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The Application of International Criminal Law to Resource Exploitation: Ituri, Democratic Republic of the Congo

ABSTRACT

Control of natural resources has been a powerful motivator for internal and international armed conflict in the Democratic Republic of Congo (DRC) for more than a century. In June 2000, the U.N. Security Council established a Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo, which especially focused on conflict in Ituri Province and elsewhere in northeastern DRC since 1998. During 2003 and 2004, the atrocities committed in this conflict became the focus of the first formal investigation by the Office of the Prosecutor of the International Criminal Court (ICC). This article, following the work of the U.N. Panel and non-governmental organizations, argues that investigation and prosecution of the natural resource crimes is both possible under the ICC Statute and should be at the center of the prosecution as it is central to the ongoing conflict.

INTRODUCTION

Control of natural resources has been a powerful motivator for internal and international armed conflict in the Great Lakes region of Africa, centering on the northeast of the Democratic Republic of Congo (DRC). Arguably, all conflicts are driven by competition for control of natural resources, generally land and especially arable land. However, large scale misappropriation of resources as a driving force for continuing conflicts cannot be trivialized. The response to trade in "[c]onflict diamonds, ...rough diamonds used by rebel movements or their allies to finance armed conflict" is the best known and most comprehensive instance of international attention to and action regarding natural resources crimes.¹ The

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1. Kimberly Process, *The Kimberly Process*, <http://kimberleyprocess.com/site/> (last visited Apr. 19, 2007).

Kimberley Process certification scheme is the organized response of the world community to these conflicts.²

Congo's mineral wealth includes copper, cobalt, gold, diamonds, tantalum, tin, niobium, silver, zinc, uranium, and thorium.³ This mineral wealth is Congo's greatest asset and is heavily concentrated in the northeast of the country, including North and South Kivu provinces and Orientale province, which includes the Ituri district.⁴ While the Kimberley Process has application to the ongoing conflict in eastern DRC, its application to just one natural resource (diamonds) suggests the inadequacy of the response.

This article argues that such efforts to reduce natural resources crimes are inadequate in both scope and substance. One alternative that will be examined is the promulgation of guidelines, conventions, and similar documents for multinational enterprises operating in areas of conflict and "weak governance."^{5,6} A related traditional course of action, multi-national

2. *Id.* (follow "List of Participants" hyperlink) (last visited Apr. 19, 2007).

3. GEORGES NZONGALA-NTALAJA, *THE CONGO FROM LEOPOLD TO KABILA: A PEOPLE'S HISTORY* 28 (2002).

4. *Id.* at 27-28. Regarding mineral wealth in Eastern DRC, see, for example, Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, *Addendum to Report*, ¶ 17 (discussing coltan wealth in "the eastern region of the Democratic Republic of the Congo"), ¶ 26 (discussing gold deposits "in the north-east and eastern regions, in the Kivus and Maniema and Ituri Provinces"), *delivered to the Security Council*, U.N. Doc. S/2001/1072 (letter from Sec'y Gen. dated Nov. 13, 2001), available at <http://www.globalpolicy.org/security/issues/congo/2001/1110letter.pdf> (last visited May 29, 2007); Human Rights Watch, *UPC Crimes in Ituri (2002-2003)*, ¶ 2 ("Ituri is one of the richest areas in the Congo with deposits of gold, diamonds, oil and timber"), <http://hrw.org/english/docs/2006/11/08/congo14517.htm> (last visited May 29, 2007). See App., 1 & 2, *infra* (maps of Democratic Republic of Congo and Ituri Province).

5. The Guidelines for Multinational Enterprises are a voluntary set of guidelines agreed upon by the member states of the Organisation for Economic Co-operation and Development (OECD). The most recent version was released on September 11, 2000. COMM. ON INT'L INV. & MULTINATIONAL ENTERPRISES, OECD, *THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES* (2000) [hereinafter MNE GUIDELINES], <http://www.oecd.org/dataoecd/56/36/1922428.pdf>. The Anti-Bribery Convention, adopted in 1997, entered into force in 1999. Its members agree to outlaw bribery of foreign officials. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, entered into force Feb. 15, 1999, S. TREATY DOC. NO. 105-43, 37 I.L.M. 1, available at http://www.oecd.org/document/18/0,2340,en_2649_34859_35029714_1_1_1_1,00.html (last visited Mar. 14, 2007). See also U.S. Dep't of Commerce, Int'l Trade Admin., Trade Compliance Ctr., OECD Antibribery Report 2001 (describing ratification process and effective date); OECD, Steps taken by the United States to implement and enforce the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, http://www.oecd.org/document/28/0,2340,en_2649_34859_36430556_1_1_1_1,00.html (last visited Mar. 14, 2007).

6. [W]eak governance zones represent some of the world's most difficult investment environments. In addition to the usual financial and business risks encountered in all investment environments, weak governance zones present risks for business that stem directly from government failure — e.g.

peacekeeping, is also examined briefly. A third alternative is proposed: assertion of jurisdiction by the International Criminal Court under its existing statute over persons involved in all phases of natural resource crimes.

NATURAL RESOURCES CRIMES AND THEIR RELATION TO OTHER INTERNATIONAL CRIMES IN DRC

Beginning in June 2000, the U.N. Security Council established a "Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo." The Panel delivered six reports and interim updates to the U.N. Security Council from 2001 to 2003 documenting the role various rebel groups, proxy groups, armies, and governments of surrounding countries and their officers and officials play in the exploitation of DRC natural resources. Crimes documented by the Panel and various international nongovernmental organizations (NGOs) include forced labor, kidnapping, mass rape and sexual slavery, mutilation, and mass murder (possibly meeting the definition of genocide in some ethnically based instances). The Panel's reports emphasize that these crimes are both in aid of and financed by the profits from illegal appropriation of natural resources in the Ituri forest and elsewhere in eastern DRC.⁷

Illegal resource extraction also has dramatic negative effects on animal species native to the region.

widespread solicitation, extortion, endemic crime and violence, abuses by security forces, and violations of the rule of law.

OECD, OECD RISK MANAGEMENT TOOL FOR INVESTORS IN WEAK GOVERNANCE ZONES 3 (Draft Text for Public Consultation, deadline for comments, Nov. 23, 2005), <http://www.oecd.org/dataoecd/54/42/35562068.pdf>.

7. Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, *Final Report*, ¶¶ 124–29, delivered to the Security Council, U.N. Doc. S/2002/1146 (letter from Sec'y Gen. dated Oct. 15, 2002) [hereinafter *Panel Report Five*] (fifth in a series of reports describing armed conflict and its consequences in the Uganda-controlled area). [Editor's note: this report is designated by the Panel as its "Final Report," but the Secretary General also identifies the Panel's subsequent 2003 report as a "final report." See *infra* note 25.] See also Human Rights Watch, *Ituri: "Covered in Blood" Ethnically Targeted Violence in Northeastern DR Congo*, 15 HUMAN RIGHTS WATCH, No. 11, July 2003, at 19–47 [hereinafter *Ituri: Covered in Blood*], hrw.org/reports/2003/ituri0703/DRC0703full.pdf; Human Rights Watch, *Seeking Justice: The Prosecution of Sexual Violence in the Congo War*, 17 HUMAN RIGHTS WATCH, No. 1A, Mar. 2005, at 7–21, <http://hrw.org/reports/2005/drc0305/drc0305.pdf>; CITIZENS FOR GLOBAL SOLUTIONS, IN UNCHARTED WATERS: SEEKING JUSTICE BEFORE THE ATROCITIES HAVE STOPPED — THE INTERNATIONAL CRIMINAL COURT IN UGANDA AND THE DEMOCRATIC REPUBLIC OF THE CONGO (2004) [hereinafter UNCHARTED WATERS], http://www.globalsolutions.org/files/general/press/pdfs/uncharted_waters.pdf.

[In]...national parks and reserves in the northeastern section of the DRC, the numbers of lowland gorillas, okapis, and elephants have significantly dropped as miners kill the animals, eat the meat, and sell the ivory tusks of elephants. The gorillas are very rare and may be on the brink of extinction. Approximately 140 eastern lowland gorillas remain in Kahuzi-Biega Park, down from 280 in 1996. 4000 out of 12,000 elephants were killed between 1995 and 1999 in a northeastern national park, while only 2 out of 350 elephant families remain in the coltan-rich Kahuzi-Biega Park. As the conditions surrounding their countrymen worsens (sic) due to the conflict they take part in, rebel groups and miners continue to degrade the very land they must depend on to survive.⁸

The Panel's research coincided with the development of the Kimberley Process, an international effort to halt the entry of conflict diamonds into world markets.⁹ A similar effort to control the trade in "conflict timber" has also been proposed and is arguably easier to implement, given the relative difficulty of hiding logs as compared to diamonds.¹⁰

DRC was a transit point for Angolan conflict diamonds, which financed the UNITA (The National Union for the Total Independence of Angola) rebel movement until UNITA leader Jonas Savimbi's death in 2002. The Panel's reports document that DRC has since become a source of conflict diamonds, with at least some diamonds transiting through Uganda.¹¹ Congolese timber from the eastern portion of the country traditionally was floated down the Congo River for export via Kinshasa.¹² Tanzania and Uganda now receive shipments of Congolese timber and ship it overseas via the ports of Dar Es Salaam, Tanzania and Mombasa, Kenya.¹³

The Panel Reports extensively documented multiple corrupt international networks for misappropriation of Congo's natural resources. In the government-controlled area of DRC, Zimbabwe Defence Industries,

8. Natalie D. Ware, *Congo War and the Role of Coltan*, at pt II, § 6 (case study prepared for Inventory of Conflict & Env't), available at <http://www.american.edu/ted/ice/congo-coltan.htm> (last visited May 29, 2007).

9. Rudy S. Salo, Note, *When the Logs Roll Over: The Need for an International Convention Criminalizing Involvement in the Global Illegal Timber Trade*, 16 GEO. INT'L ENVTL. L. REV. 127, 137-39 (2003).

10. *Id.* at 139-46.

11. Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, *Addendum to Report*, ¶¶ 36-47, delivered to the Security Council, U.N. Doc. S/2001/1072 (letter from Sec'y Gen., dated Nov. 13, 2001).

12. *Id.* ¶ 48.

13. *Id.*

an arm of the Zimbabwean armed forces, has been deeply involved.¹⁴ The network's goal has been "to maintain [the Congolese-Zimbabwean elite network's] grip on the main mineral resources—diamonds, cobalt, copper, germanium—of the Government-controlled area."¹⁵ The value of mineral assets transferred from DRC state enterprises to the network's private companies has totaled at least U.S. \$5 billion over three years according to Panel Report Five.¹⁶

In Ituri and elsewhere in northeastern DRC, elite networks associated with the Uganda Patriotic Defense Force (UPDF) and its generals and the Rwanda Patriotic Army (RPA) have played major roles in DRC resource misappropriation.¹⁷ Each group operates within an area of influence inside DRC controlled by its military and allied informal forces.¹⁸ Investment, transport, and logistical services are provided by international natural resource businesses, which are also recipients of the illicit production.¹⁹ Local ethnic militias, numerous rebel groups, and village self-defense forces are part of a shifting, rapidly realigning group of armed forces that sometimes are supported by and sometimes oppose the foreign armies and the DRC's armed forces.²⁰

RWANDA-CONTROLLED AREA

In the Rwanda-controlled area, the RPA carries on gold and coltan²¹ mining activities centrally managed by the RPA's Congo Desk.²² The Panel of Experts estimate that 60 to 70 percent of coltan mining in eastern DRC occurs through a variety of "forced labour regimes" under the direct surveillance of "RPA mining *detaches*."²³ The coltan is then flown by RPA and its collaborators directly to Rwanda without payment of taxes to any DRC entity.²⁴

14. *Panel Report Five*, *supra* note 7, ¶¶ 22–58; Norman Mlambo, *The Zimbabwe Defence Industry, 1980–1995*, SACDI DEFENCE DIG. sec. 5 (Working Paper No. 2, n.d.), <http://ccrweb.ccr.uct.ac.za/archive/defencedigest/defdigest02.html> (last visited May 29, 2007).

15. *Supra* note 7, ¶ 22.

16. *Id.*

17. *Id.* ¶¶ 69–70, 97–98.

18. *Id.* ¶¶ 65–96 (addressing the Rwandan elite network's activities and effect); *id.* ¶¶ 97–131 (addressing the Ugandan elite network's activities and effect).

19. *See id.* ¶¶ 43–46, 79–81, 109–11.

20. *See Ituri: Covered in Blood*, *supra* note 7, at 15–16 & chart, "Web of Alliances in Ituri" (reproduced *infra* as Appendix, No. 3).

21. "Coltan, short for Columbite-tantalite, is essential for the power-storing parts of cell phones, nuclear reactors, PlayStations, and computer chips." Ware, *supra* note 8, pt. I, § 2.

22. *Panel Report Five*, *supra* note 7, ¶ 70.

23. *Id.* ¶ 75.

24. *Id.*

In tracing one commercial chain of coltan mining, transport, refining, and sale, the Panel identified two interrelated Ohio-based companies with offices in DRC, Rwanda, and Burundi; a Kazakhstan coltan refiner; a Chinese coltan processor; a Mozambican shipper; a South African trading company; a Dutch coltan purchaser; and a German company, a subsidiary of Bayer AG, which is a buyer of processed tantalum.²⁵

The extent of natural resource misappropriation is huge in relation to military budgets, national budgets, and gross domestic product. Calculations by the Panel for 1999 indicated that RPA Congo Desk revenues were about four times the U.S. \$80 million allocated to the RPA in the Rwandan national budget.²⁶ This figure, U.S. \$320 million, is 20 percent of Rwanda's 1999 GDP and about 150 percent of the Rwandan annual budget for that year.²⁷ Thus, theft of DRC natural resources is quadrupling the funds available to the RPA to continue the conflict in eastern DRC.

