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Growing Teeth: The UN Security Council and International Tribunals

What had meaning in this conflict were diamonds. Between 1998 and 2000, diamonds mined by forced labour were first taken to the headquarters in Buedu and from there to the accused [Charles Taylor] in Liberia. In return ... arms were then distributed to the AFRC/RUF forces ...

Prosecutor's opening statement, Taylor case¹

Chapter Overview

This chapter looks beyond the Kimberley Process (KP) to the other international organisations that contribute to the conflict diamonds governance system. After considering briefly the role of the United Nations General Assembly (UNGA), I consider the role of the United Nations Security Council (UNSC) in creating the KP and enhancing it through its monitoring and enforcement activities. Finally, the chapter considers the jurisprudence emerging from the Special Court for Sierra Leone and the International Criminal Court (ICC) about conflict diamonds in the context of the commission of international human rights crimes. The jurisprudence uses conflict diamonds in three major ways: as the context in which international crimes are committed, as

¹ Transcript of Proceedings, *The Prosecutor v Charles Taylor (Trial)*, (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-03-01-PT, 4 June 2007) 59.

a direct aspect of an international crime, and as indirectly imposing liability for the international crimes committed by others. The chapter's concluding remarks highlight the important relationship between international human rights crimes, the KP, and the concept of conflict diamonds.

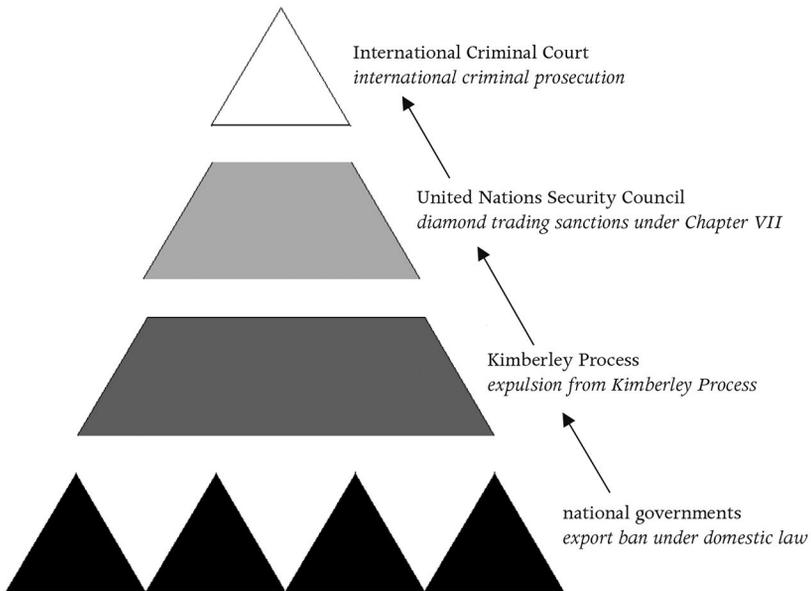


Figure 5.1: Conflict Diamonds Governance as a Networked Pyramid of Sanctions

Source: Author's research.

United Nations General Assembly

The UNGA has played a significant role in the establishment of the Kimberley Process and in providing it with ongoing political support. The Kimberley Process was initially called for under United Nations General Assembly Resolution 55/56. The legitimacy and authority of the Kimberley Process has subsequently been reinforced on an annual basis by UN General Assembly and Security Council resolutions. It has been noted, however, that, unlike a formal mandate under the coercive powers of the Security Council, General Assembly resolutions are not legally binding. The three-year review of the Kimberley Process Certification Scheme (KP) called for the UN Secretariat to be regularly

invited to KP Plenary meetings and kept informed of KP decisions. It is interesting to note that although the KP exists as a non-legally binding, informal institution, it is largely a product of the UN system, which continues to monitor its activities, provide political support and, in the case of the UNSC, intervene in particular enforcement scenarios.²

United Nations Security Council

Prior to the establishment of the Kimberley Process, the Security Council played a key role in bringing to international attention the problem of conflict diamonds. In 1998, it adopted resolutions 1173 and

2 SC Res 827, UN SCOR, 3217th mtg, UN Doc S/RES/827 (25 May 1993) ('Statute of the International Criminal Tribunal for the Former Yugoslavia'); The Role of Diamonds in Fuelling Conflict: Breaking the Link Between the Illicit Transaction of Rough Diamonds and Armed Conflict as a Contribution to Prevention and Settlement of Conflicts GA Res 55/56, UN GAOR, 55th sess, 79th plen mtg, A/RES/55/56 (1 December 2001); The Role of Diamonds in Fuelling Conflict: Breaking the Link Between the Illicit Transaction of Rough Diamonds and Armed Conflict as a Contribution to Prevention and Settlement of Conflicts, GA Res 56/263, UN GAOR, 56th sess, 96th plen mtg, UN Doc A/Res/56/263 (13 March 2002); The Role of Diamonds in Fuelling Conflict: Breaking the Link Between the Illicit Transaction of Rough Diamonds and Armed Conflict as a Contribution to Prevention and Settlement of Conflicts GA Res 57/302, UN GAOR, 57th sess, 83rd plen mtg, UN Doc A/RES/57/302 (15 April 2003); The Role of Diamonds in Fuelling Conflict: Breaking the Link Between the Illicit Transaction of Rough Diamonds and Armed Conflict as a Contribution to Prevention and Settlement of Conflicts GA Res 58/290, UN GAOR, 58th sess, 85th plen mtg, UN Doc A/RES/58/290 (14 April 2004); The Role of Diamonds in Fuelling Conflict: Breaking the Link Between the Illicit Transaction of Rough Diamonds and Armed Conflict as a Contribution to Prevention and Settlement of Conflicts GA Res 60/182, UN GAOR, 60th sess, 67th plen mtg, UN Doc A/RES/60/182 (20 December 2005); The Role of Diamonds in Fuelling Conflict: Breaking the Link Between the Illicit Transaction of Rough Diamonds and Armed Conflict as a Contribution to Prevention and Settlement of Conflicts GA Res 61/28, UN GAOR, 61st sess, 64th plen mtg, UN Doc A/RES/61/28 (4 December 2006); Report of the Kimberley Process Certification Scheme to the General Assembly pursuant to resolution 61/28, by Fernando M. Valenzuela on behalf of Kimberley Process Chair, 62nd sess, Agenda Item 13, UN Doc A/62/543 (13 November 2007); The Role of Diamonds in Fuelling Conflict: Breaking the Link Between the Illicit Transaction of Rough Diamonds and Armed Conflict as a Contribution to Prevention and Settlement of Conflicts, 62nd sess, Agenda Item 13, UN Doc A/62/L.16 (21 November 2007); The Role of Diamonds in Fuelling Conflict: Breaking the Link Between the Illicit Transaction of Rough Diamonds and Armed Conflict as a Contribution to Prevention and Settlement of Conflicts, 63rd sess, Agenda Item 11, UN Doc A/63/L.52 (5 December 2008); The Role of Diamonds in Fuelling Conflict: Statement to General Assembly, Kimberley Process Chair Nirupam Sen, 63rd sess, 67th plen mtg, Agenda Item 11, UN Doc A/63/PV.67 (11 December 2008). See also, Written Response from Australian Government to Author's Interview Questions (14 September 2007).

