



INSTITUTE FOR ENVIRONMENTAL SECURITY

Criminal jurisdiction in the Netherlands
over trade in natural
resources originating
from conflict zones

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October 2008

**CRIMINAL JURISDICTION IN
THE NETHERLANDS OVER TRADE IN
NATURAL RESOURCES ORIGINATING
FROM CONFLICT ZONES**

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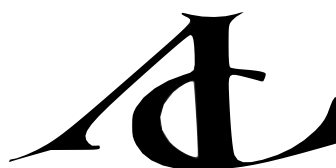
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EXECUTIVE SUMMARY

This Report has been commissioned by Bronkhorst International Law Services (BILS). The aim of the Report is to explore existing and potential possibilities of how the Netherlands can prosecute persons who engage in trade with rebel groups in natural resources originating from conflict zones, under both international and domestic law.

There is no customary rule of international law or international convention that specifically addresses the issue of criminalization and prosecution of trade with rebel groups in natural resources emanating from conflict zones. However, treaties have been concluded that aim to regulate trade in natural resources, including regional African treaties, the Convention on International Trade in Endangered Species, and certain natural resources as commodities (for example, the International Tropical Timber Agreement, 1994 and the International Cocoa Agreement, 2001). Even more treaties have been concluded that oblige States Parties to criminalize certain behavior of private persons, including the fields of illicit transfer of cultural property, arms, people and drug trafficking, corruption, organized crime, and terrorism. These treaties are referred to in order to examine how international law approaches the issue of criminalization of certain conduct.

Looking beyond international treaties, United Nations (“UN”) sanctions have been used in the past to regulate the trade of goods originating from conflict zones, including natural resources (namely diamonds and timber), where a particular situation has threatened the maintenance of international peace and security. Such sanctions may be imposed by the Security Council pursuant to its powers under Article 41 of the Charter of the United Nations or they may form recommendations by the Security Council under Articles 39 or 36 of the UN Charter. It is well accepted that sanctions imposed under Article 41 are binding upon UN Member States by virtue of Article 25 in conjunction with Article 103 of the UN Charter. There is some support for the view that Security Council-recommended sanctions are also binding. Sanctions may also be recommended by the General Assembly; however, these are non-binding in nature. To date, sanctions in relation to trade in natural resources have only been imposed in relation to specific conflict situations.

The 27 European Union (“EU”) Member States use the framework of the Common and Foreign Security Policy (“CFSP”) when implementing UN Security Council resolutions. Under the CFSP, sanctions or restrictive measures may, however, also be imposed on an autonomous basis. If the EU does decide to put in place legislation on the subject of natural resources, the Member States are under an obligation to implement such measures. While the European Commission is responsible for the



ensuring that EU law is not infringed, it is ultimately the ECJ that decides on the matter of infringement and substantial fines can be given if such is found.

Several international legal instruments may be referred to in order to examine how trade in natural resources from conflict zones is or can be dealt with. The Kimberley Process Certification Scheme (KPCS) is a legally non-binding initiative between diamond importing and exporting States, non-governmental organizations, and the international diamond industry. It calls on States Parties to control the trade in rough diamonds through a certification scheme as a means of curtailing the trade in “blood diamonds.” The KPCS has had much effect; indeed, within the European Community, the KPCS has been implemented by means of Council Regulation). Still, its voluntary nature remains an obstacle.

The most important EU initiative concerning the preservation of natural resources, the European Union Action Plan for Forest Law Enforcement, Governance and Trade (FLEGT), deals with issues such as illegal logging and trade in illegally produced timber. Voluntary partnership agreements with partner countries are concluded through the Licensing Regulation to establish a licensing scheme, whereby timber products from those countries are licensed before they are allowed to be freely released onto the Common Market. The FLEGT licensing scheme is, however, only enforceable against those timber-producing countries that have voluntarily agreed to be bound through partnership agreements, and it can therefore not be enforced against all timber-producing countries. This means that timber-producing countries refusing to enter into voluntary partnership agreements are still free to trade with the EU. Furthermore, the voluntary partnership agreements only cover direct importation from partner countries, which enables the circumvention of the licensing scheme through “timber laundering.”

In regards to prosecution of trade in natural resources from conflict zones on the basis of domestic law, the Dutch Penal Code (“DPC”) does not criminalize the trade in resources deriving from conflict zones as a crime *per se*. More general provisions might nevertheless be employed in order to bring the traffickers of such commodities to justice.

There is a good chance that the resources in question belong (partially) to another and that they are extracted with the intent to unlawfully take possession of them; and this would amount to the crime of theft (Article 311 DPC). Whether there is an actual act of theft will, however, depend on the national legislation and permit system of that particular territory, as Dutch criminal law does not contain any specific provisions on illegal extraction of resources abroad.



Fencing, i.e. the handling of illegally obtained goods (Articles 416-417bis DPC), can be an alternative basis for prosecution in case individuals or corporations buy, transfer, or acquire natural resources that have been illicitly obtained in the country of origin, through theft or another crime, while that entity (a) was aware of/should have known that the resources were obtained through the commission of a crime, or (b) while acting in pursuit of economic benefit later learns of the resources' criminal origin, but refuses to give it up.

Laundering (Article 420bis-420quinquies DPC) might be a good replacement for handling of illegally obtained goods in case the natural resources were extracted and handled by the same actor; as the launderer can, unlike a fencer, be the perpetrator of the original crime (theft, slavery etc.) through which the natural resources were illegally obtained.

In case an entity is not directly involved as perpetrator in the commission of one of the crimes mentioned above, the provision concerning complicity (Article 48 DPC) enables the possibility to hold it accountable for aiding and abetting such crimes. A corporation may, for instance, be accountable as an accessory in the theft of natural resources if it provides the thief with the necessary tools to extract the resources in order to economically benefit from them.

In light of the lack of specific measures aimed at criminalizing the trade at issue, the Report proposes a provision that obligates States to criminalize trade with rebel groups in natural resources originating in conflict zones and traded in contravention with the laws of the country or countries involved in the conflict.

There are several instruments in which such a provision could be inserted. One possibility is a general Security Council resolution under Chapter VII of the UN Charter imposing an obligation on States to criminalize trade with rebel groups in natural resources originating from conflict zones. Such resolution would be binding upon all UN Member States and would sidestep the lengthy and arduous process of treaty drafting and ratification, which can render some treaties ineffective. This solution would be contingent upon the Security Council determining that such trade in natural resources is a threat to the maintenance of international peace and security pursuant to Article 39 of the UN Charter, and upon there being enough political will among the five permanent Council Members to pass such a resolution.

An alternative solution would be to place the provision in a resolution under Chapter VI of the UN Charter, which allows the Security Council to make recommendations in relation to disputes that are



capable of threatening international peace and security. The main issue in relation to this proposal is the debate over whether such recommendations are binding on UN Member States.

The incorporation of the proposed provision into a treaty would encompass all situations at hand and not only those dealt with by the Security Council. The obstacle in this respect concerns ratification of the treaty, which often is a lengthy process and might be blocked in certain countries due to political issues.

Measures adopted within the European Union/Community framework would generally be of a binding nature and the enforcement thereof could be seen to by the Commission and the ECJ. Such an approach would, however, only bind EU Member States and leave the trade of a large number of States unrestricted.



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1. INTRODUCTION

1.1. BACKGROUND TO THE REPORT

This Report has been requested by Bronkhorst International Law Services (BILS), and it will be used by the Institute of Environmental Security (IES) as part of their Pathfinder Initiative on Combating Illegal Trade in Natural Resources. Mr. Bronkhorst serves as Coordinator of this Initiative. Specifically, the Amsterdam International Law Clinic has been asked to provide a report exploring various existing and future possibilities for how the Netherlands can prosecute those who engage in trade in natural resources originating from conflict zones, under both international and domestic law.

Natural resources such as diamonds, timber, coltan, and other minerals are often extracted from developing countries by rebel groups; and the resources are subsequently exported to developed countries as private goods.¹ There is evidence that the presence of valuable natural resources increases the likelihood of armed conflict;² and it is widely acknowledged that the sale of these natural resources is often used to fund and prolong armed conflicts.³ Once sold, these natural resources regularly enter developed countries, including the Netherlands, as a final destination or a transit point, whereupon they are sold and used as if they were legitimately obtained goods.⁴

Given that the countries of origin are often unable to exercise effective control over the illicit extraction and trade in resources on their territory, the IES has advocated that developed importing or transit countries take steps to block access to their national markets by criminalizing trade in resources that originate from conflict zones and that are illicitly extracted and sold. It is hoped that the prevention of access to the external market will diminish the money flow which fuels armed conflicts. It is expected that without the ability to export the illicitly obtained resources to external markets, the most important money flows that underlie or fund the continuation of armed conflict will soon dry up.⁵

1.2. ORGANIZATION OF THE REPORT

Section 2 gives an overview of current treaties and international and European measures that are relevant to trade in natural resources from conflict zones. As a comparative tool, it also examines

¹ Institute for Environmental Security (IES), *Project on New Legal Mechanisms for Combating Illegal Trade in Natural Resources: Alternative Jurisdiction for the Protection of Natural Resources* (September 2006) (document provided to authors by the Institute for Environmental Security); Global Witness, *The Sinews of War: Eliminating the Trade in Conflict Resource*, at 2, available at <http://www.globalpolicy.org/security/natres/generaldebate/2006/sinews.pdf> (last visited Aug. 14, 2008).

² Global Witness, *supra* fn. 1, at 2.

³ *Id.*

⁴ IES, *supra* fn. 1.

⁵ Global Witness, *supra* fn. 1, at 4.



treaties that call for States to criminalize other conduct. Section 3 provides information on domestic Dutch criminal provisions that may be applied to prosecute persons or corporations who engage in such trade. In light of the unsatisfactory existing international and domestic provisions, Section 4 proposes a provision that calls upon States to criminalize trade with rebel groups in natural resources originating from conflict zones and that have been obtained in contravention with the laws of the country of origin. It also proposes alternative ways in which this provision can be adopted. Finally, Section 5 offers our concluding remarks.

1.3. LIMITATIONS OF THE REPORT

The Report does not attempt to cover the whole issue of trade in natural resources and conflict. It focuses solely on how international law and Dutch criminal law can be used to establish as a criminal offence the conduct of a person or corporation who engages in trade in natural resources with rebel groups in a conflict zone, where those natural resources have been obtained in contravention with the laws of the country or countries involved in the conflict. The limit of the Report to trade with rebel groups, as opposed to governments, is at the request of BILS.

Furthermore, while this Report deals with trade in natural resources, it does not discuss how World Trade Organization rules may affect criminalization or prosecution of persons who engage in trade. It is suggested that further research is undertaken into this topic.



2. CURRENT REGULATION OF TRADE IN NATURAL RESOURCES FROM CONFLICT ZONES UNDER INTERNATIONAL LAW AND EUROPEAN COMMUNITY/UNION LAW

In this Section, we discuss the ways in which international and European Community/Union law currently address the problem of trade with rebel groups in natural resources originating from conflict zones.

2.1. INTERNATIONAL LAW

This Section sets out how international law currently addresses (or fails to address) the issue of criminalizing trade in natural resources from conflict zones by looking at customary international law, if any, and treaties in relation to trade of certain natural resources, treaties which oblige States to criminalize certain conduct (of private parties), and United Nations sanctions in relation to trade. Implementation of international law obligations in the Netherlands is also discussed.

2.1.1. Customary International Law and Relevant Treaties

There is no customary rule of international law that addresses the issue of criminalizing trade with rebel groups in natural resources that emanate from conflict zones. The only relevant rule of customary international law is that a State has sovereignty over all of its natural resources.⁶

There is also no international convention that specifically deals with the issue. Treaties do exist, however, that aim to regulate trade of certain types of natural resources. Furthermore, several treaties, while not dealing with trade in natural resources, oblige States to criminalize certain conduct. These treaties offer some insight into how international law approaches the issue of criminalization.

2.1.1.1. Treaties Relating to Trade in Natural Resources

Currently, treaties exist which regulate trade in specific types of natural resources, although not specifically those originating from conflict zones (i.e. irrespective of the context wherein such trade takes place), either as resources that are perceived to be in need of specific protection or as commodities. The major conventions in relation to natural resource trade are discussed below.

⁶ This right is set out in the United Nations General Assembly Resolution on Permanent Sovereignty over Natural Resources UNGA Res 1803 (1962) GAOR 17th Session Supp 17 and General Assembly Resolution on the Charter of Economic Rights and Duties of States UNGA Res 3281 (1974) GAOR 29th Session Supp 31, art. 2(1). It is generally accepted that this right forms part of customary international law. See D.J. HARRIS, *CASES AND MATERIALS ON INTERNATIONAL LAW* 578 (2004).



2.1.1.1.1. Convention on International Trade in Endangered Species of Wild Fauna and Flora

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”)⁷ seeks to regulate the trade of endangered or threatened species through strict requirements, namely by requiring that all trade (defined as “export, re-export, import and introduction from the sea”)⁸ in specific protected species (set out in Appendices I-III of CITES) is subject to import and export permits issued by designated authorities in States Parties.⁹ Article VIII calls upon States Parties to penalize trade in endangered or protected species that is in violation of the provisions of CITES. CITES has been utilized to first ban, and now strictly regulate, the trade in ivory from African and Asian elephants.¹⁰

2.1.1.1.2. African Convention on the Conservation of Nature and Natural Resources

The African Convention on the Conservation of Nature and Natural Resources (“African Convention”)¹¹ defines natural resources as “renewable resources, that is soil, water, flora and fauna.”¹² Apart from aiming to ensure the conservation of the environment and natural resources in general, the African Convention calls upon States Parties to regulate trade in flora and fauna, by making export of flora and fauna specimens illegal unless an authorization has been granted that the specimens were obtained legally.¹³

2.1.1.1.3. Lusaka Agreement on Co-operative Enforcement Operations Directed at Illegal Trade in Wild Fauna and Flora

The Lusaka Agreement on Co-operative Enforcement Operations Directed at Illegal Trade in Wild Fauna and Flora (“Lusaka Agreement”)¹⁴ is a regional African Agreement designed to combat illegal

⁷ Convention on International Trade in Endangered Species of Wild Fauna and Flora (adopted March 3, 1973, entered into force July 1, 1975) 993 UNTS 243 (“CITES”). The Netherlands ratified CITES on April 19, 1984 and the Convention entered into force for the Netherlands on July 18, 1984. There are currently 172 States Parties to CITES. See CITES, *List of Member Countries*, available at <http://www.cites.org/eng/disc/parties/index.shtml> (last visited Oct. 24, 2008).

⁸ CITES, *supra* fn. 7, art. I(c).

⁹ See *id.*, ats. III-V.

¹⁰ CITES, *Ivory Sales Get the Go-Ahead* (press release, June 2, 2007), available at http://www.cites.org/eng/news/press/2007/070602_ivory.shtml (last visited Oct. 24, 2008).

¹¹ African Convention on the Conservation of Nature and Natural Resources (adopted Sept. 15, 1968, entered into force June 16, 1969) 1001 UNTS 4 (“African Convention”). Currently, there are 30 States Parties to this Convention. See African Union, *List of Countries Which Have Signed, Ratified/Acceded to the African Convention on the Conservation of Nature and Natural Resources*, available at <http://www.african-union.org/root/au/Documents/Treaties/List/African Convention on nature and natural resources.pdf> (last visited Oct. 24, 2008).

¹² *Id.*, art.III(a).

¹³ *Id.*, art. IX.

¹⁴ Lusaka Agreement on Co-operative Enforcement Operations Directed at Illegal Trade in Wild Fauna and Flora (adopted Sept. 8, 1994, entered into force Dec. 10, 1996) 1950 UNTS 35 (“Lusaka Agreement”). There are currently 7 States Parties to the Lusaka Agreement. See United Nations, *Multilateral Treaties Deposited with the*



trade (defined as “any cross-border transaction, or any action in furtherance thereof, in violation of national laws of a [State Party] for the protection of wild fauna and flora”)¹⁵ of wild animal and plant species. Article 4 of the Lusaka Agreement obliges States Parties to, either individually or jointly, take “appropriate measures” in accordance with the Lusaka Agreement, and to investigate and prosecute illegal trade in wildlife.¹⁶ In order to assist in the fulfillment of this obligation, the Lusaka Agreement establishes a Task Force, with a wide range of powers, to facilitate cooperation between States Parties and to assist in the investigation of illegal trade.¹⁷

2.1.1.1.4. Protocol Against the Illegal Exploitation of Natural Resources

The Protocol Against the Illegal Exploitation of Natural Resources¹⁸ is an instrument prepared by the International Conference of the Great Lakes Region, and whose objective is to establish a regional framework for promoting peace, security, and stability in the region.¹⁹ The Pact on Security, Stability and Development in the Great Lakes Region,²⁰ imposing legally binding obligations on the Parties to the International Conference of the Great Lakes Region,²¹ states that Member States agree to act in accordance with the commitments set out in the Protocol Against the Illegal Exploitation of Natural Resources.²²

The Protocol is far-reaching and obliges States to ensure that all acts of illegal exploitation (defined as “any exploration, development, acquisition, and disposition of natural resources that is contrary to law, custom, practice, or principle of permanent sovereignty over natural resources, as well as the

Secretary-General, available at

<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXVII/treaty42.asp> (last visited Oct. 24, 2008).