25. United States: Trinitech International, Inc., Eagle Wings Resources International; Kazakhstan: NAC Kazatomprom; China: Ningxia Non-Ferrous Metals Smeltery; Mozambique: Mozambique Gemstone Company; South Africa: AMC African Trading and Consulting Company Ltd.; Netherlands: Chemie Pharmacie Holland; and Germany: H.C. Starck. *Id.* ¶¶ 79-80.

It should be noted that the U.S., German and Chinese companies were listed in the Panel's final report as having resolved the allegations against them. However, several reports at the time the October 2003 final report was released questioned its veracity and completeness. *The Independent* reported that "[a] controversial section has been omitted from a UN report on the plunder of wealth in the Democratic Republic of Congo....[T]he section includes details on how shady networks of business and military figures, some tied to the governments of Rwanda and Uganda, are continuing illegally to export gold, diamonds and other minerals from eastern Congo.

Declan Walsh, *UN Cuts Details of Western Profiteers from Congo Report*, INDEPENDENT (London), Oct. 27, 2003, available at <http://news.independent.co.uk/world/politics/article93191.ece>. Friends of the Earth (FOE) points out that the Panel's final report does not provide any information explaining how allegations were resolved. Press Release, Friends of the Earth 5 (Oct. 27, 2003), <http://www.foe.org/camps/intl/unreportmemo.pdf>. This is a significant unresolved issue since 42 of 85 Annex III-listed companies received a "No Further Action Required" listing in the Panel's 2003 final report. *Id.* at 3. FOE also notes that Cabot Corporation, another U.S. Annex III-listed company and the world's largest refiner of coltan, was headed by Samuel Bodman from 1992 until July 2001, when he became a Bush administration appointee as Deputy Secretary of Commerce and Treasury. *Id.* at 4. He became Secretary of Energy in February 2005. U.S. Dep't of Energy, Samuel W. Bodman, http://www.energy.gov/organization/samuel_bodman.htm (last visited Apr. 19, 2007). See also Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo, *Final Report* [as designated by the Sec'y Gen.], Annex I, delivered to the Security Council, U.N. Doc. S/2003/1027 (letter from Sec'y Gen. dated Oct. 23, 2003) [hereinafter *Panel Report Six*].

26. *Panel Report Five*, *supra* note 7, ¶ 71.

27. *Id.*

UGANDA-CONTROLLED AREA

According to the Panel, the elite network in the Uganda-controlled area is far less centralized than that in the Rwanda-controlled area. Its purpose, however, is similar: "monopolistic control over the area's principal natural resources, cross-border trade, and tax revenues for the purpose of enriching" the participants.²⁸ The Uganda network is made up of high-ranking Uganda People's Defense Force (UPDF) officers, private businessmen, and rebel leaders.²⁹ Front companies controlled by members of the network are given tax exemptions that are denied to their competitors.³⁰ Alongside military intimidation, manipulation of the banking sector, and the quasi-legitimate public façade provided by the rebel movements, these tax exemptions have made it easy for UPDF elite network companies to dominate the local economy.³¹ Coltan, gold, diamonds, and timber are the natural resource exports from which the elite network derives its revenues, along with control over import of consumables, theft, and tax fraud.³²

In the Uganda-controlled area, competition for illegitimate control of natural resources is at the heart of much conflict portrayed as essentially ethnic in character. A conflict reported by the Panel between Hema and Lendu groups in Ituri encapsulates this issue. In February 2002, the UPDF engaged in a series of attacks on the village of Geti. Panel sources reported that Hema businessmen had financed the UPDF attacks because they "sought...control over gold deposits in the Geti area, and that in fact the ethnic conflict was a minor issue."³³

ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT'S COMMITTEE ON INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISE (OECD/CIME) RESPONSE

Panel Report Five includes three annexes recommending financial restrictions on 29 companies named in Annex I, financial restrictions and travel bans on 54 individuals named in Annex II, and the listing of 85 businesses considered to be in violation of the MNE Guidelines of the

28. *Id.* ¶ 97.

29. *Id.* ¶ 98.

30. *See id.* ¶¶ 98, 104–05.

31. *Id.* ¶¶ 100–01, 104–05.

32. *Id.* ¶¶ 100–01.

33. *Id.* ¶ 123.

OECD in Annex III.³⁴ The companies listed in annexes I and III are located across the world, including DRC and neighboring African states, South Africa, European Union states, Thailand, Finland, China, Kazakhstan, and the United States. The Panel met with companies and individuals who objected to being named in the Panel's report and annexes or to the characterization of their activities. The Panel ultimately issued an additional report listing the results of those meetings.³⁵ At the end of its Security Council mandate, the Panel referred unresolved cases to the "National Contact Points" (NCPs) identified in the Multi-national Enterprises (MNE) *Guidelines* and to other national authorities.³⁶

It is generous to state that OECD's Committee on International Investment and Multinational Enterprises (known as the Investment Committee or CIME) did not respond with enthusiasm to the Panel's reliance on the *MNE Guidelines*. The Panel's view of the *MNE Guidelines* as a standard of corporate behavior and its commitment to protecting the safety of its sources were both known to the OECD.³⁷ However, in a public statement issued on February 12, 2004, the Investment Committee complained that the Panel contacted just three of ten NCPs (who had companies listed in Annex III headquartered in their country).³⁸ The Panel's reports note repeatedly that the U.N. Panel itself is not a judicial body with enforcement powers and thus is not able to protect witnesses who come

34. *Id.* Annexes I-III. *See also* MNE GUIDELINES, *supra* note 5 (The *MNE Guidelines* were used by the Panel as a measure of appropriate international business behavior.).

35. The Panel's standard of proof, a significant issue for future use of Panel reports by the International Criminal Court or other judicial bodies, is described as "reasonableness" or "sufficient cause." The Panel report states that it restricted itself to "identifying parties where it[s]...information indicat[ed that] a prima facie case [required an] answer." *Panel Report Six*, *supra* note 25, ¶¶ 15-16, Annex I. *See also supra* note 25 (discussing the lack of information in Panel Report Six about the means by which allegations against nearly half the companies listed were resolved).

36. *Panel Report Six*, *supra* note 25, ¶¶ 20-21.

