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Conflict Minerals: The Search for a Normative Framework

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SUMMARY POINTS

- The belief that the armed conflicts in the mineral-rich eastern provinces of the Democratic Republic of the Congo have been perpetuated by the income from the illicit trade in these minerals has brought together a broad coalition of interests linked by a common objective: to regulate 'conflict minerals'.
- This has generated a wave of initiatives, strategies and regulations involving the trade in minerals; many of these seek to *prevent* armed conflict while others are aimed more broadly at contributing to the maintenance of peace and security through greater transparency and good governance measures.
- These ambitious programmes of action, whether at international, regional or domestic levels, have raised difficult questions including how to distinguish between legal and illegal trade within an unregulated economy compounded by the existence of armed conflict.
- A fully regulated mining sector has the potential to offer huge rewards for local communities and the state, but whether the regulation of conflict minerals can achieve its avowed aim as a conflict-prevention strategy remains to be seen.
- There is an overriding need for governments to ensure that any measures adopted, whether legally binding or not, take into account any potential unintended consequences that are likely to have an adverse impact on the very communities that the measures are intended to protect.

LIST OF ACRONYMS

ADFL	<i>Alliance des Forces Démocratiques pour la Libération du Congo-Zaïre</i>
BGR	<i>Bundesanstalt für Geowissenschaften und Rohstoffe</i>
CFS Programme	Conflict-Free Smelter Programme
CIME	OECD Committee on International Investment and Multinational Enterprises
CNDP	<i>Congrès National pour la Défense du Peuple</i>
DRC	Democratic Republic of the Congo
EITI	Extractive Industries Transparency Initiative
ex-FAR	<i>Forces Armées Rwandaises</i> (former armed forces of Rwanda)
FARDC	<i>Forces Armées de la République Démocratique du Congo</i> (armed forces of the DRC)
FDLR	<i>Forces Démocratiques de Libération du Rwanda</i>
GeSI-EICC	Global e-Sustainability Initiative and the Electronic Industry Citizenship Coalition
GoE	United Nations Group of Experts on the Democratic Republic of the Congo (April 2004)
ICC	International Criminal Court
ICGLR	International Conference on the Great Lakes Region
ICJ	International Court of Justice
IHL	International humanitarian law (also known as the law of armed conflict)
ITRI	International Tin Research Institute
iTSCi	International Tin Supply Chain Initiative
M23	<i>Mouvement du 23 Mars</i>
MLC/ALC	<i>Mouvement national pour la libération du Congo/Armée de Libération du Congo</i> (the militia wing of the MLC)
MNE Guidelines	OECD Guidelines for Multinational Businesses
MONUC	<i>Mission de l'Organisation des Nations Unies en République Démocratique du Congo</i> (former UN peace-keeping mission to the DRC)
MONUSCO	<i>Mission de l'Organisation des Nations Unies pour la stabilisation en République Démocratique du Congo</i> (current UN peace-keeping mission to the DRC)
NCP	National Contact Point
OECD	Organisation for Economic Cooperation and Development
OECD DD Guidance	OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas
PoE	United Nations Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of the Congo (July 2000–October 2003)
RCD	<i>Rassemblement Congolais pour la Démocratie</i>

RCD-Goma	<i>Rassemblement Congolais pour la Démocratie – Goma</i>
RCD-ML	<i>Rassemblement Congolais pour la Démocratie – Mouvement de Libération</i>
RINR	ICGLR Regional Initiative on Natural Resources
RPA	Rwanda Patriotic Army (armed forces of Rwanda)
SADC	Southern Africa Development Community
SAESSCAM	Service d'Assistance et d'Ecadrement du Small Scale Mining
SEC	Securities and Exchange Commission (US)
TTT Supplement	Supplement on Tin, Tantalum and Tungsten to the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas
UN DD Guidelines	United Nations Due Diligence Guidelines
UPDF	Uganda People's Defence Force (armed forces of Uganda)

THE DEMOCRATIC REPUBLIC OF THE CONGO



Source: Elizabeth Wilmshurst, ed., *International Law and the Classification of Conflicts* (Oxford University Press and Chatham House, 2012), p. 146.

1. INTRODUCTION

Gold, tantalum, tin and tungsten, otherwise known as the 3TG minerals, have in recent years been classified as ‘conflict minerals’.¹ Although experts are divided on what proportion of the total global consumption is sourced from the Democratic Republic of the Congo (DRC), the belief that the conflicts in the country’s resource-rich eastern provinces have been perpetuated by the income generated from the illicit trade in these minerals has brought together a broad coalition of interests linked by a common objective: to regulate ‘conflict minerals’. The link between the armed conflicts in the DRC and illegal mineral extraction was first raised as a matter warranting the attention of the UN Security Council over a decade ago when it noted with concern ‘reports of the illegal exploitation of the country’s assets and potential consequences of these actions on security conditions and the continuation of hostilities’.² That the regulation of the mineral sector would stem the financing of rebel groups and thereby decrease the capacity of such groups to wage armed conflict has been the basis for the introduction of a range of measures and pilot projects at international, regional and national level.

The Security Council’s engagement with this topic has not been a smooth one. Moreover, the measures it has adopted to delink the illicit trade in minerals from the armed conflicts have had mixed results. In its 2011 final report, the UN Group of Experts on the DRC noted that while the level of ‘conflict financing’ appeared to have decreased, a greater proportion of trade had become ‘criminalized’ and there was still a troubling ‘continued strong involvement [in the sector] by military and/or armed groups’ in the eastern provinces.³

Many of the conflict mineral measures introduced in recent years are ostensibly non-binding in nature; in other words, they are intended to provide direction and guidance only. More recently, however, there has been a growing trend to adopt measures with binding legal force. For example, at the international level, Security Council resolutions 1857 (2008) and 1952 (2010) have potential legal consequences for individuals or entities that come under the purview of the UN Sanctions Committee on the DRC. At the regional level, the DRC, and its regional partners are Parties to the Protocol on the Fight against Illegal Exploitation of Natural Resources and, consequently, initiatives introduced under this framework have the capacity to be legally binding. At the national level, legislation which directly implicates conflict minerals has been introduced in the United States and in the DRC itself. The US legislation, as discussed below, is broad in scope and affects all Securities and Exchange Commission (SEC)-reporting companies. Congolese legislation binds all those within the territory of the DRC. While it is too early to assess the effectiveness of these measures, not least because some have yet to be fully implemented, one observation is warranted. Good intentions are meaningless if the outcome of introducing legally binding measures results in harm, albeit unintended, to the very subjects the law is aimed at protecting. For example, President Joseph Kabila’s decision in September 2010 to suspend all exports of minerals from three provinces in eastern DRC to prevent the illegal exploitation of minerals had to be overturned six months later given the disproportionate degree of harm the ban was having on the local population. What is more, legislators have a duty to bear in mind that, very often, the mere *prospect* that new rules may apply can have an adverse impact on the lives of the most vulnerable in society.

The primary aim of this paper is to map existing legal obligations as well as emerging norms that govern conflict minerals. Although the *direct* aim of some of the more recent measures adopted is to sever the connection between armed conflict and the trade in minerals that fund conflict, the objective of others has been to contribute more broadly to the maintenance of peace and security in the region through greater transparency and good governance measures. The *indirect* effect of such initiatives may be to delink the illicit exploitation of minerals from the armed conflicts but that is not necessarily their overriding objective. In distinguishing between the two categories, a

1 Apart from being used for making jewellery, gold is also used in electronic, communications and aerospace equipment. Tantalum is extracted from columbite-tantalite and is used in electronic components, including mobile phones, computers and digital cameras, and as an alloy for making carbide tools and jet engine components. Tungsten is an extract of wolframite and is used for metal wires, electrodes and contacts in lighting, electronic, electrical, heating and welding applications. Tin is extracted from cassiterite and is used in alloys, tin plating and solders for joining pipes and electronic circuits. Celia Taylor, ‘Conflict Minerals and SEC Disclosure Regulation’ *Harvard Business Law Review* (2012) 105, fn 11.

2 S/RES/1291 (2000).

3 S/2011/738.

subsidiary aim of this paper is to identify the ‘gaps’ and ‘overlaps’ that have been created by these developments to bring greater clarity to contemporary debates on the topic. This paper also examines the assumptions upon which existing measures are based and asks whether they are well-founded. In that regard, it aims to explore the ‘unintended consequences’ of well-intended actions.

Section 2 begins with a brief outline of the armed conflicts in the DRC followed by a review of how and why conflict minerals were originally singled out as an issue meriting attention by the UN Security Council. The difficulties it encountered in developing a conflict-prevention strategy that would effectively address the effects of the mining trade on the armed conflicts did not stop it from taking every opportunity to remind the parties to the conflict of their obligations under international humanitarian law (IHL). While this body of law, which applies in times of armed conflict, is concerned with regulating the conduct of the parties to a conflict rather than conflict prevention, it contains rules that have a direct bearing on the exploitation of natural resources. IHL remains relevant to this day, given the incessant level of violence in the eastern provinces; in view of this, the applicable rules relating to the illegal exploitation of minerals will be considered in some detail.

Section 3 traces the emergence of two parallel strategies on conflict minerals that are distinguishable on the basis of their purported aims. The focus of this section is on those measures taken by the Security Council to delink the illicit trade in minerals from the armed conflicts, which now represent one of a handful of tactics adopted to *prevent* conflict.

Section 4 is devoted to examining the variety of non-binding measures that have been introduced to regulate the extractive industry through standard-setting programmes and good practice projects. Although none of these initiatives have legal force their impact cannot be underestimated. What is more, as with the legislation adopted by the United States and the DRC, they too have the potential to adversely affect the local communities that rely on the sector for their livelihood. Moreover, given their non-binding character, any benefit accrued may be diminished by the wider geo-political landscape.

Section 5 is concerned with legally binding standard-setting measures adopted at regional and domestic levels. In an increasingly interconnected globalized world, domestic legislation has the capacity to have significant transboundary effects and the United States’ Dodd-Franks Act, based on altruistic ambitions, is designed to take advantage of that capacity. However, this particular measure has generated an anxiety that not enough has been done to take local interests into consideration.

Section 6 examines some of the pilot projects being trialled in the region to understand precisely how the standard-setting measures – both voluntary and mandatory – are being implemented in practice.

The final section of the paper reflects on the question of unintended consequences and offers some suggestions for areas of further research.

It has been estimated that 10 million people, or 16% of the Congolese population, are directly or indirectly dependent on the small-scale mining industry.⁴ The rise in the price of minerals since 2003 driven principally by high consumption in China and India means that, at least for the foreseeable future, opportunities in the DRC’s extractive sector will continue to entice a wide variety of actors, many seeking legitimate employment and investment opportunities and others prompted by less scrupulous motives. The immediate challenge for Kabila’s government, if not for the wider international community, is to nurture a vibrant and transparent sector that will bring prosperity and opportunities to the Congolese people. But whether such an outcome would necessarily reduce the level of violence that has become endemic in some parts of eastern Congo is another matter.

4 Extractive Industries Transparency Initiative, ‘Overview on the Democratic Republic of Congo’, www.eiti.org/DR Congo.

2. ARMED CONFLICT AND NATURAL RESOURCES

2.1 The armed conflicts since 1996

The First Congo War (1996–97) came to an end with Laurent-Désiré Kabila, rebel leader of the *Alliance des Forces Démocratiques pour la Libération du Congo-Zaïre* (AFDL), taking office as President after deposing Mobutu Sese Seko who had ruled Zaire (as the DRC was then called) for 32 years. Kabila owed much of his military success to the intervention of the armed forces of Uganda (UPDF) and Rwanda (RPA), although the primary objective for both Uganda and Rwanda was not to oust Mobutu but rather to respond to the repeated attacks by rebel groups operating within and from the territory of Zaire. In the years preceding the war, organized armed groups including the *Interhamwe* and ex-FAR (both of which had been complicit in the 1994 genocide in Rwanda) and rebel groups seeking to overthrow Yoweri Museveni's regime in Uganda had found safe haven in Zaire. Frustrated by Mobutu's reluctance to deal with these armed groups, both countries justified their intervention on grounds of 'security'.

Within months of Kabila's inauguration the cordial relations between Kabila, Museveni and Paul Kagame of Rwanda had dissipated. The growing ethnic divisions in eastern DRC were exacerbated by the continued presence of the RPA and UPDF on Congolese territory. As allegations involving the illicit transfer of land, natural resources and local industries to interests in both Rwanda and Uganda began to surface, escalating tensions prompted Kabila to distance himself from his former allies. Pressure on Kabila continued to mount as evidence of widespread atrocities perpetrated by the RPA and AFDL during the First Congo War emerged but it was when rumours of a planned coup – allegedly supported by Rwanda – began to circulate that Kabila decided to publicly sever his relations with both countries by ordering all foreign forces to withdraw from the DRC on 27 July 1998. One week later, on 2 August, the RPA took control of several major towns in the eastern provinces, signalling the start of the Second Congo War. Confronted by the militarily superior armed forces of Rwanda and Uganda, which had also been joined by a newly formed rebel movement, the *Rassemblement Congolais pour la Démocratie* (RCD), Kabila approached the South African Development Community (SADC) for assistance. During the next five years, the DRC became the site of multiple international and non-international armed conflicts⁵ in which millions of Congolese citizens lost their lives.⁶

By September 1998, the UPDF had gained control over a substantial portion of the mineral-rich eastern territory, which was handed over to the Congolese *Mouvement national pour la libération du Congo* (MLC/ALC), a rebel group supported by the UPDF. However, growing disagreement between Rwanda and Uganda over the direction of the conflict led the RCD to split into a pro-Ugandan wing (RCD-ML) and a pro-Rwandan wing (RCD-Goma). The proliferation of armed groups coupled with shifting alliances and the splintering of some rebel movements soon led to a stalemate, creating an environment within which the belligerents were able to consolidate their interests in the natural resources located within the territories under their respective control.

The Second Congo War came to an end in 2003 with the formal withdrawal of all foreign armed forces and the formation of a transitional government of unity. Under the peace agreement, the Congolese armed forces were reconstituted to form the *Forces Armées de la République Démocratique du Congo* (FARDC), a unified defence force that incorporated many of the organized armed groups that had been active during the conflict. The UN concurrently authorized the deployment of a peace-keeping force to provide assistance to the government during the transitional period. But despite these measures, violence continued in the eastern provinces owing to the failure to rid all foreign rebel groups from the DRC's territory, most notably the ex-FAR and Interahmwe, which had regrouped to form the *Democratic Forces for the Liberation of Rwanda*

5 Parties to the international armed conflict (IAC) included the armed forces of the DRC, Uganda, Rwanda, Burundi, Zimbabwe, Namibia and Angola. There is some evidence to suggest that Chad, Sudan and Libya also deployed troops.