1176, prohibiting the direct or indirect export of unofficial Angolan diamonds.³ In 1999, the UNSC passed a resolution prohibiting trading in diamonds originating from conflict-ridden Sierra Leone.⁴

In regulatory terms, the resolutions are important examples of the standard-setting and enforcement roles of the Security Council. The legally binding nature of these resolutions means that the rulings must be complied with by all nations. The imposition of diamond trading bans represents an important mechanism for breaking the link between the illegal diamond trade and the commission of serious human rights violations.

The Security Council has engaged with the issue of conflict diamonds over a number of years, and has intervened decisively with resolutions concerning Angola, Sierra Leone, Liberia, the Democratic Republic of Congo (DRC), and Côte d'Ivoire. At these times, the Security Council has mandated trading bans with these countries concerning the rough diamond trade.⁵

The main mechanism that the Security Council has made use of in terms of monitoring has been its panel of experts. The panel of experts mechanism is important, as it provides vital on-the-ground fact-finding that can be used to assess the requirements for further international action, including the relative success of already existing mechanisms.

3 SC Res 1173, UN SCOR, 3891st mtg, S/RES/1173 (12 June 1998) (Angola); SC Res 1176, UN SCOR, 3894th mtg, UN Doc S/RES/1176 (24 June 1998). See also Interview with Global Witness Representative (telephone interview, 21 May 2007).

4 SC Res 1306, UN SCOR, 4168th mtg, S/RES/1306 (5 July 2000) (Sierra Leone).

5 SC Res 864, UN SCOR, 3277th mtg, S/RES/864 (5 June 1998) (Angola); SC Res 1127, 3814th mtg, S/RES/1127 (28 August 1997) (Angola); SC Res 1171, UN SCOR, 3889th mtg, UN Doc S/RES/1171 (5 June 1998) (Sierra Leone); SC Res 1173, UN SCOR, 3891st mtg, S/RES/1173 (12 June 1998) (Angola); SC Res 1295, UN SCOR, 4129th mtg, UN Doc S/RES/1295 (18 April 2000) (Angola); SC Res 1306, UN SCOR, 4168th mtg, S/RES/1306 (5 July 2000) (Sierra Leone); SC Res 1343, UN SCOR, 4287th mtg, S/RES/1343 (7 March, 2001) (Liberia); SC Res 1385, UN SCOR, 4442nd mtg, UN Doc S/RES/1385 (19 December 2001) (Sierra Leone); SC Res 1408, UN SCOR, 4256th mtg, UN Doc S/RES/1408 (6 May 2002) (Liberia); SC Res 1457, UN SCOR, 4691st mtg, S/RES/1457 (24 January 2003) (Democratic Republic of Congo); SC Res 1459, UN SCOR, 6494th mtg, UN Doc S/RES/1459 (28 January 2003) (Kimberley Process Certification Scheme); SC Res 1521, UN SCOR, 4890th mtg, UN Doc S/RES/1521 (22 December 2003) (Liberia); SC Res 1579, UN SCOR, 5105th mtg, UN Doc S/RES/1579 (21 December 2004) (Liberia); SC Res 1643, UN SCOR, 5327th mtg, S/RES/1643 (15 December 2005) (Côte d'Ivoire).

In reports as early as 1997, such expert panels have assessed the impact of the diamond trade in conflict zones, as well as the efficacy of diamond trade prohibitions and other economic sanctions.⁶

Since the establishment of the Kimberley Process, the Security Council has operated more closely with this new international agency. A particularly noteworthy example relates to the situation of Côte d'Ivoire. In 2006 it came to the attention of the Kimberley Process that conflict diamonds were propping up the rebel-held north of Côte d'Ivoire. Following an inspection by a KP monitoring team, the KP took action to expel Côte d'Ivoire from the KP. Shortly after, the matter was considered by the UNSC, which imposed a ban on trading in diamonds with that country.⁷ The report on developments in Côte d'Ivoire referred to under Resolution 1572 was a joint mission undertaken in April 2006.⁸

There was also close cooperation with the UN Group of Experts appointed to report on developments in Liberia under UNSC Resolution 1521. By 2007, Liberia had notably made a transition out of its situation of conflict, had held internationally recognised elections, and elected a new president, Joan Sirleaf. In March of that year, a Kimberley Process review mission led by the European Community concluded that Liberia had designed effective controls in line with KP requirements. Although there were reservations from the NGO participants that Liberia would benefit from more time to ensure its

6 Progress Report of the Secretary-General on the United Nations Observer Mission in Angola (MONUA), S/1997/640 (13 August 1997); Report of the Panel of Experts on Violations of Security Council Sanctions Against UNITA, S/2000/203 (10 March 2000); Report of the Panel of Experts Appointed Pursuant to Security Council Resolution 1306 (2000), paragraph 19, in Relation to Sierra Leone, S/2000/1195 (20 December 2000); Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo, S/2001/357 (12 April 2001); Supplementary Report of the Monitoring Mechanism on Sanctions Against UNITA, 2001/966 (12 October 2001); Final Report Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, S/2002/1146 (16 October 2002); Report of the Group of Experts Submitted Pursuant to Paragraph 7 of Security Council Resolution 1584 (2005) Concerning Côte d'Ivoire, S/2005/699 (7 November 2005); Update Report of the Group of Experts Submitted Pursuant to Paragraph 2 of Security Council Resolution 1632 (2005) Concerning Côte d'Ivoire, S/2006/204 (31 March 2006); Interim Report of the Group of Experts on the Democratic Republic of the Congo, Pursuant to Security Council Resolution 1698 (2006), S/2007/40 (31 January 2007).

7 See also Interview with Global Witness Representative (telephone interview, 21 May 2007), with the representative commenting favourably on this coordination, although she noted that the action of the Security Council should have occurred more rapidly.

8 Written Response from Australian Government to Author's Interview Questions (14 September 2007).

resilience against the return of conflict diamonds, the KP presented its findings to the UNSC. The UNSC decided to lift its diamond embargo on Liberia on 27 April 2007 and Liberia was admitted to the KP on 4 May 2007.⁹

One of the important strengths of the Security Council resolutions is the legitimating role it plays at the apex of the United Nations security system. For example, the Security Council resolutions have enhanced the support base for the Kimberley Process, with significant momentum being gained for US national implementation legislation as a result of Security Council backing. The resolutions are, to an extent, self-contained mechanisms, as national governments are legally obliged to take action to implement them, even in the absence of national implementing legislation or involvement in a scheme such as the Kimberley Process.

Security Council expert panel reports have themselves acted as a type of enforcement mechanism, in the sense of naming and shaming particular individuals and corporations who have allegedly been involved in the conflict diamonds trade. Following its 2002 report on the DRC, the expert panel engaged in a negotiated process by which corporate and individual names could be removed from the black list following evidence of significant compliance with United Nations resolutions. The expert panel also reported a number of corporations to the Organisation for Economic Co-operation and Development (OECD) under the OECD multinational code of conduct for further action. Under this code, multinationals are required to account for their conduct before a committee. The OECD process, however, has been criticised as lacking in significant punitive powers in the event that breaches are found to have occurred. One approach that wasn't apparently considered, but was open to the Security Council, was the referral of individuals, including corporate directors, for prosecution by the ICC. This contingency is discussed in more depth below.

The consciousness-raising and information-sharing role of the Security Council has continued in more recent times. On 25 June 2007 there was a thematic debate at the UNSC following a proposal by the Belgian Mission on the theme 'Natural Resources and Armed Conflict', involving amongst other themes the illicit trade in diamonds.

