came through UNSC resolution 1493 of 2003. Among other issues, this resolution called for an arms embargo against armed rebel groups involved in various breaches of humanitarian law, including the illegal exploitation of the DRC's natural 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 Iturbi 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.<sup>52</sup>

Further, it also demanded that all states must

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 material 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.<sup>53</sup>

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<sup>50</sup> 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 (arts 3 and 4) sweeping powers of entry, inspection and seizure without prior notice on cargo carrying aircraft and carriage vehicles and also ports, airports, airfields, military bases and border crossings.”

<sup>51</sup> This was achieved through the following Resolutions, S/RES1341 (2001), S/RES1493 (2003) and S/RES1533 (2004) and S/RES1565 (2004).

<sup>52</sup> Paragraph 19 of UN Security Council Resolution 1493 (2003).

<sup>53</sup> See par 20 of UN Security Council Resolution 1493 (2003).

Concerted efforts against armed rebel groups and *militias* were also continued on the basis of UNSC 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 during the DRC conflict.<sup>54</sup> Various other UNSC resolutions were adopted condemning illegal natural resource exploitation activities by actors in the DRC war, and widening the powers of MONUC in response to these actions.<sup>55</sup>

The onerous commitments placed upon MONUC by the UN SC seem to suggest that MONUC was better equipped to deal with this issue. However, since its creation, MONUC has laboured under serious human and financial resource constraints.<sup>56</sup> Its personnel figures were grossly inadequate to handle and discharge its responsibilities across the vast expanse of the DRC's war fronts which extended for more than two million square miles.<sup>57</sup> Implicitly acknowledging the incapacity of MONUC, other UNSC resolutions turned to individual states, urging them to take action, possibly through government decisions, commissions of inquiry, courts martial, laws, and rules to combat illegal exploitation of natural resources.<sup>58</sup> Generally, however, in post-2003 resolutions, the UNSC effectively opted to be a back

<sup>54</sup> See par 4 and 7 of UN Security Council Resolution 1533 (2004), authorising MONUC to undertake such operations and giving it additional powers to discharge its responsibilities.

<sup>55</sup> Paragraph 5 of UN Security Council Resolution 1533 (2004).

<sup>56</sup> Prunier *From genocide to continental war* (2009) 49, notes that by 2001, MONUC had about 566 personnel (instead of the authorised 537) comprising twenty-six soldiers, 111 local recruits (administrative and logistic) 205 expatriate UN civil servants and 218 military observers.

<sup>57</sup> 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/9B50ED745B13CEF2C1256DC100546026-iss-drc-19sep.pdf> (last accessed 9 September 2013). The writer reports (at par 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'.

<sup>58</sup> Of all governments implicated by the Reports of the Panel of Experts for active involvement in illegal natural resource exploitation activities during the DRC conflict, one African country, Uganda, ordered a *Porter Commission of Inquiry into Allegations of Illegal Exploitation of Natural Resources and Other Forms of Wealth of the DRC* in 2001, available at: <http://www.mofa.go.ug/pdfs/Final%20Report.pdf> (last accessed 3 November 2013). Belgium also made an official inquiry, see *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* available at: <http://www.senate.be/www/?MIval=/publications/viewPub.html&COLL=SandLEG=2andNR=942andVOLGNR=1andLANG=fr> (last accessed 8 October 2013).

bencher in the DRC's economic exploitation crisis, ceding the front benches, along with greater enforcement and supervisory powers, to MONUC, while simultaneously ignoring MONUC's serious resource constraints and the daunting challenges it faced in the DRC.<sup>59</sup>

An examination of the UNSC's role in addressing the conflict-resource phenomenon therefore suggests that this organ will continue to prioritise the cessation of hostilities rather than focusing on inhibiting violations of international humanitarian law. Certainly, this is in tandem with its purposes of maintaining international peace and security in accordance with the UN Charter. For the DRC, this organ seemed prepared to venture in to these muddled waters only where the conflict-resource problem proved to be an obstacle to peace processes or led to the prolongation of armed conflict. In essence, therefore, the UNSC gradually took cognisance of the contribution of conflict-resources upon an in-depth study of conflict patterns in the DRC. What followed were blanket condemnations of the use of conflict-resources to fund the conflict, and other observations of how this contributed serious violations of international humanitarian and human rights law. Roberts condemns this stance and argues that the UNSC's emerging programme of action is that serious violations of humanitarian and human rights law are first noted; this is followed by investigations or fact finding under UN auspices. These generally result in condemnation and calls for action by member states, after which ultimately, nothing happens.<sup>60</sup> This evaluation is somewhat harsh. It ignores that the UNSC is not strictly an international policing or compliance mechanism to monitor complex breaches and rights violations or problematic phenomena engendered by complex conflict patterns by parties to conflicts. Considering the complex nature of the DRC conflict, its integral conflict-resource phenomenon, and the interconnectedness of the issues that arose from it, there is little doubt that the UNSC was bound to record limited success in tackling the conflict-resource problem. In view of the challenges inherent within the UNSC mechanism, it would seem appropriate to assess the regional conflict resolution framework of the Congolese Peace Process as this was one of the options available to address the DRC's conflict-resource crisis.