6 The International Rescue Committee (IRC) has reported that between 1998 and 2007, 5.4 million people died as a direct and indirect result of the conflict. See Benjamin Coghlan et al., *Mortality in the Democratic Republic of Congo: An Ongoing Crisis*, IRC report, 2007, http://www.rescue.org/sites/default/files/migrated/resources/2007/2006-7_congomortalitysurvey.pdf.

(FDLR), coupled with the inability to enforce a comprehensive country-wide programme of disarmament and demilitarization. In 2008, major hostilities once again broke out in the east between FARDC and the pro-Tutsi *Congrès national pour la défense du peuple* (CNDP), a Congolese rebel group that had benefited from the patronage of Rwanda. In early 2009, the unexpected thawing of relations between the DRC and Rwanda led to a joint military operation in the east. Although an agreement was brokered between Kinshasa and the CNDP whereby the latter was integrated into FARDC, the armed activities of the foreign rebel groups, in particular the FDLR, perpetuated an environment of insecurity.

Since 2010, FARDC, with the support of MONUSCO (the UN peacekeeping force renamed from MONUC) has made considerable progress in establishing some semblance of stability, although serious problems persist. CNDP forces were not fully incorporated into FARDC, allowing for the establishment of parallel chains of command. This has led, once more, to the outbreak of armed conflict in the eastern provinces. A new armed group, the M23, commanded by ex-CNDP leader General Bosco Ntaganda and supported by Rwanda, has wrought havoc in the region. Meanwhile, the FDLR also remains a militarily strong and politically significant foreign rebel force in the provinces of North and South Kivu.

2.2 Natural resources and the fuelling of armed conflict

Soon after the outbreak of the Second Congo War the UN Security Council, in its capacity as the body entrusted with primary responsibility for the maintenance of international peace and security under the UN Charter, issued a statement declaring the situation in the DRC to constitute ‘a serious threat to regional peace and security’.⁷ The following spring it adopted a resolution condemning the violence in the DRC and demanded a cessation of the conflict and the withdrawal of all foreign forces.⁸ This foreshadowed a trend that would continue for over a decade whereby the Security Council, acting under its peace and security mandate, would remain actively seized of the situation in the DRC. During the initial period of the conflict the Security Council limited its engagement to reminding all the warring parties of their international humanitarian law (IHL) obligations, primarily, if not exclusively, in respect of civilian protection. But as the conflict continued unabated and the situation became increasingly complex, two developments – one factual, one legal – became apparent, requiring it to revisit its stance.

The factual development arose in the form of emerging evidence indicating that the illegal exploitation of the DRC’s natural resources was fuelling the wars. This phenomenon was not unique to the conflict in the DRC. The relationship between, for example, trafficking in diamonds, weapons and the protracted conflicts in Sierra Leone, Liberia and Angola was well documented and the Security Council was clearly not averse to invoking its legally binding Chapter VII powers in such circumstances.⁹ In 1998, as part of its strategy to stem the flow of weapons financed through ‘conflict diamonds’ by the Angolan rebel group, UNITA (*União Nacional para a Independência Total de Angola*), it adopted resolution 1173 to prevent the sale of Angolan diamonds lacking a certificate of origin from the government of national unity and reconciliation.¹⁰ But in comparison to the measures taken in Angola, the path taken by the Security Council in the DRC appeared markedly cautious. There were many reasons for this including the fact that the armed conflicts were international in character (fought between states rather than between the government and rebel groups), giving rise to a different set of political and legal issues. In particular, what distinguished the case of the DRC was that by late 1999, the country had been effectively ‘partitioned’ into three separate areas: Kabila’s government with support from Zimbabwe, Namibia and Angola controlled the west and south; Rwanda with the RCD in support controlled the east; and Uganda with the MLC in support controlled the north. Since under IHL territory is considered occupied when it is under the authority of the hostile army, there were growing calls that both Rwanda and Uganda

7 Security Council, Statement by the President of the Security Council, 31 August 1998, S/PRST/1998/26.

8 S/RES/1234 (9 April 1999), para 2. Three further resolutions were adopted in 1999 including S/RES/1258, S/RES/1273 and S/RES/1279.

9 The Security Council imposed embargoes on rough diamonds originating from countries in conflict including Angola (1998), Sierra Leone (2000), Liberia (2003), and Côte d’Ivoire (2005).

10 S/RES/1173, 12 June 1998.

were *de facto* occupying powers and therefore legally obliged to comply with the relevant international law rules concerning the treatment of property in occupied territory.¹¹ Thus, when rumours began to surface of the illegal exploitation of the DRC's natural resources in the areas under the occupiers' control, not least by the armed forces of the occupiers themselves, the Security Council's decision to authorize the creation of a Panel of Experts (PoE) to investigate the allegations was necessary to enable it to develop an informed strategy.¹²

In April 2001, the PoE released its first report on the illegal exploitation of natural resources in the DRC.¹³ Although its principal task as a fact-finding body was to assess the links between the illegal exploitation of natural resources and the continuation of the conflict and to make recommendations, what is noticeable is the absence of any reference to IHL norms which, given the existence of an armed conflict, was the most relevant legal regime within which to assess the alleged illegal exploitation of the DRC's resources. That said, the PoE's assignment was a difficult one since much of the extractive sector before the armed conflict was unregulated. How would it be possible to distinguish the 'illegal' war-time practices (whether by foreign armed forces or parallel quasi-governmental authorities) from pre-existing informal practices? To overcome this difficulty, the PoE produced its own set of criteria, which led it to conclude that the involvement of both Rwanda and Uganda in the extractive sector was a violation of the DRC's sovereignty.¹⁴ Described as 'systematic and systemic', the scale and depth of the illegal exploitation documented by the PoE were staggering.¹⁵ Moreover, the evidence appeared to support the allegations that profits from the illegal exploitation of natural resources were being channelled by the belligerents to sustain their war-fighting efforts.

The PoE's recommendations were unequivocal. The council was urged to: (i) adopt an embargo on the import and export of certain raw materials to and from Rwanda, Uganda and Burundi coupled with the institution of a sanctions regime for violators; (ii) introduce an arms embargo on rebel groups together with targeted sanctions including the freezing of assets; and (iii) extend the latter sanctions regime to individuals and companies participating in the illegal exploitation of the DRC's natural resources. The last two recommendations marked the beginning of what would become the Security Council's conflict-prevention strategy in the DRC.

The heated reaction of the states named in the PoE's report was partially placated by the release of an Addendum in which the panel retracted and clarified some of the allegations in its original report.¹⁶ Crucially the Addendum redirected attention to the role of non-state actors and alternative means through which the illegal exploitation of resources might be addressed.¹⁷ Amid the political fracas, the Security Council revised the PoE's mandate, setting in motion a process whereby a framework to govern the extractive sector in peace-time would gradually begin to take shape.¹⁸ Interpreting its renewed mandate broadly, in its 2002 report the PoE took the initiative of 'naming and shaming' the international corporations that were indirectly benefiting from the illegal exploitation of resources.¹⁹ But when the evidence in support failed to stand up to scrutiny, the named companies threatened the UN with lawsuits. As the pressure intensified, and with the delicate negotiations over how to end the conflict making progress, the PoE was instructed to

11 Article 42, 1907 Hague Regulations.

12 See paragraph 77, Security Council mission to the DRC (S/2000/416, 11 May 2000) followed by the Statement of the President of the Security Council requesting the Secretary-General to establish a panel of experts (S/PRST/2000/20).

13 Acting upon the Secretary-General's Report pursuant to Resolution 1291, in June 2000 the Security Council granted the Secretary-General the authority to establish a Panel of Experts to investigate and report on concerns regarding the illegal exploitation of natural resources and other wealth; S/PRST/2000/20.

14 If by sovereignty, the PoE was referring to the principle of permanent sovereignty over natural resources as expressed in General Assembly resolution 1803 of 14 December 1962, it should be noted that the ICJ expressly rejected the applicability of the principle to situations of exploitation of natural resources by members of the armed forces of a state militarily intervening in another state; *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, I.C.J. Reports 2005 (Dec. 19), para 244 (hereinafter *Armed Activities Case*).

15 Regrettably, not all the evidence tendered by the PoE was to stand up to scrutiny; see Security Council debate on the situation concerning the DRC of 14 December 2001 (S/PV.4437) following the release of the Addendum to the report (S/2001/1072).

16 For the Addendum to the report see S/2001/1072 of 13 November 2001. For debate on the PoE's reports see S/PV.4437 of 14–15 December 2001.

17 Alternative means included, for example, renegotiating contracts and improving export procedures.

18 For the Security Council Presidential Statement on the mandate of the PoE, see S/PRST/2001/39 of 19 December 2001.

19 See in particular, Annex III, Final report of the Panel of Experts (S/2002/1146) of 16 October 2002.

review its list on the basis of more robust evidence. The 2003 Report of the Panel was to be its last.²⁰ Shortcomings aside, collectively the PoE's reports paved the way for the evolution of two parallel normative projects in respect of conflict minerals (see section 3.1).

Despite the overwhelming evidence pointing to the systematic violation of IHL rules on natural resources, none of the PoE's reports engaged with this body of law. The Security Council was not unaware of the legal implications contained in the panel's factual findings, as exemplified in its carefully worded statement following the release of the first report.²¹ Albeit limited, IHL provides some rules on the protection of natural resources in times of conflict, as inferred by the Security Council's repeated references to the 1949 Fourth Geneva Convention in subsequent resolutions.²² But what precisely were the rules that applied to all parties to the conflicts, and in particular to Rwanda and Uganda as occupying powers?

2.3 The law of armed conflict and natural resources

International humanitarian law has long prohibited the 'theft' of property – private or public – in armed conflict.²³ Commonly referred to as 'pillage' (although sometimes described as looting, spoliation, plunder²⁴) the unlawful appropriation of property in times of war has been treated as a criminal offence since the late nineteenth century.²⁵ Article 33 of the 1949 Third Geneva Convention, which applies to international armed conflict, simply states that 'pillage is prohibited'; a similar provision is found in the 1977 Additional Protocol II for non-international armed conflict to which that instrument applies.²⁶ Irrespective of whether the conflict is international or non-international in character, pillage is a war crime.²⁷ Despite being an archaic term (and some disagreement as to the requisite elements of the offence) pillage continues to be prosecuted by international and domestic courts, as demonstrated most recently with the prosecution of Charles Taylor by the Special Court of Sierra Leone.²⁸ That the PoE had used the terms 'looting' and 'plundering' in its report did not detract from the obligation on all the belligerent parties to prevent, investigate where necessary and prosecute members of its armed forces for pillage.²⁹

Most war crimes jurisprudence defines pillage as the appropriation of property without consent of the owner for private or personal use subject to the exceptions envisaged in situations of belligerent occupation as provided in the 1907 Hague Regulations.³⁰ Accordingly, the requisition of

20 Following the Second Report, the panel's mandate was extended by SCR 1547 (2003), which also set out the scope of its mandate for its final term.

21 S/PRST/2001/39, 19 December 2001.

22 In February 2001, the Security Council adopted resolution 1341 reminding all parties to the conflict of their obligations under the 1949 Fourth Geneva Convention (which specifically addresses occupation law) and further emphasized that the occupying forces would be held responsible for human rights violations in the territory under their control; S/RES/1341 of 22 February 2001, para 14. See also operative paragraph 17 of resolution 1291 of 24 February 2000.

23 Articles 28 and 47 of the 1899 Hague Convention (II) respectively state: 'the pillage of a town or place, even when taken by assault, is prohibited' and that 'pillage is formally forbidden'.

24 The International Criminal Tribunal for former Yugoslavia (ICTY) has held that 'the unlawful appropriation of public and private property in armed conflict has varyingly been termed 'pillage', 'plunder' and 'spoliation' and that the term plunder 'should be understood to embrace all forms of unlawful appropriation of property in armed conflict for which individual criminal responsibility attaches under international law, including those acts traditionally described as 'pillage'; Prosecutor v Delalic et al., IT-96-21-T, 16 November 1998, para 591.

25 This was so in domestic law although by the twentieth century individual criminal responsibility in international law attached to pillage.

26 Article 4 (2)(g) of the 1977 Additional Protocol II. For further commentary, see Jean-Marie Henckaerts and Lousie Doswald-Beck, eds, *Customary International Humanitarian Law*, study for the International Committee of the Red Cross (ICRC) (2005).

27 For pillage as a war crime see Article 6(b) of the Statute of the Nuremberg Charter and the statutes of the ICTY, International Criminal Tribunal for Rwanda (ICTR), Special Court for Sierra Leone (SCSL), and International Criminal Court (ICC).

28 The Special Court for Sierra Leone has held that 'the requirement of "private or personal use" is unduly restrictive and ought not to be an element of the crime of pillage'; Prosecutor v Fofana, SCSL-04-14-T, 2 August 2007, para 160. By contrast, under the ICC statute the appropriation of property must be 'for personal or private purposes'. The post-Second World War cases treated pillage as including those acts committed in furtherance of the Axis war effort.

29 Armed Activities case, para 254.

30 In the post-Second World War IG Farben case, the tribunal held that '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

privately owned property ‘for the needs of the army of occupation’ is *not* prohibited under IHL. Whether Uganda and Rwanda were occupying Powers within the meaning of IHL is a factual determination. In 2005, the International Court of Justice (ICJ) found there was sufficient evidence to conclude that Uganda was an occupying power within the meaning of Article 42 of the 1907 Hague Regulations. Had the Court not lacked jurisdiction to assess the evidence in respect of Rwanda, it is not unlikely that a similar conclusion would have been forthcoming. As occupying powers both were entitled to requisition property to the extent necessary for maintaining their armed forces in the occupied territories. Nevertheless, the post-Second World War cases suggest that such appropriation is limited to items such as food and general supplies for the day-to-day functioning of the occupying forces. Consequently, the transfer of property for use by the occupier *outside* the occupied territory is generally considered prohibited.³¹ Nor, for that matter, may the occupier sell the property for profit, since the intention of the exception is merely to allow the occupier to provide for its armed forces in the occupied territory during the period of occupation. Although the text of Article 53 of the Hague Regulations appears to introduce a broad exception allowing for the appropriation of a wide category of public property which may be used for military operations, most case law has interpreted this provision narrowly.³² Likewise, privately owned property which may be seized by the occupying forces has also been restrictively interpreted to include only that which has a direct military use.