¹⁵ Lusaka Agreement, *supra* fn. 14, art. 1.

¹⁶ *Id.*, art. 4.

¹⁷ *Id.*, art. 5.

¹⁸ Protocol Against the Illegal Exploitation of Natural Resources, adopted Nov. 30, 2006 at the International Conference on the Great Lakes Region, *available at*

http://www.icglr.org/common/docs/docs_repository/protocolienr.pdf (last visited Oct. 24, 2008). The Protocol

has 11 States Parties (Angola, Burundi, Central African Republic, Democratic Republic of Congo, Kenya, Republic of Congo, Rwanda, Sudan, Tanzania, Uganda and Zambia) being those States that are members of the International Conference on the Great Lakes Region and parties to the Pact on Security, Stability and

Development in the Great Lakes Region. *See* C. Beyani, *Introductory Note on the Pact on Security, Stability and Development in the Great Lakes Region*, LSE RESEARCH ONLINE, at 1-2, *available at*

<http://eprints.lse.ac.uk/2429/01/BeyaniPDF.pdf> (last visited Oct. 24, 2008).

¹⁹ *See* International Conference on the Great Lakes Region, About the Conference, *available at*

http://www.icglr.org/F_END/about.asp (last visited Oct. 24, 2008).

²⁰ Pact on Security, Stability and Development in the Great Lakes Region, adopted Dec. 15, 2006, *available at* http://www.icglr.org/common/docs/docs_repository/pactsecuritystabilitydevelopment.pdf (last visited Oct. 24, 2008).

²¹ C. Beyani, *supra* fn. 18, at 1.

²² Pact on Security, Stability and Development in the Great Lakes Region, *supra* fn. 20, art. 9.



provisions of this Protocol”²³ of natural resources are offences under its criminal law.²⁴ The Protocol lists examples of acts that should be criminalized, including concluding an agreement to exploit natural resources in violation of a State’s legal and/or regulatory procedures, or exploitation of resources where no agreement has been made.²⁵ Natural resources are defined as “substances provided by nature that are useful to human beings and have an economic value, found in any of the States of the Great Lakes Region.”²⁶

Article 13 further calls upon Member States to criminalize the following conduct;

- (a) The conversion or transfer of property, with knowledge that such property was obtained from the proceeds of natural resources that have been exploited illegally, or concealing or disguising the illegal origin of the property concerned, or helping any person who is involved in the illegal exploitation of natural resources to evade the legal consequences of his or her acts;
- (b) The concealment or conspiracy to conceal or disguise the true nature, source, location, disposition, movement or ownership of the property in question, with knowledge that such property was obtained from, or with, the proceeds gained from the illegal exploitation of natural resources;
- (c) The acquisition, possession or use of property by a person who knows or knew, at the time of receipt, possession or use of such property, that it was obtained from, or with, the proceeds gained from the illegal exploitation of natural resources.²⁷

Article 15 calls upon Member States to impose effective sanctions for offences relating to the illegal exploitation of natural resources, including against corporate entities.²⁸

2.1.1.1.5. Treaties in Relation to Natural Resources as Commodities

Treaties exist which regulate the trade of natural resources as commodities, such as the International Tropical Timber Agreement, 1994 (“ITTA”)²⁹ and the International Cocoa Agreement, 2001.³⁰ Among

²³ Protocol Against the Illegal Exploitation of Natural Resources, *supra* fn. 18, art. 1.

²⁴ *Id.*, art. 12.

²⁵ *Id.*

²⁶ *Id.*, art. 1.

²⁷ *Id.*, art. 13.

²⁸ *Id.*, art. 15.

²⁹ International Tropical Timber Agreement, 1994 (adopted Jan. 26, 1994, entered into force Jan. 1, 1997) 1955 UNTS 81 (“ITTA”). There are currently 61 States Parties to this treaty. The Netherlands signed the International Tropical Timber Agreement on July 5, 1995, but has not yet ratified. See United Nations, Multilateral Treaties Deposited with the Secretary-General: International Tropical Timber Agreement, 1994, *available at* <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXIX/treaty75.asp> (Apr. 8, 2008). A new agreement (International Tropical Timber Agreement, 2006) was adopted on Jan. 27, 2007, but it has not yet



other objectives, the ITTA aims to promote expansion of international trade in timber from sustainable sources.³¹ It strives to achieve this objective through policies and projects aimed at promoting sustainable forest management and conservation that are developed by the International Tropical Timber Organization, an intergovernmental organization established by the ITTA.³² The ITTA's focus is thus on sustainable development of forests in the country of origin; it does not deal with criminalization of conduct in contravention of the ITTA's objectives.

Similarly, the International Cocoa Agreement, 2001 aims to promote international cooperation in the world cocoa economy, including through promotion of a sustainable cocoa economy.³³

2.1.1.2. Treaties Prohibiting Trade or Trafficking in Other Objects

Regard can further be had to treaty regimes that aim to prohibit trade or trafficking in objects other than natural resources, in order to obtain a sense of how States approach these issues.

2.1.1.2.1. Cultural Property

The Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property³⁴ seeks to prohibit the illicit trade in cultural property by calling upon States Parties to introduce a certificate of authorization for export of "cultural property," as that term is defined in the Convention.³⁵ States Parties are also obliged to undertake "necessary measures," which are undefined, to prevent the importation of illegally exported cultural property into their territory.

come into force. See United Nations, Multilateral Treaties Deposited with the Secretary-General: International Tropical Timber Agreement, 2006, *available at*

<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXIX/treaty87.asp> (March 1, 2008).

³⁰ International Cocoa Agreement, 2001 (adopted March 2, 2001, entered into force Oct. 1, 2003) UN Doc TD/COCOA.9/7. There are currently 17 Parties to the International Cocoa Agreement, 2001 comprising both exporting and importing countries (including the European Community and therefore the Netherlands). See United Nations, Multilateral Treaties Deposited with the Secretary-General: International Cocoa Agreement, 2001, *available at* <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXIX/treaty85.asp> (last visited Oct. 24, 2008).

³¹ ITTA, *supra* fn. 29, art. 1(e).

³² "International Tropical Timber Organization, About ITTO, *available at* <http://www.itto.or.jp/live/PageDisplayHandler?pageId=225> (last visited Oct. 24, 2008).

³³ International Cocoa Agreement, *supra* fn. 30, art. 1.

³⁴ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (adopted Nov. 14, 1970, entry into force Apr. 24, 1972) 823 UNTS 232. As of Oct. 3, 2003, there were 103 States Parties to this Convention. The Netherlands is not a Party. See UNESCO, *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property: Ratifiers*, *available at* http://www.unesco.org/culture/laws/1970/html_eng/page3.shtml (last visited Oct. 24, 2008).

³⁵ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, *supra* fn. 24, art. 6.



States Parties are to further undertake to impose “penalties and administrative sanctions” against individuals who export or import cultural property in violation of the Convention.³⁶

2.1.1.2.2. *Narcotics*

The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (“Narcotic Drugs Convention”)³⁷ imposes detailed obligations on States Parties to establish criminal offences in relation to drug trafficking. It calls upon States Parties to establish offences under their respective domestic laws criminalizing, among other activities, the sale, transport, or importation of narcotics and other substances, when those acts are done intentionally.³⁸ States Parties are obliged to take measures to establish their jurisdiction over such offences when the offence is committed in its territory or on board a vessel flying that State’s flag or aircraft registered in that State,³⁹ and they *may* establish jurisdiction over offences when they are committed by a national or resident of the State Party,⁴⁰ or when the offence is committed outside its territory with a view to the commission, within the State’s territory, of a further offence set out in the Convention.⁴¹

The Narcotic Drugs Convention also includes detailed provisions on the types of sanctions that States Parties must impose for offences that they are obliged to criminalize under the Convention, including imprisonment, pecuniary sanctions, and confiscation of goods,⁴² as well as other measures such as rehabilitation, which take into account the specific circumstances of individuals who may participate in the drug trade.

2.1.1.2.3. *Arms Trafficking*

The Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime⁴³ obliges States Parties to establish criminal offences relating to the illicit

³⁶ *Id.*, art. 8.

³⁷ United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (adopted 20 December 1988, entered into force Nov. 11, 1990) UN Doc E/CONF.82/15, Corr.1 and Corr.2 (“Narcotic Drugs Convention”). There are 183 States Parties to the Convention. See United Nations, *Multilateral Treaties Deposited with the Secretary-General: United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, available at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterVI/treaty25.asp> (last visited Oct. 24, 2008).

³⁸ Narcotic Drugs Convention, *supra* fn. 37, art. 3(1).

³⁹ *Id.*, art. 4(2)(a).

⁴⁰ *Id.*, art. 4(2)(b)(i).

⁴¹ *Id.*, art. 4(2)(b)(iii).

⁴² *Id.*, art. 3(4)(a).

⁴³ The Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime (adopted



manufacturing or trafficking of firearms, when such conduct is committed intentionally.⁴⁴ It also calls for States Parties to establish effective systems of export and import licensing and authorization.⁴⁵

2.1.1.3. Treaties Obliging States to Criminalize Other Behavior

Several multilateral treaties oblige States Parties to take steps to criminalize certain behavior. While these conventions do not relate to trade in natural resources, they are useful models of how treaties oblige States to criminalize certain behavior.

2.1.1.3.1. Organized Crime

The United Nations Convention Against Transnational Organized Crime⁴⁶ calls upon States Parties to adopt measures establishing criminal offences for certain conduct when committed intentionally, namely participating in an organized criminal group,⁴⁷ laundering the proceeds of crime,⁴⁸ and corruption.⁴⁹ States Parties are required to adopt measures exercising jurisdiction over the established offences when they are committed in their territory or on board a vessel flying their flag or aircraft registered under their laws.⁵⁰ States Parties may, but are not obliged to, adopt measures to enable the exercise of their jurisdiction when the offences have been committed by one of their nationals or habitual residents, or when one of the established offences is committed outside a State Party's territory with a view to the commission of a further offence within the State Party's territory.⁵¹

States Parties must also establish appropriate sanctions that take into account the gravity of the crimes,⁵² and they must adopt measures to enable confiscation of proceeds of crimes.⁵³

May 31, 2001, entered into force July 3, 2005) UNGA Res 255 (31 May 2001) UN Doc A/RES/55/255. There are currently 67 States Parties to this Protocol. See United Nations, *Multilateral Treaties Deposited with the Secretary-General: Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime*, available at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty16.asp> (last visited Oct. 24, 2008).

⁴⁴ *Id.*, art. 5(1).

⁴⁵ *Id.*, art. 10.

⁴⁶ United Nations Convention Against Transnational Organized Crime (adopted 15 November 2000, entry into force 29 September 2003) UNGA Res 25 (15 November 2000) UN Doc A/RES/55/25. Currently, there are 138 States Parties to this Treaty. See United Nations, *Multilateral Treaties Deposited with the Secretary-General: United Nations Convention Against Transnational Organized Crime*, available at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty13.asp> (last visited Oct. 24, 2008).

⁴⁷ *Id.*, art. 5.

⁴⁸ *Id.*, art. 6.

⁴⁹ *Id.*, art. 8.

⁵⁰ *Id.*, art. 15(1).

⁵¹ *Id.*, art. 15(2).

⁵² *Id.*, art. 11.

⁵³ *Id.*, art. 12.



2.1.1.3.2. *Trafficking of Persons*

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime⁵⁴ calls upon States Parties to establish offences criminalizing conduct defined in the Protocol as trafficking in persons, when that conduct is committed intentionally.⁵⁵

2.1.1.3.3. *Corruption*

The United Nations Convention Against Corruption⁵⁶ requires States Parties to establish criminal offences for various acts of corruption set out in Chapter III of that Convention, when committed intentionally,⁵⁷ and to adopt appropriate sanctions⁵⁸ and methods for seizure of proceeds of crime.⁵⁹ Jurisdiction shall be exercised by States Parties under the Convention when the established offences are committed in a State Party's territory or on its vessel or aircraft,⁶⁰ and it *may* be exercised where the offence is committed by or against a State Party's national, when an established offence is committed outside the State Party's territory with a view to a further offence being committed within the State Party's territory, or when the offence is committed against the State Party itself.⁶¹

2.1.1.3.4. *Terrorism*

Two conventions regarding offences relating to terrorism are instructive for the purposes of the Report. The International Convention for the Suppression of the Financing of Terrorism⁶² states, *inter*

⁵⁴ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted Nov. 15, 2000, entered into force Dec. 25, 2003) UN Doc A/55/383. The Protocol has 116 States Parties. *See* United Nations, *Multilateral Treaties Deposited with the Secretary-General: Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, available at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty14.asp> (last visited Oct. 24, 2008).

⁵⁵ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime *supra* fn. 54, art. 5.

⁵⁶ United Nations Convention Against Corruption (adopted Oct. 31, 2003, entered into force Dec. 14, 2005) UN Doc A/58/422 ("Convention Against Corruption"). There are currently 104 Parties to the Convention. *See* United Nations, *Multilateral Treaties Deposited with the Secretary-General: United Nations Convention Against Corruption*, available at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty18.asp> (last visited Oct. 24, 2008).

⁵⁷ *Id.*, arts 15-25.

⁵⁸ *Id.*, art. 30.

⁵⁹ *Id.*, art. 31.

⁶⁰ *Id.*, art. 42(1).

⁶¹ *Id.*, art. 42(2).

⁶² International Convention for the Suppression of the Financing of Terrorism (adopted Dec. 9, 1999, entered into force Apr. 10, 2002) UNGA Res 54/109 (Dec. 9, 1999) UN Doc A/RES/54/109. There are currently 160 Parties to the Convention. *See* United Nations, *Multilateral Treaties Deposited with the Secretary-General: International Convention for the Suppression of the Financing of Terrorism*, available at



alia, that a person commits an offence if s/he willfully provide or collect funds with the intention or knowledge that those funds will be used in order to carry out terrorist acts.⁶³ States Parties undertake to adopt measures establishing the above and other offences as criminal offences under their domestic law.⁶⁴ Jurisdiction must be established over offences where they have been committed in the State Party's territory, on board its vessel or aircraft, or by its national.⁶⁵

The International Convention for the Suppression of Acts of Nuclear Terrorism⁶⁶ calls for the establishment of criminal offences by its States Parties in relation to conduct that the Convention itself defines as an offence if it is committed unlawfully and intentionally.⁶⁷ States Parties are obliged to exercise jurisdiction over the offences when they are committed in a State Party's territory, on its vessel or aircraft or by a national.⁶⁸ Jurisdiction may also be established when, among other circumstances, the offence is committed against a State Party national.⁶⁹

2.1.1.4. Effectiveness of Treaty Implementation

This Section briefly analyzes the effectiveness of some of the treaties discussed above. Several of these treaties have been widely ratified, namely the CITES (173 States Parties),⁷⁰ the Narcotic Drugs Convention (153 States Parties),⁷¹ the United Nations Convention Against Transnational Organized Crime (138 States Parties),⁷² and the International Convention for the Suppression of the Financing of Terrorism (160 States Parties).⁷³ Unfortunately, an attempt to locate information about the implementation and effectiveness of the Protocol Against the Illegal Exploitation of Natural Resources, the most relevant international instrument (although it focuses on States where the

<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty12.asp> (last visited Oct. 24, 2008).

⁶³ *Id.*, art. 2(1).

⁶⁴ *Id.*, art. 4.

⁶⁵ *Id.*, art. 7(1).

⁶⁶ International Convention for the Suppression of Acts of Nuclear Terrorism (adopted Apr. 13, 2005, entered into force July 11, 2007) UNGA Res 59/290 (13 April 2005) UN Doc A/RES/59/290. Currently, there are 29 Parties to the Convention. See United Nations, *Multilateral Treaties Deposited with the Secretary-General: International Convention for the Suppression of Acts of Nuclear Terrorism*, available at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty19.asp> (last visited Oct. 24, 2008).