37. The *MNE Guidelines* have been adopted by OECD member states and several other states. *See* MNE GUIDELINES, *supra* note 5. As the guidelines are voluntary, it seems reasonable to believe that the OECD would applaud their adoption as a measure by other institutions. *Id.* The *MNE Guidelines* "are an essential component of the 1976 Declaration on International Investment and Multinational Enterprises." OECD, THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 1 (OCDE/GD(97)40 1997). The Panel's account of its contacts with CIME confirms that supposition and states that a process was agreed upon for referring information to CIME NCPs about companies incorporated in their jurisdiction, "subject to protecting the security of the [Panel's] sources." *Panel Report Six*, *supra* note 25, ¶¶ 20-21 (emphasis added).

38. OECD Comm. on Int'l Inv. & Multinational Enterprises, *Illegal Exploitation of Natural Resources in the Democratic Republic of Congo: Public Statement by CIME* (Feb. 12, 2004) [hereinafter OECD CIME, *Illegal Exploitation*], http://www.oecd.org/document/6/0,2340,en_2649_34889_27217798_1_1_1_1,00.html (last visited Mar. 16, 2007).

forward voluntarily from reprisals.³⁹ The OECD statement noted that the chair of the Investment Committee wrote a letter that the OECD Secretary-General transmitted to the U.N. Secretary-General suggesting ways "that future cooperation might be enhanced."⁴⁰

The statement also reported that the Investment Committee planned to start a project to use the DRC as a case study to help it understand how "companies, NCPs and other actors [can]...conduct business responsibly in the DRC and other 'weak governance zones.'"⁴¹ The OECD released the description of that project in May 2004 and included a timeline with draft and final reports scheduled to be available in December 2004 and spring 2005, respectively.⁴² Fourteen responses to the draft report are available.⁴³ As of this writing, neither the draft nor the final report is available on OECD's website.⁴⁴

Thus, by early 2006, the OECD, the body most concerned with breaches of its own standards of behavior for multinational business, was still studying the problem of "companies [that] appear to have benefited from the chaotic environment in the [DRC] through, for example, the acquisition of concessions or other contracts...on terms that were more favorable than they might have received in countries where there was peace and stability."⁴⁵ The United States' NCP, Wesley Scholz, director of the Office of Investment Affairs in the State Department, was reported in

39. The U.N. Office of Legal Affairs provided guidance to the Panel. The Office of Legal Affairs recommended that information and documents be handed over to responding individuals and entities "provided that such release did not place at risk the safety of Panel members, its staff or its sources, did not violate a duty of confidentiality owed to a source or did not compromise the Panel's internal decision-making." *Panel Report Six, supra* note 25, ¶¶ 14-16.

40. OECD CIME, *Illegal Exploitation, supra* note 38.

41. *Id.*

42. OECD DIRECTORATE FOR FIN. & ENTERPRISE AFFAIRS, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES: CONDUCTING BUSINESS WITH INTEGRITY IN WEAK GOVERNANCE ZONES: OECD INSTRUMENTS AND EXAMPLES FROM THE DRC 6 (2004), www.oecd.org/dataoecd/1/3/33760086.pdf.

43. The responses make clear that a draft report has circulated. See ALL PARTY PARLIAMENTARY GROUP ON THE GREAT LAKES REGION AND GENOCIDE PREVENTION (APPG), THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES AND THE DRC: INTERIM FINDINGS (2004), <http://www.oecd.org/dataoecd/8/57/34304866.pdf>.

44. The Investment Committee's listed contact has not responded to an e-mail inquiry about the status of the project. E-mail from author to the OECD Investment Committee's official contact address, DAF.Contact@oecd.org (Apr. 26, 2005, 11:15 PM EDT) (on file with author).

45. *Panel Report Six, supra* note 25, ¶ 12. The report listing apparent violators of the MNE Guidelines was released on October 15, 2002, more than three-and-one-half years ago at this writing. *Panel Report Five, supra* note 7 (date of letter from Chairman of the Panel to the Sec'y Gen.).

October 2003 to have argued "that the OECD Guidelines do not apply to the U.S. corporations named in the October report because they were not directly involved in the DRC, but only purchased resources through their parties."⁴⁶ Little or no practical assistance in cutting the ties between natural resource exploitation, arms trafficking, and political and ethnic violence can be expected through this process.

INTERNATIONAL PEACEKEEPING ACTIVITIES

As documented by the Panel, natural resource exploitation both motivates continuing conflict throughout eastern and northeastern DRC, including Ituri, and serves as the funding source for arms and other military necessities.⁴⁷

Panel reports of 2002 and 2003 clearly link resource exploitation to conflict and arms trafficking. Continued conflict and instability serves as an excuse for neighboring countries to maintain a military presence or support internal armed groups, thereby allowing unfettered access to DRC natural resources. The sale of illegally extracted resources is the critical funding source for the activities of armed groups.⁴⁸

With a U.N. mandate, the "Artemis" Force, a French-led, European Union (EU) Interim Emergency Multinational Force, operated in Bunia, Ituri Province from June through September 2003.⁴⁹ The EU force went into Bunia after armed groups burned it on May 6, 2003.⁵⁰ Sudden withdrawal by Ugandan (UPDF) forces in Bunia on that date precipitated a power struggle for control of the city.⁵¹

Security Council resolution 1493, adopted in July 2003, prepared for the departure of the EU force by authorizing the Ituri Brigade with a strengthened mandate.⁵² Then U.N. Secretary-General Annan outlined the

46. Jim Lobe, *Global Businesses Profit from Congo War, Groups Charge*, GLOBAL POLICY FORUM, Oct. 28, 2003, <http://www.globalpolicy.org/soecon/tncs/2003/1028congo profit.htm>.

47. *Panel Report Six*, *supra* note 25, ¶¶ 43–47 (discussing, diagramming, and summarizing the links between resource exploitation, arms trafficking, and continuing conflict).

48. *Id.* ¶ 44.

49. Amnesty Int'l USA, *Democratic Republic of Congo-Ituri: A Need for Protection, a Thirst for Justice*, http://www.amnestyusa.org/countries/dr_congo/document.do?id=71711FE4D330C1C880256DDA00478B0C (last visited Apr. 19, 2007).