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<sup>59</sup> 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 Wedgwood 'United Nations Peacekeeping and the use of force' (2001) 5 *Washington Journal of Law and Policy* 69 74.

<sup>60</sup> Roberts 'The laws of war: problems of implementation in contemporary conflicts' (1995–1996) 6 *Duke Journal of Comparative and International Law* 47.



## REGIONAL PEACE INITIATIVES

### The Congolese Peace Process

The Congolese Peace Process is the regional initiative revolving around the Lusaka Ceasefire Agreement<sup>61</sup> signed in August and September 1999 and facilitated by South Africa and Zambia. The major highlights of the agreement were the call for an immediate ceasefire;<sup>62</sup> the establishment of a Joint Military Commission to investigate post ceasefire violations;<sup>63</sup> disarmament strategies against identified *militias* and armed rebel groups;<sup>64</sup> and the withdrawal of foreign forces.<sup>65</sup> Finally, the agreement called for initiation of Congolese national dialogue and for this process to involve the major role players in DRC politics.<sup>66</sup>

There are a number of important aspects of the Lusaka Agreement that impacted on illegal natural resource exploitation activities by armed rebel groups and other actors in the DRC's conflict zones. First, the agreement recognised the major rebel groups, the RCD and the MLC, as well as their backers, Rwanda and Uganda, as parties<sup>67</sup> to the agreement. Burundi was not made party to the agreement. However, the agreement recognised the governments of the DRC, 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 had entered into. This was important in that the agreement committed the parties, for instance, to act against *militias* and foreign armed rebel groups.<sup>68</sup> These groups included those fighting against the governments of Rwanda (ex-FAR and Interahamwe), Uganda (the FDD, the ADF, and the LRA), Angola (UNITA), and Sudan (the WNBF, NALU, and the UNFRF II).<sup>69</sup> As mentioned above, these groups took advantage of the conflict situation to participate in various illegal activities in the DRC, including arms trade and attacks against foreign armies. Their behaviour gave Rwanda and Uganda added justification for continued military presence in the DRC, thus maintaining a conflict situation which they used as a smokescreen to carry out illegal natural resource

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<sup>61</sup> The Agreement is available at: <http://www.ieru.ugent.be/lusakaceasefire.pdf> (last accessed 20 December 2013).

<sup>62</sup> Lusaka Peace Agreement art 1.

<sup>63</sup> Article III paragraph 11b of the Lusaka Peace Agreement.

<sup>64</sup> Ceasefire Agreement Chapter 9 of Annex 'A'.

<sup>65</sup> *Id* at Chapter 4.

<sup>66</sup> *Id* at Chapter 5.

<sup>67</sup> Annex 'C' to the Ceasefire Agreement defines 'Parties' as signatories to the Agreement.

<sup>68</sup> Lusaka Peace Agreement art III par 22.

<sup>69</sup> Ceasefire Agreement n 64 above.

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 criticises the way in which the agreement accepted anti-Kabila rebel groups as parties with a seat at the table, despite the same privilege not being extended to anti-Rwandese and anti-Ugandan rebel groups in the DRC which had to be outlawed and disarmed.<sup>70</sup> It was clear that the post-agreement period would enable Rwanda and Burundi to focus on maintaining their military positions in the DRC and to use this opportunity to exploit the DRC's natural resources by proxy, using their rebel allies who were then in 'official' control of the mineral rich areas.<sup>71</sup> In light of this, it can be argued that future conflict resolution initiatives should consider accommodating all important conflict actors and take them on board, if there is to be any chance for the targeted peace initiatives to achieve their objectives.