As occupying powers, both Rwanda and Uganda were under the further obligation to ‘take all the measures in their power to restore, and ensure, as far as possible, public order and safety’ in the occupied territories.³³ This obligation comprised the duty to secure respect for the applicable rules of human rights law and IHL by its own armed forces as well as a duty of vigilance to prevent others, including rebel groups, from violating such norms in the territory over which each had control. Given the scale of the looting and plundering, it came as no surprise when the ICJ found Uganda had breached its obligations as an occupying power.³⁴ In its judgment the Court rejected, for lack of evidence, Uganda’s submission that the exploitation in the occupied territory was carried out for the benefit of the local population. Uganda’s submission raised an important point of law involving the doctrine of usufruct. How this principle is understood under IHL merits particular consideration as it has a direct bearing on the exploitation of minerals in occupied territory.

Article 55 of the Hague Regulations restricts the appropriation of immovable public property in providing that the occupying state

shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.

This doctrine had long applied all natural resources, including minerals, based on the mistaken belief that such resources were renewable. But with the realization that some natural resources were non-renewable, the usufruct principle embodied in the text of Article 55 took on a different meaning and consequently could *only* be read as prohibiting the occupier from exploiting non-renewable resources such as minerals. Thus, in a leading post-Second World War case involving the exploitation of state-owned mines in occupied Russia, the tribunal rejected the submission that

international law’; *United States v Krauch et al.* (IG Farben), 8 Trials of War Criminals 1081, 1133. See also ICTY judgment in *Prosecutor v Martić* IT-95-11-T, 10 June 2007, para 102.

31 For a list of cases cited in support, see manual by James Stewart, ‘Corporate War Crimes: Prosecuting the Pillage of Natural Resources’ (Open Society Justice Initiative, 2011), para 80 and footnote 160.

32 Article 53 states, ‘[a]n army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations. All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms, and, generally, all kinds of munitions of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made.’ Stewart, ‘Corporate War Crimes’, paras 82–84.

33 Article 43, 1907 Hague Regulations.

34 *Armed Activities Case*. See also the DRC’s oral submission which identifies the ‘systematic plunder and illegal exploitation’ of DRC’s natural resources in areas occupied by Rwanda’s armed forces; CR 2002/36, 13 June 2002, www.ictj.org.

the seizure of minerals from the mines was lawful under Article 55 and found the defendant guilty of pillage.³⁵

Nevertheless, in practice, it is the rule (the occupier may continue to mine at pre-occupation rates) rather than the principle (the occupier must safeguard the capital of these properties) that is often still claimed. Although counter-intuitive, there may be good grounds for allowing the rule to be upheld. As already noted, since a large proportion of the population in the DRC was reliant on the continued existence of an informal economy, to distinguish between illegal and legal mineral extraction on the basis of the status of the belligerent party that has control over the territory in which the minerals are located is not only meaningless but, if enforced, is likely to disproportionately penalize the very civilian population that IHL is designed to protect. One option is to allow the continued extraction of minerals in occupied territory subject to the condition that all profits from the extractive sector – whether ‘legal’ or otherwise – are spent exclusively for the benefit of the local population. That Uganda’s submission to the ICJ was rejected on the facts (that profits were not being used for the exclusive benefit of the local population) rather than in principle suggests that this interpretation of the doctrine has some purchase.

35 *US v Ernst von Weizsäcker et al. (Ministries Case) Case No. 11*, 14 April 1949.

3. THE UN SECURITY COUNCIL AND THE UNAVOIDABLE MINERAL PROBLEM

Throughout the duration of the Second Congo War, the UN Security Council took every opportunity to remind the parties of their IHL obligations. However, because its primary objective was to bring the armed conflicts to an end, how this goal could most effectively be achieved continued to dominate its agenda. Nonetheless, its engagement with the region remained, for the most part, reactive and subject to the fast-evolving situation on the ground.

3.1 The emergence of parallel strategies

The complexity of the challenges presented by the violence in the DRC was not lost on the Security Council. The illicit mineral trade may have perpetuated the armed conflicts but, equally, the lawlessness and insecurity created by the conflicts provided the ideal environment within which criminal networks could operate. The overriding question was how this cycle of violence could be broken, particularly in the light of the fractured nature of the state and the inherent difficulties faced in distinguishing between lawful and unlawful mineral exploitation.³⁶ The PoE's solution had been a simple one: to identify individuals and companies that were benefiting from the trade in 'conflict minerals' and by regulating their conduct from outside the region, curtail funding to the organised armed groups. Distinguishing between lawful and unlawful exploitation would be resolved by whether or not such entities were complying with the OECD Guidelines for Multinational Enterprises (MNE Guidelines).³⁷ Whether this option was appropriate in the circumstance was a question that remained unanswered owing to a number of developments brought on by the end of the Second Congo War.

In December 2002, the signing of the Global and All-Inclusive Agreement (Pretoria Agreement) allowed for the formation of an All-Party Transitional Government. In response, the Security Council swiftly reframed its engagement with the DRC from one of conflict prevention to post-conflict state-building.³⁸ Accordingly, its priorities were redefined to include: (i) supporting the parties establish the transitional government; (ii) assisting with security reform; continuing its disarmament, demobilization, repatriation, resettlement and reintegration programmes; and (iii) helping to facilitate a peaceful resolution to the ongoing non-international armed conflicts in the Kivus and Ituri.³⁹ This paved the way for the Security Council to adopt a far more contained conflict prevention strategy dominated by the need to stop the flow of *weapons* to the rebel groups. In 2003, resolution 1493 was adopted imposing an arms embargo on 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 Pretoria Agreement.⁴⁰ The 'problem' of conflict minerals consequently slipped in priority on the Security Council's agenda.

A second development came about with the intervention of the OECD in the minerals debate prompted by the PoE's second report.⁴¹ In January 2003, the Security Council adopted resolution 1457 asking the panel to provide the OECD Committee on International Investment and Multinational Enterprises (CIME), the body vested with oversight responsibilities for the MNE Guidelines, with relevant information to enable the appropriate authorities to assess whether any company operating in or from the jurisdiction of an OECD member state had failed to comply with the guidelines.⁴² This effectively set in motion a trend for the OECD to become increasingly

36 In its last report the PoE shifted its focus to the control of weapons on the basis that since the armed conflict, arms-trafficking and resource exploitation were mutually reinforcing and arms-trafficking was 'the weakest element of the cycle and the area where the international community can play an effective role'. It adopted the view that '[w]ithout arms, the ability to continue the conflict, thereby creating the conditions for illegal exploitation of resources, cannot be sustained' and '[e]mpphasis should therefore be placed on stemming and, if possible, halting the flow of illegal arms' to the DRC; S/2003/1027, paras 59–60.

37 See second PoE Final Report (S/2002/1146) of 16 October 2002, paras 170–78, and Annexes.

38 S/2003/566, para 58.

39 *Ibid.*, para 30.

40 S/RES/1493 of 28 July 2003, para 20; S/2003/566, para 96.

41 Letter from Donald Johnston, OECD Secretary-General, to Kofi Annan, UN Secretary-General, dated 9 January 2004.

42 S/RES/1457 of 24 January 2003.

involved and take a lead in the development of strategies to address the problem of conflict minerals.

The same resolution called on states, international financial institutions, and other organizations to assist in efforts to create appropriate national structures and institutions to control resource exploitation and 'to establish Congolese institutional capacity to ensure that the extractive sector was controlled and operated in a transparent and legitimate way' for the benefit of the Congolese people. This third development created an environment that would draw in a wide variety of stakeholders governed by an ambition to contribute to the maintenance of peace and security through regulation, not least of the mineral sector. Henceforth, two parallel strategies in respect of conflict minerals began to take shape. The overriding priority of one would be to sever the connection between the armed conflict and natural resources, while the second would be concerned with contributing more broadly to the maintenance of peace and security in the region through greater transparency and good governance measures.

3.2 Arms control and conflict minerals: an ambiguous relationship

In March 2004, with no end to the non-international armed conflicts in sight, a further resolution was adopted, establishing: (i) a Security Council Committee (the 1533 Committee) to oversee the weapons embargo; and (ii) a Group of Experts (GoE) to assist the Committee by monitoring the implementation of the said embargo.⁴³ Although mandated to focus on the flow of weapons, the GoE's investigations continued to lead it back to the topic of conflict minerals since what could not be ignored was the 'extensive evidence proving the linkage between the mismanagement of mineral concessions and diversions of natural resources for the financing of arms-embargo violations'.⁴⁴ Thus it too was confronted by the same question that had faced the PoE three years earlier: *how, most effectively, could the links between the illegal exploitation of natural resources, the flow of weapons, and the unremitting armed conflicts be severed?*

Retracing the PoE's steps, the GoE proposed extending the sanctions regime to all individuals and entities involved in the illegal exploitation of minerals. But rather than distinguishing between lawful and unlawful exploitation on the basis of compliance with the OECD Guidelines, the GoE's recommendation was to evaluate by reference to Congolese law.⁴⁵ This proposal was strongly opposed by the UN Secretary-General, Kofi Annan, who had been commissioned by the Security Council to assess the potential economic, humanitarian and social impact of such a measure on the Congolese people.⁴⁶ The need to take account of the particularities of a situation when developing policy options was demonstrated with compelling clarity by the Secretary-General's report, which concluded that the unregulated nature of the entire sector was such that a broad sanctions regime, even if viable, would most certainly threaten the livelihood of artisanal miners, labourers and small sellers, the very people the sanctions regime was intended to protect.⁴⁷ Thus the risk of unintended consequences, namely causing disproportionate harm to the most vulnerable, was far too high.

When large-scale violence broke out in the Kivus in March 2008, the Security Council adopted resolution 1807 authorizing the Sanctions Committee to freeze assets belonging to, and impose travel bans in respect of, individuals and entities supporting, through the provision of arms, the illegal armed groups in the eastern part of the DRC.⁴⁸ In addition it requested the GoE to report on the sources of financing which were supporting the illicit trade in arms and thereby perpetuating the conflict. The GoE released two further reports that year evidencing the deep and complex links

43 S/RES/1533 of 12 March 2004. Over the years the 1533 Committee recommended a number of modifications including the extension of the embargo to the entire DRC territory and the adoption of targeted sanctions (travel bans, asset freezes); see resolutions 1533 (2004), 1596 (2005), 1649 (2005), 1698 (2006), 1768 (2007), 1771 (2007), and 1799 (2008).

44 Report of the Group of Experts of 18 July 2006 (S/2006/525), para 123. In contrast, see Fourteenth Report of the Secretary-General on the United Nations Organization Mission in the DRC (S/2003/1098), 17 November 2003, paras 72–73.

45 Report of the Group of Experts of 31 January 2007 (S/2007/40), para 52.

46 S/RES/1698 of 31 July 2006, para 8.

47 Secretary-General's report of 8 February 2007 (S/2007/68).

48 S/RES/1807 of 31 March 2008.

between the armed groups, trafficking in weapons, mineral exploitation and the continuing violence in the eastern provinces. According to the GoE the principal source of revenue raised by the FDLR stemmed from its involvement in the illegal exploitation of natural resources in the trade of gold, cassiterite, coltan and wolframite, with estimated profits of millions of dollars per annum.⁴⁹ But for the international community, the most troubling aspect of the GoE's findings was that such minerals were regularly exported through companies in Austria, Belgium, Canada, China, Hong Kong, India, Malaysia, Thailand, Rwanda, South Africa, Switzerland, the Netherlands, the Russian Federation, the United Arab Emirates and the United Kingdom. The GoE's recommendation was unambiguous: it was incumbent on all states to take appropriate measures to ensure that exporters and consumers of Congolese mineral products under their jurisdiction exercise due diligence in respect of their suppliers.⁵⁰ Companies would have to take measures to ensure that their business practices were not directly or indirectly supporting the perpetuation of the armed conflicts. Ten days later, resolution 1857 extended the criteria under which individuals and entities could be designated as subject to targeted sanctions to include those supporting the illegal armed groups through illicit trade of natural resources.⁵¹ Significantly, the concept of 'due diligence' entered the Security Council's language for the first time; the resolution encouraged states 'to take measures, as they deem appropriate, to ensure that importers, processing industries and consumers of Congolese mineral products under their jurisdiction exercise due diligence on their suppliers and on the origin of the minerals they purchase'.⁵²

3.3 From militarization to criminalization

Throughout the following year, the GoE continued to collate information on the linkage between the illegal exploitation of natural resources and the financing of illegal armed groups. Evidence continued to mount of the vast income that was being generated through the illicit trade in minerals, particularly for the FDLR. But equally concerning was the rising number of criminal networks that were beginning to dominate the sector and whose actions were leading to widespread fraud and serious human rights violations. This troubling feature of the mineral trade had evolved following the military operations against the FDLR in early 2009, when the mines vacated by the rebel groups had been taken over by criminal networks, some of which were controlled by units of the Congolese armed forces (FARDC) comprising former CNDP hardliners. Once again, the GoE's recommendations were unequivocal: since the government was clearly unable to take the necessary measures to address the exploitation of the country's natural resources, responsibility fell on other states to clarify the due diligence obligations of companies under their respective jurisdictions which operated in the DRC.⁵³ In December 2009, the GoE was given the task by the Security Council of producing guidelines for the exercise of due diligence by the importers, processing industries and consumers of mineral products regarding the purchase, sourcing (including steps to be taken to ascertain the origin of mineral products), acquisition and processing of mineral products from the DRC.⁵⁴

Following a consultation process with a wide variety of stakeholders, a set of guidelines was annexed to the GoE's November 2010 report.⁵⁵ The Security Council was presented with two options.⁵⁶ The first was based on a narrow reading of due diligence framed by the terms of resolution 1857. In other words, individuals and entities would only be required to take measures to mitigate the risk of directly or indirectly worsening the conflict in the east caused by: (i) supporting the illegal armed groups operating in the eastern part of the DRC; and (ii) violating the asset freeze

49 See S/RES/1807 of 31 March 2008, para 18(d); S/2008/772, para 46 and S/2008/773 of 12 December 2008, paras 72-101 and 127-135.

50 Recommendation 14 (S/2008/773).

51 S/RES/1857 of 22 December 2008, para 4(g).

52 *Ibid.*, para 15.

53 S/2009/603 of 23 November 2009.

54 Paragraph 7, S/RES/1896 of 7 December 2009.

55 S/2010/596.

56 *Ibid.*, paras 305-12.

and travel bans on sanctioned individuals and entities.⁵⁷ Significantly, this excluded the criminal elements within FARDC since they were not a listed illegal armed group.