9 Ibid; Interview with Global Witness Representative (telephone interview, 21 May 2007).

The council adopted a presidential statement on natural resources and armed conflict that underlined the importance of taking this dimension into account, where appropriate in the mandates of UN and regional peacekeeping operations, within their capabilities.¹⁰

The Security Council stated that natural resources are a crucial factor in contributing to long-term economic growth and sustainable development, while noting that in armed conflict situations the exploitation of natural resources has played a role in the outbreak, escalation, or continuation of the conflict. The council emphasised the contribution of monitoring schemes such as the KP.¹¹

The response to the crisis in Côte d'Ivoire also illustrates the high level of coordination between the Kimberley Process and the UNSC. The Working Group on Monitoring monitored the situation regarding illicit mining in Côte d'Ivoire throughout 2005, drawing on a variety of reliable sources, and cooperated closely with the UN Panel of Experts on Côte d'Ivoire, which was convened by the Security Council. The Kimberley Process Secretariat then made a formal submission to the UN panel in June 2005, while a special envoy to the chair visited Abidjan in April 2005 to clarify Côte d'Ivoire's status in the Kimberley Process.¹² A special working group to deal with conflict diamonds from Côte d'Ivoire was established by the Kimberley Process at the 15–17 November plenary meeting.¹³ On the basis of a presentation by the working group of the evidence available regarding production in Côte d'Ivoire, the Moscow Plenary meeting of November 2005 adopted a comprehensive package of measures to tackle the outflow of conflict diamonds from Côte d'Ivoire. Implementation of these measures is proceeding under the responsibility of the chair assisted by the Working Group on Monitoring.¹⁴ Despite the rapid response of the working group to the crisis, and its cooperation as reflected in United Nations Security Council Resolution 1643 (2005), the working group

10 Written Response from Australian Government to Author's Interview Questions (14 September 2007).

11 Ibid.

12 Kimberley Process Working Group on Monitoring, *Submission for the 2006 Review of the KPCS* (Kimberley Process Secretariat, February 2006) 19–20.

13 Update Report of the Group of Experts Submitted Pursuant to Paragraph 2 of Security Council Resolution 1632 (2005) Concerning Côte d'Ivoire, UN Doc S/2006/204 (31 March 2006) 10.

14 Kimberley Process Working Group on Monitoring, *Submission for the 2006 Review of the KPCS* (Kimberley Process Secretariat, February 2006) 19–20.

recognised that the Kimberley Process's action has not by itself put an end to the illicit trade in Côte d'Ivoire conflict diamonds, and that further action is required.¹⁵

International Criminal Tribunals

Holding individuals criminally liable for particular conduct not only involves serious sanction for that person, but also sends a strong message to the international community. The liability for international crimes of those involved in industry was recognised at the Nuremberg trials of Farben, Flick, and Krupp following World War Two.¹⁶ Recently established international courts and tribunals now provide the legal mechanisms for prosecuting modern industrial crimes, with a number of current conflict diamonds cases setting important international precedents.

Internationally, the UNSC has acted as a mediator between regulatory bodies such as the Kimberley Process and international criminal processes. One option that it has exercised has been the creation of ad hoc international criminal tribunals, such as the Sierra Leone Special Court, for the prosecution of international crimes that involve a conflict diamonds dimension. The court, which is a hybrid institution jointly established by the United Nations and the Sierra Leone Government, was established to prosecute international crimes committed in the territory of Sierra Leone since 1996. Due to the conflict diamonds dimension of the Sierra Leone conflict, the special court is uniquely placed amongst the ad hoc international criminal tribunals to carry out international conflict diamonds prosecutions.¹⁷

15 Ibid 20.

16 *Trials of Nazi War Criminals before the Neurnberg Tribunals under Control Council Law No 10: Neurnberg October 1946–April 1949*, Volumes V, VI, VII, VIII, IX (United States Government Printing Office, 1952). Available at: www.mazal.org/NMT-HOME.htm. Nuremberg prosecutors give useful commentary on the trials in these works. Taylor, T, 'Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials Under Control Council Law No. 10' (William S. Hein & Co: Buffalo, 1997) 184–202; Sprecher, D A, *Inside the Nuremberg Trial: A Prosecutor's Comprehensive Account*, Vol. 1 (University Press of America, 1999) 134–137.

17 Website of the Residual Special Court for Sierra Leone. Available at: www.rscsl.org.

Sankoh, leader of the Revolutionary United Front (RUF), was arrested in 2000, and was to have been put on trial as part of the first case before the special court. Although Sankoh died before the commencement of his trial in 2004, proceedings commenced against other high-level members of the RUF, namely Issa Hassan Sesay, Morris Kallon, and Augustine Gbao.¹⁸ The Trial Chamber delivered its judgement, convicting all three, in this combined case on 2 March 2009, and the Appeals Chamber confirmed the convictions on 26 October 2009.

In June 2003, the Sierra Leone Special Court unsealed an indictment against Liberian President Charles Taylor in relation to his alleged involvement in violations of international criminal law during the Sierra Leone conflict. President Taylor subsequently resigned his office and went into hiding in Nigeria in August 2003, until being taken into custody by the Court on 29 March 2006.¹⁹ His trial, which was moved to The Hague, commenced in early 2008.²⁰ Charles Taylor was found guilty on 26 April 2012 on all 11 counts, when the Trial Chamber delivered its judgement. On 30 May 2012, the Trial Chamber delivered its sentencing judgement, sentencing Taylor to 50 years imprisonment. On 26 September 2013, Taylor's conviction and sentence were upheld by the judgment of the Appeals Chamber.²¹

Pro-government forces, most notably the so-called Civilian Defence Forces (CDF) militia, also known as the Kamajors, have also been brought to account for human rights abuses allegedly committed

18 Transcript of Proceedings, 'Opening Statement of the Prosecution', *The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao (Trial)*, (Trial Chamber I, Special Court for Sierra Leone, Case No SCSL-04-15-T, 5 July 2004); Jalloh, C C, 'The Contribution of the Special Court for Sierra Leone to the Development of International Law' (2007) 15 *RADIC* 165, 165–207. See also Schocken, C, 'The Special Court for Sierra Leone: Overview and Recommendations' (2002) 20 *Berkeley Journal of International Law* 436.

19 Brockman, J, 'Liberia: The Case for Changing UN Processes for Humanitarian Interventions' (2004) 22 *Wisconsin International Law Journal* 711, 738–739; Special Court for Sierra Leone, Office of the Prosecutor, 'Chief Prosecutor Announces the Arrival of Charles Taylor at the Special Court' (Press Release, 29 March 2006). Available at: www.rscsl.org/Documents/Press/OTP/prosecutor-032906.pdf.

20 Transcript of Proceedings, 'Evidence of Expert Witness Ian Smillie', *The Prosecutor v Charles Taylor (Trial)*, (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-03-01-PT, 7 January 2008).