50. *Id.*

51. *Id.*

52. S.C. Res. 1493, U.N. Doc. S/RES/1493 (July 28, 2003). The resolution [a]uthorizes MONUC to use all necessary means to fulfill its mandate in the Ituri district and, as it deems it within its capabilities, in North and South Kivu; Requests the Secretary-General to deploy in the Ituri district, as soon as possible, the tactical brigade-size force whose concept of operation is set out in paragraphs 48 to 54 of his second special report, including the

violence occurring in Ituri, especially between the Hema and Lendu ethnic groups, from February through May 2003.⁵³ He also described the negotiation of a ceasefire agreement that led to the creation of the Ituri Pacification Commission and the deployment of a 700 to 800 member MONUC reserve unit to Bunia.⁵⁴ Annan recommended creation of a MONUC brigade to operate in Bunia beginning in August 2003.⁵⁵ By mid-November, the 4,800-strong Ituri Brigade fully deployed in Bunia and began to expand outside the town.⁵⁶ Yet even these numerically greater and more forceful troops were only able, at best, to stabilize the level of violence.⁵⁷

Both U.N. and OECD approaches are lacking a crucial element, the ability to hold parties personally accountable. Criticism of "impunity" is a thread in much of the dialogue about Congo's war and the violence in Ituri.⁵⁸ However, the rule of law is not functioning in Ituri. Ituri's intractable conflict presents a problem that the International Criminal Court is precisely intended to address, the inability of a state to carry out an investigation and prosecution; literally to maintain the rule of law.⁵⁹

reinforced MONUC presence in Bunia by mid-August 2003 as requested in resolution 1484 (2003), particularly with a view to helping to stabilize the security conditions and improving the humanitarian situation, ensuring the protection of airfields and displaced persons living in camps and, if the circumstances warrant it, helping to ensure the security of the civilian population and the personnel of the United Nations and the humanitarian organizations in Bunia and its environs and eventually, as the situation permits, in other parts of Ituri....

Id. ¶¶ 26, 27. Resolution 1493 specifically authorizes the use of force to carry out MONUC's mission, including that of the Ituri Brigade, by stating that it is "[a]cting under Chapter VII of the Charter of the United Nations...." *Id.* at 2. See U.N. CHARTER art. 42 (authority to use armed force). MONUC is the French acronym for United Nations Organization Mission in the Democratic Republic of the Congo. See generally MONUC, <http://www.un.org/Depts/dpko/missions/monuc/index.html> (for more background information about MONUC) (last visited Mar. 18, 2007).

53. The Secretary-General, *Second Special Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo*, ¶¶ 9-17, U.N. Doc. S/2003/566/ (May 27, 2003) [hereinafter *Second Special Report*].

54. *Id.* For MONUC, see *supra* note 52.

55. *Second Special Report*, *supra* note 53, ¶¶ 48-54.

56. The Secretary-General, *Fourteenth Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo*, ¶¶ 7-9, U.N. Doc. S/2003/1098 (Nov. 17, 2003).

57. *Id.*

58. See *Panel Report Six*, *supra* note 25, diagram following ¶ 46; *Second Special Report*, *supra* note 53, ¶¶ 46, 62, 71. See also UNCHARTED WATERS, *supra* note 7, *passim*.

59. International Criminal Court, Rome Statute, arts. 14, 17, A/CONF.183/9 (July 17, 1998) [hereinafter *Rome Statute*], available at <http://www.un.org/law/icc/statute/romefra.htm> (DRC is unable to prosecute, as required for admissibility under art. 17(1)(a); DRC has made a referral of the Ituri situation as required for admissibility under art. 14.). *Prosecutor Receives Referral of the Situation in the Democratic Republic of Congo*, ICC-OTP-20040419-50-En,

INTERNATIONAL LAW AND THE EASTERN DRC/ITURI CONFLICT

Even setting aside the *Rome Statute*, the crimes reported in Ituri are clearly of a serious, widespread, and systematic enough nature to qualify as crimes of universal jurisdiction under customary international law.⁶⁰ However, universal jurisdiction is, in this instance, of little or no value since all the states in the region are implicated in the crimes and few of the perpetrators in the region seem likely to leave. Perhaps "universal criminality" will be the term coined to explain this episode when viewed from a sober distance.

With no prospect of prosecution by the DRC national legal system in sight, President Joseph Kabila referred "the situation of crimes within the jurisdiction of the Court allegedly committed anywhere in the territory of the DRC since the entry into force of the Rome Statute, on 1 July 2002" to the Prosecutor of the International Criminal Court, Luis Moreno Ocampo.⁶¹ In the same press release, Prosecutor Ocampo announced that he was continuing to analyze the DRC situation, "especially in Ituri."⁶² Nearly a year later, the prosecutor sought and received permission from ICC Pre-Trial Chamber I to "request the services of the Netherlands Forensic Institute" in examining unspecified evidence.⁶³ This step made clear that there will be prosecutions arising from the "traditional" war crimes and

Office of the Prosecutor, International Criminal Court, http://www.icc-cpi.int/pressrelease_details&id=19&l=en.html (last visited May 29, 2007). *The Office of the Prosecutor of the International Criminal Court Opens Its First Investigation*, ICC-OTP-20040623-59-En, Office of the Prosecutor, International Criminal Court, http://www.icc-cpi.int/pressrelease_details&id=26&l=en.html (last visited May 29, 2007).

60. Customary international law is "[i]nternational law that derives from the practice of states and is accepted by them as legally binding." BLACK'S LAW DICTIONARY (8th ed. 2004). While this definition is a potentially confusing oversimplification, it is nevertheless accurate to state that the violent crimes discussed above are widely accepted as crimes of universal jurisdiction since Nuremberg. The trials held by the U.N.-constituted international criminal tribunals for Rwanda (ICTR) and former Yugoslavia (ICTY) demonstrate that these crimes continue to be in current usage by the world community. "[T]he universality principle allows any state jurisdiction under international law to provide criminal...[sanctions] for violations of international law." JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS 157 (2d. ed. 2000).

61. Press Release, ICC, Prosecutor Receives Referral of the Situation in the Democratic Republic of Congo (Apr. 19, 2004), available at http://www.icc-cpi.int/pressrelease_details&id=19.html (last visited Mar. 18, 2007).

62. *Id.*

63. Press Release, ICC, Decision of Pre-Trial Chamber I on the Prosecutor's Request under Article 56 of the Rome Statute (Apr. 26, 2005), available at <http://www.icc-cpi.int/press/pressreleases/105.html> (last visited Mar. 18, 2007).

crimes against humanity in the Ituri district. Confirmation came nearly a year later with the first arrest in the DRC investigation.⁶⁴

However, another significant question arises. What about the illegal appropriation of natural resources that is well documented as the motivator and funding source for these crimes?⁶⁵ Will the ICC Prosecutor seek charges for the natural resources crimes? If so, who will be the defendants? What will be the charges?