⁶⁷ *Id.*, art. 5. Article 2 sets out conduct that, under the convention, is taken to be an offence.

⁶⁸ *Id.*, art. 9(1).

⁶⁹ *Id.*, art. 9(2).

⁷⁰ See CITES, *List of Member Countries*, *supra*, fn. 7.

⁷¹ See United Nations, *Multilateral Treaties Deposited with the Secretary-General: United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, *supra* fn. 37.

⁷² See United Nations, *Multilateral Treaties Deposited with the Secretary-General: Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime*, *supra* fn. 43.



resources originate rather than importing States), and binding upon all 11 States Parties to the International Conference of the Great Lakes Region, has been unsuccessful. Instead, two other relevant treaties are briefly considered.

2.1.1.4.1 Convention on International Trade in Endangered Species of Wild Fauna and Flora

Of all the treaties canvassed in this Report, CITES is the most ratified. Although there has never been any thorough assessment of CITES' effectiveness, it is perceived to be effective⁷⁴ and, indeed, it has been concluded by at least one commentator that CITES has generally been complied with.⁷⁵ Formal cautions and warnings to non-complying States Parties have led to compliance from a majority of affected States Parties, as has the recommendation or threat of suspension of export of specimens covered under CITES.⁷⁶

2.1.1.4.2. International Convention on the Suppression of the Financing of Terrorism

The International Convention on the Suppression of the Financing of Terrorism is an interesting case study, as its core provisions have become binding upon both States Parties and non-States Parties by virtue of UN Security Council Resolution 1373.⁷⁷ Resolution 1373, adopted shortly after the attacks of September 11, 2001, obliges States to criminalize the planning, preparation, support or perpetration of terrorist acts⁷⁸ as well as to criminalize the financing of terrorism,⁷⁹ an obligation which came directly from the International Convention on the Suppression of the Financing of Terrorism. Furthermore, States are obliged to become parties to relevant international conventions on anti-terrorism, including the International Convention on the Suppression of the Financing of Terrorism.⁸⁰ Resolution 1373 establishes a Committee to monitor implementation of the Resolution and calls upon States to advise the Committee of the steps they have taken to implement Resolution 1373.⁸¹ As a result, the International Convention on the Suppression of the Financing of Terrorism, which only had four

⁷³ See United Nations, *Multilateral Treaties Deposited with the Secretary-General: International Convention for the Suppression of the Financing of Terrorism*, *supra* fn. 62.

⁷⁴ R. Reeve, *The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)*, in *MAKING TREATIES WORK: HUMAN RIGHTS, ENVIRONMENT AND ARMS CONTROL* 134 (G. Ulfstein et al. eds., 2007).

⁷⁵ *Id.*, at 153.

⁷⁶ See Resolution Conf 12.8 (Rev CoP13) of the Conference of the Parties to CITES, available at <http://www.cites.org/eng/res/12/12-08R13.shtml#FN0> (last visited Oct. 24, 2008) (This Resolution gives the Standing Committee of CITES (a committee which provides policy guidance on CITES' implementation) a mandate to recommend trade suspensions in relation to non-complying States Parties.).

⁷⁷ UNSC Res 1373 (Sept. 28, 2001) UN Doc S/RES/1373, available at <http://www.un.org/News/Press/docs/2001/sc7158.doc.htm> (last visited Oct. 24, 2008).

⁷⁸ *Id.*, at para 1(e).

⁷⁹ *Id.*, at para 1(b)-(d).

⁸⁰ *Id.*, at para 3(d).

⁸¹ *Id.*, para 6.



ratifications and had not yet entered into force at the time of Resolution 1373,⁸² now has 160 States Parties and more far-reaching effect by virtue of the obligations under Resolution 1373.

2.1.2. United Nations Sanctions as a Means to Prevent Trade in Natural Resources from Conflict Areas

One means by which the international community has regulated trade with conflict areas is through the imposition by the United Nations of economic sanctions, which prohibit trade with a specific country or part of a country. Such sanctions may either be mandatory (imposed by the Security Council) or voluntary (recommended by the Security Council and/or the General Assembly).

2.1.2.1. Mandatory Sanctions Imposed by the Security Council

Under Article 41 of the Charter of the United Nations, the Security Council may take non-military enforcement measures to give effect to its decisions.⁸³ Article 41 of the UN Charter states:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.⁸⁴

The measures set out in Article 41 are not exhaustive and the Security Council has a wide discretion in relation to what kind of measures it can adopt.⁸⁵ The use of measures authorized under Article 41 is conditioned upon the Security Council having made a determination under Article 39 of the UN Charter that a particular situation constitutes a threat to peace, a breach of peace, or an act of aggression.⁸⁶ Article 39 states:

⁸² See L. Helfer, *Non-Consensual Lawmaking*, UNIVERSITY OF ILLINOIS LAW REVIEW 71, 81 (2008).

⁸³ J.A. Frowein & N. Krisch, *Article 41*, in I THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 739 (B. Simma et al. eds., 2002).

⁸⁴ Charter of the United Nations, art. 41, available at <http://www.un.org/aboutun/charter/> (last visited Oct. 24, 2008).

⁸⁵ B. CONFORTI, THE LAW AND PRACTICE OF THE UNITED NATIONS 185 (2000).

⁸⁶ Frowein & Krisch, *supra* fn. 83, at 726.



The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

The Security Council has acted under Article 41 and passed resolutions imposing binding sanctions in several instances. Several of these resolutions have concerned embargos in relation to the procurement of arms, such as the arms embargos imposed against Yugoslavia,⁸⁷ Somalia,⁸⁸ Angola,⁸⁹ and Sudan.⁹⁰ Binding sanctions have, however, also been imposed in relation to natural resources, often diamonds but also timber and oil. The imposition of sanctions regarding the trade in natural resources, particularly diamonds and timber, under the Security Council's Chapter VII powers reflects the recognition by the Council of the link between trade in natural resources and the fuelling of armed conflict.

Instances in which the Security Council has imposed sanctions on the trade in certain natural resources include the cases of Angola (prohibiting the direct or indirect import of all diamonds not controlled through the Certificate of Origin issued by the Angolan Government),⁹¹ Sierra Leone (imposing a duty on States to prevent the direct or indirect import of all rough diamonds from Sierra Leone except those that are controlled by a Certificate of Origin regime to be implemented by the Government of Sierra Leone),⁹² and Liberia (imposing a duty on States to prevent the direct or indirect import all rough diamonds from Liberia, regardless of whether such diamonds originated in Liberia⁹³ and prohibiting

⁸⁷ UNSC Res 713 (Sept. 25, 1991) UN Doc S/RES/713 and UNSC Res 1160 (March 31, 1998) UN Doc S/RES/1160.

⁸⁸ UNSC Res 733 (Jan. 23, 1992) UN Doc S/RES/733.

⁸⁹ UNSC Res 864 (Sept. 15, 1993) UN Doc S/RES/864.

⁹⁰ UNSC Res 1556 (July 30, 2004) UN Doc S/RES/1556; UNSC Res 1591 (March 29, 2005) UN Doc S/RES/1591.

⁹¹ UNSC Res 1173 (June 12, 1998) UN doc S/RES/1173 and UNSC Res 1176 (June 24, 1998) UN Doc S/RES/1173. These sanctions were aimed to ban the export of diamonds from areas controlled by the União Nacional Para a Independência Total de Angola (UNITA), which was involved in armed conflict with the Angolan Government.

⁹² UNSC Res 1306 (July 5, 2000), para. 1, UN Doc S/RES/1306 which imposed sanctions for an 18 month period. These sanctions were renewed for a further 11 month period by UNSC Res 1385 (Dec. 19, 2001) UN Doc S/RES/1385 and for a further 6 months by UNSC Res 1446 (Dec. 4, 2002) UN Doc S/RES/1446.

⁹³ UNSC Res 1343 (March 7, 2001), para. 6, UN Doc S/RES/1343. In addition, Resolution 1343 required Liberia to "cease all direct or indirect import of Sierra Leone rough diamonds which are not controlled through the Certificate of Origin regime of the Government of Sierra Leone, in accordance with resolution 1306 (2000)": UNSC Res 1343 (March 7, 2001), para. 2(c), UN Doc S/RES/1343. Sanctions under Resolution 1343 were terminated by UNSC Res 1521 (Dec. 22, 2003) UN Doc S/RES/1521 and new sanctions of identical wording were imposed by that same resolution for an initial 12 month period. These sanctions were renewed for a further 12 month period by UNSC Res 1579 (Dec. 21, 2004) UN Doc S/RES/1579.



the import of timber products originating in Liberia⁹⁴). In respect of the Security Council's demands for an embargo against diamonds imported from Angola and Sierra Leone unless covered by a certificate of origin scheme, it has been said that the Security Council's measures forced the international diamond market to adopt effective mechanisms to verify the origin of diamonds.⁹⁵

Once the Security Council imposes sanctions pursuant to Article 41, such sanctions become binding upon all UN Member States by virtue of Article 25 of the UN Charter, which states that “[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”⁹⁶ Furthermore, by virtue of Article 103 of the UN Charter, UN Member States' obligations under the UN Charter prevail over conflicting obligations under any other international agreement.⁹⁷ Article 103 applies not only to obligations directly arising from the UN Charter but also to binding decisions of UN organs, including decisions and enforcement measures by the Security Council.⁹⁸ Although Article 103 refers only to obligations of Member States that arise under any other international agreements, some argue that a State's obligations under the UN Charter should prevail over *all* conflicting obligations, whether treaty, customary law or private law.⁹⁹ The Security Council has for some time now included a standard formula in several decisions taken under Chapter VII calling upon Member States to act in conformity with their obligations under the respective resolution, notwithstanding any rights and/or obligations existing under any international agreement, contract, license or permit.¹⁰⁰ This obligation is clearly broader than that set out in Article 103; it refers not only to rights and obligations under international agreements but also under private contracts, licenses, and permits.

The primary responsibility for the actual implementation of UN sanctions falls upon States, which are obliged to use the instruments available to them under domestic law to give effect to Security Council-

⁹⁴ UNSC Res 1478 (May 6, 2003) UN Doc S/RES/1478, imposing sanctions on timber products for an initial 10 month period. Resolution 1478 were terminated by UNSC Res 1521 and new sanctions of similar wording were imposed by that same resolution for a 12 month period. These sanctions were renewed for a further 12 month period by UNSC Res 1579 (Dec. 21, 2004) S/RES/1579.

⁹⁵ J.A. Frowein & N. Krisch, *Introduction to Chapter VII*, in I THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 709 (B. Simma et al. eds., 2002).

⁹⁶ Charter of the United Nations, *supra* fn. 84, art. 25. *See also* Frowein & Krisch, *supra* fn. 83, at 739 (Frowein and Krisch also state that, while it is not entirely clear from the wording of the provision whether Article 41 measures create binding effects on Member States, the contrast with Article 39, which allows the Security Council to make “recommendations”, indicates the mandatory nature of Article 41 measures.).

⁹⁷ Charter of the United Nations, *supra* fn. 84, art. 103.

⁹⁸ R. Bernhardt, *Article 103*, in II THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 1295 (B. Simma et al. eds., 2002).

⁹⁹ *Id.*, at 1299.

¹⁰⁰ *Id.*, at 1300. Relevant resolutions in which this “formula” has been included are UNSC Res 1127 (Aug. 28, 1997) UN Doc S/RES/1127 and UNSC Res 1173 (June 12, 1998) UN Doc S/RES/1173 (imposing sanctions on



imposed sanctions.¹⁰¹ No uniform practice exists in relation to how States are to give effect to UN sanctions.¹⁰² If States fail to implement UN-imposed sanctions, they become internationally responsible.¹⁰³ The means by which the Netherlands implements Security Council-imposed sanctions will be explained below. It should be noted that although Security Council resolutions are addressed to States, the latter have a responsibility to ensure that private parties within their jurisdiction respect sanctions obligations.¹⁰⁴ In this regard, the Security Council has often urged, but not obligated, States to establish offences criminalizing the violation of sanctions.¹⁰⁵

In order to ensure the proper implementation and effect of sanctions, the Security Council appoints sanctions committees, consisting of representatives from all Security Council members, to monitor sanctions imposed by the Security Council.¹⁰⁶ Sanctions committees may also appoint panels or groups of experts who act as an “investigative arm” of the sanctions committee and provide advice to the committee in relation to monitoring.¹⁰⁷

One of the main problems with sanctions is that the Security Council is reliant upon individual States to enforce them. Ineffective implementation of sanctions by States as well as the sanctions resolutions themselves lead to loopholes through which resources subject to sanctions can still find their way onto world markets. By way of example, after the Security Council passed Resolutions 1173 and 1176 prohibiting the direct and indirect export of diamonds from Angola not accompanied by a Certificate of Origin issued by the Angolan Government, a report from Global Witness, a leading NGO concerned with the link between natural resources and conflict, found the following:

members of the Angolan rebel group UNITA); UNSC Res 1132 (Oct. 8, 1997) UN Doc S/RES/1132 (imposing petroleum and arms embargoes on Sierra Leone and travel sanctions on the military junta).

¹⁰¹ See Frowein & Krisch, *supra* fn. 83, at 746-747.

¹⁰² N. Schrijver, *The Use of Economic Sanctions by the UN Security Council: An International Law Perspective*, in *INTERNATIONAL ECONOMIC LAW AND ARMED CONFLICT* 148 (H.H.G. Post ed., 1994).

¹⁰³ See International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts*, art. 1, Report of the International Law Commission on the work of its 53rd Session (2001), UN Doc A/56/10, also available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (last visited Oct. 24, 2008) (Every internationally wrongful act of a State entails the international responsibility of that State). See also *id.*, art. 2 (This Article defines a wrongful act as conduct that is attributable to the State under international law and that constitutes a breach of an international obligation of that State.); *id.*, art. 12 (A breach of an international obligation by a State exists when “an act of that State is not in conforming with what is required or it by that obligation, regardless of its origin or character.”). Therefore, breach of a State’s obligation to carry out the decisions of the Security Council under Article 25 of the UN Charter can lead to the international responsibility of that State.

¹⁰⁴ Schrijver, *supra* fn. 102, at 148.

¹⁰⁵ See Frowein & Krisch, *supra* fn. 83, at 747. See also UNSC Res 1196 (Sept. 16, 1998) UN Doc S/RES/1196 regarding arms embargoes in general; UNSC Res 1295 (Apr. 18, 2000) UN Doc S/RES/1295 in relation to Angola and UNSC Res 1306 (July 5, 2000) UN Doc S/RES/1306 in relation to Sierra Leone.

¹⁰⁶ Security Council Report, *March 2006 Sanctions Committees*, available at http://www.securitycouncilreport.org/site/c.glKWLeMTIsG/b.1439313/k.949/March_2006BRSanctions_Committees.htm (last visited Oct. 24, 2008).



Whilst resulting in some reduction of revenue for UNITA, the implementation of UNSC Res. 1176 appears token at best. Investigations reveal that significant diamond exports still take place, mainly by air and in smaller quantities, through countries such as Zambia. Most of the diamonds are sold on the open market in Antwerp and in other countries. Belgium, as home to the world's premier diamond market, bears significant responsibility for this situation.

This illegal trade is made possible through a combination of inadequate control and verification of [Certificates of Origin] from the [Angolan Government], and the fact that diamonds imported from neighbouring countries do not require any effective verification of source. The latter situation, especially given the involvement of corrupt officials, provides a perfect loophole for the laundering of UNITA sourced diamonds through Angola's neighbouring countries, and on to the international market.¹⁰⁸

Furthermore, there continues to be criticism that sanctions target not only the groups involved in conflict but also innocent civilians of the target country. The Security Council has been attempting to address this issue through the refinement of sanctions targeting specific groups or individuals and allowing for humanitarian exemptions from sanctions.¹⁰⁹

2.1.2.2. Voluntary United Nations Sanctions

Aside from Security Council-mandated sanctions imposed under Chapter VII of the UN Charter, certain UN bodies can also recommend sanctions to be imposed by States. The Security Council may recommend such measures under Article 39 (upon a determination that there is a threat to the peace, breach of the peace, or an act of aggression)¹¹⁰ and under Article 36(1). The latter empowers the Security Council to make recommendations at any stage of a dispute whose continuance is likely to endanger the maintenance of international peace and security, or a situation "of a like nature."¹¹¹

¹⁰⁷ *Id.*

¹⁰⁸ C. Gooch, *Is the Price of Diamonds Too High?*, GLOBAL WITNESS, available at <http://www.globalpolicy.org/soecon/tncs/angola.htm> (March 1, 2008). See also M. Fleshman, "Conflict diamonds" evade UN sanctions, 15(4) AFRICAN RECOVERY (December 2001), available at <http://www.un.org/ecosocdev/geninfo/afrec/vol15no4/154diam.htm> (March 1, 2008) (commenting on the failure of UN sanctions to effectively stop the flow of diamonds from rebel group-controlled areas of Angola).