21 The Special Court for Sierra Leone and the Residual Court for Sierra Leone at Freetown and The Hague, *The Prosecutor vs. Charles Gankay Taylor*. Available at: www.rscsl.org/Taylor.html.

during the war. The Trial Chamber delivered its judgement in that case on 2 August 2007, convicting all accused, and the Appeals Chamber confirmed the convictions in its judgement of 28 May 2008.²²

Another forum for international conflict diamonds prosecutions is the treaty-based permanent ICC. The ICC possesses territorial and nationality jurisdiction for states parties for crimes committed since 2002, and prosecutions in relation to such states parties may be initiated through referral by the particular state party, under Article 13(a), or by the prosecutor acting on its own initiative, under Article 13(c).²³ Along with Sierra Leone, the DRC is perhaps the most important state to have ratified the ICC statute from the perspective of conflict diamonds prosecutions. It should be noted that the court may also exercise jurisdiction over situations in states that are not parties to the statute under limited circumstances. A non-party state may give the court jurisdiction in relation to a 'crime in question', pursuant to Article 12(3), and the court may similarly exercise jurisdiction over a non-party state in the event of a referral from the UNSC, under Article 13(b). The mechanism of a non-party state giving jurisdiction to the court was utilised by Côte d'Ivoire in September 2003, when it requested that the ICC accept jurisdiction over crimes committed on its territory since the events of 19 September 2002 'for an unspecified period of time'. The grant of jurisdiction was confirmed by the Côte d'Ivoire Government in documents dated 14 December 2010 and 3 May 2011. In a decision of Pre-Trial Chamber III of the ICC dated 3 October 2011, the grant of jurisdiction was used as a foundation to approve investigations by the prosecutor into crimes allegedly

22 *The Prosecutor v Moinina Fofana and Allieu Kondewa (Trial Judgement)* (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-14-T, 2 August 2007).

23 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002).

committed by former Côte d'Ivoire President Laurent Gbagbo.²⁴ His case at the ICC was joined to that of Blé Goudé on 11 March 2015, and the trial commenced on 28 January 2016.²⁵

Human rights violations in the diamond-rich Ituri region of the DRC have already attracted the attention of the ICC, leading to indictments and the first arrests by the recently established court.²⁶ Thomas Lubanga Dyilo, the alleged leader of the military wing of the *Union des Patriotes Congolais*, was arrested on the same day as the issuance of the indictment against him on 17 March 2006, with the assistance of Congolese authorities, French armed forces, and MONUC forces. Dyilo was found guilty on 14 March 2012 of the war crimes of enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities. He was sentenced on 10 July 2012 to a total of 14 years of imprisonment. His verdict and sentences were confirmed by the ICC Appeals Chamber on 1 December 2014.²⁷

The ICC followed up its first arrest with the arrest of Germain Katanga, the alleged military leader of the *Force de Résistance Patriotique en Ituri* (FRPI), on 18 October 2007, also in relation to alleged crimes in the Ituri area. Katanga was found guilty on 7 March 2014 of one count of crime against humanity and 4 counts of war crimes committed on 24 February 2003 during the attack on the village of Bogoro (DRC).

24 Ibid; International Criminal Court, Pre-Trial Chamber III, 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire' (Pre-Trial Chamber III Decision, ICC-02/11, 3 October 2011) paras 10–15, 34–35, 212–213. Available at: www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/11-14&ln=en; Punyasena, W, 'Conflict Prevention and the International Criminal Court: Deterrence in a Changing World' (2006) 14 *Michigan State Journal of International Law* 39, 64–65; Petrova, P, 'The Implementation and Effectiveness of the Kimberley Process Certification Scheme in the United States' (2006) 40 *International Lawyer* 945, 945; Dawn News, 'Blood Diamond Fears in Ivory Coast Political Duel' (28 December 2010). Available at: www.dawn.com/2010/12/28/blood-diamond-fears-in-ivory-coast-political-duel.html; McClanahan, P, *As Ivory Coast's Gbagbo Holds Firm, 'Blood Diamonds' Flow for Export* (23 January 2011) ReliefWeb. Available at: reliefweb.int/node/381665.

25 The International Criminal Court, *The Prosecutor vs. Laurent Gbagbo and Blé Goudé*, ICC-02/11-01/15. Available at: www.icc-cpi.int/cdi/gbagbo-goude/Pages/default.aspx.

26 Fonseca, A, *Four Million Dead: The Second Congolese War, 1998-2004* (18 April 2004) 49. Available at: www.oocities.org/afonseca/CongoWar.htm.

27 International Criminal Court, 'Case Information Sheet: The Prosecutor v. Thomas Lubanga Dyilo', ICC-01/04-01/06. Available at: www.icc-cpi.int/iccdocs/PIDS/publications/LubangaENG.pdf.

He was sentenced on 23 May 2014 to a total of 12 years imprisonment. The judgement is final as parties have discontinued their appeals. Decisions on possible reparations to victims will be rendered later.²⁸

Mathieu Ngudjolo Chui, allegedly the military leader of the *Front des Nationalistes et Intégrationnistes* (FNI), was the third person arrested, on 7 February 2008, in relation to the conflict in this area. Chui was acquitted on 18 December 2012 of three counts of crimes against humanity and seven counts of war crimes. He was released from ICC custody on 21 December 2012. His acquittal was confirmed by the ICC Appeals Chamber on 27 February 2015.²⁹

Conflict Diamonds: Use as Context

Prosecutions by the international criminal justice system can take into account the significance of the conflict diamonds trade in several ways. The first is primarily contextual: control over diamond mining and diamond trading becomes a military objective within a conflict. The Sierra Leone cases have highlighted the fact that Kono, Kenema, and Kailahun districts were targeted for combat operations as a result of their being rich areas for diamond mining.³⁰ The diamond mining areas changed hands several times, between Armed Forces

28 International Criminal Court, 'Case Information Sheet: The Prosecutor v. Germain Katanga', ICC-01/04-01/07. Available at: www.icc-cpi.int/iccdocs/PIDS/publications/KatangaEng.pdf.

29 International Criminal Court, 'Case Information Sheet: The Prosecutor v. Mathieu Ngudjolo Chui', ICC-01/04-02/12. Available at: www.icc-cpi.int/iccdocs/PIDS/publications/ChuiEng.pdf. Human rights violations and ongoing conflict have also occurred in the Rwandan-influenced regions of North and South Kivu, although a recent peace deal with General Nkunda, leader of a RCD-Goma splinter group, may herald the way to greater stability. See British Broadcasting Corporation, 'Eastern Congo Peace Deal Signed' (23 January 2008). Available at: www.globalpolicy.org/security/issues/congo/2008/0123gomadeal1.htm. An arrest warrant was also issued for Bosco Ntaganda. 'Warrant of Arrest', *The Prosecutor v Bosco Ntaganda* (International Criminal Court, Case No ICC-01/04-02/06, 7 August 2006); *The Prosecutor v Bosco Ntaganda (Decision on Prosecutor's Application for Warrants of Arrest, Article 58)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-02/06, 10 February 2006).

30 *The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao (Trial Judgement)* (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-15-T, 2 March 2009) 3, 8, 10, 184, 186, 188, 239, 251, 348–349 (strategic importance of Kono diamonds fields), 355 (confiscation of diamonds from civilians); *The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao (Appeal Judgement)* (Special Court for Sierra Leone, Appeals Chamber, 29 October 2009) 4, 365–367 (regarding findings on Kailahun as a diamond mining site).