The second option entailed widening the class of actors to include ‘criminal networks and perpetrators of serious human rights abuses particularly within the national armed forces’ of the DRC.⁵⁸ This option not only involved adding *state* actors but significantly broadened the substantive scope of the Security Council’s engagement in the DRC. Although resolution 1857 had extended the class of actors, the link between their conduct and the armed conflicts was preserved by narrowing the definition of proscribed support to the organized armed groups. By contrast, the decision to accept the GoE’s recommendation by adopting the second option not only signified a fundamental departure from the previous position, which had been defined in 2003 with the adoption of resolution 1493, but clearly went beyond the original objective of halting the armed conflicts to addressing the causes of ‘insecurity’ more generally.⁵⁹

Resolution 1493, like subsequent resolutions adopted by the Security Council in the years between the two wars, had inadequately addressed the role of state actors in perpetuating armed conflict and gross human rights violations. This oversight, partially remedied by resolution 1952, can be viewed as an unfortunate legacy of an influential theoretical approach which dominated and shaped policy thinking: that greed rather than political grievance lies at the root of civil wars.⁶⁰ This assumption led many in the international community to focus their efforts on curbing the financing of non-state actors, while paying minimal attention to the role of the state. As experts in the field have revealed, the flaws embedded in this narrow approach to problematizing armed conflict have proved damaging, not least because in understating the complexity of armed conflict, opportunities have been lost.⁶¹

3.4 The legal implications of Security Council resolution 1952 (2010)

By paragraph 8 of resolution 1952 the Security Council supported taking forward the GoE’s due diligence guidelines but only went so far as to call upon all states to take appropriate steps to ‘raise awareness’ of the guidelines and to ‘urge importers, processing industries, and consumers of Congolese mineral products to exercise due diligence’ by applying the guidelines. Nevertheless the resolution requires the *Sanctions Committee* to consider whether an individual or entity has exercised due diligence when assessing the designation for sanctions for supporting illegal armed groups in eastern DRC, and thus gives the guidelines an immediate legal effect.

The UN Due Diligence Guidelines (UN DD Guidelines) outline five steps that are required of importers, processing industries and consumers of mineral products from ‘red flag’ locations which include the ‘eastern part of the Democratic Republic of the Congo and other countries in the region through which minerals from that area are known to transit, including Rwanda, Burundi, Uganda, Kenya, the United Republic of Tanzania and the Sudan’.⁶² More specifically, the five steps are:

- Strengthening company management systems;
- Identifying and assessing risk in the supply chain;

⁵⁷ The reasoning of i) is based on the fact that the arms embargo is specifically targeted at such groups.

⁵⁸ Recommendation (a), S/2010/596, para 370.

⁵⁹ S/RES/1952 of 29 November 2010, para 7; S/2010/596 para 317. This decision can be contrasted to the statement made by the President of the General Assembly during the thematic debate on ‘maintenance of international peace and security: natural resources and conflict’ that ‘improving management of natural resources in the absence of conflict is not the primary responsibility of the Security Council’ but rather that ‘the various and complex aspects of the relationship between natural resources and conflict should be addressed through the collaboration of all organs, namely, the General Assembly, the Security Council and the Economic and Social Council’ (S/PV.5707, 25 June 2007).

⁶⁰ Paul Collier, ‘Doing Well Out of War: An Economic Perspective’, in Mats Berdal and David Malone, eds, *Greed and Grievance: Economic Agendas in Civil Wars* (Boulder, CO: Lynne Rienner/International Peace Academy, 2000), p. 26; *The Bottom Billion: Why the Poorest Countries are Failing and What Can Be Done about It* (New York: Oxford University Press, 2007).

⁶¹ Arvind Ganesan and Alex Vines, ‘Engine of War: Resources, Greed, and the Predatory State’ Human Rights Watch 2004 World Report; David Keen, ‘Greed and Grievance in Civil War’, *International Affairs*, vol. 88, no. 4 (2012), pp. 757–77.

⁶² GoE Report 2010/596, para 308, footnote 20.

- Designing and implementing a strategy to respond to identified risks;
- Ensuring independent third-party audits;
- Publicly disclosing supply chain due diligence and findings.⁶³

Although the UN DD Guidelines do not have direct legal force on member states or individuals and entities operating in or from their jurisdiction, the fact that the Sanctions Committee is authorized to consider designating a company for sanctions on the basis of whether due diligence has been exercised means that there is now indirect pressure on all companies to comply with the guidelines. To avoid the risk of being the subject of coercive measures, companies will need to design and implement strategies to mitigate the risks of providing direct and indirect support not only to organized armed groups as defined by the Security Council but also to criminal networks and/or perpetrators of serious human rights abuses, including within FARDC. This would involve, for example, taking positive steps to avoid payments or otherwise providing assistance to members of such groups. Such assistance may very well preclude companies from extracting, trading, processing and consuming minerals in situations where organized armed groups, criminal networks and perpetrators of serious human rights abuses are in physical control of mines or transportation routes and/or are involved in forced or compulsory labour or illegal taxation.⁶⁴ The ambition to both demilitarize and decriminalize the extractive sector may be an objective common to all stakeholders; but unless a fair balance is struck on the allocation of responsibility between the private sector and government, there is a risk that the expectations imposed on the former may prove to be counter-productive.

In drafting the guidelines, the GoE was informed by the work of a broad cross-section of institutional actors in both the public and private sectors within and outside the region. Although it was at the intersection with the OECD's MNE Guidelines that the concept of 'due diligence' was first applied to companies in the extractive sector which had continued to operate during the armed conflicts in the DRC, these developments did not occur within a normative vacuum, as discussed below. In fact, the origin of the very concept of due diligence in respect of corporations can be traced to the work of the Special Representative for the Secretary-General on Human Rights and Business, John Ruggie.

⁶³ *Ibid.*, paras 327–55.

⁶⁴ GoE Report 2010/596, paras 356–69.

4. ENGENDERING RESPONSIBILITY THROUGH VOLUNTARY CODES OF PRACTICE

Until recent years international law has, for the most part, remained silent on the responsibility of corporate actors in respect of human rights obligations. But as a consequence of the changing conceptions of responsibility in international law, this normative void is being filled through the adoption of soft-law instruments.

4.1 Delineating responsibility in transitional environments

If the 1990s was a decade when *individual* accountability for gross human rights violations became crystallized at the international level, the following decade was when the concept of corporate responsibility for international human rights violations began to take root, culminating in the endorsement of the *Guiding Principles on Business and Human Rights* by the UN Human Rights Council in June 2011.⁶⁵ The recognition that companies are responsible for respecting human rights and are expected to address any adverse impacts caused by their business practices – not least in weak governance zones – has framed the context within which the regulation of the extractive sector has evolved in recent years. An equally significant development that has also informed strategic thinking has been the debate on war economies, which has come to acknowledge that ‘where the exploitation and trade of natural resources can form the basis of war, they can also be the basis for development.’⁶⁶

In 2007, against this backdrop and prompted by the ad hoc nature in which the Security Council had engaged with the issue of natural resources and armed conflict, Belgium tabled a concept note on the topic for debate.⁶⁷ More specifically, the concern was that the international community had failed to address, in a systematic and comprehensive manner, the relationship between natural resources as the engine for development and natural resources and conflict (whether as the cause of conflict or the means by which it is fuelled). The statement issued following the debate reveals a first attempt on the part of the Security Council to delineate a normative framework within which more coherent and comprehensive legal and policy options might be pursued on the basis of clearly articulated areas of responsibility attendant upon the existence of armed conflict. Primary responsibility, it was acknowledged, would continue to be vested in the Security Council in cases where the exploitation, trafficking and illicit trade of natural resources play a role in contributing to the outbreak, escalation or continuation of armed conflict. However, it was recognized that in transitional post-conflict situations other UN institutions including the General Assembly (GA), the Economic and Social Council (ESC) and regional groupings had an important role to play in ensuring that natural resources served as an engine for sustainable development, albeit tempered by concerns about sovereignty. Central to the involvement of these stakeholders was the concept of governance, based on the thesis that ‘in managing natural resources and their revenues, better attention to governance can reduce poverty, facilitate economic growth and promote more meaningful development’. It was also agreed that if the militarization and criminalization of the extractive sector was a reflection of weak governance, a vital role could be played not only by states of producing countries but by importing countries, multilateral bodies, the private sector and civil society.⁶⁸

By contrast to the measures adopted by the Security Council which are concerned *primarily* with delinking the illicit trade in minerals from the conflicts, the strategies pursued by other stakeholders have thus far aimed to contribute more broadly to the maintenance of peace, security and good governance in the region. That there are overlaps between the different initiatives is only to be expected since each has clearly informed the other. But the consequence of this has been that the

65 A/HRC/RES/17/4 of 6 July 2011. See also <http://www.business-humanrights.org/SpecialRepPortal/Home>.

66 Nicholas Garrett and Harrison Mitchell, ‘Trading Conflict for Development’, Resource Consulting Service report, April 2009, p. 11.

67 Belgium’s concept note ‘Maintenance of international peace and security: natural resources and conflict’ of 6 June 2007 (S/2007/334). See also Security Council debate on the topic (S/PV.5705); and Security Council statement of 25 June 2007 (S/PRST/2007/22).

68 S/2007/334, para 6 and S/PRST/2007/22.

strategies to address *conflict* minerals are increasingly being subsumed into, and therefore conflated with, parallel projects with different objectives including better governance, fighting corruption and promoting transparency. While separating the issues pertaining to armed conflict from those of development, governance or human rights is often an artificial exercise, the trend to amalgamate has created some confusion not only for legislators but also for those attempting in good faith to implement the relevant rules and standards. To compound the confusion, over the last two years there has been a discernible shift among some stakeholders, whose activities have traditionally been limited to peacetime, to extend their reach to addressing the linkage between the extractive sector and armed conflict. Notwithstanding the identifiable benefits and good intentions upon which all these measures have been founded, common to all such legal and policy developments that directly and indirectly implicate the mineral industry is the criticism that there has been a tendency to accord insufficient consideration to local interests, not least in fragile post-conflict environments such as in the DRC.

4.2 Setting standards through voluntary codes

4.2.1 The OECD⁶⁹

The most far-reaching outcome of the PoE's decision to refer to the MNE Guidelines was that it inadvertently paved the way for the OECD to take a lead in formulating the standards expected of businesses in the extractive sector operating in conflict-affected and high-risk areas. Although none of the material produced by the OECD is legally binding, its normative pull is significant.⁷⁰ The MNE Guidelines, however, do provide an enforcement mechanism of sorts in that companies operating in and from an adhering state that fail to comply with the Guidelines run the risk of being referred to the National Contact Point (NCP) of the state party, the entity responsible for investigating complaints involving non-compliance.⁷¹ Moreover, since the NCP is under an obligation to make its findings publicly available in the form of a reasoned statement, the negative publicity associated with the procedure acts as a strong incentive for companies to respect the Guidelines.⁷² In 2011, the guidelines were updated to take account of emerging human rights obligations of companies and their need to exercise due diligence in their supply chains.⁷³ This did not mean, however, that the previous version was silent on the standards expected of businesses operating in conflict-affected and weak governance zones – as was demonstrated by the test case lodged with the UK NCP by Global Witness in 2007.

The complaint involved Afrimex UK Ltd, which had been listed by the UN Panel of Experts for having failed to comply with the OECD Guidelines.⁷⁴ The specific allegations included the payment of taxes to the then rebel group RCD-Goma rather than to the government in Kinshasa, and a failure to exercise sufficient due diligence on their supply chain, as a consequence of which minerals had been sourced from mines using child and forced labour under deplorable health and

69 OECD member states include: Australia, Austria, Belgium, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States.

70 See also 2006 OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones drafted to assist companies comply with the MNE Guidelines. This is based on the reasoning that the 'heightened risks' encountered in weak governance zones (corruption, human rights abuses) create a need for 'heightened care' in ensuring that companies comply with local law and relevant international instruments. Weak governance zones are defined as environments in which governments cannot or will not assume their roles in protecting rights, providing basic public services, and ensuring that public-sector management is efficient and effective.

71 The UK NCP has repeatedly stated that 'OECD governments and a number of non OECD members are committed to promoting their observance'; for example, Statement by the UK NCP for OECD Guidelines for MNE: DAS Air, 21 July 2008, para 4.

72 In 2000, OECD member states decided to allow non-governmental organizations access to the complaints mechanism.

73 In particular, the updated Guidelines take on board the human rights obligations pertaining to business as expounded in the *Protect, Respect and Remedy* framework developed by John Ruggie.

74 Afrimex was mentioned in the PoE's first report and was subsequently listed in Annex III of the October 2002 report. Following a dialogue with Afrimex, the UN classified the company in Category 1, as a 'resolved' case that required no further action. In 2008 the UK NCP reopened a complaint involving DAS Air filed by RAID despite the fact that the company had gone into administration. The UK NCP found that DAS Air had breached the human rights provision and failed to undertake due diligence with regard to its supply chain.

safety conditions. In finding against the company, the NCP reasoned that Afrimex had applied insufficient pressure on its associated company in the DRC (SOCOMI) to cease trading in minerals during a period when taxes and licence fees were paid to RCD-Goma, and as a result ‘these taxes and licence fees were used to fund the continuation of the war’.⁷⁵ As such, Afrimex had not complied with Chapters II.1 and II.2 of the MNE Guidelines which required it to ‘respect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments’ and to ‘contribute to economic, social and environmental progress with a view to achieving sustainable development’.

Recalling the definition of due diligence as expounded by John Ruggie in his 2008 business and human rights report, the NCP also found Afrimex had failed to contribute to the ‘effective abolition of child labour’ and ‘the elimination of all forms of forced compulsory labour’; nor had it taken ‘adequate steps to ensure occupational health and safety in their operations’.⁷⁶ The evidence indicated that Afrimex had exercised insufficient due diligence in respect of its supply chain; as a consequence it had not complied with the recommendations in the MNE Guidelines on Employment and Industrial Relations.