A second aspect of the Peace Agreement was its direct and indirect effect on the political and military positions of the major protagonists in the DRC conflict. By recognising the major armed rebel groups as parties to the conflict, the agreement effectively legitimised their occupation of DRC territory; their exercise of quasi-governmental administrative functions in areas under their occupation; and, most importantly, their natural 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'.<sup>72</sup> This position set a dangerous precedent for future conflict resolution efforts. Furthermore it was without doubt counterproductive to efforts aimed at combating illegal exploitation of the DRC's natural resources at the hands of these groups and their clear violation of international humanitarian law in pursuit of this objective.

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<sup>70</sup> Nzongola-Ntalaja *The Congo from Leopold to Kabila* (2002) 234.

<sup>71</sup> 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 *Armée nationale congolaise*. See UN Doc S/2002/1146 par 16.

<sup>72</sup> Grignon 'Economic agendas in the Congolese peace process' in Nest *et al* n 2 above at 71.

It is therefore argued that peace treaties which 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 should explicitly recognise the illegality of such activities in international humanitarian law, and include provisions to the effect that the conduct of such activities in the period after the signing of such agreements constitutes a breach of the treaty, and exposes the violators to criminal sanctions. This approach would accord with the African Union's belief that international criminal justice should be helpful in fostering peace and contributing to those political processes on the ground which are designed to secure and consolidate peace.<sup>73</sup>

## CONCLUSION

This article has illustrated the nature of the conflict-resource problem as experienced during the DRC's wars of the past decade. Although there has been growing international interest in the phenomenon since 2000, this interest is yet to inspire the strengthening of relevant international legal and institutional mechanisms that should confront the curse of conflict-resources. Despite a seemingly concerted international activity intended to address the conflict-resource problem in the DRC, existing mechanisms in the DRC and in the region have yielded far too little an impact on the ground in places of ongoing conflict.

In truth, successive conflicts in the DRC have taught us a lesson: seeking a practical solution to the conflict resource problem is more difficult than shooting a moving object. Different rebel groups with different interests, objectives and structures have emerged out of virtually every conflict that has consumed the DRC in the past decade, and these groups have adopted various methods of illegally accessing and controlling the natural resource patterns in conflict areas under their spheres of influence. These trends and conflict patterns are likely to recur in future conflicts in the region. Notwithstanding this gloomy outlook, it would be remiss not to attempt to identify possible issues that could be developed further as the way forward in dealing with the conflict-resource problem in Africa.

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<sup>73</sup> 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.

Most importantly, it is asserted that any system of government embraced by conflict-prone states affected by the conflict-resource problem, must ensure that the close link between politics and economics is realigned to ensure that government contests with armed rebel groups are not predicated on the ability to access and control natural resource exploitation patterns.<sup>74</sup> Once this has been achieved, political instability will not mortally implicate the economic system nor compromise its integrity. Further, this would make it highly unlikely for political instability to be seen as sponsoring the emergence and resurgence of the conflict-resource problem. The fact is, however, that politics and economics appear to be inseparable for many African countries such as the DRC. The difficulty in attempting to separate these twin pillars in society provides a clear illustration of the extent of the problem that conflict-states face in dealing with the conflict-resource phenomenon.

It is suggested that a further incentive for realigning the link between economics and politics in Africa's war torn societies, could mean that the progress of such societies is not measured or characterised by political contestations centred on the control of valuable natural resources. The fact that the DRC's successive post-independence political systems were hinged on state control of natural resources, meant that the more control was claimed, exercised, and demonstrated, the more national political power was entrenched. In many ways, this entrenchment of political power through control over natural resources was a source of protest and political grievance. Armed rebel groups consequently regarded the contesting of state control and ownership of natural resources, particularly during armed conflicts, as one of the direct ways of wresting state political power from the government of the day. This trend must be reversed. However, what must never be ignored is the absolute need continually to strengthen domestic and international legal and institutional infrastructure, and to design a comprehensive formula that would address the conflict-resource phenomenon in contemporary African society.

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<sup>74</sup> The conflict-resource trend is a recurring feature of war in Congo. See, for recent developments, *CBC News* 'Congo's rebels take Goma airport near UN base' November 20, 2013 available at: <http://www.cbc.ca/news/world/story/2012/11/20/congo-goma-m23-rebels.html> (last accessed 20 November 2013) (stating that 'analysts and country experts say the real reason for the rebellion is over control of DRC'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').