Revolutionary Council (AFRC), RUF, and CDF.³¹ Context has also been given through setting out, in both RUF and AFRC indictments, the capture of diamond-rich areas as an objective AFRC/RUF, involving the commission of international crimes as a means to achieving this objective.³²

When used contextually, the role of conflict diamonds is not articulated as criminal in itself, but rather shows the significance of the trade in exacerbating the conflict and increasing the likelihood that international crimes will be committed. Areas of economic significance may be considered legitimate military targets. International crimes only become involved when, for example, civilians are targeted as part

31 Transcript of Proceedings, *The Prosecutor v Charles Taylor (Trial)*, (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-03-01-PT, 4 June 2007) 59–60; 65; *The Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu (Trial Judgement)* (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-04-16-T, 20 June 2007) [336]; Transcript of Proceedings, ‘Opening Statement of the Prosecution’, *The Prosecutor v Moinina Fofana and Allieu Kondewa (Trial)*, (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-14-T, 3 June 2003) 10, 11, 20, 28; *The Prosecutor v Moinina Fofana and Allieu Kondewa (Trial Judgement)* (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-14-T, 2 August 2007) [374], [381], [384], [389]–[405]; *The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao (Trial Judgement)* (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-15-T, 2 March 2009) 612, 614 (concerns the rift between AFRC and RUF which occurred in April 1998).

32 ‘Corrected Amended Consolidated Indictment’, *The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (Special Court for Sierra Leone, Case No SCSL-2004-15-PT, 2 August 2006) [36]–[39], [71] cited in *The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao (Appeal Judgement)* (Special Court for Sierra Leone, Appeals Chamber, 29 October 2009) 6, 28; see also the identical wording in ‘Further Amended Consolidated Indictment’, *The Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu* (Special Court for Sierra Leone, Case No SCSL-2004-16-PT, 18 February 2005) [33] cited in *The Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu (Appeal Judgement)* (Special Court for Sierra Leone, Appeals Chamber, Case No SCSL-2004-16-A, 22 February 2008) 81. The Prosecution in the RUF Indictment sought to modify the purpose to be the ‘pillage the resources in Sierra Leone, particular diamonds [sic], and to control forcibly the population and territory of Sierra Leone’. However, this modification was rejected by the Trial Chamber in its judgment. *The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao (Trial Judgement)* (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-15-T, 2 March 2009) 115, 118, 127–128. Nevertheless, the chamber held that it did not materially prejudice the defence case. It is also apparent that the confirmation of the original formulation by the chamber did not have an adverse effect on the prosecution. The Trial Chambers’ approach was upheld on appeal. *The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao (Appeal Judgement)* (Special Court for Sierra Leone, Appeals Chamber, 29 October 2009) 35–38. The Appeals Chamber, furthermore, confirmed the Trial Chamber’s finding that a common purpose can be constituted by a non-criminal objective (i.e. diamond mining), where the intended means to achieve that objective are criminal (i.e. enslavement, terror, etc.): *The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao (Appeal Judgement)* (Special Court for Sierra Leone, Appeals Chamber, 29 October 2009) 107, see also 120–121, 127–128, 130–135.

of the military operation, when child soldiers are employed as part of the operation, or when slave labour is used to mine diamonds in the area.

The Charles Taylor case also used the trade in conflict diamonds to provide a context for the commission of international crimes. The indictment focused on six fields controlled at different times by the RUF. In Kono, there were diamond fields in Koidu, Tombudu, and Yengema. In Kenema, there were the Tongo Field, including the so-called 'Cyborg Pit'.³³ In its opening statement against Taylor, the prosecution argued that Taylor conducted his diamond transactions through Eddie Kanneh, a Sierra Leonean and former SLA officer who joined the RUF in 1998.³⁴ The statement alleged that in 2000 there were regular shipments of arms, in exchange for diamonds, from Taylor to the RUF in Sierra Leone, and Taylor's men visited the RUF-held territories and reported to Taylor on economic and military developments.³⁵ Similarly, the CDF case describes military operations to wrest control of the Tongo diamond fields from the RUF and AFRC as the context for crimes that were committed by the CDF or Kamajors at those locations.³⁶

The conflict diamonds cases before the ICC also refer to the contextual role of diamonds as military targets in the war in the DRC. The charging document for the Katanga and Ngudjolo cases refers in the background section on the 'Region of Ituri' to the significance of natural resources, including diamonds, in exacerbating the conflict in the region. It states that the desire to control Ituri's natural resources has been integral in promoting conflict in the region. The charging document states that

33 Transcript of Proceedings, *The Prosecutor v Charles Taylor (Trial)*, (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-03-01-PT, 4 June 2007) 33. See also Transcript of Proceedings, 'Opening Statement of the Prosecution', *The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao (Trial)*, (Trial Chamber I, Special Court for Sierra Leone, Case No SCSL-04-15-T, 5 July 2004) 48; *The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao (Trial Judgement)* (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-15-T, 2 March 2009) 323–324, 439–440.

34 Transcript of Proceedings, *The Prosecutor v Charles Taylor (Trial)*, (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-03-01-PT, 4 June 2007) 40, 42, 45, 49–51.

35 Ibid 51–53.

36 *The Prosecutor v Moinina Fofana and Allieu Kondewa (Trial Judgement)* (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-14-T, 2 August 2007) [375]; *The Prosecutor v Moinina Fofana and Allieu Kondewa (Appeal Judgement)* (Special Court for Sierra Leone, Appeals Chamber, Case No SCSL-04-14-A, 28 May 2008) 16, 80; *The Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu (Trial Judgement)* (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-04-16-T, 20 June 2007) [327]–[332].

the natural wealth in Ituri includes gold, diamonds, Colombo tantalite (coltan), timber and oil. Mongbwalu, located north-west of Bunia in Djugu territory, is known as an important gold mine.³⁷ In the context of the Katanga and Ngudjolo cases, the connection between the two local military forces to Ugandan and DRC governments are stated to have been political and military in nature although it is known from UN reports that the relationship also involved trading in diamonds and other natural resources.³⁸

The Lubanga arrest warrant does not directly refer to conflict diamonds other than in a contextual sense. In terms of substantive crimes, Lubanga is charged with the enlistment, conscription, and use of child soldiers in the conflict in Ituri in the north-east of the DRC. However, the diamond trade is referred to in the prosecutor's opening statement, as part of the factual context in which the child soldiers were recruited and deployed.³⁹

Conflict Diamonds: Substantive Crimes

One way in which conflict diamonds situations may accrue international criminal liability is when the mining itself involves criminal conduct. Key examples of this are when the RUF and the AFRC conducted mining operations using abducted civilians as slaves,

37 'Document Containing the Charges Pursuant to Article 61(3)(a) of the Statute', *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (International Criminal Court, Case No ICC-01/04-01/07, 21 April 2008) [1], [16], [25]–[35], [72]–[89], 31–34; International Criminal Court, 'Case Information Sheet: The Prosecutor v. Germain Katanga', ICC-01/04-01/07. Available at: www.icc-cpi.int/iccdocs/PIDS/publications/KatangaEng.pdf. See also 'Warrant of Arrest', *Ntaganda* (International Criminal Court, Case No ICC-01/04-02/06, 7 August 2006) 4, 5; (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-02/06, 10 February 2006) 12.

38 'Document Containing the Charges Pursuant to Article 61(3)(a) of the Statute', *Chui* (International Criminal Court, Case No ICC-01/04-01/07, 21 April 2008) [1], [16], [25]–[35], [72]–[89], 31–34; Final Report Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, UN Doc S/2002/1146 (16 October 2002).