The reasoning of the NCP is problematic on two grounds. First, at issue was the conduct of Afrimex during the period 1998–2000 which clearly predated the due diligence supply chain standard that was applied. Second, and perhaps more problematic, was that insufficient consideration was given to the existing context and local practice during the period in question with respect to the payment of taxes, fees and licence agreements. Until the signing of the Pretoria Agreement in 2003, there was still a great deal of uncertainty as to whether the government in Kinshasa would remain in power or be overthrown by the rebel groups, in the same way that it had come to power itself only a year earlier. This raises the question of whether there was an onus on all companies, including Afrimex, to cease all business in the country until a stable government was established. Furthermore, there was little consideration of the common practice among rebel groups with effective control over an area of instituting a tax system and granting exploitation rights to companies within such territories. Laurent Kabila himself, as the rebel leader of the ADSL, had granted numerous mineral concessions to foreign firms during the First Congo War. Afrimex may have been in violation of Chapters II.1 and II.2 of the Guidelines but had it insisted that SOCOMI withhold payment of taxes to RCD-Goma, it is difficult to see how Afrimex could have avoided a finding of non-compliance with the underlying premise of Chapter II that ‘enterprises should take fully into account established policies in the countries in which they operate’, quite apart from the specific obligation to abstain from improper involvement in local political activities.⁷⁷ Moreover, even as late as 2004 there was continued uncertainty among policy-makers as to how companies should engage with rebel authorities in war zones where the finance they provided could contribute to continued conflict.⁷⁸

Both these issues have been partially, albeit not entirely, resolved by the 2011 MNE Guidelines, released to coincide with the adoption by the OECD Council of the *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* (OECD DD Guidance), comprising a set of recommendations on securing responsible supply chains of minerals.⁷⁹ The OECD DD Guidance is addressed to OECD Members and non-Member adherents to the *OECD Declaration on International Investment and Multinational Enterprises* and reflects a political commitment on the part of these states to actively promote the observance of the recommendations contained therein by companies operating in and from their jurisdiction in conflict-affected and high-risk areas.⁸⁰ Although designed with the DRC and Great Lakes region in

⁷⁵ Final statement by the UK NCP in respect of Afrimex (UK) Ltd., 28 August 2008, para 39.

⁷⁶ Due diligence was defined by the Special Representative as entailing ‘a process whereby companies not only ensure compliance with national laws but also manage the risk of human rights harm with a view to avoiding it. The scope of human rights-related due diligence is determined by the context in which a company is operating, its activities, and the relationships associated with those activities’ (A/HRC/8/5 of 7 April 2008).

⁷⁷ Chapter II.11.

⁷⁸ For example, see All Party Parliamentary Group on the Great Lakes Region, *Interim Findings: The OECD Guidelines for MNEs and the DRC*, 13 December 2004.

⁷⁹ A Tin, Tantalum and Tungsten Supplement designed specifically for the supply chain of these minerals was attached to the DD Guidance and a Gold Supplement and endorsed in February 2012.

⁸⁰ In addition to the OECD countries (see footnote 69) there are nine non-OECD adhering countries: Argentina, Brazil, Colombia, Egypt, Latvia, Lithuania, Morocco, Peru and Romania.

mind, 'high-risk areas' is defined broadly as potentially including 'areas of political instability or repression, institutional weakness, insecurity, collapse of civil infrastructure and widespread violence'.⁸¹ The trigger mechanism for the applicability of the accompanying *Supplement on Tin, Tantalum and Tungsten (TTT Supplement)* is linked to the criteria attached to 'red flag locations' and consequently is even broader in scope.⁸²

As with the UN's Guidelines, the OECD DD Guidance has been developed to assist corporations meet two specific objectives: to respect international human rights standards and to avoid contributing to armed conflict through their sourcing practices. In other words, it has been specifically tailored to delink the trade in minerals from directly or indirectly funding organized armed groups and thereby perpetuating armed conflict. The five steps outlined in the OECD DD Guidance – which correspond with and flesh out the UN's five-step process listed above – aim to cultivate transparent mineral chains in and from conflict-affected and high-risk areas and help companies comply with international and domestic law, including the sanctions regime adopted by the Security Council. Due diligence, whether under the UN guidelines or under the OECD Guidance, requires companies to identify the origin of the minerals they buy, assess the conditions of mining, trade and transportation, and exclude from their supply chain minerals that are benefiting organized armed groups or criminal networks. To identify and address actual or *potential* risks, companies must be aware of the origin of the minerals being purchased. Thus, under the OECD DD Guidance and TTT Supplement, 'upstream' companies (those from the mine site through to the smelters/refiners) are encouraged to establish chain-of-custody or traceability schemes, while 'downstream' companies (those from the smelters/refiner through to the retailers) are encouraged to review the due diligence process in their supply chain, the credibility of which is contingent on the existence of a robust traceability or chain-of-custody scheme. Upstream companies are further required to assess the context of conflict-affected and high-risk areas; identify the locations and qualitative conditions of the extraction, trade handling and export of the minerals; and gain and maintain up-to-date on-the-ground information to assess risk effectively.⁸³ The level of detailed direction offered to both upstream and downstream companies in the TTT Supplement is both striking and daunting.

Although the OECD would be the first to recognize that artisanal or small and medium- scale enterprises simply do not have the same capacity as larger enterprises to take on board all the recommendations,⁸⁴ a concerted effort will be needed to ensure that the demands placed on local enterprises are not overly burdensome since many have only ever operated within an informal economy.⁸⁵ The dangers associated with demanding too much too soon were clearly a factor that was taken into consideration when developing the Guidance, which expressly acknowledges that due diligence is 'an on-going, proactive and reactive process'.⁸⁶ In emphasizing process rather than demanding immediate results, the Guidance encourages companies to 'take reasonable steps and make good faith efforts to conduct due diligence and prevent or mitigate risks of adverse impacts'.⁸⁷

81 Although a definition of 'armed conflict' is not provided, the wide definition of 'high-risk areas' would capture all areas considered to be in a state of armed conflict.

82 'Red Flag' locations refer to minerals that originate from or have been transported via conflict-affected or high-risk areas; minerals that are claimed to originate from a country that has limited known reserves, likely resources or expected production levels of the mineral in question; and minerals that are claimed to originate from a country in which minerals from conflict-affected and high-risk areas are known to transit. 'Red flags' will also apply if a company's suppliers or other known upstream companies have shareholder or other interests in companies that supply minerals from or operate in one of the 'red flag' locations or the company's suppliers, or if other known upstream companies are known to have sourced minerals from a red flag location of mineral of origin and transit in the last 12 months.

83 See 'Step 2: Identify and Assess Risks in the Supply Chain', TTT Supplement, p. 35.

84 The due diligence exercise is intended to be linked 'to the size of the company's activities or supply chain activities': OECD DD Guidance for Responsible Supply Chains, p. 13.

85 Summary Report of the ICGLR-OECD-UN Meeting on Implementing Due Diligence Recommendations for Responsible Mineral Supply Chains, 5–6 May 2011, p. 3. The OECD has subsequently issued a separate supplement for gold on the grounds that the supply chain for gold differs significantly from those for the other minerals. The five-step framework set out in the Guidance also applies to gold. The OECD is scheduled to review the Gold Supplement in July 2012.

86 OECD DD Guidance for Responsible Supply Chains, p. 13.

87 *Ibid.*

4.2.2 Other voluntary standard-setting initiatives

The OECD has not been alone in setting the standards expected of businesses operating in the extractive sector in conflict-affected or high-risk zones. In 2000, the UN Global Compact, a voluntary corporate responsibility initiative, was launched with the aim of 'aligning business operations and strategies' based on ten universally accepted principles in the areas of human rights, labour, environment and anti-corruption.⁸⁸ The Global Compact boasts a membership of over 8,700 corporate participants and stakeholders from over 130 countries, making it the largest voluntary corporate responsibility initiative in the world.

In 2010, the Global Compact released its own voluntary *Guidance on Responsible Business in Conflict-Affected and High-Risk Areas* to help companies implement responsible business practices and live up to the Global Compact Ten Principles.⁸⁹ In particular, Guidance Point 5 encourages companies

to carefully monitor their business relations, transactions as well as flows of funds and resources and to develop a rigorous supply chain management system to assess and monitor if and how their suppliers obtain resources and raw materials in conflict-affected and high-risk areas.

The objective is to enable companies to 'ensure that they are not providing funding or support to armed actors who may benefit from revenues generated by the sale of such goods and resources'. Despite the brevity of the risk-reduction recommendations, the expectations placed on companies are considerable. For example, companies are encouraged to examine and monitor existing and newly established business relations to verify that they do not supply funding or other resources to organized armed groups; conduct an extensive mapping exercise and focus due diligence on their suppliers to verify the origin of products; expand their supply-chain due diligence process to sub-tier suppliers; develop a robust mechanism for monitoring business and funding transactions; and encourage suppliers and sub-tier suppliers to develop the capacity to implement responsible business practices. To the extent that the Global Compact reaches a wider audience than the OECD, it fills a gap that would otherwise exist; nonetheless, the overlaps between its recommendations and those of the OECD's risk creating confusion among companies that are subject to both regimes, although neither is mandatory.

Another recently established standard-setting project with global ambitions is the Extractive Industries Transparency Initiative (EITI), established in 2002. The aim of this voluntary policy mechanism involving a coalition of governments, companies, civil society groups and international organizations is to strengthen governance by improving transparency and accountability in the extractive sector. Based on twelve principles and six criteria, the EITI requires subscribing countries to publish in full all company payments and government revenues from the oil, gas and mining sectors.⁹⁰ As such, its *primary* objective is not to sever the link between the illicit trade in minerals and the armed conflicts. Nevertheless, proponents of the scheme maintain that the public disclosure of payments by governments and companies in the extractive sector would enable citizens to hold both accountable and thereby improve management of the sector, reduce corruption, and mitigate conflict.⁹¹ Critics have questioned whether greater transparency would necessarily translate into improved governance, let alone mitigate conflict. Concerns have also been voiced that because the EITI initiative risks depicting corruption as a public-sector problem, any failure to deliver on development and growth objectives would be directed at mineral-producing countries rather than searching for other causes.⁹²

⁸⁸ See www.unglobalcompact.org.

⁸⁹ 'Guidance on Responsible Business in Conflict-Affected and High-risk Areas: A Resource for Companies and Investors', UN Global Compact-Principles for Responsible Investment (PRI) publication, 2010, p. 14, www.unglobalcompact.org/Issues/conflict_prevention/index.html.

⁹⁰ www.eiti.org/eiti/principles.

⁹¹ Virginia Haufler, 'Disclosure as Governance: The Extractive Industries Transparency Initiative and Resource Management in the Developing World', *Global Environmental Politics*, vol. 10 (2010).

⁹² See, for example, 'Breaking the Curse: How Transparent Taxation and Fair Taxes can Turn Africa's Mineral Wealth into Development', Open Society Institute of Southern Africa, Third World Network Africa, Tax Justice Network Africa, 2009, <http://documents.twinafrica.org/breaking-the-curse-march2009.pdf>.

All these standard-setting initiatives are still in their nascent stage. Consequently it is too early to assess their capacity for achieving their stated aims. Moreover, however well devised the framework, much depends on whether implementation is feasible. Even if stakeholders are genuinely committed to any one initiative, let alone all three, implementation requires a relatively sophisticated regulatory framework, accompanying legislation, modalities for gathering the required data, government and civil society capacity not only to engage with the relevant process but to use the collated information effectively and, in the case of the EITI, a commitment on the part of the government to redirect revenue to sustainable local projects.⁹³ Given the enormous task of translating standards into practice, numerous pilot projects, public- and private-sponsored, have been trialled over recent years while others are still in the developmental stages (these are discussed in section 6).

⁹³ The DRC has participated in the EITI since 2005, and in February 2007 a Governance Contract was formally adopted which outlines the measures that are to be taken to improve 'participation, transparency, responsibility, respect for the primacy of law, efficiency and equity'.

5. INSISTING ON RESPONSIBILITY THROUGH LEGISLATIVE MEASURES

To the extent that states choose not to incorporate either the UN guidelines or the OECD's DD Guidance into domestic law, they remain a set of aspirational norms apart from in exceptional circumstances involving decisions of the Sanctions Committee. However, there are already signs that states are more willing than ever before to introduce legally binding instruments, both unilaterally and collectively, that define not only their own obligations but those of businesses. Increasingly businesses are being required in law to exercise due diligence in their sourcing practices to avoid contributing to the perpetuation of conflict.

5.1 International Conference on the Great Lakes Region (ICGLR)⁹⁴

The ICGLR, comprising eleven African states,⁹⁵ came into existence in 2006 with the adoption of the *Pact on Peace, Security, Stability and Development*. Brought together by a common ambition to transform the region from one of endemic conflict and insecurity to one of sustainable peace, security and development, the ICGLR adopted the Pact and its ten Protocols, which establish a legal framework governing the relations between the states parties to the treaty. The *Protocol on the Fight against Illegal Exploitation of Natural Resources* forms a key component of the legal regime, indicating the high priority accorded to the issue among the member states in the region.

The Protocol marks an important break from the past in two significant ways. First, it represents an acknowledgment that the illegal exploitation of natural resources must be addressed as a transboundary problem rather than being confined exclusively to the realms of the domestic. As such, the Protocol requires member states to cooperate in the fight against the illegal exploitation of natural resources, protect human rights, criminalize both the illegal exploitation of natural resources and the laundering of the proceeds of illegal resource exploitation, and put an end to impunity by actively prosecuting individuals who have allegedly committed such offences. But second, the Protocol signifies a fairer share of responsibility between the private and public sectors in that it calls for member states to take preventive measures including the creation of a Mechanism for the Certification of Natural Resources from the region, or a certification and tracking scheme. In other words, embedded in the Protocol is the recognition that the establishment of a conflict-free mineral trade is dependent just as much on states meeting their obligations as it is on companies exercising due diligence.

The Protocol provides the legal basis for the implementation of the ICGLR's *Regional Initiative on Natural Resources* (RINR), which was formally adopted by member states at the Lusaka Summit in December 2010.⁹⁶ The RINR sets out six tools which have been designed to curb the illicit exploitation of natural resources. These include: (i) a regional certification mechanism (see section 6.1); (ii) the harmonization of national legislation; (iii) a regional database on mineral flows; (iv) the formalization of the artisanal mining sector; (v) the promotion of the EITI; and (vi) a whistle-blowing mechanism. While each of the tools represents an express recognition by the member states of their responsibilities in facilitating conflict-free trade, the obligations on companies nevertheless remain integral to the regional strategy in that the Lusaka Declaration also endorsed and called on those sourcing minerals from the region to comply with the OECD DD Guidance. The declaration went one step further in directing the ICGLR Secretariat and the Regional Committee on Natural Resources to integrate the processes and standards of the OECD DD Guidance into the six tools of the RINR.⁹⁷

For businesses engaged in the extractive sector in the region, keeping pace with the measures adopted by the ICGLR, and especially with those adopted within the framework of the RINR, is

⁹⁴ See www.icglr.org.