¹⁰⁹ United Nations, *Security Council Sanctions Committees: An Overview*, available at <http://www.un.org/sc/committees> (March 1, 2008)

¹¹⁰ Charter of the United Nations, *supra* fn. 84, art. 39.

¹¹¹ *Id.*, art. 36(1).



While it appears that such “recommendations” are not binding, as Article 25 of the UN Charter obliges Member States to carry out the *decisions* of the Security Council, it has been argued that Article 25, in obliging States to “accept and carry out” Security Council decisions, entails the binding nature of *all* acts of the Security Council, as all such acts are taken by a decision.¹¹² The International Court of Justice in *Legal Consequences for States of the Continued Presence of South Africa in Namibia, Notwithstanding Security Council Resolution 276 (1970)*¹¹³ stated that Article 25 did not apply merely to Chapter VII enforcement measures but to decisions of the Security Council adopted in accordance with the Charter.¹¹⁴ The Court stated that when deciding whether a resolution is binding, careful regard should be taken to the language of the Security Council resolution in question, the discussions leading to the resolution, the UN Charter provision that has been invoked, and all circumstances that might assist in determining the legal consequences of the resolution.¹¹⁵

Under Chapter IV of the UN Charter, the General Assembly is also given powers to make recommendations on a variety of matters, including any questions or matters within the scope of the UN Charter¹¹⁶ and any questions “relating to the maintenance of international peace and security” brought before it by a UN Member State, a non-member State or the Security Council.¹¹⁷ One situation in which sanctions have been recommended is that of apartheid-era South Africa, where the Security Council encouraged UN Member States to impose voluntary economic sanctions such as suspension of all new investment and prohibition on the sale of krugerrands.¹¹⁸ The General Assembly had previously called for a voluntary more far-reaching boycott of all South African goods.¹¹⁹ The advantage of recommended sanctions is that, as they are seen as non-binding, they can include more far-ranging measures than mandatory sanctions. However, their non-binding nature also means that they may be less likely to be implemented.

¹¹² H. KELSEN, *THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS* 444 (1950); CONFORTI, *supra* fn. 85, 283.

¹¹³ (1971) ICJ REP 4 (“Namibia Case”).

¹¹⁴ *Legal Consequences for States of the Continued Presence of South Africa in Namibia, Notwithstanding Security Council Resolution 276 (1970)* (1971) ICJ REP 4, 113.

¹¹⁵ *Id.*, at 114.

¹¹⁶ Charter of the United Nations, *supra* fn. 84, art. 10. This power is subject to Article 12 which prohibits the General Assembly from making recommendations in relation to any dispute or situation that the Security Council is seized of.

¹¹⁷ Charter of the United Nations, *supra* fn. 84, art. 11(2). This power is subject to Article 12 which prohibits the General Assembly from making recommendations in relation to any dispute or situation that the Security Council is seized of.

¹¹⁸ UNSC Res 569 (July 26, 1985) UN Doc S/RES/569. The Security Council only imposed a mandatory arms embargo on South Africa by UNSC Res 418 (Nov. 4, 1977) UN Doc S/RES/418. Further economic sanctions were not made mandatory because such a proposal was vetoed by the United Kingdom and the United States, which continued to have economic and business ties with South Africa. *See* Schrijver, *supra* fn. 102, at 132.

¹¹⁹ UNGA Res 1761 (Nov. 6, 1962) (17th Session).



2.1.3. International Law in the Dutch Domestic Legal System

In the Netherlands, treaty provisions may be directly applied in domestic proceedings. The main obstacle for this “automatic standing incorporation”¹²⁰ is that the treaty provisions must be “self-executing,” which means that they are intended to be applicable in the national legal order without further modifications or additions. This requirement flows from Article 93 of the Dutch Constitution,¹²¹ which deals with the direct applicability of treaty provisions and decisions of international organizations that create rights and obligations for individuals. Specifically, Article 93 specifies that in order to be directly applicable, such decisions and rules have to be drafted as to be “binding on all persons.” Whether a decision or rule satisfies this criterion is determined by examining whether it is sufficiently precise and may be applied in the national legal order without any adjustments (i.e. it must be self-executing). Article 94 of the Constitution states that “[s]tatutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions.” This Article is construed as entailing that self-executing treaty provisions have precedence over national law and even the Constitution.¹²²

With respect to criminal law, the legality principle embedded in Article 1(1) of the Dutch Penal Code (*Wetboek van Strafrecht*) nevertheless requires that treaty provisions which criminalize certain conduct are implemented in Dutch law: both the definition of criminal offences and applicable sanctions need to be provided for by an act of parliament.¹²³ The legality principle is also enshrined in Article 7(1) of the European Convention on Human Rights and Fundamental Freedoms.¹²⁴ With respect to decisions by international organization such as the UN, Article 3 of the 1977 Sanctions Act (*Sanctiewet*)¹²⁵ provides that royal decrees can be enacted in order to fulfill obligations deriving from treaties, decisions, or recommendations from organs of international organizations, or international agreements

¹²⁰ A. CASSESE, INTERNATIONAL CRIMINAL LAW (2003), at Chap.12 (Cassese employed this term to describe the situation where “an internal norm provides in a permanent way for the automatic incorporation into national law of any relevant rule of international law, without there being any need for the passing of an ad hoc national statute”).

¹²¹ The Dutch Constitution, available at http://www.servat.unibe.ch/icl/nl00000_.html (last visited Apr. 6, 2008) (in English). The Constitution is available in the Dutch language at <http://wetten.overheid.nl/cgi-bin/deeplink/law1/title=Grondwet> (last visited Oct., 24, 2008).

¹²² E. A. Alkema, *Foreign Relations in the 1983 Dutch Constitution*, 3 NETHERLANDS INTERNATIONAL LAW REVIEW 320 (1984).

¹²³ Dutch Penal Code, art. 1(1) (*Wetboek van Strafrecht*), available at <http://www.wetten.nl> (last visited Oct. 24, 2008) (in Dutch) (“Geen feit is strafbaar dan uit kracht van een daaraan voorafgegane wettelijke strafbepaling.”).

¹²⁴ European Convention on Human Rights and Fundamental Freedoms, art. 7(1), Nov. 4, 1950, 213 U.N.T.S. 222, also available at <http://www.echr.coe.int/echr/> (last visited Aug. 14, 2008) (“No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.”).



concerning international peace and security, the fight against terrorism, or the promotion of the international rule of law. A violation of such a royal decree issued on the basis of the Sanctions Act will constitute an economic offence according to Article 1 of the Economic Offences Act (*Wet op de economische delicten*).¹²⁶

Accordingly, possible legislative initiatives from international organizations concerning the criminalization of the trade in natural resources deriving from conflict zones can be transposed in Dutch law by virtue of the Sanctions Act in conjunction with the Economic Offences Act.

2.2. EUROPEAN COMMUNITY/UNION LAW: COMMON FOREIGN AND SECURITY POLICY AND ENFORCEMENT

As described above, the Security Council of the United Nations may require all UN Member States to implement certain measures, such as economic sanctions, in order to deal with a situation posing a threat to international peace and security. Using the framework of the Common Foreign and Security Policy (“CFSP”), the EU and its 27 Member States implement such imposed UN Security Council Resolutions. In this process, the EU adheres to the terms of those resolutions; but it may, however, also decide to apply further restrictive measures.¹²⁷

The EU may also decide within the framework of the CFSP to impose sanctions or restrictive measures on an autonomous basis. This is done in the pursuit of the specific objectives of the CFSP as set out in Article 11 of the Treaty on European Union, namely:

- to safeguard the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the United Nations Charter;
- to strengthen the security of the Union in all ways;

¹²⁵ Dutch Sanctions Act (1977) (*Sanctiewet*), available at http://www.st-ab.nl/wetten/0255_Sanctiewet_1977.htm (last visited Oct. 24, 2008).

¹²⁶ The Economic Offences Act, art. 1, available at http://www.st-ab.nl/wetten/0653_Wet_op_de_economische_delicten_WED.htm (last visited Oct. 24, 2008). See also *id.*, art. 2 (The economic offences mentioned in Article 1 are to be considered as crimes.).

¹²⁷ European Union External Relations, *Sanctions under the Common Foreign and Security Policy*, available at http://ec.europa.eu/external_relations/cfsp/sanctions/index.htm (last visited Oct. 24, 2008). Insofar a *Member State* decides to apply further restrictive measures this must be done in a manner consistent with the Community law and, in particular, with the provisions adopted by the Community in the sphere of the common commercial policy provided for by Article 133 of the Treaty. See ECJ, Judgement, Jan. 14, 1997, *The Queen, ex parte Centro-Com Srl v HM Treasury and Bank of England*. For relevant cases on the definition and scope of “Common Commercial Policy,” see C-83/94 *Leifer*, ECR [1995], I-3231.



- to preserve peace and strengthen international security, in accordance with the principles of the United Nations Charter and the Helsinki Final Act, and the objectives of the Paris Charter, including those on external borders;
- to promote international cooperation;
- to develop and consolidate democracy and the rule of law and respect for human rights and fundamental freedoms.¹²⁸

However, with regard to the trade in natural resources originating from conflict zones only few initiatives have been taken by the EU itself, as such sanction regimes are generally implemented following Security Council Resolutions, such as Security Council Resolution 1315 on the situation in Sierra Leone.¹²⁹

Often, in order to render CFSP decisions operative (CFSP decisions fall under the second pillar of the European Union), they are further implemented in European Community law (the first pillar of the European Union), usually through an EC regulation or decision.¹³⁰ It is the European Commission's responsibility to ensure that Community law is implemented and applied correctly. In this respect, its role is known informally as the "guardian of the treaties."¹³¹ In monitoring Community law, the Commission undertakes its own studies and assessments, but also investigates complaints from EU citizens and petitions from the European Parliament. If, after the initial investigation, the Commission considers that a breach of Community law has occurred, it will instigate formal infringement proceedings. The infringement procedure comprises several stages, as set out in Article 226 of the Treaty establishing the European Community, and can ultimately lead to the referral of the case by the Commission to the European Court of Justice. Does the Court find that a Member State is in breach of Community law, the Member State concerned must then take the measures necessary to comply with the judgment of the Court. If it fails to do so, it is open to the Commission to take further action against that Member State under Article 228 of the EC Treaty. The Commission can issue similar measures as under Article 226 and once again refer the matter to the Court. If the Court finds that the Member State has not complied with the initial judgment, it may impose a fine on that State, in form

¹²⁸ European Commission, *supra* fn. 127.

¹²⁹ See Ian Brannon & Paul Collier, *Natural Resources and Violent Conflict: Options and Actions* 232 (The World Bank, 2003); European Commission, *Sanctions or Restrictive Measures in Force (Measures Adopted in the Framework of the CFSP)*, available at http://ec.europa.eu/external_relations/cfsp/sanctions/measures.htm (last visited Oct. 24, 2008).

¹³⁰ On the legal bases that can be used to implement second pillar measures in the first pillar of the European Union, see *Joined Cases C-402/05 P and C-415/05 P, C-402 Kadi and Al Barakaat, ECJ, Judgment, Sept. 3, 2008*, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0402:EN:HTML> (last visited Oct. 24, 2008) (Articles 60 EC, 301 EC and 308 EC).



of a lump sum or penalty payment.¹³² It is noted that the imposition of a penalty payment or lump sum has not yet happened in relation to EC law implementing a CFSP decision.

2.3. RELEVANT MEASURES UNDER INTERNATIONAL AND EUROPEAN COMMUNITY LAW

This Section briefly looks at measures under both international and European law that relate to the issue of trade in natural resources originating from conflict zones. As will be seen, none of these current measures advocate the criminalization of trade in natural resources from conflict zones.

2.3.1. The Kimberley Process

One of the few international initiatives to attempt to break the link between the trade in illegally sourced natural resources and conflict is the Kimberley Process, aiming to stop the flow of conflict diamonds onto the world diamond market. It is noted that Kimberley Process Certification Scheme (“KPCS”)¹³³ is a non-binding diamond certification scheme, and it does not oblige participant States to impose any criminal penalties for importing or exporting conflict diamonds.

The Kimberley Process began in 2000, when Southern African diamond-producing States met in Kimberley, South Africa to discuss ways in which to stop the trade in conflict diamonds.¹³⁴ The process received the support of both the General Assembly and the Security Council, which have both passed numerous resolutions in support of the process.¹³⁵ Several other States joined the process, as well as NGOs and the international diamond industry, culminating in the creation of the KPCS in November 2002. The KPCS entered into force on 1 January 2003.¹³⁶

The KPCS implements a certification scheme designed to control the trade in rough diamonds. The scheme is open to all States that are willing and able to implement its requirements and as of

¹³¹ Europa, *European Union Institutions and Other Bodies: Commission*, available at http://europa.eu/institutions/inst/comm/index_en.htm (last visited October 24, 2008).

¹³² See European Commission, *Infringements of EU Law*, available at http://ec.europa.eu/community_law/infringements/infringements_en.htm (last visited Oct. 24, 2008).

¹³³ Kimberley Process Certification Scheme, available at http://www.kimberleyprocess.com/documents/basic_core_documents_en.html (last visited Oct. 24, 2008) (“KPCS”). See also European Commission, *The EU & The Kimberley Process*, available at http://ec.europa.eu/external_relations/kimb/intro/index.htm (last visited Oct. 24, 2008).

¹³⁴ Kimberley Process, *Background*, available at http://www.kimberleyprocess.com/background/index_en.html (last visited Oct. 24, 2008).

¹³⁵ The General Assembly first adopted a resolution supporting the creation of an international certification scheme for rough diamonds during its meeting on Dec. 1, 2000: UNGA Res 56 (Jan. 29, 2001) UN Doc GA/RES/55/56. The Security Council first expressed its support for the Kimberley Process in UNSC Res 1295 (18 April 2000) UN Doc S/RES/1295.



September 2007, the KPCS has 48 members, representing 74 States (the European Community represents its Member States, including the Netherlands, and counts as an individual participant).¹³⁷

Within the European Community, the KPCS is implemented by means of Council Regulation (EC) No 2368/2002.¹³⁸

Both diamond importing and exporting States participating in the KPCS undertake to ensure that a Kimberley Process Certificate, identifying a shipment of rough diamonds to be in compliance with the KPCS, accompanies each shipment of rough diamonds.¹³⁹ Participant States further undertake to put in place appropriate legislation to implement the KPCS¹⁴⁰ and establish a system of internal controls to eliminate the presence of conflict diamonds from rough diamonds imported into and or exported out of its territory.¹⁴¹ Participants also undertake to exchange statistical data.¹⁴² KPCS participants should ensure that they only import from or export to other KPCS participants.¹⁴³ Implementation of the KPCS is monitored through review visits, annual reports, and by regular exchange and analysis of statistical data.¹⁴⁴

It appears that the Kimberley Process has been effective in stemming the flow of conflict diamonds. According to the Kimberley Process's official website, it is estimated that conflict diamonds now represent less than one percent of the international diamond trade in diamonds, compared to estimates of up to 15 percent in the 1990s.¹⁴⁵ The Kimberley Process has also taken action against participants who fail to abide by its requirements, most notably when the Republic of Congo was expelled from the KPCS as a result of its failure to prevent conflict diamonds from being traded.¹⁴⁶

¹³⁶ Interlaken Declaration of Nov. 5, 2002 on the Kimberley Process Certification Scheme for Rough Diamonds, art. 2, available at http://www.kimberleyprocess.com/documents/basic_core_documents_en.html (last visited Oct. 24, 2008).

¹³⁷ Kimberley Process, *supra* fn. 134.

¹³⁸ Council Regulation (EC) No 2368/2002, Dec. 20, 2002, available at http://europa.eu/eur-lex/pri/en/oj/dat/2002/l_358/l_35820021231en00280048.pdf (last visited Oct. 24, 2008).