THE ROME STATUTE AND ELEMENTS OF CRIMES

There was little, if any, discussion of natural resources crimes in the “pre-history” of the Rome Statute, the 50 years after Nuremberg from 1948 until adoption of the statute in 1998. International Law Commission (ILC) reports do not mention environmental or natural resource crimes until 1995.⁶⁶ In 1989, Trinidad and Tobago raised issues of effective means of combating international drug trafficking. The General Assembly responded in 1990, once again encouraging the ILC to examine this matter as part of its project (ongoing since 1947) of drafting a Code of Crimes Against the Peace and Security of Mankind. This bit of good fortune reopened discussions that led to the Rome Statute.⁶⁷ (Drug trafficking was ultimately not included in the adopted Rome Statute.⁶⁸)

Although there was brief discussion of “willful and severe damage to the environment” as a crime (illegal appropriation of natural resources was not mentioned), the proposed crime was not included in the ILC draft statute. The argument against its inclusion is that “in most cases such damage will be caught by other crimes, such as aggression or war crimes,

64. In January 2006, the ICC Prosecutor applied for an arrest warrant against Thomas Lubanga Dyilo, the founder and head of the Union des Patriotes Congolais (UPC) and its military wing, Forces Patriotiques Pour la Libération du Congo (FPLC). Lubanga Dyilo is charged with the war crime of enlisting and conscripting children under 15 and using them to participate in hostilities. The warrant was unsealed in March 2006, after Lubanga Dyilo was taken into ICC custody and flown out of DRC. Press Release, Office of the Prosecutor, Int'l Criminal Court, Issuance of a Warrant of Arrest against Thomas Lubanga Dyilo, ICC-OTP-20060302-126-En (Mar. 17, 2006), available at <http://www.icc-cpi.int/press/pressreleases/133.html>.

65. See *supra* notes 7–33 and accompanying text.

66. *Report of the International Law Commission on the Work of Its Forty-Seventh Session*, U.N. GAOR Supp. (No. 10) at 62–63, U.N. Doc. No. A/50/10(SUPP) (1995); THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS 2–3 (Roy S. Lee ed., 1999).

67. THE INTERNATIONAL CRIMINAL COURT, *supra* note 66.

68. *Id.* at 86–87.

and where that is not the case, there may be doubt as to whether it achieves the threshold of gravity for an international crime."⁶⁹

So, what are the crimes and elements of crimes that subsume gross violations of environmental welfare and misappropriation of national stores of natural resources? Do they potentially apply to the core natural resource exploitation activities in Ituri and elsewhere in Congo? All the potential candidates are grouped under Article 8 of the Rome Statute, War Crimes. The elements are duplicative to account for both international warfare and "armed conflict not of an international character."⁷⁰

Subsections that are candidates for application to Ituri and DRC generally are:

- Art. 8(2)(a)(iv): War crime of destruction and appropriation of property;
- Art. 8(2)(b)(xiii): War crime of destroying or seizing the enemy's property;
- Art. 8(2)(b)(xvi): War crime of pillaging;
- Art. 8(2)(e)(v) War crime of pillaging; and
- Art. 8(2)(e)(xii) War crime of destroying or seizing the enemy's property.⁷¹

Article 8(2)(a)(iv) provides protection for property of civilians, which seems to include personal ownership of natural resources rights. It applies in the situation of an international conflict and requires that the property be protected by one or more of the 1949 Geneva Conventions.⁷² It also requires that the appropriation be extensive and wanton. Protection applies to real property as well as personal property.⁷³ The Fourth Geneva Convention also prohibits destruction of state and property owned collectively; thus, it applies to the property of legal persons (corporations and other business entities) that hold natural resources property.⁷⁴

Article 8(2)(b)(xiii) provides stronger protections to natural resources property in international conflicts. Only in cases of military necessity is seizure of property allowed. Property is protected from

69. THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 522–23 (Antonio Cassese et al. eds., 2002).

70. ICC, Assembly of States Parties, Elements of Crimes, art. 8(2)(c)(i)-1, Official Records, ICC-ASP/1/3 (Sept. 3–10, 2002) [hereinafter ICC, Elements of Crimes], available at http://www.icc-cpi.int/asp/asprecords/ASP_1stsession.html.

71. *Id.* at 127, 137–38, 150, 155.

72. Most relevant to this issue is the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Aug. 12, 1949), <http://www.unhchr.ch/html/menu3/b/92.htm> (Civilians are the vast majority of those affected by the ongoing violence and economic exploitation in the Ituri/eastern DRC war zone.).

73. *Id.* art. 53 (addressing "destruction," which can reasonably include destruction of wealth or livelihood by appropriation and other forms of taking).

74. *Id.*

destruction or seizure under the international law of armed conflict. This more general term allows for the potential consideration of customary international law and any other generally accepted laws of war. It may also open the door for far narrower interpretations of "the international law of armed conflict."⁷⁵

Article 8(2)(b)(xvi) outlaws pillaging in international conflicts. It is clearly the strongest protection of those discussed so far. The elements are clear and simple. The property was "appropriated."⁷⁶ The intent was "to deprive the owner of the property and appropriate it for private or personal use. The appropriation was without the consent of the owner."⁷⁷

Article 8(2)(e)(v) outlaws pillaging in a conflict "not of an international character." The elements are precisely the same as its counterpart in international conflicts.⁷⁸

Article 8(2)(e)(xii) duplicates article 8(2)(b)(xiii) in the context of "a conflict not of an international character." Although it is intended for internal conflicts, it includes the same reference to the international law of armed conflict as its counterpart, raising the same possibilities and problems noted above.⁷⁹

The war crime of pillaging is squarely on target, encompassing all the methods of illegal appropriation recounted by NGOs and the Panel. Yet, at first blush, pillaging sounds like an ancillary crime, perhaps a minor, "throw-away" charge when compared to the laundry list of human brutality already recounted. Yet it should be at the center, not the periphery, of prosecutions arising from the situation in Ituri.

The Panel's reports demonstrated repeatedly and convincingly that natural resource exploitation has been both the *motivation* and the *funding source* for continuing warfare. Many other crimes likely to be prosecuted, including forced labor and hostage taking, are incidental to illegal resource extraction, which is pillaging. Because the elements of the crime are so simple, it is likely to be easier to prove than some other crimes. Theft of natural resources and the wealth it creates tend to leave a forensic trail of bills of lading, shipping orders, wire transfers, contracts, etc.

Ease of proof may also allow the ICC Prosecutor the luxury of following confessions and convictions up the ladder to reach the actors involved at the highest levels in organizing these crimes. Cooperation of international partners in illegal activities may stand up as a charge of pillaging. It will be extremely difficult to conclusively connect foreign

75. ICC Elements of Crimes, *supra* note 70, at 137.

76. *Id.* at 138–39.

77. *Id.*

78. *Id.* at 150.

79. *Id.* at 155.

financiers to organized forced labor or other brutal crimes unless proof is available that they knowingly cooperated in stealing the natural resources in question.

Like Belgium's Leopold II, Congo's first proprietor, international natural resources companies and executives are likely to walk away unscathed and wealthier regardless of their level of complicity. The only indictment and arrest to date is of one rebel leader, Mr. Thomas Lubanga Dyilo,⁸⁰ for the war crime of enlisting and conscripting children under 15 years of age. The contrast between this single arrest and the extensive information on vicious economic exploitation developed by the United Nations Security Council's Panel over several years, as recounted above,⁸¹ suggests that international business executives may escape the prosecutor's grasp.