⁹⁵ Angola, Burundi, Central African Republic, Republic of Congo, Democratic Republic of Congo, Kenya, Uganda, Rwanda, Sudan, Tanzania and Zambia.

⁹⁶ Lusaka Declaration of the ICGLR Special Summit to fight illegal exploitation of the natural resources in the Great Lakes Region, 15 December 2010, <http://www.oecd.org/dataoecd/33/18/47143500.pdf>.

⁹⁷ Under Article II of the Memorandum of Understanding between the OECD and the ICGLR which was signed in December 2011, the latter reaffirmed its commitment to integrate the OECD Due Diligence Guidance into the six tools of the ICGLR Regional Initiative: Annual Report on the OECD Guidelines for Multinational Enterprises 2011, Annex 1.3.

critical to the extent that these are likely to be legally binding on all who come within the jurisdictions of the respective member states. While there may have been an expectation among companies registered in OECD member states that compliance with the guidance in one shape or form would be required, this would not have been the case for non-OECD registered companies. The integration of the OECD's DD Guidance into the RINR's six tools may have closed a 'gap' in the normative framework but it also raises important questions as to who is formulating norms with potential transborder effects and how that process is being pursued.

5.2 Section 1502, Dodd-Frank Wall Street Reform and Consumer Protection Act

On 21 July 2010, President Barack Obama signed into law the Dodd-Frank Act introducing new disclosure requirements for all SEC-reporting companies⁹⁸ which use 'conflict minerals' sourced from the Great Lakes region in their products. The primary aim of section 1502 of the Act is to prevent the perpetuation of armed conflict in the DRC by ensuring that the trade in these minerals does not fund the activities of the illegal armed groups operating in the region. For the purpose of the Act, 'conflict minerals' are defined as columbite-tantalite (coltan), cassiterite, gold, wolframite,⁹⁹ or their derivatives, or indeed any other mineral designated by the US Secretary of State to be financing the conflict in eastern DRC or adjoining countries.¹⁰⁰ Under the legislation all SEC-reporting companies are required to disclose annually whether a specified conflict mineral 'necessary to the functionality or production of a product' manufactured by the company originates in the DRC or an adjoining country.¹⁰¹ In practice, all companies that manufacture goods using any of the listed minerals (estimated by the SEC to be more than 5,500, of which approximately 1,200 are sourced from the region) will need to undertake a 'reasonable country of origin inquiry'.¹⁰² If, as a result of the inquiry, the company *knows* that the minerals did *not* originate (or the company *has no reason to believe* that the minerals *may have* originated) in the relevant countries or are from scrap or recycled sources, it is required to publicly disclose, on its website, a description of the steps taken which led it to arrive at its determination.

Under the Act, the SEC was mandated by Congress to promulgate a Final Rule by April 2011 setting out the implementing regulations.¹⁰³ On 22 August 2012, over a year after the expiration of the statutory deadline, the SEC Commissioners released the Final Rule which was adopted by a narrow margin of 3–2. Reasons for this delay included the 'complex' and 'technical nature' of the issues involved;¹⁰⁴ the volume of feedback received by the SEC following the public consultation process; and the 'significant learning curve' experienced by SEC officials.¹⁰⁵

The Final Rule requires companies that are sourcing from the region, or have reason to believe that the minerals used in their products may have originated in the region, to produce a disclosure report (the Conflict Minerals Report), which must be independently audited. The Report must contain a description of the due diligence efforts taken to determine the source and chain of custody of the listed minerals and conform to a nationally or internationally recognized due diligence framework, such as the OECD DD Guidance. Only if the reporting company concludes that its products do *not* contain minerals that directly or indirectly benefit armed groups in the DRC or an adjoining country may it label its products 'DRC conflict free'.

98 SEC-reporting companies are those with more than US \$10 million in assets whose securities are held by more than 500 owners.

99 When processed, these minerals yield metals used in industrial and other applications: tantalum, tin, tungsten and gold, respectively; US Government Accountability Office, 'Conflict Minerals Disclosure Rule: SEC's Actions and Stakeholder-developed Initiatives', (GAO Report), July 2012, p. 6.

100 Adjoining countries include Angola, Burundi, the Central African Republic, the Republic of Congo, Rwanda, Sudan, Tanzania, Uganda and Zambia.

101 Although there is no definition to determine when a conflict mineral is 'necessary to the functionality or production' of a manufactured product, nor is a definition provided for the term 'manufacture', in an attempt to assist issuers make such determinations, the SEC does provide some guidance; see pp. 22, 72–94 and 60–67.

102 The inquiry 'must be performed in good faith and be reasonably designed to determine whether any of its minerals originated in the covered countries or are from scrap or recycled sources'; SEC Rule, 22 August 2012.

103 The Act required the SEC to publish a Final Rule no later than 270 days after the date of enactment of the Act, namely 17 April 2011.

104 A proposed Rule issued in December 2010 was over 100 pages in length, including 70 questions.

105 GAO Report, pp. 14–15.

In contrast, if a company concludes that its products are *not* 'DRC conflict free', it is required in its Conflict Minerals Report (which must also be independently audited) to furnish details of all such products, the facilities used to process the minerals, the country of origin of the minerals, and the efforts to determine the mine or location of origin. As a direct consequence of the public consultation process, the SEC significantly revised its original proposal by providing a temporary transition period of two years for all companies (and four for smaller reporting companies) that are simply unable to establish whether the minerals in their products originated in the region or financed or benefited armed groups.¹⁰⁶ During this period such companies will be entitled, in their Conflict Minerals Report, to describe those products as 'DRC conflict undeterminable' but they will be required to provide further details, if available, on the facilities used to process the minerals, the country of origin and mine or location of origin. In addition, the company will need to identify the steps it has taken or will take to mitigate the risk that its sourcing practice is benefiting armed groups including any steps to improve due diligence. During this 'window' a company will not be required to obtain an independent audit of its report.¹⁰⁷

These disclosure requirements are clearly intended to dissuade companies from continuing to do business, or source minerals from suppliers who do business, with those who are benefiting from the revenue generated through the trade in such minerals to further their ambitions through conflict. To that extent the rule 'faithfully implements' the intention of Congress.¹⁰⁸ For the manufacturers of such products, their ability to exercise due diligence is contingent on the existence of a robust chain of custody or traceability scheme since products cannot be determined to be conflict free unless it can be established that the minerals did not directly or indirectly finance or benefit armed groups. Since the Dodd-Frank provision is addressed to only SEC-registered companies, on first glance it would appear to be narrower in scope than both the OECD DD Guidance and UN DD guidelines, which are addressed to 'all companies in the mineral supply chain that supply or use tin, tantalum, tungsten and their ores or mineral derivatives and gold sourced from conflict-affected or high-risk areas'. In practice, the legal 'gap' is likely to make little difference since the SEC-reporting companies will necessarily require all those companies with which they do business to comply with the terms of the Dodd-Frank Act.¹⁰⁹ In particular, the labelling provision within the Act, which is absent from both the OECD and UN frameworks, will function to exert additional commercial pressure on companies to demand full compliance from their partners in the mineral chain. The emphasis in this aspect of the legislation on outcome over process (creating a fundamental distinction between the Dodd-Frank Act and the OECD's framework) has been partially addressed by the SEC's Final Rule which introduces the temporary two-year transition period.

Although the SEC was subject to considerable criticism for failing to meet its statutory deadline, thereby creating uncertainty and hindering progress (albeit unintended) on some fronts,¹¹⁰ many will welcome the fact that the Final Rule is crafted to complement and correspond with the OECD's DD Guidance. This will also allay concerns that the due diligence standards developed by the OECD and GoE would not satisfy the required Dodd-Frank standards. However, not all fears expressed by stakeholders in the region have been addressed since there remains the risk, as Commissioner Daniel Gallagher in his dissenting statement observed, that the rule may 'contribute to a reduction in, or abandonment of, commercial activity in the DRC' leading to 'a de facto economic embargo' on minerals sourced from the region.¹¹¹ For example, the feasibility of determining without doubt that a product has not been 'contaminated' with 'conflict minerals' for the purpose of labelling may mean that businesses would simply source from outside the region to avoid breaching the rigid requirement. More generally, there is some anxiety that even with the harmonization of standards, the additional disclosure requirements, which necessarily impose additional liabilities on companies, will function to create a 'market disincentive' with regard to

106 The Commission's adopting release (34-67716; File No. S7-40-10) [hereinafter 'adopting release'], 22 August 2012, p. 138.

107 Adopting release, p. 29.

108 Chairman Mary Schapiro, 'Opening Statement at the SEC Open Meeting', 22 August 2012.

109 See, for example, statement of Steve Pudles, Chairman of the Board of IPC – Association Connecting Electronic Industries, before the Sub-Committee on International Monetary Policy and Trade, US House of Representatives, 10 May 2012.

110 For example, the GeSI-EICC reported difficulties in engaging tin and tungsten smelters to participate in the CFS Programme before a Final Rule was issued.

111 See also footnote 44 accompanying text of SEC's adopting release.

sourcing from the region.¹¹² Concerns have also been voiced that the designation of ‘armed group’, which the Act defines as perpetrators of serious human rights abuses as identified in the annual Country Reports on Human Rights Practices compiled by the US State Department, may prove counter-productive unless, for example, specific units within the armed forces can be identified and isolated.¹¹³

5.3 The DRC’s laws and the challenge of implementation

That external actors have felt compelled to introduce an array of measures involving the extractive sector has not been entirely due to an absence of domestic law, but rather to the state’s failure to enforce existing laws. Pillage, for example, has long been criminalized under the DRC’s Code of Military Justice (1972)¹¹⁴ and with the ratification of the Rome Statute in April 2002 and the subsequent adoption of the Military Penal Code later that year, the DRC’s military courts have attempted to prosecute members of the armed forces for the offence.¹¹⁵ But although there have been a handful of successful prosecutions, there have been many more failed attempts, particularly involving high-ranking members of the armed forces. Likewise, the 2002 Mining Code’s express prohibition on public servants engaging in mining and the mineral trade has simply had no influence in many of mine sites in the eastern provinces controlled by the armed forces.¹¹⁶

Be that as it may, the 2002 Mining Code is the primary legal instrument governing mining activities in the DRC and sets out the framework within which responsibilities for the mining sector are allocated between the different arms of the state. The code accords the President full authority to enact mining regulations to implement its provisions; decisions over mining rights are vested in the office of the Minister of Mines supported by the Mining Registry; lawful authority to trade in minerals derived from artisanal production requires a licence from the ministry; and, at the production level, artisanal mining permits are granted by the Mining Ministry’s provincial representatives. In theory, the sector is regulated by the state agency, the Small-scale Mining Assistance and Training Service (SAESSCAM). In practice, however, the government’s inability to establish a meaningful presence in remote mining locations, compounded by the inefficiency of the bureaucracy, has meant that local customary authorities continue to play a parallel role in the granting of land tenure and mining rights. This renders the trade ‘opaque’ at best.¹¹⁷

Despite the existence of a domestic legal framework, the extractive-sector regime remains deeply flawed at all levels as a consequence of non-enforcement or arbitrary decision-making. For example, the process by which mining rights are granted has been described as ‘completely dysfunctional’,¹¹⁸ while questions surround the government’s capacity to exercise due diligence in arriving at such decisions, let alone its ability to monitor and penalize non-compliance.¹¹⁹ The failure of successive governments to properly revoke concession rights granted by their predecessors before issuing new rights has created multiple claims over ownership. This has created a climate of uncertainty;¹²⁰ the situation is aggravated by the tension between the civil and customary authorities which are vying with each other for the right to decide. The prevalence of corrupt practices, whether as cause or consequence of the fractured nature of the sector in which

112 Summary Report of the ICGLR-OECD-UN Joint Meeting on the implantation of due diligence for responsible supply chains in the Great Lakes Region, 29–30 November 2011, p. 8.

113 Section 1502 (e)(3).

114 Articles 436 and 435 (as amended in 1980). Also see Article 63 of the Military Penal Code (023/2002 of 18 November 2002) which provides that ‘any pillage or damage to commodities, goods or belongings committed by soldiers ... as a group ... [with violence] is punished with penal servitude for life. In all other cases, pillage is punished with 10 to 20 years of penal servitude.’ Article 65 further provides that ‘if the pillage was committed in time of war, or in a region where a state of siege or of emergency has been proclaimed, or at the occasion of a police operation aimed at maintaining or re-establishing public order, the perpetrators are punished by death.’

115 See, for example, the 2006 Bongi Massba case, Judgement on Appeal of the Military Court of the Eastern Province, 4 November; http://www.icrc.org/customary-ihl/eng/docs/v2_cou_cd_rule52.

116 Article 27 of the Congolese mining code (007/2002 of 11 July 2002).

117 Jason Stearns, ‘General Conclusions’, in Jeroen Cuvelier (ed.), *The Complexity of Resource Governance in a Context of State Fragility*, International Alert, 2010, pp. 70–71.

118 World Bank, ‘Democratic Republic of Congo: Growth with Governance in the Mining Sector’, May 2008, Report No. 43402-ZR, p. 22.

119 *Ibid.*, p. 23.

120 Report of the GoE S/2006/525, para 125.

formal and informal economies exist in parallel, has deprived the state of substantial levels of revenue in the form of legitimate taxation and with it the potential for progressive reinvestment and the furtherance of sustainable development.

These structural failures have been further compounded by poor policy choices, such as the September 2010 decision to institute a ban on all exploitation and export of minerals from North Kivu, South Kivu and Maniema provinces.¹²¹ While the aim of the decree may have been to halt all illegal exploitation of minerals by the 'mafia-like networks' within FARDC, the ban did precisely the opposite by providing an opportunity for renegade elements of FARDC to consolidate their control over the mines in the regions subject to the ban. Moreover, those who suffered the greatest harm were the very many artisanal miners and their families whose sole source of income was linked to the mining sector.