¹³⁹ Kimberley Process Certification Scheme, *supra* fn. 133, ss III(a) and (b).

¹⁴⁰ *Id.*, s IV(d).

¹⁴¹ *Id.*, s IV(a).

¹⁴² *Id.*, s IV(e).

¹⁴³ *Id.*, s III(c).

¹⁴⁴ Kimberley Process, *supra* fn. 134.

¹⁴⁵ *Id.* However, a United Nations press release quotes Botswanan President Festus Gontebanye Mogae, the 2006 Chair of the KPCS as stating that before the KPCS, conflict diamonds represented about 4 percent of world diamond production. See United Nations, General Assembly backs Kimberley Process to prevent diamonds from funding conflict (Dec. 4, 2006), available at <http://www.un.org/apps/news/story.asp?NewsID=20838&Cr=conflict&Cr1=diamond> (last visited Oct. 24, 2008).

¹⁴⁶ Global Witness, *The Kimberley Process Gets Some Teeth: The Republic of Congo is Removed from the Kimberley Process for Failing to Combat the Trade in Conflict Diamonds* (press release, July 9, 2004), available at



Nevertheless, the KPCS has received some criticism, mainly because it is based on voluntary commitments of States Parties, rather than legally binding measures. The KPCS also heavily relies on participants controlling their respective diamond trade, a problem if a participant's internal controls are lacking.¹⁴⁷

2.3.2. The European Union Action Plan for Forest Law Enforcement, Governance and Trade (FLEGT)

The most important EU initiative concerning the preservation of natural resources is the European Union Action Plan for Forest Law Enforcement, Governance and Trade ("EU FLEGT Action Plan"),¹⁴⁸ which deals with trade in illegally produced timber.¹⁴⁹ The EU FLEGT Action Plan has been developed in the recognition of, amongst other things, the fact that profits of illegal logging often flow back to corrupt regimes and conflict zones.

The core of the EU FLEGT Action Plan is the Licensing Regulation¹⁵⁰ allowing only legally produced timber products, from certain timber-producing countries, with which the EC has completed a voluntary partnership agreement, to enter the EC Common Market.¹⁵¹ The EC has through the Licensing Regulation been enabled to conclude voluntary partnership agreements with partner countries to establish a licensing scheme, whereby timber products from those countries are licensed before they are allowed to be freely released onto the Common Market.¹⁵²

While the EU FLEGT Action Plan constitutes a big step towards a total ban on illegal logging, the voluntary nature of the partnership agreements poses some difficulties. The FLEGT licensing scheme is only enforceable against those timber-producing countries that have agreed to be bound through

http://www.globalwitness.org/media_library_detail.php/341/en/the_kimberley_process_gets_some_teeth_the_public (last visited Oct. 24, 2008).

¹⁴⁷ S.A. Malamut, *A Band-Aid on a Machete Wound: The Failures of the Kimberley Process and Diamond-Caused Bloodshed in the Democratic Republic of the Congo*, SUFFOLK TRANSITIONAL LAW REVIEW 25, 47-48 (Winter 2005).

¹⁴⁸ Communication from the Commission to the Council and the European Parliament FLEGT, proposal for an EU action plan COM (2003) 251 final, May 21, 2003 as adopted by Council Conclusions FLEGT OJ C 268, Nov. 7, 2003 ("EU FLEGT Action Plan"), also available at http://ec.europa.eu/development/icenter/repository/FLEGT_en_final_en.pdf (last visited Oct. 24, 2008).

¹⁴⁹ See *id.*, at 4 ("Illegal logging takes place when timber is harvested in violation of national laws."); Council Regulation (EC) No. 2173/2005 of 20 December 2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community, art. 2(1), OJ L 347 Dec. 30, 2005, also available at http://ec.europa.eu/development/icenter/repository/B2_FLEGT_regulation_OJ_en.pdf (last visited Oct. 24, 2008) ("'[L]egally produced timber' means timber products produced from domestic timber that was legally harvested or timber that was legally imported into a partner country in accordance with national laws determined by that partner country as set out in the Partnership Agreement [...]").

¹⁵⁰ Council Regulation (EC) No. 2173/2005, *supra*, n. 149.

¹⁵¹ Amsterdam International Law Clinic Report 2007, "The European Union FLEGT Action Plan", p. 9.

¹⁵² *Id.*



partnership agreements and can therefore not be enforced against all timber-producing countries.¹⁵³ This means that timber-producing countries refusing to enter into voluntary partnership agreements are still free to trade with the EC.¹⁵⁴ Furthermore, the voluntary partnership agreements only cover direct importation from partner countries, which enables the circumvention of the licensing scheme through “timber laundering” where logging companies search for other markets to send their products and not directly to the EC.¹⁵⁵

2.3.3. The Joint European Union-Africa Strategy

More political initiatives to create a sustainable trade in natural resources have arisen in the recent years, especially when dealing with conflict zones. An example is the Joint EU-Africa Strategy, which amongst other issues, deals natural resources and conflict prevention.

The second ever summit between heads of state and government from EU and Africa was held in Lisbon on December 8-9, 2007. In the Joint Strategy and Action Plan approved at the summit it is stated that:

While today’s global environment has opened up new opportunities to enhance international peace and security, it has also come with new security challenges, which in a world of increasing interdependence and close links between the international and external aspects of security only can be addressed through concerned international action, including in a UN context. Issues relating to transnational organized crime, international terrorism, mercenary activities, and human and drugs trafficking, as well as the illicit trade in natural resources, which are a major factor in triggering and spreading conflicts and undermining state structures, are of particular concern.¹⁵⁶

Illicit trade in natural resources is, as we have observed, recognized as a major factor in triggering and spreading conflicts and undermining state structures; and it is therefore of particular concern of the participating EU and African states. The text is, however, so far only of a political nature and practical measures have yet to be taken.

¹⁵³ *Id.*, at p. 47.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*



2.4. INTERIM CONCLUSIONS

Currently, the Netherlands is not obligated under international law to establish criminal offences in relation to trade with rebel groups in natural resources emanating from conflict zones, in general. The most relevant international instrument is the Protocol Against the Illegal Exploitation of Natural Resources, which obliges States to criminalize a wide-range of conduct in relation to the illegal exploitation of natural resources. However this instrument only applies to parties to the International Conference on the Great Lakes Region. Other treaties obliging States Parties to establish domestic criminal offences over conduct including arms and drugs trafficking, organized crime and financing of terrorism are useful examples of how States address the need to criminalize certain conduct.

UN sanctions, pursuant to Article 41 of the UN Charter, against trade with certain States or groups are one example of how trade in resources linked with conflicts can be prohibited. States, by virtue of Article 25 of the UN Charter, are under an obligation to carry out those decisions and, as such, to ensure that sanctions are not violated by private individuals under their jurisdiction. It is also arguable that “recommended” and thus possibly more far-reaching sanctions of the Security Council pursuant to Articles 39 and 36 of the UN Charter are also binding upon States.

When implementing the UN Security Council resolutions the European Union uses the framework of the CFSP, under which sanctions or restrictive measures may also be imposed on an autonomous basis. If the EU does decide to put in place legislation on the subject of natural resources, the Member States are under an obligation to implement such measures. The Commission is responsible for making sure that Community law is not infringed. Ultimately, the ECJ decides on the matter of infringement and substantial fines can be given if such is found.

As far as other relevant instruments go, the Kimberley Process Certification Scheme establishes a voluntary certification scheme for diamonds, natural resources that are often linked to financing armed conflict, and has been rather successful in its attempts to keep conflict diamonds off the world market. However, the KPCS is silent on the need to criminalize the trade in diamonds from conflict zones.

The most important EU initiative concerning the preservation of natural resources, the EU FLEGT Action Plan, deals with issues such as illegal logging and trade in illegally produced timber. Voluntary partnership agreements with partner countries are concluded through the Licensing Regulation to establish a licensing scheme, whereby timber products from those countries are licensed before they

¹⁵⁶ The Africa-EU Strategic Partnership, *Joint Strategy and Action Plan*, available at <http://www.eu2007.pt/NR/rdonlyres/D449546C-BF42-4CB3-B566->



are allowed to be freely released onto the Common Market. The FLEGT licensing scheme is, however, only enforceable against those timber-producing countries that have voluntarily agreed to be bound through partnership agreements and can therefore not be enforced against all timber-producing countries. This means that timber-producing countries refusing to enter into voluntary partnership agreements are still free to trade with the EC. Furthermore the voluntary partnership agreements only cover direct importation from partner countries, which enables the circumvention of the licensing scheme through “timber laundering”.

As a more political initiative the Joint EU-Africa Action Strategy deals with issues such as peace and security, governance and human rights, migration, energy and climate change, trade, infrastructures and development. Practical measures are however still to be taken.



3. POSSIBILITIES OF CRIMINALISING AND PROSECUTING TRADE IN NATURAL RESOURCES FROM CONFLICT ZONES UNDER EXISTING DUTCH LAW

In order for the Netherlands to exercise jurisdiction over the trade in natural resources deriving from conflict zones, it is first of all necessary to examine whether this trade has been criminalized in the Netherlands. In this Section, we will therefore examine whether Dutch criminal law currently contains any provisions which could be employed to hold corporations or individuals accountable for the trade in natural resources deriving from conflict zones.

As a preliminary remark, it should be emphasized that Dutch criminal law is applicable to both natural persons and juristic entities, without the need to derive the latter's criminal responsibility from acts of individuals (Article 51 Dutch Penal Code ("DPC")).¹⁵⁷

3.1. CRIMES

3.1.1. Theft

Article 310 DPC provides that "he who takes away any good that (partially) belongs to another, with the intent to unlawfully take possession of that good, shall be punished with four years of imprisonment or a monetary penalty of € 18500." The objective of this provision is to protect the property and possession of chattel.¹⁵⁸

Article 311 contains aggravating circumstances for the crime of theft. Pertinently, paragraph 4 mentions theft by two or more united persons (participation) as an aggravating circumstance that augments the incarceration with two years to a maximum of six years in total. Paragraph 2 lists theft in times of war as another aggravating circumstance.¹⁵⁹ It remains questionable, however, whether the extraction of resources in zones of conflict will fall within this definition, as it is unclear what exactly constitutes a conflict zone. Finally, Article 312(a) raises the maximum sentence in case violence or threats are used in the commission or preparation of the theft to a maximum of nine years of imprisonment or fine of € 74000, whilst paragraph 2(2) adds another three years and raises the fine to € 740000 if this crime is committed by two or more united persons.

¹⁵⁷ Criminal liability of corporations under Dutch law has been extensively discussed in the *Drijfmest* case, HR 21-10-2003, AB 2004, § 310. See Section 3.6, *infra*.

¹⁵⁸ C.P.M. CLEIREN & J.F. NIJBOER, DE TEKST VAN HET WETBOEK VAN STAFRECHT EN ENKELE AANVERWANTE WETTEN VOORZIEN VAN COMMENTAAR 1201 (2006).

¹⁵⁹ This provision specifically relates to looting and pillaging in times of war.



3.1.1.1. Subjective and Objective Elements

The thief needs to have the clear intention to acquire the object and the additional intent to do so illegitimately. With respect to the objective element of this crime, “to take possession of a good,” presumes that the thief performed this action by him- or herself.¹⁶⁰ In case legal persons are involved, the theft may, for instance, be committed by employees or others contracted by the legal persons to perform the theft of resources.

3.1.1.2. Relevance

Whether the extraction of natural resources in a certain area will constitute an act of theft will depend on the national legislation and permit system of that particular territory, as Dutch criminal law generally does not contain any specific provisions on illegal extraction of resources abroad.¹⁶¹ With respect to conflict zones, national criminalization of the theft of natural resources, however, proves to be problematic. Charles Taylor, for instance, regularized the theft of natural resources in Liberia by enacting the Strategic Commodities Act. This Act granted the President the “sole power to execute, negotiate and conclude all commercial contracts or agreements with any foreign or domestic investor” and gave him full control over all the natural resources in Liberia.¹⁶² The Moroccan occupation of Western Sahara and subsequent extraction of its natural resources is another (disputable) example of the difficulties surrounding the national legislation concerning theft in zones of conflict, as legislation is often adjusted to suit the dominant party’s needs.

3.1.2. Handling of Illegally Obtained Goods

Article 416-417bis DPC criminalize the handling (including the possession, acquisition, and transfer) of goods obtained through the commission of a crime by a person other than the actual perpetrator (fencing). The handling of illegally obtained goods has been criminalized in order to prevent entities from taking advantage of crimes committed by others. The crime is therefore based on the premise that the handler did not commit the crimes through which the goods were obtained him- or herself, but rather is a third party that profits from goods deriving from criminal actions.¹⁶³

The connection between the handler and the actual perpetrator of the crime does not have to be a direct one, which implies that the former could, for instance, also have obtained the goods from a previous

¹⁶⁰ CLEIREN & NIJBOER, *supra* fn. 158, 1202.

¹⁶¹ Except for some product specific provisions such as the acquisition, sale, possession or transfer of endangered species (Article 13 Flora- en Faunawet in conjunction with Article 1a of the Economic Offences Act (WED)).

¹⁶² See Global Witness, *Natural Resources in Conflict: Liberia*, available at <http://www.globalwitness.org/pages/en/liberia.html> (last visited Oct. 24, 2008).



handler.¹⁶⁴ It is, moreover, irrelevant whether the perpetrator of the original crime, i.e. the crime from which the goods originate, can be held accountable for his or her illicit behavior in a Dutch court. In other words, Dutch law does not need to apply to the original crime.¹⁶⁵

The term “good” in the definition of the crime comprises all material objects, including natural resources.¹⁶⁶ “Obtained through the commission of a crime” in Articles 416-417*bis* DPC indicates that a crime has to precede the handling of the goods; such preliminary crimes can include theft, embezzlement, and blackmailing and are, as mentioned above, by definition not committed by the handler him- or herself.

In general, Article 416 DPC does not cover goods obtained through the commission of a misdemeanor, but only sees to the handling of goods deriving from the commission of a crime.¹⁶⁷ The possession and transfer of goods deriving from criminal acts furthermore assumes that the fencer has factual control over the goods; but it is not required that the goods are in the physical proximity of the fencer. The goods can thus also be stored elsewhere, for instance in another State, waiting to be transported to potential buyers.

As for punishment, it is imprisonment for a maximum of 4 years and/or a fine of € 74000. If the goods were handled by a legal person, a fine of € 740000 can be imposed (Article 23(7) DPC). For all crimes committed before February 1, 2006, the previous maxima of € 67000 and € 670000, respectively still apply.¹⁶⁸

3.1.2.1. Objective and Subjective Elements

Book 3 Title XXX DPC (*begunstiging*)¹⁶⁹ criminalizes three types of handling: intentional handling (*opzetheling*), culpable handling (*schuldheling*), and habitual handling (*gewoonteheling*).

The first type of handling (Article 416(1) sub a) requires the following action (*actus reus*): the acquirement, possession, or transfer of goods that were obtained through the commission of a crime.

¹⁶³ HR 11 March 2003, NbSr 2003, § 172.

¹⁶⁴ HR 3 June 1918, NJ 1918, p. 676; C.D. SCHAAP, HELING GETOETST 271-272 (1999).

¹⁶⁵ Kamerstukken II 1989/90, 21 565, nr. 3, p. 5.

¹⁶⁶ *Id.*

¹⁶⁷ CLEIREN & NIJBOER, *supra* fn. 158, at 1444. According to Article 1(1) of the Economic Offences Act, a violation of the Sanctions Act (for instance the extraction of resources in contravention of an international treaty or decision of an international organization) constitutes a crime.

¹⁶⁸ *Id.*, at 1439-1451. The previous maxima are therefore also applicable to all other crimes discussed in this report committed before Feb. 1, 2006.

¹⁶⁹ The term *Begunstiging* refers to the favoring of a crime committed by another.



The subjective element (*mens rea*) will be fulfilled if, at the time of acquisition, the handler was aware of the fact that the good was obtained through the commission of a crime.¹⁷⁰ According to the relevant case law, knowingly and willingly accepting the considerable risk that the goods were obtained through the commission of a crime (*dolus eventualis*) would, however, also suffice to fulfill the mental element.¹⁷¹ Unlike the second paragraph (Article 416(1) sub b) which explicitly mentions the pursuit of profit, the motive for the handling of goods deriving from a crime under paragraph (a) is irrelevant. If the handler was aware of the fact that the goods were illegally obtained, but for instance sought to help a friend rather than to profit from his/her criminal conduct, this would still constitute the crime of handling of illegally obtained goods under paragraph (a).