39 'Warrant of Arrest', *The Prosecutor v Thomas Lubanga Dyilo* (International Criminal Court, Case No ICC-01/04-01/06, 10 February 2006) 1–5; International Criminal Court, 'Case Information Sheet: The Prosecutor v. Thomas Lubanga Dyilo', ICC-01/04-01/06. Available at: www.icc-cpi.int/iccdocs/PIDS/publications/LubangaENG.pdf; Transcript of Proceedings, 'Prosecutor's Opening Statement', *The Prosecutor v Thomas Lubanga Dyilo (Trial)*, (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 26 January 2009) 15.

with child soldiers operating as enforcers of the slave labour system.⁴⁰ Small mining communities were called zoo bushes.⁴¹ Conditions for the miners were harsh, with there often being little or no food available for their sustenance, and miners were sometimes forced to wear only their underwear in an effort by the RUF to exert authority over them.⁴² Civilians were killed or beaten at mines such as the Cyborg Pit, some because they were suspected of stealing diamonds, and others because their deaths created a climate of terror to deter escape.⁴³

A significant, if controversial, finding of the RUF Trial Chamber was that it determined that the forced labour that occurred at the Kenema district mining sites, especially the Cyborg Pit, constituted the war crime of terror whereas, by contrast, in the Kono district it was determined that, although enslavement had been made out, terror did not occur. The Trial Chamber drew a distinction between the severity of the enslavement in Kenema and Kono: whereas the former

40 'Corrected Amended Consolidated Indictment', *The Prosecutor v Issa Hassan Sesay* (Special Court for Sierra Leone, Case No SCSL-2004-15-PT, 2 August 2006) 8–22, especially [70]–[71]; *The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao (Trial Judgement)* (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-15-T, 2 March 2009) 298, 334–338 (describing the use of the 'Small Boys Unit' to kill and terrorise civilians used to forcibly mine at the Cyborg Pit mine and the Tongo Field mine. It also discusses forced mining in Kono district), 340–341, 343–344 (use of forced mining labour as 'enslavement'), 346–347 (discusses killings at pit as 'terror'), 348 (killings at Cyborg Pit not considered 'collective punishment'), 375–382, 398–399, 423, 429–430, 443 (forced mining as 'enslavement' in Kailahun District), 497–498 (use of child soldiers in Tongo Field, Kenema, to guard diamond mining operations: they committed most of the documented killings there), 511–514, 584, 635; Transcript of Proceedings, 'Opening Statement of the Prosecution', *The Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu (Trial)*, (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-2004-16-T, 7 March 2005) 24, 25, 30, 35, 36; Transcript of Proceedings, *The Prosecutor v Charles Taylor (Trial)*, (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-03-01-PT, 4 June 2007) 54, 65–67; 'Further Amended Consolidated Indictment', *The Prosecutor v Alex Tamba Brima* (Special Court for Sierra Leone, Case No SCSL-2004-16-PT, 18 February 2005) 67–68.

41 *The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao (Trial Judgement)* (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-15-T, 2 March 2009) 423.

42 Transcript of Proceedings, *The Prosecutor v Charles Taylor (Trial)*, (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-03-01-PT, 4 June 2007) 64; *The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao (Trial Judgement)* (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-15-T, 2 March 2009) 334–338, 340–341, 343–344, 346–348, 375–382, 398–399.

43 Transcript of Proceedings, *The Prosecutor v Charles Taylor (Trial)*, (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-03-01-PT, 4 June 2007) 54, 62, 65–67; 'Further Amended Consolidated Indictment', *The Prosecutor v Alex Tamba Brima* (Special Court for Sierra Leone, Case No SCSL-2004-16-PT, 18 February 2005) [67]–[68]; *The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao (Trial Judgement)* (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-15-T, 2 March 2009) 334–338, 340–341, 343–344, 346–348, 356–357, 372, 375–382, 398–399.

was characterised by severe mistreatment and killings, the latter was considered less severe. These factual findings played in the Trial Chamber's mind when it was called upon to make its legal finding as to whether the actions of the AFRC/RUF showed a specific intent to cause terror. Due to the difference in severity, the chamber found that there was no specific intent to cause terror in Kono, terror being a side-effect of the enslavement, although it was present in Kenema.⁴⁴ This distinction, however, appears a little artificial. It is recalled that what must be proved is the 'specific intent to cause terror'. When it is clear that the consequence of large-scale abduction and enslavement is the creation of terror in a civilian population, it is difficult to argue that terror was not also intended when the campaign of enslavement was implemented.

This discussion on the nature of the specific intent to cause terror is similar to the legal argument that if there is a clear objective in mind underlying a crime such as the obtaining of a military objective, then it is not possible to determine that the action was carried out with the specific intent to cause terror. This reasoning, however, was overruled by the Appeals Chamber that concluded the specific intent to cause terror can exist side-by-side with other objectives.⁴⁵

The mining of diamonds may also be considered a crime in itself if it is categorised as the plunder of the natural resources of the state concerned. Jurisprudence on the war crime of plunder and pillage articulates that it is not simply private property that might be open to being plundered, but also public or state-controlled property. Pursuant to domestic legislation, natural resources are typically considered to be owned by the state rather than being private property, subject to licensing out to individuals for commercial exploitation purposes.⁴⁶ Therefore, the ransacking of a diamond mine or unauthorised

44 *The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao (Trial Judgement)* (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-15-T, 2 March 2009) 407.

45 *Ibid* [1348]; *The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao (Appeal Judgement)* (Special Court for Sierra Leone, Appeals Chamber, 29 October 2009) 240–242, 318–319.

46 *Loi Portant Code Minier 2002* [Law Relating to the Mining Code] (The Democratic Republic of Congo) Law No 007/2002, 11 July 2002; *Da Lei dos Diamantes 1994* [The Diamond Law] (Angola) Law No 1/92, 7 October 1994; *Code Minier 1995* [Mining Code] (Côte d'Ivoire) Law No 95-553, 17 July 1995; *Mines and Minerals Act 1994* (Sierra).

exploitation of an alluvial diamond field might be considered an act of plunder against the state as well as or instead of the theft of private property.⁴⁷

An opportunity was missed to test the parameters of the war crime of pillage in the context of the work of the Sierra Leone Special Court. Unfortunately, count 14 of the indictment charged pillage of 'civilian property' in the Kono district and did not refer to the diamond resources of Sierra Leone. Even though the prosecution made submissions on this charge in its prosecution final trial brief, the chamber refused to consider them due to the lack of particularisation in the indictment.⁴⁸ At the trial level, the chamber found that this type of pillaging did not constitute an act of terrorism as it lacked, in their opinion, the specific intent to spread terror. The chamber found that, as the name of the military operation, 'Operation Pay Yourself', suggests, the AFRC/RUF rebels appropriated civilian property for their personal gain.⁴⁹ This finding, however, is open to the criticism that, although one of the objectives of Operation Pay Yourself was personal gain, it appears clear that terror is a consequence of such behaviour. Therefore, it is possible to consider that a charge of terrorism should have also been made out in relation to this behaviour.

Interestingly, the chamber had to determine whether armed conduct by child soldiers against civilians at diamond mines could be considered to be active participation in hostilities, as is required for the crime of using child soldiers. Naturally, such attacks contravene the international law prohibition on the targeting of civilians, and so a question arises whether such attacks can be included in the concept of active hostilities. Significantly, the chamber did not say that, in doing so, the civilians were legitimate military targets, but simply that there were strategic outcomes in military terms which accrued to the RUF through deploying the child soldiers in this manner.⁵⁰

47 *The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao (Trial Judgement)* (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-15-T, 2 March 2009) 399, discussion of the crime of 'pillage'. The chamber did not consider pillage in the context of looting state property. In an interesting discussion, the chamber noted the widespread nature of the looting to support it as being a 'serious violation', therefore meeting the test set out in the jurisdiction of the Special Court (as distinct from international law).