The outlook is not entirely negative. Shortly after announcing the ban, the Ministries of Finance and Mines jointly issued a procedures manual on mineral traceability, setting out specific responsibilities for all actors in the chain from extraction to exportation.¹²² To ensure effective implementation, Commissions with monitoring responsibilities, comprising representatives of the provincial governments, FARDC, the mining police, the private sector and UN organizations, have been established in North and South Kivu; according to Global Witness, this initiative has already recorded some success in facilitating a dialogue between the FARDC and mining police.¹²³

In September 2011, the Ministry of Mines issued a *note circulaire* obliging all mining operators to exercise due diligence, referencing both the UN and OECD frameworks.¹²⁴ In February 2012, further legislation was enacted requiring mining and mineral trading companies not only to satisfy the OECD due diligence standard but also to implement the ICGLR's RINR certification scheme (discussed below).¹²⁵ The decision in May to suspend two Chinese-owned mineral export companies for allegedly failing to exercise due diligence in their sourcing practices is indicative of a commitment on the part of the government to enforce the new regulatory framework.¹²⁶

According to the latest GoE report, released in June 2012, there has been a growing willingness among some in the mining sector, albeit limited to certain localities, to implement due diligence in their supply chains. In contrast to those who have failed to implement traceability or chain-of-custody schemes, these actors have been able to export to smelters that insist on conflict-free minerals and have thus benefited from a rise in export levels.¹²⁷ Moreover, international NGOs have begun to document a change in attitude among local traders, exemplified by a greater willingness to engage in due diligence training schemes.¹²⁸

121 Decree No. 705 of 20 September 2010.

122 No. 0711/CAB.MIN/MINES/01/2010/ of 15 October 2010. The ban was also justified to allow the government to put in place a mineral-tracing programme to 'conform with international standards'; Report of the GoE S/2010/596, para 174.

123 Global Witness, 'Congo's Mineral Trade in the Balance', May 2011, p. 11.

124 Report of the GoE S/2011/738 para. 375

125 Arrêté ministériel N.0057.CAB.MIN/MINES/01/2012 du février 2012 portant mise en oeuvre du mécanisme régional de certification de la Conférence Internationale sur la Région des Grands-Lacs en République Démocratique du Congo, Article 8.

126 Both TTT Mining and Huaying Trading Company were identified in the report of the GoEs as having made purchases of minerals that contributed to the financing of armed groups and criminal networks within FARDC; S/2011/738, paras 342.

127 Report of the GoE, S/2012/348, para 138. See also Summary of ICGLR-OECD-UN GoE Joint Meeting on Implementation of Due Diligence for Responsible Mineral Supply Chains in the Great Lakes Region, 29–30 November 2011, p. 3.

128 Global Witness, 'Coming Clean', May 2012, p. 5.

6. PILOTING SUPPLY CHAIN INITIATIVES AND CERTIFICATION SCHEMES

The sheer number and types of schemes being piloted and developed in the Great Lakes region have led to some confusion as to their scope and purpose among both internal and external stakeholders. With regard to supply chain schemes, the OECD Guidance recommends the use of either chain-of-custody schemes (in practice this requires a paper trail documenting the sequence of entities which have custody of minerals as they move through a supply chain) or traceability systems (the physical tracking of minerals through, for example, bagging and tagging at all points of the supply chain from the mine of origin to the point of export).

To meet their due diligence obligations, downstream companies are reliant on the existence of verifiable tracking systems which are subject to regular risk assessments. In the absence of any state-sponsored mechanism the private sector, through industry associations, has taken the lead in introducing various schemes to address its immediate needs. That said, with the formal adoption of the UN/OECD due diligence frameworks, there has been a growing momentum among states in the region, acting unilaterally and collectively, to introduce both mineral tracking and certification schemes within their jurisdictions. The current challenge confronting all stakeholders – public and private – is how best to integrate new and existing schemes so as to establish a coherent and workable framework that enables all parties to pursue their interests and comply with their legal obligations.

6.1 ICGLR Regional Initiative on Natural Resources

The formal adoption of the RINR under the Lusaka Declaration in December 2010 paved the way for the ICGLR to develop a regional tracking and certification scheme for cassiterite, coltan, wolframite and gold. The outcome of this process was the adoption by the member states in November 2011 of the ICGLR Certification Manual, which provides a practical guide for implementing the ICGLR Mineral Tracking and Certification Scheme (ICGLR Certification Scheme).¹²⁹ The manual sets out the in-region standards for traceability and certification and is fully compliant with the OECD DD Guidance.

The scheme establishes that member states are responsible for implementing and supervising a chain-of-custody tracking system within their own borders. This does not preclude the possibility that states may wish to seek assistance from other partners to develop and implement such a scheme. To ensure that minimum standards are being applied, the integrity of the national tracking systems will be verified annually by third-party auditors appointed by the ICGLR. Member states are expected to arrange annual mine site inspections to determine whether individual mines should be classified as 'certified' (green flagged), yellow flagged, or 'uncertified' (red flagged). Such assessments may be carried out independently by government-appointed inspectors or in collaboration with MONUSCO or the BGR (see sections 6.2 and 6.3). The ICGLR-appointed auditors will also be responsible for cross-checking mine inspection assessments. The ICGLR Certificate will only be awarded to mineral shipments that are 'conflict free', and certification will become obligatory for all exports of 'designated minerals' after 15 December 2012. Under the scheme, a 'conflict-free' mineral chain has been defined as one that does not directly or indirectly support non-state armed groups or public or private security forces which illegally control mine sites or otherwise control transportation routes, points where minerals are traded and upstream actors in the supply chain; illegally tax or extort money or minerals at points of access to mine sites, along transportation routes or at points where minerals are traded; and/or illegally tax or extort intermediaries, export companies or international traders.

As set forth in the RINR, a regional database will be maintained by the ICGLR to track transborder mineral flows based on information transmitted by each member state's chain-of-custody system. The prospect of a regional database that is capable of being independently cross-referenced is a hugely significant step as it will assist in addressing one often 'overlooked' aspect of resources and armed conflict: the role of neighbouring countries in perpetuating a climate of insecurity marred by

¹²⁹ In particular, the ICGLR worked with Partnership Africa Canada (PAC) to develop the certification mechanism.

human rights violations or even armed conflict in furtherance of their own economic interests.¹³⁰ The fragmented approach to record-keeping across the region exacerbated by armed conflict has meant that allegations of illegal exploitation by neighbouring states have often been difficult to substantiate (see section 2.2); a regional database therefore offers the prospect that this endemic problem will be addressed once and for all.

6.2 Industry-sponsored initiatives

6.2.1 *The International Tin Supply Chain Initiative (iTSCi)*

In July 2009, the International Tin Research Institute (ITRI), a UK-based tin industry association, launched the International Tin Supply Chain Initiative (iTSCi), a mineral traceability initiative which extends from the mine site to smelter. Developed in collaboration with the Malaysia Smelting Corporation (MSC), Thailand Smelting & Refining Co Ltd (Thaisarco-AMC) and Traxys-Europe SA,¹³¹ iTSCi is a physical chain-of-custody system in which minerals, through a tagging and documentation process, are tracked and traced to enable companies to provide verifiable information on the origin of the minerals linked to individual mine sites. In addition to a tagging system, iTSCi has two further components: a risk assessment process and independent third-party audits.¹³² To participate in the initiative, every supply chain operator and mine site must undergo a risk assessment exercise by an independent auditor and take mitigating action to address any risks identified. Since the aim of the scheme is to enable companies to comply with the OECD DD Guidance and the regulations developed by the ICGLR,¹³³ the iTSCi has been designed to encourage supply chain operators to bring about *progressive* improvements rather than to discontinue trade where any risks have been documented. The iTSCi has developed a risk assessment template not only to help companies comply with their due diligence obligations but also to identify where further action by the state is required.¹³⁴ Since 2010, ITRI has expanded its initiative to include tantalum and tungsten.

Although a pilot project to tag minerals from the mines to the smelters in South Kivu was suspended because of the export ban imposed by the Congolese government, pilot projects have continued to be trialled in Katanga Province and Rwanda.¹³⁵ Plans to reinstate the initiative in the Kivus were delayed due to the reluctance among companies to source from the provinces following the adoption of the Dodd-Frank Act. Moreover, the launch of the Conflict-Free Smelter programme (CFS, see below) functioned to introduce uncertainty in the sector as companies became increasingly concerned that compliance with the iTSCi would not necessarily satisfy the requisite 'conflict-free' threshold demanded by the CFS programme which assumed a restrictive interpretation of the Dodd-Frank Act.

6.2.2 *The Conflict-Free Smelter programme (CFS)*

The Conflict-Free Smelter programme is a joint industry initiative launched in 2010 by the Global e-Sustainability Initiative (GeSI) and the Electronic Industry Citizenship Coalition (EICC), a US-based association.¹³⁶ In this voluntary audit programme, which came into effect in April 2011, smelters seeking to be assessed 'CFS compliant' must undergo an independent third-party audit in

¹³⁰ Ganesan and Vines, 'Engine of War' (see note 61 above).

¹³¹ FCO, Global Issues, <http://www.fco.gov.uk/en/global-issues/conflict-minerals/voluntary-schemes/certification-mechanisms/itri-tin-supply-chain-initiative>.

¹³² https://www.itri.co.uk/index.php?option=com_zoo&view=item&Itemid=189.

¹³³ In December 2010, a partnership agreement between ITRI and the ICGLR was signed to establish a tracking system aimed at certifying the conflict-free origin of tin sourced from the region.

¹³⁴ See, for example, iTSCi Field Governance Assessment, Katanga: Key Issues and Recommendations for Mitigation Measures (April 2011–February 2012),

https://www.itri.co.uk/index.php?option=com_mtree&task=listcats&cat_id=186&Itemid=11.

¹³⁵ In March 2012 a Memorandum of Understanding with the DRC's Ministry of Mines was agreed, paving the way for the programme to be extended from Katanga to the provinces of Maniema and the Kivus,

https://www.itri.co.uk/index.php?option=com_mtree&task=att_download&link_id=52254&cf_id=24.

¹³⁶ The EICC and GeSI were originally formed to support and promote environmentally and socially responsible practices among their members and partners.

accordance with the OECD DD Guidance. To pass an audit, smelters must provide documentation from a 'credible in-region sourcing program verifying their conflict-free sources' and demonstrate that 100% of the purchased minerals are 'reasonably' considered conflict-free.¹³⁷ In the event that information is lacking, the smelter is entitled to request a three-month 'corrective action' period before a further audit is conducted.¹³⁸ However, if the smelter fails the audit because conflict minerals have been found in the supply chain, it is expelled from the CFS for a year.

In contrast to the iTSCi, which favours mitigating and managing identified risks in the supply chain, CFS has adopted this absolutist outcome-oriented approach because its aim is to enable downstream companies to meet the 'conflict-free' status as defined in the Dodd-Frank Act. As of July 2012, nearly half of the tantalum-smelting companies worldwide have been certified as conflict-free through the CFS Programme.

6.2.3 The World Gold Council, the Responsible Jewellery Council and the London Bullion Market Association

The World Gold Council (WGC) is in the process of finessing a Conflict-Free Gold Standard to assist gold-mining companies to demonstrate that their business practices do not fuel armed conflict, fund armed groups or contribute to human rights violations associated with conflict.¹³⁹ By contrast with other initiatives which have limited geographical application to the DRC and adjoining countries, the WGC standard is being designed to have 'global application', and in that respect it corresponds to the scope of the OECD's DD Guidance. According to the WGC, the initiative will stretch from mine sites to the refiner and reference will be made to 'objective benchmarks and sources of best practice guidance' as exemplified by the UN Guiding Principles on Business and Human Rights.¹⁴⁰

In March 2012, the Responsible Jewellery Council (RJC) launched its Chain-of-Custody Standard for gold and platinum group metals.¹⁴¹ This aims to 'support the identification of responsibly-sourced jewellery materials' throughout the supply chain and defines 'responsibly-sourced' as being 'conflict-free' and meeting minimal human rights, labour and environmental standards. The RJC has also designed a toolkit for its members to ensure that companies conform with the OECD DD Guidance, the London Bullion Market Association Responsible Gold Guidance, the CFS Program and the Dodd-Frank Act. Participating members must be independently audited to be certified.

The London Bullion Market Association (LBMA) has developed its own Responsible Gold Guidance to assist gold refiners accredited under its scheme to purchase conflict-free gold. Based on the OECD DD Guidance, the LBMA Guidance was released in January 2012. The similarities between this initiative and that of the CFS Programme prompted a decision on the part of the LBMA, GeSI and EICC to collaborate in order to avoid duplication.¹⁴²

6.3 Bundesanstalt für Geowissenschaften und Rohstoffe (BGR)

Germany's Federal Institute for Geosciences and Natural Resources (BGR) has been piloting several mineral certification schemes at artisanal mine sites in the DRC and Rwanda. Trials of its Certified Trading Chains (CTC) were launched in 2008 in collaboration with a number of mineral producers in Rwanda and, since 2009, several pilot schemes have been trialled in eastern DRC

137 EICC-GeSI Conflict-Free Smelter Assessment Program, Frequently Asked Questions, 30 March 2012, p. 6.

138 Summary of ICGLR-OECD-UN GoE Joint Meeting on Implementation of Due Diligence for Responsible Mineral Supply Chains in the Great Lakes Region, 29–30 November 2011, p. 8.

139 The 'Conflict-Free Gold Standard Exposure Draft' (March 2012) and supplementary documentation are available at http://www.gold.org/about_gold/sustainability/conflict_free_standard/.

140 World Gold Council Conflict-Free Gold Standard: Exposure Draft, March 2012, http://www.gold.org/about_gold/sustainability/conflict_free_standard/.

141 The RJC 'Chain-of-Custody (CoC) Standard' and supplementary documentation are available at <http://www.responsiblejewellery.com/chain-of-custody-certification/>.

142 Conflict Minerals Disclosure Rule: SEC's actions and stakeholder-developed initiatives' US Government Accountability Office, July 2012, p. 40.

and run jointly with the DRC's Ministry of Mines. The objectives of the pilot projects are broad in scope in that certification is envisaged as a means by which to formalize the artisanal mining sector, set production standards, improve transparency and accountability, and ensure that the state's profits from exports contribute to economic and social development and poverty reduction.¹⁴³ As part of the certification scheme for tin, tungsten, tantalum and gold, the BGR is assisting the Congolese government to create a comprehensive mapping database of active artisanal dig sites; collate estimates on minerals produced and the number of miners employed; and assess the security situation of mine sites on a regular basis. This information feeds into the assessment of whether particular mine sites should be certified; those that fail the certification process will not be permitted to contribute material to exports.¹⁴⁴

In 2010, the BGR was commissioned by the German Ministry for Economic Cooperation and Development to help the ICGLR implement the RINR and its six tools.