In case the handler had the clear intention to acquire illegally obtained goods and already made preparations to receive the goods (s/he might for instance have rented a storage room or signed a contract), s/he might be liable even if the crime is not completed. Article 45 DPC¹⁷² namely criminalizes the attempt to commit a crime when the intention of the perpetrator is demonstrated through the commencement of the execution of the crime.

As mentioned above, the *mens rea* of Article 416(1)(b) differs slightly from the first variant of intentional handling for, in addition to the knowledge (or *dolus eventualis*) of the goods' criminal origin, the handler should have deliberately acted in the pursuit of profit and have the intention to economically benefit from the good(s). This additional subjective element was included as this paragraph covers situations in which a person/corporation acquires a good in good faith and although s/he later learns that the goods were obtained through the commission of a crime, decides to keep/sell the good with the intention to profit from it. The pursuit of profit includes the expectation that (part of) the good(s) can be restrained,¹⁷³ the intention to receive a reward for returning the good,¹⁷⁴ the intention not to lose the good(s) through confiscation,¹⁷⁵ it and does not have to be realized to be punishable, the intention to profit from the fenced good suffices.

Culpable handling (Article 417*bis* (1) paragraph (a) and (b) DPC) concerns the same type of action as Article 416, but requires that the fencer could have reasonably presumed that the goods were acquired

¹⁷⁰ HR Dec. 13, 2005, BbSr 2006, § 10.

¹⁷¹ HR Jan. 19, 1993, NJ 1993, 491 and HR 16 February 1993, NJ 1994, 32.

¹⁷² The text of Article 45 is available (in Dutch) at <http://www.wetboek-online.nl/wet/Sr/45.html> (last visited Oct. 24, 2008).

¹⁷³ HR Nov. 15, 1943, NJ 1944, 67

¹⁷⁴ HR Apr. 27, 1976, NJ 1976, 439

¹⁷⁵ HR Sept. 10, 1985, NJ 1986, 163.



through the commission of a crime, which implies conscious negligence.¹⁷⁶ The fencer is assumed to be accountable for culpable handling in case s/he could have foreseen the criminal origin of the good.¹⁷⁷

Habitual handling (Article 417) is the act of handling illegally obtained goods plus the aggravating circumstance that this is done on a regular basis. The crime criminalized in this Article is therefore the repeated commission of the crime described in Article 416.

In order to convict individuals or legal persons for handling, the indictment needs to mention that the goods were obtained through a criminal activity and this assertion needs to be proven. It is not necessary to mention who committed the original crime, but if it is plausible that the person accused of handling committed the original crime, a conviction for handling is not possible.¹⁷⁸ This also applies in case the crime was committed within the sphere of influence of a legal person, where corporate officials have been closely linked to the crime.¹⁷⁹

3.1.2.2. Relevance

The Dutch criminal provisions concerning handling of illegally obtained goods might be relevant for our purposes in case individuals or corporations buy, transfer, or acquire natural resources that have been illicitly obtained in the country of origin, through theft or another crime, while that entity (a) was aware of/should have known the fact that the resources were obtained through the commission of a crime or (b) while acting in pursuit of economic benefit later learns of the resources' criminal origin, but refuses to give it up.

Although the crime of handling illegally obtained goods thus does not punish possession of resources deriving from conflict zones as a crime *per se* (only handling goods obtained through the commission of a crime is punishable), it can still be an effective tool to punish the trade in resources originating

¹⁷⁶ HR Dec. 17, 1985, NJ 1986, 428.

¹⁷⁷ Although both concepts imply foresight, the difference between *dolus eventualis* and conscious negligence lies in the fact in that the former the result is voluntary (in order to obtain natural resources a corporation willingly accepts that they have most likely been obtained through the commission of crimes), while in the latter the result is involuntary (the corporation trusts that the resources have been obtained in a legal manner). For further information, see D.W. Morkel, *On the Distinction between Recklessness and Conscious Negligence*, 30(2) THE AMERICAN JOURNAL OF COMPARATIVE LAW 325-333 (1982).

¹⁷⁸ HR Feb. 7, 1978, NJ 1978, 661.

¹⁷⁹ CLEIREN & NIJBOER, *supra* fn. 158, at 1446.



from these areas in view of the fact that such resources are likely to have been extracted through prior criminal activities such as theft, slavery, and human rights violations.¹⁸⁰

3.1.3. Laundering

Laundering (Article 420*bis*-420*quinquies* DPC) entails (a) the concealment of the true (criminal) nature, origin, or expropriation of an object, or (b) the acquisition, transfer or possession of an illegally obtained good, while the launderer is aware/should have been aware that the good derived from a criminal act. The aim of this provision is to protect the integrity of the financial and economic market, by preventing the concealment of the criminal origin of the goods and stopping them from entering the legal market.

As concerns punishment, laundering can lead to imprisonment for a maximum of four years or a fine of € 74000. With respect to legal persons, the fine might be raised to a maximum of € 740000 (Article 23(7) DPC).

3.1.3.1. Objective and Subjective Elements

The acts listed in Article 416 DPC (acquisition, possession and transfer of illegally obtained goods) are also mentioned in the definition of laundering (Article 420*bis* (b) DPC). Laundering nevertheless protects a different interest (the protection of the integrity of the financial and economic markets as opposed to preventing taking advantage of criminal acts performed by others). It also covers situations in which the original crime was committed by the same person who consequently handled the goods.¹⁸¹

Laundering is, like handling, divided in three types: intentional laundering, culpable laundering, and habitual laundering. For detailed information concerning the subjective element we therefore refer to the previous Section.

3.1.3.2. Relevance

A conviction for acts of laundering might be a good alternative for handling of illegally obtained goods in case the natural resources were extracted and handled by the same actor. A launderer can

¹⁸⁰ For a detailed discussion of the crimes preceding handling of illegally obtained goods and laundering, *see infra*, Section 3.4.

¹⁸¹ CLEIREN & NIJBOER, *supra* fn. 158, at 1441, 1446, 1453.



after all, unlike the fencer, be the perpetrator of the original crime (theft, slavery, etc.) through which the natural resources were illegally obtained.

3.1.4. The Underlying Crime of Handling Illegally Obtained Goods and Laundering

Handling and laundering both presume the commission of a crime that produced the goods that are fenced or laundered. In case of handling, the handler, moreover, cannot have committed this crime him- or herself, whereas this rule does not apply with respect to laundering.

Although these provisions generally concern goods that were obtained through the commission of a crime, it is irrelevant whether this base crime falls under Dutch jurisdiction. If the handled/launched resources were obtained through the illegal extraction of natural resources in violation of national laws of the country of origin or an international instrument on for instance theft or slavery, the handling or laundering of such goods can therefore be punishable in the Netherlands.

3.1.5. Complicity

Article 48 DPC provides that s/he who intentionally offers support in the commission of a crime (simultaneous complicity) or intentionally provides the opportunity, means, or information for the commission of a crime (consecutive complicity) will be punished as an accessory.

The accessory thus provides support to the actual perpetrator before or during the commission of the crime. Supportive acts after the commission of a crime do not constitute acts of complicity on their own; only in combination with preceding acts may they indicate previous complicity. In other cases, supportive acts performed after the crime has been committed will only be punishable if they fall under the heading of *begunstiging* (favoring the commission of a crime; Title XXX DPC), which includes laundering and handling of illegally obtained goods).¹⁸² As follows from the text of Article 48, complicity is furthermore only punishable in combination with a crime; acts that support the commission of a misdemeanor will thus not give rise to accomplice liability.

With respect to punishment, the maximum penalty for the crime that was assisted will be diminished by one third (Article 49(1)). If a lifelong sentence is imposed on the supported crime, complicity will be punished with a maximum of 15 years of imprisonment (Article 49(2)). With respect to the assessment of the punishment, only those acts that the accessory deliberately facilitated or promoted and their consequences will be taken into account (Article 49(4)).

¹⁸² *Id.*, at 399.



3.1.5.1. Objective and Subjective elements

There are three requirements for accomplice responsibility: (i) the accomplice must intend the crime s/he aids and abets as well his or her aiding and abetting (double intent); (ii) s/he must provide genuine assistance either before or during the commission of the crime; and (iii) the crime – or a punishable inchoate crime¹⁸³ – must ensue.¹⁸⁴

With respect to the mental element, the intent of the accessory should be aimed at the supportive acts and at all the elements of the crime that is committed. If, instead of the crime that the accomplice intended to support, a totally different crime is committed, i.e. murder instead of theft, the mental element of the accomplice will therefore not be fulfilled.¹⁸⁵

3.1.5.2. Relevance

Complicity provides another option for criminal liability of entities for the trade in natural resources deriving from conflict zones under current Dutch law. In case an entity is not directly involved as perpetrator in the commission of one of the crimes mentioned above, Article 48 DPC nevertheless enables the possibility to hold it accountable for aiding and abetting such crimes. A corporation may, for instance, be accountable as an accessory in the theft of natural resources if it provides the thief with the necessary tools to extract the resources in order to economically benefit from them.

3.2. THE COMMISSION OF CRIMES BY JURISTIC PERSONS

The perpetration of illicit acts by juristic persons in general has been discussed extensively in the *Drijfmest* case.¹⁸⁶ According to the Dutch Supreme Court, the fact that criminal offences were committed within the sphere of influence of a juristic person provides an important indication that they may be imputed to that juristic person. Whether an action is actually committed within the juristic person's sphere of influence can be deduced from one or more of the following circumstances: the act is performed by an employee; the crime falls within the legal person's normal business practices; the corporation profited from the illegal act; the corporation could control the commission of the offence and accepted it or used to accept it.

Fulfillment of these criteria will, however, not always automatically give rise to liability of the juristic person; the nature and objective of the violated norm will have to be taken into consideration as well.

¹⁸³ That is: attempt or punishable preparation.

¹⁸⁴ CLEIREN & NIJBOER, *supra* fn. 158, at 400.

¹⁸⁵ *Id.*

¹⁸⁶ *Drijfmest* case, HR Oct. 21, 2003, AB 2004, § 3.4.



After all, some provisions¹⁸⁷ address specific persons or prohibit acts that by their very nature cannot be performed by a legal person.¹⁸⁸

Juristic persons, such as corporations, will surely profit from the possession, transfer or acquisition of illegally extracted natural resources; and the handling of such resources will therefore fall within the corporation's sphere of influence, allowing criminal liability of the corporation for the crime of handling, unless the underlying crime (the illegal extraction) was committed by the corporation itself.

3.3. JURISDICTION

3.3.1. Theft

A legal person responsible for theft can first of all be prosecuted in the Netherlands when the crime has been committed in the Netherlands (art. 2 DPC). Since our object is, however, the illegal extraction of resources in conflict zones, theft in the Netherlands is irrelevant.

Another basis for jurisdiction over acts of theft is the nationality principle (art. 5(2) DPC), which can be applied as long as theft of resources has been criminalized in both the Netherlands and the foreign country.¹⁸⁹

The universality principle is suitable to protect the fundamental interests of society and makes sure that the perpetrators of certain crimes (i.a. crimes against humanity) will not go unpunished. The universality principle is, however, only of limited importance in the Dutch legal order. Articles 4(3),(5)-(8),(13) and (14) DPC establish universal jurisdiction over a number of crimes such as terrorism and international perjury, but do not include theft.

3.3.2. Handling of Illegally Obtained Goods

In case the illicit acts were performed on Dutch territory (Article 2 DPC), the Netherlands will have territorial jurisdiction. The crime is considered to be committed in the Netherlands if the resources obtained through the commission of a crime were acquired, possessed, or transferred in the Netherlands. As handling encompasses a wide variety of actions with respect to the illegally obtained good (merely the possession of a good obtained through a crime already constitutes the crime of

¹⁸⁷ It has to be noted that only few such provisions exist; juristic persons are only incapable of committing offences which entail personal physical involvement. Consequently, a juristic person would not be able to commit rape, but it can commit murder.

¹⁸⁸ J. DE HULLU, *MATERIEEL STRAFRECHT* (2006).



handling illegally obtained goods), jurisdiction based on territoriality will generally not constitute an obstacle, especially as the goods do not need to be in the physical proximity of the fencer. As soon as an individual or corporation acquires, possesses, or transfers goods obtained through the commission of a prior crime, the Netherlands may claim jurisdiction over the crime of handling of illegally obtained goods, irrespective of whether the goods are present on Dutch territory. It should be noted that, although the location of the goods is irrelevant, the relevant actions – in respect to ownership documents for instance – should take place on Dutch territory. The nationality of the entity handling the natural resources does not matter as long as it finds itself, at the time of the commission of the crime, in the Netherlands.

Although territorial jurisdiction covers many situations, it is possible that a Dutch corporation or individual acquired, possessed, or transferred illegally extracted resources outside of Dutch territory.¹⁹⁰ In this case, the criminal actions have not been performed in the Netherlands and territorial-based jurisdiction is excluded. The nationality principle might close this jurisdictional gap if the corporation or individual that possessed, transferred, or acquired the natural resources had Dutch nationality (Article 5 DPC).¹⁹¹ In order to convict entities on the basis of active personality, however, the crime has to be criminalized in both the Netherlands and the country where the resources were handled (double criminality principle - Article 5(2) DPC). It is not necessary that the crimes committed by the Dutch national have the same title (in this case handling) in the country where the offences were committed. The offence may also be codified under a different title; the main condition for the double criminality is that the foreign penalization protects the same interest as the provision in the Dutch Penal Code.¹⁹² In case a Dutch national engages in the trade of national resources outside of the Netherlands, nationality-based jurisdiction might consequently be exercised if handling is also criminalized in the country where the handling of the goods takes place (in addition to criminalization under Dutch law).

Due to the fact that possession, acquisition, and transfer of goods obtained through the commission of a crime do not require those goods to be in the physical proximity of the fencer, jurisdiction over this

¹⁸⁹ Another requirement is that the illegal act committed by the Dutch entity is considered a crime in the Dutch Penal Code; art. 310 DPC (theft) has been criminalized in Book 2 of the Dutch Penal Code and can therefore be considered a crime.

¹⁹⁰ A Dutch national or corporate official may for instance travel to the Congo, buy illegally extracted diamonds and directly ship them to the U.S.A..

¹⁹¹ In case of corporations, nationality is established by the location of the corporation's main seat. If the main seat of a corporation trading in illicitly obtained natural resources is based in the Netherlands, jurisdiction can therefore be established (if other conditions such as double criminality have been fulfilled). *See* Y. BURUMA & P.E.M. VERREST, *INTRODUCTIE INTERNATIONAAL STRAFRECHT*, Nijmegen: Ars Aequi Libri, p. 39.

¹⁹² *Id.*, at 87-90.



crime is easily established as long as there is a link with the Netherlands, either through nationality or territory.

3.3.3. Laundering

The Netherlands may first of all prosecute entities when the laundering of the resources has been committed on Dutch territory. An entity which has personally illicitly extracted natural resources (through the commission of a crime such as use of slave labor or in violation of a national permit system) and subsequently tries to sell these resources in the Netherlands may therefore be prosecuted in the Netherlands.

Another option is provided by the active nationality principle. When a Dutch individual or corporation illicitly extracts the resources and subsequently transfers these resources to another country (not the Netherlands), prosecution in the Netherlands is possible if the laundering is also criminalized in one of the other countries (either the country where the resources were extracted or the country where they will be sold).

3.3.4. Complicity

With respect to jurisdiction over entities complicit in the commission of crimes such as theft of handling of illegally obtained goods, it suffices to examine where the committed crime can be prosecuted. We therefore refer to the sections on the jurisdiction of the separate offences above.



4. PROPOSAL FOR A NEW INTERNATIONAL LAW PROVISION CRIMINALISING TRADE IN NATURAL RESOURCES FROM CONFLICT ZONES

As has been shown above, international and European law does not address the issue of criminalizing trade in natural resources originating from conflict zones, in general. Furthermore, UN sanctions are only put in place when the Security Council decides to act in relation to a particular conflict. Even then, it has been shown that sanctions are not always effective in stopping the flow of natural resources from conflict areas.