A credible threat of personal criminal liability can bring accountability where the OECD *MNE Guidelines* produce years of foot dragging and other NGO and international organizations' actions have no means to pierce the corporate veil.

Additionally, evidence of economic motivations for other war crimes may be accessible only in corporate files. Companies tend to have contracts with their suppliers, no matter how unsavory. An opportunity to bring executives into court may result in fuller documentation of motives and more success in the prosecution of other war crimes.

A prosecution that does not seek to punish the greatest beneficiaries of these crimes will have failed in two critical respects. Appropriation of its natural resources is inextricably tied to Congo's 120-year history of brutality.⁸² This generation of Congo's pillagers must face sure, stiff consequences if the cycle of theft and death is to end. A recent nationwide mortality survey, conducted by the International Rescue Committee,

80. Warrant of Arrest, Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo, No. ICC-01-04-01/06 (Feb. 10, 2006) (French original, official English translation by the Court), available at http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-2_tEnglish.pdf.

81. See *supra* notes 7-33 and accompanying text.

82. From the beginning of the European colonial period, DRC and its predecessor states and colonies, Zaire, the Belgian Congo, and the Congo Free State, were organized around a principle of wealth extraction to benefit the rulers. Acts now clearly defined as crimes against humanity were business as usual. This background is a factor in the intractability of conflict in the modern DRC. Congo's European colonial period was especially harsh. As an independent European state only since 1830, Belgium had no imperial history. King Leopold II, Belgium's second king, set about the task of assembling an empire to enrich himself and develop his country. By 1885, the Congo Free State (CFS) became the only colony *personally* owned by a monarch. NZONGALA-NTALAJA, *supra* note 3, at 20-21. See also ADAM HOCHSCHILD, KING LEOPOLD'S GHOST: A STORY OF GREED, TERROR, AND HEROISM IN COLONIAL AFRICA 33, 36, 80-85 (1998).

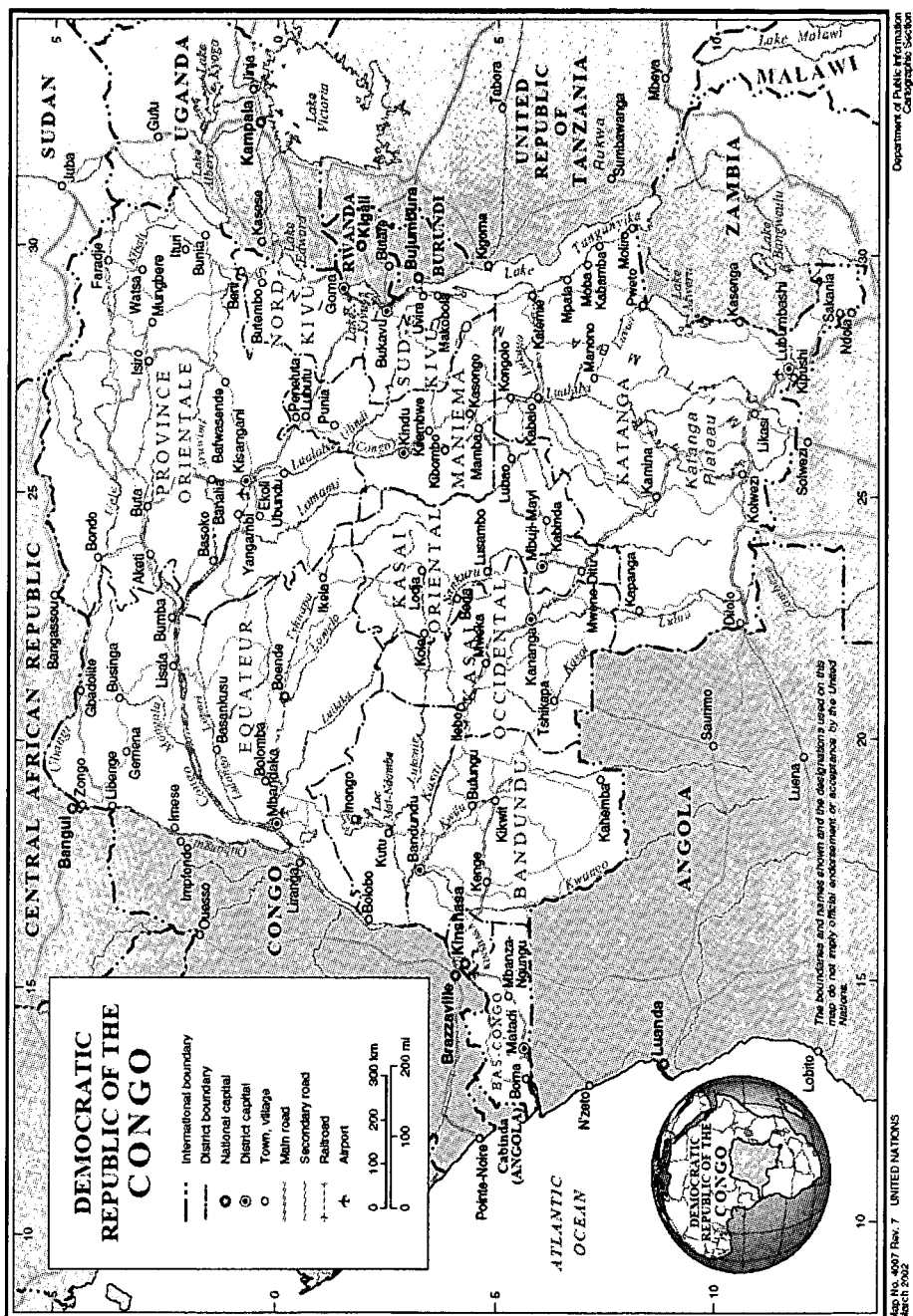
estimates the death toll in DRC at 3.3 million people from 1998 through 2002, lending credence to description of the DRC conflict as Africa's first world war.⁸³