48 *Ibid* 400–401.

49 *Ibid* 408.

50 *Ibid* 511–513.

Conflict Diamonds: Indirect Liability

Another way in which conflict diamonds prosecutions can be employed is in establishing individual criminal responsibility for other international crimes. For example, Charles Taylor is alleged to have assisted the RUF by accepting diamonds in exchange for providing weapons and ammunition.⁵¹ Diamond transactions that take place in the knowledge that the transaction will assist the RUF to continue to commit international crimes connect the individual indirectly to the crimes ultimately committed by the RUF, such as the unlawful killing of civilians, causing bodily harm to civilians, the use of child soldiers, or sexual offences.⁵² A supplementary question is how far down the line it might be possible to prosecute an individual for indirectly assisting the commission of international crimes in this way.

Both the ICC statute and the statute of the Sierra Leone Special Court support the application of the recently developed doctrine of joint criminal enterprise. This doctrine has arisen from the recent jurisprudence of the Yugoslav Tribunal and the Rwanda Tribunal and is a doctrine of individual criminal responsibility that would be of great utility in pursuing a prosecution in relation to the conflict diamonds problem.⁵³ A person may be guilty by supporting a criminal project, for example through the provision of the economic resources needed to sustain the project, even if the person does not directly carry out the crime.

The international criminal law requirements for joint criminal enterprise liability were recently set out in a case before the International Criminal Tribunal for the former Yugoslavia Appeals Chamber. Regardless of the category at issue, or of the charge under consideration, a conviction requires a finding that the accused

51 Transcript of Proceedings, *The Prosecutor v Charles Taylor (Trial)*, (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-03-01-PT, 4 June 2007) 30–31, 41, 74–78. See also *The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao (Trial Judgement)* (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-15-T, 2 March 2009) 259–260, 264, 266, 595–596, regarding the RUF/AFRC trade in diamonds.

52 Transcript of Proceedings, 'Opening Statement of the Prosecution', *The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao (Trial)*, (Trial Chamber I, Special Court for Sierra Leone, Case No SCSL-04-15-T, 5 July 2004) 20–21, 25–26, 39.

53 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 25(3)(d); *The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao (Trial Judgement)* (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-15-T, 2 March 2009) [257], [1977]–[1985].

participated in a joint criminal enterprise. There are three requirements for such a finding. First is a plurality of persons. Second is the existence of a common purpose (or plan) that amounts to or involves the commission of a crime provided for in the statute. Third is the participation of the accused in this common purpose, characterised as the accused making a 'significant contribution' to the common purpose. The *mens rea* required for a finding of guilt differs according to the category of joint criminal enterprise liability under consideration. Where convictions under the first category of joint criminal enterprise are concerned, the accused must both intend the commission of the crime and intend to participate in a common plan aimed at its commission.⁵⁴

The indictments for both the RUF and AFRC cases refer to the role of the diamond trade as being a goal of the joint criminal enterprise in Sierra Leone:

The RUF ... shared a common plan ... which was to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas. The natural resources of Sierra Leone, in particular the diamonds, were to be provided to persons outside Sierra Leone in return for assistance in carrying out the joint criminal enterprise.⁵⁵

54 *The Prosecutor v Brđjanin (Appeal Judgement) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-99-36-A, 3 April 2007)* [364]–[365]. See also [227]–[228].

55 'Corrected Amended Consolidated Indictment', *The Prosecutor v Issa Hassan Sesay* (Special Court for Sierra Leone, Case No SCSL-2004-15-PT, 2 August 2006) [36]–[39], [71] cited in *The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao (Appeal Judgement)* (Special Court for Sierra Leone, Appeals Chamber, 29 October 2009) 6, 28. See also the identical wording in 'Further Amended Consolidated Indictment', *The Prosecutor v Alex Tamba Brima* (Special Court for Sierra Leone, Case No SCSL-2004-16-PT, 18 February 2005) [33] cited in *The Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu (Appeal Judgement)* (Special Court for Sierra Leone, Appeals Chamber, Case No SCSL-2004-16-A, 22 February 2008) [81]. The prosecution in the RUF indictment sought to modify the purpose to be the 'pillage the resources in Sierra Leone, particular diamonds [sic], and to control forcibly the population and territory of Sierra Leone'. However, this modification was rejected by the Trial Chamber in its judgement. *The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao (Trial Judgement)* (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-15-T, 2 March 2009) 115, 118, 127–128. Nevertheless, the chamber held that it did not materially prejudice the defence case. It is also apparent that the confirmation of the original formulation by the chamber did not have an adverse effect on the prosecution. The Trial Chambers' approach was upheld on appeal. *The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao (Appeal Judgement)* (Special Court for Sierra Leone, Appeals Chamber, 29 October 2009) 35–38. The Appeals Chamber, furthermore, confirmed the Trial Chamber's finding that a common purpose can be constituted by a non-criminal objective (i.e. diamond mining), where the intended means to achieve that objective are criminal (i.e. enslavement, terror etc.): *The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao (Appeal Judgement)* (Special Court for Sierra Leone, Appeals Chamber, 29 October 2009) 107, see also 120–121, 127–128, 130–135.

It is interesting to note that, in the AFRC case, the reference to conflict diamonds as part of the joint criminal enterprise was challenged on the grounds of being irrelevant to the crimes pleaded in the document. It was argued that the objectives of the common plan must themselves be crimes. This argument was upheld by the Trial Chamber, but the Appeals Chamber overturned it, arguing instead that, while the common plan of a joint criminal enterprise must involve the commission of international crimes, there may be other elements involved in the joint criminal enterprise that are not intrinsically criminal.⁵⁶ By contrast, the CDF indictment does not refer to diamonds, although it mentions the objective of gaining and exercising control over the territory of Sierra Leone.⁵⁷

April 1998 was a central moment in the conflict as it was the time that the coalition between the RUF and the AFRC ended. In the light of the split between the two factions, the Trial Chamber considered that this was the time that the joint criminal enterprise between the two factions ceased to exist. As a result, different modes of individual liability needed to be pleaded in relation to crimes committed after this date.⁵⁸

In the RUF case, the chamber made findings not only that the control of the diamond mining in Sierra Leone was a part of the common purpose of the joint criminal enterprise, but also that management of the diamond mining by the accused Sesay represented his significant contribution to that joint criminal enterprise. The chamber noted that Sesay planned the enslavement of civilian miners and the use of child soldiers to guard mining sites and force the miners to work at Tongo Field. It is notable that some of these indicia of 'significant contribution' relate to direct contribution to the joint criminal enterprise rather than this mode of liability representing solely an indirect mode of responsibility.

56 'Further Amended Consolidated Indictment', *The Prosecutor v Alex Tamba Brima* (Special Court for Sierra Leone, Case No SCSL-2004-16-PT, 18 February 2005) [32]–[33], [74]–[76]; *The Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu (Appeal Judgement)* (Special Court for Sierra Leone, Appeals Chamber, Case No SCSL-2004-16-A, 22 February 2008) [188].