Where there is no Security Council action, domestic Dutch criminal provisions may offer some avenues for prosecuting those who trade in natural resources originating from conflict zones. However, use of these provisions may not be ideal because such criminal provisions are not specifically suited for criminalizing the transnational trade in natural resources from conflict zones.¹⁹³

Accordingly, this Report proposes a new provision obligating States to take measures to criminalize trade with rebel groups in natural resources originating from conflict zones, when such resources were obtained in contravention with the laws of the country or countries involved in the conflict. Such a provision could be the subject of several international instruments that could be used to ensure the provision is enforced, such as (i) a general Chapter VII resolution by the Security Council, (ii) a Chapter VI resolution by the Security Council, (iii) an international treaty, or (iv) European Union/Community legislation. This Section looks at the effectiveness of each of these options. It should be noted that the Section only seeks to serve as a starting point, and therefore is not able to canvas all the issues that may require further analysis.

For the purpose of this Report, the proposed provision will only deal with natural resources that are traded by rebel groups and not by the government of a particular State. However, we wish to note that a focus solely on criminalizing trade in resources with rebel groups would ignore the fact that governments of States may also engage in illicit trade in natural resources. Furthermore, a focus on criminalizing trade with rebel groups may also imply support for a government that may itself be perpetuating human rights violations. Accordingly, it is suggested that further research be undertaken to address these aspects of trade in natural resources linked with conflict.

¹⁹³ Furthermore, use of domestic criminal law provisions may be even more problematic in countries other than the Netherlands, which may not recognise the principles of active personality or criminal corporate liability.



4.1. PROPOSED NEW PROVISION AND DEFINITION OF TERMS

It is proposed that the provision, irrespective of which instrument in which it is placed, should oblige States to take the necessary measures to establish as a criminal offence where:

A person knowingly engages in trade with rebel groups in natural resources originating from conflict zones, when the resources were obtained in contravention with the laws of the country or or countries involved in the conflict.

As with all provisions, it is necessary to define key terms.

4.1.1. “Trade”

The term “trade” may have several meanings. It is submitted that for the purpose of the proposed provision, trade could be defined as “acquisition, import and export, including whilst in the process of transit to a final destination.” Such a definition is in line with terminology used in existing international conventions that seek to prohibit illicit trade in various goods, which have been discussed in Section 2, namely CITES,¹⁹⁴ the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property,¹⁹⁵ and the Narcotic Drugs Convention.¹⁹⁶ This definition is also in line with the aim of the Kimberley Process Certification Scheme, which seeks to regulate the import and export of diamonds that are not accompanied by a KPCS certificate.¹⁹⁷

The proposed definition of “trade” would target the activities of corporations and persons who purchase resources from conflict zones and on whom rebel groups rely for funding. It also envisages the type of behavior over which the Netherlands, or other States, could exercise jurisdiction fairly uncontroversially.

Furthermore, NGOs and other organizations involved in resources and conflict have also focused on import when dealing with processing and importing countries. For example, a Global Witness report

¹⁹⁴ CITES, *supra* fn. 7, art. I(c) (defining trade as “export, re-export, import and introduction from the sea”).

¹⁹⁵ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, *supra* fn. 34, art. 3 (This Article states that the import, export and transfer of cultural property contrary to the convention is illicit.).

¹⁹⁶ Narcotic Drugs Convention, *supra* fn. 37, art. 3(1). Article 3(1) refers to, *inter alia*, the sale, transport or importation of narcotics and other substances as conduct that States Parties should establish as criminal offences under their domestic laws.

¹⁹⁷ Kimberley Process Certification Scheme, *supra* fn. 133, s III.



on the mining of cassiterite in the Democratic Republic of the Congo lists prosecution of importers as one recommendation to assist in stopping the trade in cassiterite.¹⁹⁸

4.1.2. “Rebel Groups”

A rebel group is in its ordinary meaning a group that refuses allegiance to and opposes by force an established government or ruling authority.¹⁹⁹ An internationally workable definition of a rebel groups has, however, neither been found in any of the many Security Council Resolutions dealing with the problems arising from trade in natural resources with rebel groups, nor in other relevant reports.

One might look to the 1949 Geneva Convention III, Article 4, paragraph A(2). This Article offers a definition of combatants other than those belonging to the Armed Forces of a Party. It is here described that prisoners of war, *inter alia* combatants, are persons who have fallen into the power of the enemy and who are:

Members of other militia and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

- (a) that of being commanded by a person responsible for his subordinates;
- (b) that of having a fixed distinctive sign recognizable at a distance;
- (c) that of carrying arms openly;
- (d) that of conducting their operations in accordance with the laws and customs of war.²⁰⁰

This definition of combatants might be too rigid for the purpose of the proposed provision. While members of a rebel groups might often be commanded by a person responsible for his/her subordinates, the other three conditions will seldom be fulfilled. Rather, a less detailed definition as the one stated at the beginning of this Section should be applied in order to cover the groups in

¹⁹⁸ Global Witness, *Under-mining Peace: The Explosive Trade in Cassiterite in Eastern DRC*, available at http://www.globalwitness.org/media_library_detail.php/138/en/under_mining_peace_tin_the_explosive_trade_in_cass (last visited March 1, 2008).

¹⁹⁹ See THE FREE DICTIONARY, available at <http://www.thefreedictionary.com/rebel> (last visited 17 January 2008).

²⁰⁰ Geneva Convention relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, entered into force Oct. 21, 1950, art. 4(A) (2).



question in a sufficient way. Accordingly, it is suggested that the dictionary definition of “rebel group” could be used, that is, a group that refuses allegiance to and opposes by force an established government or ruling authority.

4.1.3. “Natural Resources”

Only two of the international instruments discussed in this Report (the African Convention and the Protocol Against the Illegal Exploitation of Natural Resources) provide a definition of natural resources.²⁰¹ Still, the African Convention’s definition of natural resources as “renewable resources, that is soil, water, flora and fauna”²⁰² is not satisfactory for our purposes, as it does not cover the range of natural resources that rebel groups normally trade in, namely, gold and minerals as well as renewable resources such as timber. Looking outside of international conventions, the Organisation for Economic Cooperation and Development’s Glossary of Statistical Terms defines natural resources as “natural assets (raw materials) occurring in nature that can be used for economic production or consumption.”²⁰³

In light of the context for which the proposed provision is prepared, it is suggested that the definition of “natural resources” should be “materials occurring in nature that have an economic value and can be used for economic production or consumption.” This definition is wide enough to include both renewable and non-renewable resources, and also highlights the fact that natural resources are important to rebel groups because they are valuable commodities and thus provide a source of funding for conflicts.

4.1.4. “Conflict Zone”

Inspiration for the definition of the term “conflict zone” can be taken from the well defined area of armed conflict.

The definition of armed conflict was laid down in the case of *Prosecutor v. Tadic*, in which the International Criminal Tribunal for the Former Yugoslavia held that “an armed conflict exists

²⁰¹ African Convention, *supra* fn. 11, art. III(a) (defining natural resources as “renewable resources, that is soil, water, flora and fauna”). *See also* Protocol Against the Illegal Exploitation of Natural Resources, *supra* fn. 18, art. 1 (defining natural resources as “substances provided by nature that are useful to human beings and have an economic value, found in any of the States of the Great Lakes Region”).

²⁰² African Convention, *supra* fn. 11, art. III(a).

²⁰³ Organisation for Economic Cooperation and Development, *Glossary of Statistical Terms entry for “natural resources”*, available at <http://stats.oecd.org/glossary/detail.asp?ID=1740> (last visited Oct. 24, 2008).



whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.²⁰⁴

As the focus of this Report, and certainly of this new provision, is to find ways to prohibit the trade in natural resources with *rebel groups*, the situations towards which our focus should be directed are those described in the last part of the above mentioned definition: “[...] protracted armed violence between governmental authorities and organized armed groups or between such groups within a State,” i.e. those situations concerning conflicts of a non-international character.

In the case of *Prosecutor v. Akayesu*,²⁰⁵ the International Criminal Tribunal for Rwanda noted that the ICRC commentary on Article 3 common to the four Geneva Conventions suggested useful criteria on when a situation amounts to an actual conflict, resulting from the various amendments discussed during the Diplomatic Conference of Geneva in 1949, *inter alia*:

That the Party in revolt against the de jure Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring the respect for the Convention.

That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military in possession of a part of the national territory.

- (a) That the de jure Government has recognized the insurgents as belligerents; or
- (b) that it has claimed for itself the rights of a belligerent; or
- (c) that it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or
- (d) that the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of peace, or an act of aggression.²⁰⁶

The above referenced criteria were enunciated as a means of distinguishing genuine armed conflict from mere acts of banditry or unorganized and short-lived insurrections, as the protective norms set by

²⁰⁴ *Prosecutor v. Tadic*, IT-94-1, ICTY Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70.

²⁰⁵ *Prosecutor v. Akayesu*, ICTR-96-4-T, Trial Chamber I, Judgment, Sept. 2, 1998, available at <http://69.94.11.53/ENGLISH/cases/Akayesu/judgement/akay001.htm> (last visited Oct. 24, 2008).

²⁰⁶ *Id.*, at para. 619.



Common Article 3 apply only when the conflict is determined to be an armed conflict not of an international character.²⁰⁷

For a finding to be made on the existence of an internal armed conflict it is therefore necessary to evaluate both the intensity and organization of the parties to the conflict.²⁰⁸ The criteria listed above from (a) to (b) are in this aspect of a more indicative nature.

Such evaluation, as described above, of the intensity and organization of the parties to the conflict seems to be of some relevance also with regards to the determination of whether or not one should still be able to engage in trade in natural resources with rebel groups from certain areas. If the instability in a certain country is caused by mere acts of banditry or unorganized and short-lived insurrections, the situation should not trigger the applicability of the here proposed legal instrument. The conflict at hand must reach certain intensity before far reaching sanctions should be put in place or before a treaty provision should be able to be applied. A stricter requirement is also likely to render it more easily acceptable for states.

Additional Protocol II to the Geneva Conventions offers a different and more demanding definition of an armed conflict. For the Additional Protocol II to apply, a conflict must

[...] take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.²⁰⁹

Within this definition, it is of importance that the armed forces opposing the government must be under responsible command, which entails a degree of organization within the armed group or dissident armed forces. This degree of organization should be such as to enable the armed group or dissident forces to plan and carry out concerted military operations, and to impose discipline in the name of a de facto authority.²¹⁰ Further, these armed forces must be able to dominate a sufficient part of the territory so as to maintain sustained and concerted military operations and to apply Additional

²⁰⁷ *Id.*, at paras. 619-620.

²⁰⁸ *Id.*, at para. 620.

²⁰⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609, *entered into force* Dec. 7, 1978.

²¹⁰ *Prosecutor v. Akayesu*, *supra* fn. 205, at para. 626.



Protocol II.²¹¹ In essence, the operation must be continuous and planned. The territory in their control is usually that which has eluded the control of the government forces.²¹²

The definition as seen in Additional Protocol II differentiates itself from that in Common Article 3 in that the State needs to be involved and the armed group or dissident armed forces need to have territorial control before the norms of Additional Protocol II can be applied. The threshold of determining whether an armed conflict exists is therefore higher in Additional Protocol II than in Common Article 3.

For the purpose of this new provision, we consider the threshold set by Additional Protocol II too high. Rather the definition of Common Article 3 should be used as a guideline when defining the term conflict zones in the present provision. Firstly, the State does not necessarily need to and has not always been involved in those conflicts involving trade in natural resources as a means of financing rebel fighting. Secondly, when it can be determined that a certain armed group or dissident forces have the required territorial control, the conflict might already have been going on for quite some time. If the goal is to prevent conflict one should at an early stage of the conflict, where territorial control cannot necessarily be said to exist, be able to apply the proposed provision. It is to be hoped that by halting the trade in natural resources within the area at hand make, it would be much harder for the conflict to continue.

4.2. FURTHER COMMENTS ON THE PROPOSED PROVISION

This Section proposes ideas about the appropriate *mens rea*, jurisdiction, and sanctions to be given to criminal offences established pursuant to the proposed provision.

4.2.1. The Proposed *Mens Rea* Required for the Proposed Provision

It is suggested that the *mens rea* required for a criminal offence based on the proposed provision is one of a person having “knowingly engaged” in trade in natural resources from rebel groups, when the resources were extracted in contravention with the national laws of the country or countries involved in the conflict. This would therefore target persons and/or corporations that are aware that they are engaging in the illicit purchase and import of natural resources from rebel groups, yet (continue to) do so regardless of these circumstances.

²¹¹ *Id.*

²¹² *Id.*



Although several of the international conventions discussed in this Report oblige States to establish criminal offences over certain conduct only when it is committed “intentionally,”²¹³ this may be too narrow a base on which to establish a criminal offence, as most persons who engage in trade with rebel groups may not do so intentionally, but would certainly do so knowingly. Instead, regard should be had to Article 13 of the Protocol Against the Illegal Exploitation of Natural Resources, which obliges Member States to establish as a criminal offence the conversion or transfer of property, with the *knowledge* that such property was obtained from the proceeds of illegal exploitation of natural resources.²¹⁴

4.2.2. Jurisdiction

In accordance with the provisions on jurisdiction included in the majority of international conventions discussed in Section 2, it is suggested that States should be obligated to establish jurisdiction over conduct set out in the proposed provision where:

- The offence (or an element thereof) is committed in the State’s territory; and/or
- The offence (or an element thereof) is committed on board a vessel flying the State’s flag or an aircraft registered in the State.

States should also be permitted, but not obliged, to establish jurisdiction where:

- The offence (or an element thereof) is committed by a national or habitual resident of the State; and/or
- The offence (or an element thereof) is committed outside a State’s territory with a view to the commission of a further offence within the State’s territory.

²¹³ See Narcotic Drugs Convention, *supra* fn. 37, art. 3(1); United Nations Convention Against Transnational Organized Crime, *supra* fn. 46, art. 5(1); International Convention for the Suppression of the Financing of Terrorism, *supra* fn. 62, art. 2(1); Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime, *supra* fn. 43, art. 5(1); Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime *supra* fn. 54, art. 5; Convention Against Corruption, *supra* fn. 56, arts. 15-25; International Convention for the Suppression of Acts of Nuclear Terrorism, *supra* fn. 66, art. 5.

²¹⁴ Protocol Against the Illegal Exploitation of Natural Resources, *supra* fn. 18, art. 13.



This exercise of jurisdiction is in accordance with other treaties calling upon States to criminalize certain conduct set out in Section 2; and it would allow the Netherlands, or any State, to exercise jurisdiction, in one way or another, over all of the conduct prohibited in the proposed provision.²¹⁵

4.2.3. Proposed Sanctions

Penal provisions in international conventions are often limited to statements obliging each State Party to criminalize the issue at hand without giving any directions as to how this must be done and what sort of criminalization is needed.

The International Convention for the Suppression of the Financing of Terrorism is an example hereof. In Article 4 it is stated that:

Each State Party shall adopt such measures as may be necessary:

- (a) to establish as criminal offences under its domestic law the offences set forth in article 2;
- (b) to make those offences punishable by appropriate penalties which take into account the grave nature of the offences.²¹⁶

A much more detailed provision is found in Article 3 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. It lists in paragraph 4 rather specific manners in which the offences should be dealt with:

- a) Each Party shall make the commission of the offences established in accordance with paragraph 1 of this article liable to sanctions which take into account the grave nature of these offences, such as imprisonment or other forms of deprivation of liberty, pecuniary sanctions and confiscation.

²¹⁵ See Narcotic Drugs Convention, *supra* fn. 37, arts. 4(2)(a) and 4(2)(b)(i); United Nations Convention Against Transnational Organized Crime, *supra* fn. 46, arts. 15(1) and 15(2); Convention Against Corruption, *supra* fn. 56, arts. 42(1) and 42(2). *Cf.* International Convention for the Suppression of the Financing of Terrorism *supra* fn. 62, art. 7(1) and International Convention for the Suppression of Acts of Nuclear Terrorism (adopted 13 April 2005, entry into force 11 July 2007) UNGA Res 59/290 (13 April 2005) UN Doc A/RES/59/290, art. 9(1), which also oblige States Parties to establish jurisdiction over offences if they are committed by a national of that State Party.

²¹⁶ International Convention for the Suppression of the Financing of Terrorism, *supra* fn. 62, art. 4.



- b) The Parties may provide, in addition to conviction or punishment, for an offence established in accordance with paragraph 1 of this article, that the offender shall undergo measures such as treatment, education, aftercare, rehabilitation or social reintegration.

- c) Notwithstanding the preceding subparagraphs, in appropriate cases of a minor nature, the Parties may provide, as alternatives to conviction or punishment, measures such as education, rehabilitation or social reintegration, as well as, when the offender is a drug abuser, treatment and aftercare.