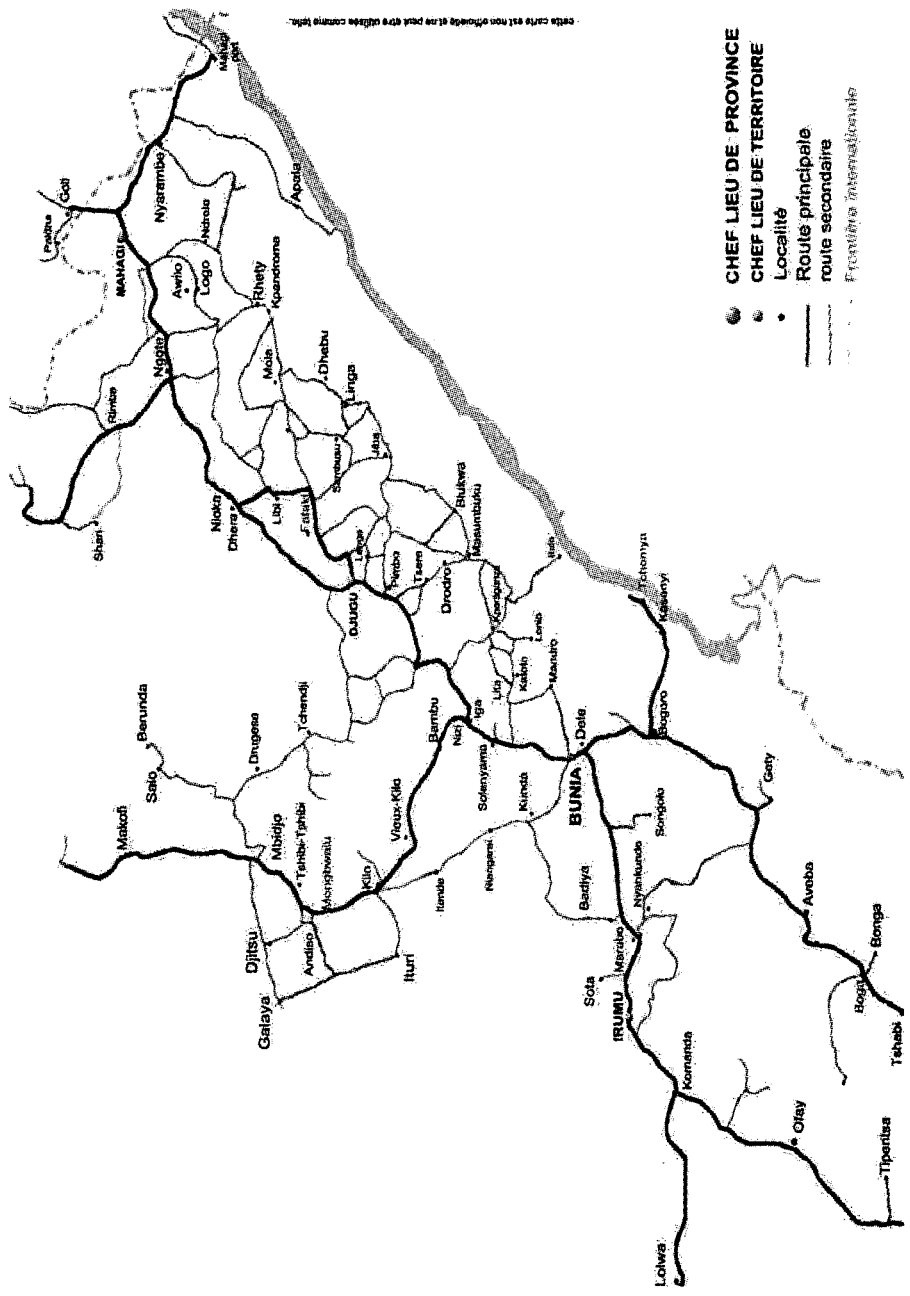
Finally, this is the first prosecution at the ICC and may be the first to go to trial. International natural resource appropriators and arms traffickers who collaborated with criminal networks should not walk away free, leaving Congolese and other Central Africans facing criminal liability for war crimes. Criminal responsibility for war crimes does not stop at the borders of less-developed countries. This prosecution will shape how the ICC is viewed and how seriously the OECD *MNE Guidelines* and similar appeals are taken in the developed world and multinational boardrooms. The threat of personal criminal liability and effective prosecution may have a salutary effect on corporate behavior.

83. Benjamin Coghlan et al., *Mortality in the Democratic Republic of Congo: A Nationwide Survey*, 367 LANCET 44, 49 (2006).

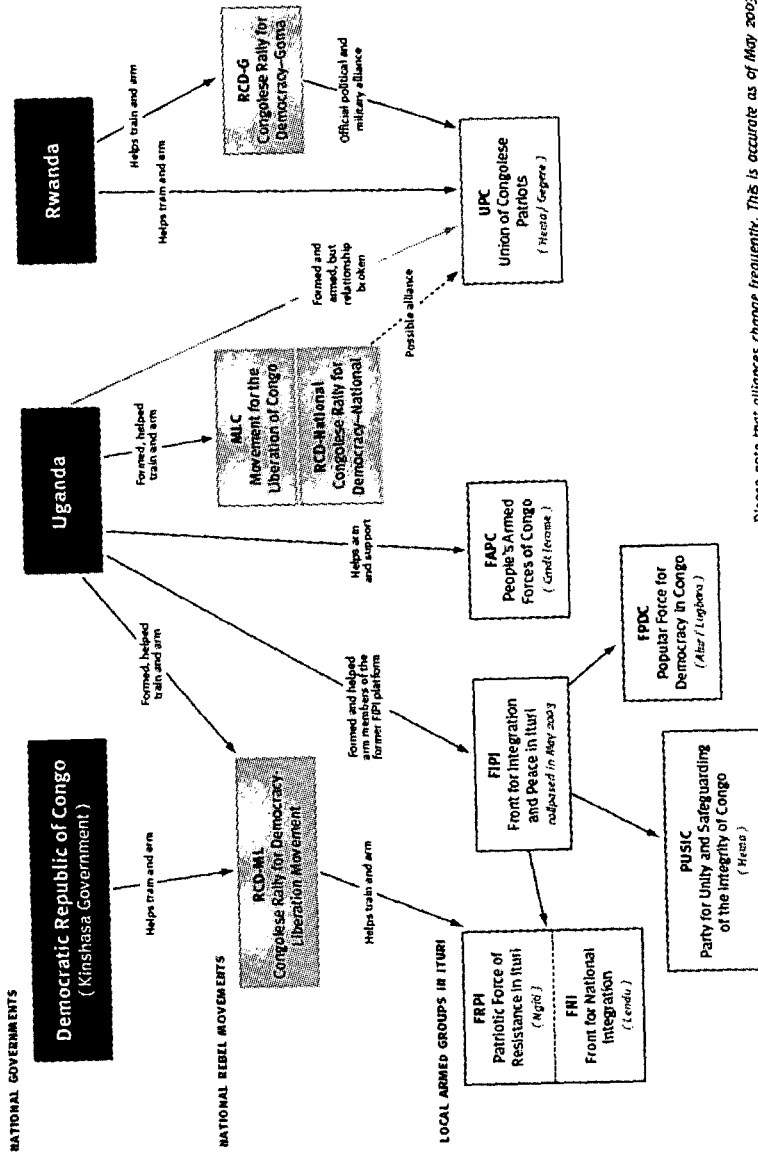
Appendix

1. Map of Democratic Republic of the Congo
2. Map of Ituri District
3. Web of Alliances in Ituri, May 2003





Web of Alliances in Ituri



Please note that alliances change frequently. This is accurate as of May 2003.