57 'Indictment', *The Prosecutor v Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa* (Special Court for Sierra Leone, Case No SCSL-03-14-I, 5 February 2004) [19].

58 *The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao (Trial Judgement)* (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-15-T, 2 March 2009) 614–618.

In making this finding, the chamber noted that forced mining in Tongo Field provided an important source of revenue for the junta regime and that this topic was discussed in the AFRC Supreme Council meetings when Sesay was present. The sheer scale of the enslavement in Kenema district demonstrated that the forced mining was a planned and a systematic policy of the regime devised at the highest level. The chamber inferred from Sesay's membership of the Supreme Council that he was involved in the planning and organisation of the forced mining in Kenema. The chamber also found that he, along with Samuel Bockarie, received diamonds at the AFRC Secretariat originating from Tongo Field. In addition, Sesay was personally engaged in mining for his personal benefit in Tongo Field.⁵⁹

The chamber also found that Sesay was involved in mining activities in Kono district and made a significant contribution to the joint criminal enterprise activities there. He visited the mines to collect diamonds, signed off on the mining log books and transported diamonds to Bockarie and also took them to Liberia. The chamber held that Sesay, therefore, participated in the forced labour in diamond mines in Kono district between 14 February and May 1998 in order to further the common purpose.⁶⁰

The chamber also found that Kallon made a significant contribution to the joint criminal enterprise through assisting the diamond mining operations. Firstly, it found that, as a member of the AFRC Supreme Council, Kallon was involved in decision-making processes that included the orchestration of the widespread forced labour in the Kenema district. The chamber also found that Kallon used his bodyguards to force civilians to mine diamonds at Tongo Field, a practice that was prevalent among senior RUF and AFRC commanders. The chamber also found that on two occasions, Kallon was present at the mining pits in Tongo Field when Small Boys Units and other rebels shot into the pits, killing unarmed enslaved civilian miners.⁶¹

59 *The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao (Trial Judgement)* (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-15-T, 2 March 2009) 588–589, 604–605, 611.

60 *Ibid* 618–619.

61 *Ibid* 590–591, 604–605, 611. See also *The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao (Appeal Judgement)* (Special Court for Sierra Leone, Appeals Chamber, 29 October 2009) 279, 452–453, 458–459.

In relation to the Kono district, the chamber also found that Kallon made a significant contribution to the joint criminal enterprise through his activities in engaging his bodyguards to supervise on his behalf the private mining by enslaved civilians. Kallon also visited mining sites in Kono district during February/March 1998. He also received regular communications about the activities of the joint forces in Kono. As a result, the chamber found that Kallon actively participated in the joint criminal enterprise in Kono.⁶²

In relation to the period from December 1998 to January 2000, the chamber found that Bockarie appointed M S Kennedy as the Overall Mining Commander in Kono district. In 2000, it was Sesay who appointed Kennedy's replacement. The overall mining commander reported to Sesay. Throughout 1999 and 2000, Sesay visited Kono district and collected diamonds. Sesay maintained a house in Koidu Town where he received mining commanders for this purpose. He also visited the mines and ordered that civilians be captured from other districts. He arranged for transportation of the captured civilians to the mines. The chamber found that the nature and magnitude of the forced mining in Kono district required extensive planning on an ongoing basis. It was provided by the detailed administrative and archiving records maintained to compute the size, grade, origin, and value of the diamonds found. The mining system in Kono district was designed and supervised by Sesay who operated at the highest levels. His conduct was a significant contributory factor to the perpetration of enslavement, and he intended the commission of the crimes.⁶³ On appeal, these findings were challenged on the basis that the chamber relied on planning as the mode of individual criminal liability for Sesay. The Appeal Chamber found that the Trial Chamber did rely on planning, but that the legal test for planning was correctly identified as a substantial contribution rather than a significant contribution.⁶⁴

62 *The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao (Trial Judgement)* (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-15-T, 2 March 2009) 621. See also *RUF Appeal* (Special Court for Sierra Leone, Appeals Chamber, 29 October 2009) 279, 452–453, 458–459.

63 *The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao (Trial Judgement)* (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-15-T, 2 March 2009) 624. See also general conclusion regarding the JCE at 639.

64 *The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao (Appeal Judgement)* (Special Court for Sierra Leone, Appeals Chamber, 29 October 2009) 245, 248, 350–251.

An alternate mode of liability is aiding and abetting, which requires that the acts in question must be specifically directed to assist the crime and must make a substantial contribution to the commission of the crime. This mode of liability was used in a civil action taken pursuant to the US Alien Torts Claims Act, in relation to the alleged involvement of a multinational corporation in human rights abuses by government forces providing security services.⁶⁵

Neither the ICC statute nor the Special Court statute provide for the prosecution of corporations as legal persons but allow for the prosecution of individuals who may be the directors of such corporations. This is arguably a weakness in the utilisation of criminal sanctions to stop the conflict diamonds trade, although the possibility of individual prosecution is arguably a stronger deterrent for the corporate leadership. A case scenario considered in the literature was a hypothetical prosecution of De Beers for their involvement with Angolan conflict diamonds under the US Alien Torts Law. The case study found that this would be unlikely to succeed, however, based on a number of issues specific to US domestic law.⁶⁶ It is interesting to note that, in relation to the conflict situation in the Congo, the UNSC expert report highlighted poor behaviour not only by individuals but corporations as well. There remains an option for the directors of such corporations, if not the corporations themselves, to face criminal charges before the ICC.⁶⁷

Concluding Remarks

This chapter has considered the organisations above and beyond the Kimberley Process that make a significant contribution to the conflict diamonds governance system. While the United Nations General Assembly provides important political support and lends legitimacy to the KP, it is perhaps the UNSC that is more central to its operation. The UNSC was alert to the issue of conflict diamonds before the KP was established and, in some respects, acted as the midwife to the KP

65 *Doe I v Unocal Corp*, 248 F 3d 915, (9th Cir, 2001).

66 Saunders, L, 'Note: Rich and Rare are the Gems they War: Holding De Beers Accountable for Trading Conflict Diamonds' (2001) 24 *Fordham International Law Journal* 1402.

67 Final Report Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, UN Doc S/2002/1146 (16 October 2002).

through its resolutions. The UNSC has lent significant resources to the task of monitoring through its expert committees on the various African conflict situations, as well as enforcement, in particular, through the imposition of diamond trading embargoes. The ultimate ratchet in the international pyramid of sanctions is a prosecution before an international criminal tribunal. This ratchet has been applied in the four cases heard by the Special Court for Sierra Leone, as well as preliminary proceedings in a number of cases before the ICC. Conflict diamonds have been referred to so as to provide the context in which crimes were committed (diamond areas as military targets), as an integral part of the direct commission of crimes (such as the use of child soldiers to enforce diamond mining) and so as to prove indirect liability for the commission of crimes by others (diamond sales to purchase weapons used to commit crimes).

The UNSC and the ICC can be viewed as part of a single conflict diamonds governance system that reinforces the activities of the Kimberley Process. A conflict diamond is conceptualised with reference to the connection between the mining of the stone and grave human rights abuses amounting to international crimes. As such, conflict diamonds inherently attract the jurisdiction of international criminal tribunals. This represents a big stick that, according to pyramid theory, reinforces ability of the Kimberley Process to operate through less coercive means such as negotiation or informal naming and shaming.

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