6.4 MONUSCO and the '*Centre de négoce*'

In late 2009, MONUSCO, in collaboration with the government of the DRC, announced a pilot project to establish five 'trading centres' in the Kivus. The initiative involves creating a marketplace where traceable minerals can be traded in a secure environment made possible by the deployment of the Mining Police, trained by MONUSCO. Validation of the individual mine sites and the transportation routes to the respective trading centres are to be carried out by joint teams comprising government officials, civil society, MONUSCO and the BGR. The Ministry of Mines has identified three possible categories: 'green' sites (and routes) are those not controlled by armed groups and where basic rights are respected; 'orange' sites (and routes) are those indirectly controlled by armed groups; and 'red' sites (and routes) are those under the direct control of armed groups. In March 2012, eight months after validation missions were conducted at mine sites in two locations, the Ministry of Mines released a list of 18 green mine sites. Validation missions were planned to take place every three months but have not been repeated.¹⁴⁵

143 BGR, 'Implementing Certified Trading Chains in Rwanda', March 2004, p. 10.

144 Further details and documentation on the BGR certification system are available at http://www.bgr.bund.de/EN/Themen/Zusammenarbeit/TechnZusammenarb/Projekte/Laufend/Afrika/1046_2006-2202-7_Kongo_Transparenz_Rohstoffsektor_en.html?nn=1549142; see also Report of the GoE S/2011/738, para 377.

145 Report of the GoE S/2012/348, p. 37, box 6.

7. ON REFLECTION AND LOOKING FORWARD

7.1 Unintended consequences

On 10 May 2012, the US Sub-Committee on International Monetary Policy and Trade of the House Financial Services Committee took evidence at a public hearing on 'The Costs and Consequences of Dodd-Frank Section 1502: Impacts on America and the Congo'.¹⁴⁶ In his opening statement, Representative Donald Manzullo expressed his concern that the provision had been subject to too little scrutiny by Congress before adoption and that inadequate consideration had been given to unintended consequences, including the risk of 'unintentionally' benefiting 'our foreign competitors, particularly in China' and harming US small businesses. Repeated references to 'unintended consequences' echoed throughout the testimonies of other speakers.

This concern was shared by the dissenting SEC Commissioners, Daniel Gallagher and Troy Paredes. In addition to sharing a deep-seated discomfort with Congress's decision to use the federal securities laws as the means by which to achieve the humanitarian goals identified in section 1502,¹⁴⁷ neither commissioner was fully convinced that enough 'rigorous analysis' had been undertaken to ensure that the implementation of the Rule would advance the stated objectives 'as opposed to unintentionally making matters worse' for the Congolese people. The fundamental problem, insofar as Commissioner Paredes was concerned, was that the social benefits could not be quantified in the absence of empirical data and an appropriate methodology for measuring the effectiveness of the provision in achieving those benefits; 'best intentions' were simply not enough.

In the debates surrounding the international community's engagement with the DRC, the question of 'unintended consequences' is ever-present, as demonstrated by the Secretary-General's 2007 report.¹⁴⁸ Nevertheless, the adoption of the Dodd-Frank Act has prompted a renewed interest in the question and a focal point that unites a broad coalition of policy-makers, business leaders, trade associations, academics and civil society activists both within the Great Lakes region and outside. The shared concern – that too little thought has been directed to the potential adverse consequences of measures adopted – is a valid one, in spite of the radically different perceptions as to the interests at stake. For example, the additional costs that will be incurred by US businesses as a direct result of the Dodd-Frank disclosure rules raise the prospect that US businesses will simply opt to source from other jurisdictions rather than from the DRC. The risks posed by the adoption of section 1502 for the DRC, not least for local mining communities, are therefore enormous.

As some experts have noted, the oversimplification of the causes of armed conflict or of endemic violence in post-conflict environments such as the DRC has often led to the introduction of inappropriate and, occasionally bad, law.¹⁴⁹ Section 1502 of the Dodd-Frank Act has not only come under attack by its critics for simply being bad law, but even its supporters have raised a number of concerns with the terms of the provision; whether the standards demanded are even achievable, because not practicable; whether the demands set forth in the provision are such that the risk of reputational damage as a consequence of inadvertently violating the statutory requirement are too high; and whether the cost of the disclosure requirements are so prohibitive that businesses simply can no longer afford to source from the DRC. The SEC has estimated that the initial cost of compliance will be approximately US\$3–\$4 billion, while the annual cost of ongoing compliance is likely to be between \$207 and \$609 million.¹⁵⁰ But setting aside both cost

¹⁴⁶ Transcripts of the hearing are available at <http://financialservices.house.gov/Calendar/EventSingle.aspx?EventID=293936>.

¹⁴⁷ Pointing out that the SEC's mission is 'to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation', both Commissioners questioned whether federal securities law was the appropriate instrument for pursuing humanitarian, social or foreign policy objectives.

¹⁴⁸ Secretary-General's report of 8 February 2007 (S/2007/68).

¹⁴⁹ For example, see testimony by Mvemba Phezo Dizolele, before the Sub-Committee on International Monetary Policy and Trade, US House of Representatives, 10 May 2012.

¹⁵⁰ Adopting release, p. 240.

and risk to US businesses, are these drawbacks outweighed by the potential benefits that the legislation seeks to deliver?

The initial signs are not reassuring since even before coming into operation, the Dodd-Frank Act has produced a number of unintended consequences of an adverse nature for mining communities in the eastern provinces. This was demonstrated by the events following the announcement by the EICC that, as from 1 April 2011, its membership would no longer permit purchases from refiners and smelters of tin, tantalum and tungsten that accepted material which did not comply with the regulatory requirement under section 1502.¹⁵¹ The announcement prompted an initial rush among traders to unload their stock with little concern as to whether any due diligence standards should be applied. Once the deadline had passed, traders in the Kivus and Maniema were unable to sell their remaining stock to those smelters and refineries that were seeking conflict-free smelter status under the CFS initiative.¹⁵² This left many traders with little choice but to sell to refiners and smelters not seeking CFS status, but at discounted prices.¹⁵³ As revenue flows decreased, businesses were forced to close, unemployment rose, and poverty levels worsened.¹⁵⁴ According to the UN Group of Experts, tens of thousands of people who relied on the artisanal mining trade were adversely affected, and the economic output of region as a whole declined, as did revenues for provincial and national governments.¹⁵⁵ Meanwhile, the level of fraud rose as some businesses used illicit channels to get their stock on the international markets.

But if the Dodd-Frank Act has been criticized for having inadvertently caused a series of events that have had a harmful effect on local mining communities, have any other measures adopted had similar consequences? The export ban announced by President Kabila in September 2010 clearly had a devastating effect on the livelihood of those reliant on the sector and revealed the extent to which decision-makers must take into full account the potential unintended consequences of policy choices.

7.2 Some questions meriting further research

The primary ambition of this paper has been to set out both existing and evolving legal frameworks that govern 'conflict minerals'. In so doing this paper has deliberately avoided engaging with the more difficult and complex question, namely, the root causes of armed conflict. That said, it would be remiss to simply identify and describe the measures adopted without some further comment as to whether their stated ambitions and the assumptions upon which they are founded are well grounded. Whether the regulation of conflict minerals will, or even *can*, contribute towards mitigating armed conflict is a question that will continue to be contested. Even if a pattern (supported by compelling empirical evidence) can be documented between a rise in regulation and a fall in the level of violence, it would be a mistake to conclude definitively that one is the outcome of the other.¹⁵⁶ Moreover, it would be foolhardy to suggest that the successful enforcement of a regulatory framework governing conflict minerals alone can address the causes of armed conflict and endemic violence. The inescapable fact is that for many warring parties, conflict minerals merely represent *one* means by which to pursue their grievances; hence, if it is not conflict minerals, it will be some other commodity. If that is indeed the case, why regulate or legislate at all? Perhaps the best answer, to paraphrase Hannah Arendt, is that some of the finest tools we have in responding to the violence of armed conflict are legal ones. By this view, the measures

151 Report of the GoE S/2011/738, para 338.

152 In an attempt to resolve this difficulty, the SEC in its Final Rule has excluded any conflict minerals that are 'outside the supply chain' prior to 31 January 2013. This would include all minerals that have been smelted; after gold has been fully refined; or after any conflict mineral or its derivatives that have not been smelted or fully refined are located outside of the relevant countries. In conceding that existing stockpiles could have financed or benefited armed groups, the SEC nevertheless concluded that since it was unlikely that such minerals could further benefit armed groups, applying the Final Rule would not further the purpose of the Dodd-Frank Act; adopting release, pages 128–30.

153 Report of the GoE S/2011/738, para 342.

154 *Ibid.*, paras 339, 368.

155 *Ibid.*, para 369.

156 Fidel Bafilemba, Sash Lezhnev and Sarah Zingg Wimmer, 'From Congress to Congo', Enough Project publication, August 2012. <http://www.enoughproject.org/publications/congress-congo-turning-tide-conflict-minerals-closing-loopholes-and-empowering-miners>.

adopted – whether as binding law or aspirational standards – represent something more than just the regulation of *conflict minerals*. The turn to law is a political strategy in that it attempts to displace the rule of violence with a culture based on the rule of law. The challenge for both policy-maker and lawyer is to establish a normative framework that is just.

The NGO sector, which played an instrumental role in lobbying US politicians to sign up to the Dodd-Frank Act, has now turned its attention to the European Union in a bid to introduce comparable legislation at the EU level. That there is some desire among members of the European Parliament to follow in the footsteps of the Americans is clear. In October 2010 the European Parliament adopted a resolution on the DRC in which it welcomed ‘the adoption of the new US “Conflict Minerals” Law’ and requested ‘the Commission and the Council to examine a legislative initiative along these lines’.¹⁵⁷ Within the Commission there appears to be less appetite for such legislation.¹⁵⁸ The commission’s cautious approach may be well founded since even among the NGO community there are concerns that unless the EU legislative process involves key stakeholders from the region, there is a risk that the economic and social well-being of local mining communities will be severely jeopardized.¹⁵⁹ In other words, the lessons learned from the Dodd-Frank process are now seeping into strategies adopted by the NGO sector. This is further demonstrated by calls on the EU to adopt binding legislation that is in harmony with the OECD’s DD Guidance and, crucially, to commit politically and financially to assisting the ICGLR develop its regional tracking and certification scheme. Thus there is now an implicit recognition that this is a far bigger project requiring a comprehensive and holistic approach coupled with a long-term commitment on the part of external stakeholders than one that merely involves the unilateral introduction of legislation.

A normative framework governing conflict minerals is still in its embryonic stage. The emergence of a framework – albeit skeletal – has been characterized by competing and sometimes conflicting interests and priorities. But despite a fractured process that has been plagued by trial and error, there has been considerable progress at international, regional and domestic levels. The responsibilities of states (whether acting collectively or individually), of individuals and of corporations in addressing conflict minerals are more clearly defined than ever. There is greater certainty over what norms are legally binding, whether by treaty, by customary international law or by virtue of binding Security Council resolutions. Through state practice, new norms are emerging, as demonstrated by the notion of due diligence.

For the DRC and its regional partners, the benefits of a fully regulated mining sector are potentially huge. The prevailing opinion is that a transparent trade governed by the rule of law can increase public revenues and make a vital contribution to economic and social reconstruction. Regulatory measures that promote good governance in the exploitation and trade of minerals, it is also reasoned, have the potential to contribute towards the decriminalization of the sector and promote greater respect for fundamental rights.¹⁶⁰ The UN and OECD due diligence frameworks are founded on the assumption that regulation can assist in stemming the flow of funds to organized armed groups, thereby mitigating armed conflict. Human rights advocates within civil society and the human rights mechanisms of the UN have adopted the view that the regulation of the sector is a necessary condition for the protection of human rights generally, and the prevention of sexual

¹⁵⁷ European Parliament resolution of 7 October 2010 on failures in protection of human rights and justice in the Democratic Republic of Congo, P7_TA(2010)0350, para. 14.

¹⁵⁸ This should not be confused with the draft Transparency Directive published by the European Commission in November 2011 which parallels section 1504 of the Dodd-Frank Act requiring companies to disclose payments to host governments in line with the EU’s decision to enact legislation to incorporate the Extractive Industries Transparency Initiative.

¹⁵⁹ See, for example, the agreed ‘Recommendations’ following a roundtable on conflict minerals hosted by Judith Sargentini, Member of the European Parliament for the Greens/European Free Alliance and madeTfair on 26 May 2011 which state: ‘within the process of developing European legislation, all possible steps should be taken to avoid contributing, willingly or unwillingly, to a de facto embargo of minerals from eastern DRC, for example, as it pushes companies to source from elsewhere.’

¹⁶⁰ See Report of the High Commissioner on the Situation of Human Rights and the Activities of her officer in the Democratic Republic of Congo, 1 March 2009, para 59 (A/HRC/10/58); Technical Assistance and Capacity Building – Combined Report of seven thematic special procedures on technical assistance to the Government of the Democratic Republic of the Congo and Urgent examination of the situation in the east of the country, 5 March 2009, paras 73–74 (A/HRC/10/59); and the Second Joint Report of Seven UN Experts on the Situation in the DRC (8 March 2010), at para 78, concluded that ‘the illegal exploitation of natural resources continues to be one of the main causes of human rights abuses’.

violence in particular.¹⁶¹ After all, this latter objective is the primary motivation behind the enactment of section 1502.¹⁶² There are, however, growing calls to re-examine whether and to what extent the assumptions upon which some measures are founded are sustainable.

The practical challenges that confront stakeholders in the region are daunting. While the disposal of existing mineral stocks is of immediate concern, there is growing pressure to determine how robust chain-of-custody or traceability systems can best be established, as well as how exporters, traders and smelters can be encouraged to conform with the OECD's DD Guidance.¹⁶³ But most of all, there is now significant pressure on all ICGLR member states to take seriously their legal obligations under the Protocol on Natural Resources and the RINR, and to deliver on stated promises. Developing a normative framework to govern conflict minerals may have proved a difficult task but for the states in the region, implementation and enforcement will be even more challenging.

¹⁶¹ A/HRC/10/5, para 74.

¹⁶² Section 1502 opens with the statement: 'It is the sense of Congress that the exploitation and trade of conflict minerals originating in the Democratic Republic of the Congo is helping to finance conflict characterized by extreme levels of violence in the eastern Democratic Republic of the Congo, particularly sexual- and gender-based violence, and contributing to an emergency humanitarian situation therein'.

¹⁶³ Summary of ICGLR-OECD-UN GoE Joint Meeting on Implementation of Due Diligence for Responsible Mineral Supply Chains in the Great lakes Region, 29–30 November 2011.

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