- d) The Parties may provide, either as an alternative to conviction or punishment, or in addition to conviction or punishment of an offence established in accordance with paragraph 2 of this article, measures for the treatment, education, aftercare, rehabilitation or social reintegration of the offender.²¹⁷

The more detailed manner in which this Convention deals with sanctions is mainly due to the fact that offenders may have severe drug addictions themselves and special attention must be directed towards this issue.

The more detailed the penal provisions are, the more likely it is that States Parties to the proposed provision on trade in natural resources will criminalize the offence in similar manners and that the result of this criminalization will be what the founders of the proposed provision intended. However, such a detailed approach may also cause substantial difficulties in getting States to ratify, as States traditionally aim to retain as much leeway as possible. A balanced approach is therefore desirable.

Since most of the offenders will be expected to be corporations engaging in trade with rebel groups in order to gain profit from the selling of the natural resources, the penal provision should include criminal sanctions specifically for individuals *and* a provision urging States to implement criminal liability for corporations. As for the individual offender, such penalties as imprisonment or other forms of deprivation of liberty, pecuniary sanctions, and confiscation could be suggested, while penalties for offenders such as corporations should be only pecuniary sanctions and confiscation.

²¹⁷ Narcotic Drugs Convention, *supra* fn. 37, art. 3(4).



4.2.4. Possible Exceptions

It may be useful to consider whether there should be strict exceptions made to the proposed provision. For example, an exception could be made where a person, whilst knowingly engaging in illegal trade with rebel groups in natural resources, does so out of necessity or for the public good. This could be the case where, for example, an aid organization must purchase water for the civilian population from rebel forces who illegally control access to water in a certain area. Under the proposed provision, this action could be criminalized in the Netherlands if, for example, the aid organization was registered in the Netherlands, as the purchase of water would be an “acquisition,” and the organization would have entered into the transaction knowing that the resource was illegally sold by rebel groups.

4.3. INSTRUMENTS IN WHICH THE PROPOSED PROVISION CAN BE PLACED

The following Section will provide alternatives as to how the proposed provision could be implemented: through Security Council resolutions under Chapter VII or Chapter VI, as a treaty provision, or through EC/EU instruments.

4.3.1. Chapter VII Resolution by the Security Council

It is suggested that the proposed provision can be set out in a general Chapter VII resolution by the Security Council, pursuant to Article 41 of the UN Charter. Such action by the Security Council is sometimes referred to as international or global legislation.²¹⁸

As discussed in Section 2, the Security Council has previously taken such action in relation to the threat of terrorism immediately following September 11, 2001; when the Security Council, acting under Chapter VII of the UN Charter, passed Resolution 1373,²¹⁹ thus making the core provisions of the International Convention on the Suppression of the Financing of Terrorism binding upon all States. At the time of Resolution 1373, the International Convention on the Suppression of the Financing of Terrorism had only been ratified by four countries and had not yet entered into force.²²⁰ However, through exercising its Chapter VII powers, the Security Council made the core obligations set out in that Convention immediately binding upon all UN Member States.²²¹ Furthermore, Resolution 1373 also established a Committee to monitor implementation of the resolution, and called upon States to

²¹⁸ See Helfer, *supra* fn. 82, at 81. See also P. Szasz, *The Security Council Starts Legislating*, 96(4) AMERICAN JOURNAL OF INTERNATIONAL LAW 901 (2002).

²¹⁹ UNSC Res 1373, *supra* fn. 77.

²²⁰ See Helfer, *supra* fn. 82, at 81.

²²¹ See *id.*



advise the Committee of the steps they had taken to implement Resolution 1373 within 90 days of its adoption.²²²

There are several advantages to advocating that the proposed provision be set out in a general Chapter VII resolution under Article 41, many of which are evident from the Security Council's action in relation to terrorism. Firstly, a Chapter VII resolution would address all UN Member States, thus avoiding the problem of some States being able to avoid being bound by certain obligations, as can occur with treaties. Article 25 of the UN Charter obliges Member States to carry out the decisions of the Security Council, including decisions taken under Chapter VII of the UN Charter.²²³

Furthermore, as noted in Section 2 of this Report, UN Member States' obligations under the UN Charter prevail over conflicting obligations under any other international agreement by virtue of Article 103 of the UN Charter,²²⁴ and possibly over other non-treaty obligations.²²⁵ The Security Council could also include in the resolution, as it has on previous occasions, an obligation on Member States to act in conformity with their obligations under the respective resolution, notwithstanding any rights and/or obligations existing under any international agreement, contract, license, or permit.²²⁶

The example of Resolution 1373 also indicates a further advantage of placing the proposed provision in a general Chapter VII resolution. Resolution 1373 was adopted unanimously by the Security Council only three weeks after the September 11 attacks, and it was thus able to bypass the slow and arduous process of treaty drafting and ratification by a sufficient number of States to make a treaty effective.²²⁷

²²² UNSC Res 1373, *supra* fn. 77, at para 6.

²²³ J. Delbruck, *Article 25*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 457 (B. Simma et al. eds., 2002). Non-UN Member States may also be subject to obligations imposed by the Security Council as, although they are not directly bound by the UN Charter, Article 2(6) of the Charter requires the UN to ensure that non-Member States act in accordance with the principles of the Charter in "so far as may be necessary for the maintenance of international peace and security". Accordingly, the Security Council routinely addresses resolutions to "all States", including Resolution 1373. See *Charter of the United Nations*, *supra* fn. 84, art. 2(6); Szasz, *supra* fn. 218, at 901.

²²⁴ Charter of the United Nations, *supra* fn. 84, art. 103.

²²⁵ Bernhardt, *supra* fn. 98, at 1299.

²²⁶ *Id.*, at 1300. This formula is found in UNSC Res 1127 (Aug. 28, 1997) UN Doc S/RES/1127; UNSC Res 1173 (June 12, 1998) UN Doc S/RES/1173; UNSC Res 1132 (Oct. 8, 1997) UN Doc S/RES/1132; UNSC Res 1267 (Oct. 15, 1999) UN Doc S/RES/1267 and UNSC Res 1298 (May 17, 2000) UN Doc S/RES/1298.

²²⁷ See Helfer, *supra* fn. 82, at 81.



Finally, a Chapter VII resolution containing the proposed provision would make it possible for the Security Council to establish a monitoring committee, as it did in relation to Resolution 1373, to monitor States' implementation of the obligations set out in the resolution.²²⁸

One of the main disadvantage associated with placing the proposed provision in a Chapter VII resolution is that the Security Council cannot make a decision imposing any obligations on UN Member States unless it has made a determination under Article 39 that there is a threat to or breach of peace, or an act of aggression. The UN Charter does not define the meaning of these words, although the Security Council has, at times, taken a wide view as to what situation many constitute a threat to or breach of peace.²²⁹ However, it is not too difficult to find a link between trade in natural resources whose proceeds foster and prolong armed conflict and a threat to international peace and security. The Security Council has already acknowledged the link between natural resources trade and armed conflict in several resolutions imposing trade sanctions on specific countries or territory controlled by certain groups, which have been discussed in Section 2. Accordingly, it may be fairly unproblematic for the Security Council to identify the general trade in natural resources with rebel groups from conflict areas as a threat to peace or a breach of peace.

The second main disadvantage of advocating a Chapter VII resolution obliging States to criminalize trade in natural resources from conflict zones is the fact that a Chapter VII resolution can only be passed as long as none of the five permanent Security Council members veto the decision. If there is no political will among the Security Council members, especially the permanent five, to effectively address the issue, then the resolution will not be passed.

It should also be noted that, under Article 39, the Security Council may also make "recommendations" once it has determined the existence of a threat to or breach of the peace, or an act of aggression.²³⁰ As noted in the Section 2 discussion of Article 25, it is arguable that such recommendations are also binding upon UN Member States. Accordingly, a further alternative would be to place the proposed provision in a Chapter VII resolution made pursuant to Article 39. However, given that measures pursuant to Article 41 are clearly binding upon States, this should be the preferred legal basis for any Chapter VII resolution encompassing the proposed provision.

²²⁸ Article 29 of the UN Charter allows the Security Council to establish subsidiary organs "as it deems necessary for the performance of its functions".

²²⁹ Eg UNSC Res 1308 (17 July 2000) UN Doc S/RES/1308 stated that the HIV/AIDS epidemic, if left unchecked, may pose a risk to stability and security.

²³⁰ Charter of the United Nations, *supra* fn. 84, art. 39.



4.3.2. Chapter VI Resolution by the Security Council

An alternative would be to advocate for a Security Council Chapter VI resolution encompassing the proposed provision. Chapter VI of the UN Charter is devoted to the Security Council's powers in relation to the peaceful settlement of disputes which are capable of threatening international peace and security.²³¹

Article 36(1) of the UN Charter states that “[t]he Security Council may, at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, recommend appropriate procedures or methods of adjustment.”²³²

Article 33 refers to parties to a dispute whose continuance is likely to endanger the maintenance of international peace and security.²³³ However, the inclusion of the phrase “or of a situation of like nature” in Article 36 implies a wider power of the Security Council to make recommendations not just in relation to disputes between two or more States, but also in relation to general situations which are likely to endanger the maintenance of international peace and security.²³⁴ Action taken under Article 36 does not require the determination of an existence of a threat to or breach of the peace, or an act of aggression under Article 39.²³⁵

The main issue surrounding resolutions taken under Chapter VI is that the binding nature of such resolutions is unclear,²³⁶ given that Article 25 of the UN Charter only obliges Member States to carry out the *decisions* of the Security Council. It has been suggested that in Chapter VI, only Article 34, which allows the Security Council to investigate any dispute or situation which may lead to international friction in order to determine whether the continuance of the dispute or situation would endanger the maintenance of international peace and security,²³⁷ is set out in terms that imply the binding nature of a decision to carry out an investigation.²³⁸ However, we refer to the discussion on Article 25 in Section 2 and the view held by the International Court of Justice in the *Namibia Case*, and by at least one commentator, that all Security Council acts are “decisions” for the purpose of Article 25.²³⁹

²³¹ CONFORTI, *supra* fn. 85, at 151.

²³² Charter of the United Nations, *supra* fn. 84, art. 36(1).

²³³ *Id.*, art. 33(1).

²³⁴ T Stein “Article 36” in B Simma et al (eds) *The Charter of the United Nations: A Commentary* (2nd edn Oxford University Press Oxford 2002) vol I, 618.

²³⁵ T Stein “Article 36” in B Simma et al (eds) *The Charter of the United Nations: A Commentary* (2nd edn Oxford University Press Oxford 2002) vol I, 620.

²³⁶ Delbruck, *supra* fn. 223, at 457.

²³⁷ Charter of the United Nations, *supra* fn. 84, art. 34.

²³⁸ Delbruck, *supra* fn. 223, at 457.

²³⁹ KELSEN, *supra* fn. 112, at 444; CONFORTI, *supra* fn. 85, 283.



4.3.3. Treaty

A new treaty in which the proposed provision could be incorporated would, as compared to the above mentioned Security Council resolutions, due to its standing effect encompass all conflicts from the outset and not only those dealt with in the Council. This offers a clear advantage as political issues would not hinder the full effect of the treaty, in the same manner as such issues might hinder the effective working process in the Security Council.

However, in order for such treaty to have any significance, States must not only sign it, but also ratify it. This is a process that can take years and often be upheld by political issues, which could leave the said treaty without any influence in important situation that calls for urgent attention. Furthermore, universal ratification would be unlikely.

4.3.4. European Union/Community Measure

It is also possible that a provision criminalizing the conduct in question could be laid down in a European Union/Community measure. Depending on the specific nature of the measure, such measures would have binding effect in each of the 27 Member States; and enforcement provisions are well developed. The provision would, however, only be binding upon the European Union Member States, which would leave a large number of States unrestricted in their trade in natural resources with rebel groups from conflict zones. As to the appropriate legislative basis/bases for the Union/Community to adopt the proposed provision, further research is suggested.

4.4. INTERIM CONCLUSIONS

In light of the *lacuna* in international and European law on the general issue of criminalizing trade in natural resources originating from conflict zones, a general provision is proposed that calls upon States to establish as a criminal offence where a person knowingly engages in trade with rebel groups in natural resources originating from conflict zones, in contravention with the laws of the country or countries involved in the conflict. Definitions of the necessary terms for such a provision are proposed, as are suggestions on the appropriate *mens rea*, jurisdiction, sanctions, and possible exceptions when such conduct should not be criminalized.

There are several international instruments in which such a provision could be effectively placed. The option that would address the highest number of States and arguably would be the most effective is a Security Council resolution pursuant to Article 41 of the UN Charter. Inspiration can be taken from the Security Council's action in relation to terrorism in Resolution 1373. This option would, however, be conditional upon a determination by the Security Council under Article 39 that the general trade in



natural resources from conflict zones, without government approval, represents a threat to the peace. A second option could be to place the provision in a Chapter VI Security Council resolution, pursuant to Article 36(1) of the UN Charter. A determination of a threat to or breach of peace would not be necessary in this instance; however, the binding nature of such action by the Security Council is questionable.

The incorporation of the proposed provision into a treaty would encompass *all* situations at hand and not only those dealt with by the Security Council. A problem, though, arises with regard to ratification of the treaty, which often is a lengthy process and might be blocked in certain countries due to political issues.

Sanctions or restrictive measures imposed within the European Union/Community framework could, depending on the nature of the measure, be of binding nature and the enforcement thereof would be seen to by the Commission and the ECJ. Such an approach would, though, only bind the European Union Member States and leave the trade of a large number of States unrestricted.



5. GENERAL CONCLUSIONS

The issue of criminalization of trade with rebel groups in natural resources originating in conflict zones is not satisfactorily dealt with under current international law. Inspiration can be taken, however, from international treaties that oblige States Parties to criminalize certain conduct, in relation to how international law addresses issues such as jurisdiction, *mens rea*, and sanctions.

United Nations sanctions are measures that have obliged States to place restrictions on trade in natural resources, namely diamonds and timber, originating from specific conflict zones such as Liberia and Sierra Leone. Such measures also benefit from monitoring by UN sanctions committees.

The EU, and through it the 27 Member States, use the framework of the Common Foreign and Security Policy when implementing UN Security Council resolutions. Under the CFSP, sanctions or restrictive measures may also be imposed on an autonomous basis. If the EU does decide to put in place legislation on the subject of natural resources, the Member States are under an obligation to implement such measures. The Commission undertakes the procedure of upholding that Community law is not infringed, and it is ultimately the ECJ that decides on the matter of infringement, and substantial fines can be given if such is found.

The EU FLEGT Action Plan deals with issues such as illegal logging and trade in illegally produced timber. Here, voluntary partnership agreements with partner countries are concluded through the Licensing Regulation to establish a licensing scheme. In this way, timber products from those countries are licensed before they are allowed to be freely released onto the Common Market. It is, however, only enforceable against those timber-producing countries that have voluntarily agreed to be bound through partnership agreements. This means that timber-producing countries refusing to enter into voluntary partnership agreements are still free to trade with the EC. Furthermore, the voluntary partnership agreements only cover direct importation from partner countries, which enables the circumvention of the licensing scheme through “timber laundering.”

Other measures that make some attempt to break the link between trade in natural resources and conflicts are the Kimberley Process Certification Scheme for diamonds and the Join EU-Africa Action Strategy, neither of which criminalizes the conduct in question.

As regards the criminalization of the trade of natural resources under Dutch law, it should be emphasized that such conduct is not punishable as a crime *per se* (i.e. there is no provision which explicitly forbids the extraction or trade of resources from *conflict zones*). There are, however, a



number of alternatives in order to assure that the persons engaging in such trade will be punished and future trade discouraged. Options to prosecute (juristic) persons for the trade in commodities deriving from conflict zones include theft (art. 310 Dutch Penal Code), handling of illegally obtained goods (art. 416-417bis DPC), laundering (art. 420*bis*-420*quinquies* DPC), and complicity (art. 48 DPC).

Given the lack of both international and domestic measures specifically targeted at prosecuting the general trade with rebel groups in natural resources originating from conflict zones, this Report has put forth a general provision calling upon States to criminalize such conduct. Suggestions for the definition of the various terms of the provision, as well as issues such as *mens rea*, jurisdiction, and sanctions have been offered. The Report has also listed international and EU/EC instruments in which such a provision could be placed and their likely effectiveness. It appears that a Chapter VII resolution of the Security Council incorporating the proposed provision, which would be binding upon all UN Member States would be the most effective in achieving State compliance. However, such a resolution is entirely dependent on the political will of the Security Council. In any event, it is hoped that this Report will provoke discussion and action on this important issue.