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Transnational law and the politics of conflict minerals regulation: construing the extractive industry as a 'partner' for peace

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ABSTRACT

This article considers the distributional effects of public and semi-private arrangements regulating extractive activities in conflict settings. The focus is on transnational legal interventions meant to improve how natural resources are 'managed' in fragile, war-torn, and post-conflict countries, namely the Kimberley Process Certification Scheme for Diamonds, the Extractive Industry Transparency Initiative, and the OECD Due Diligence Guidance on Responsible Supply Chain of Minerals. Drawing upon a variety of critical traditions, it elucidates the assumptions upon which dominant approaches to 'conflict minerals' are premised. In doing so, the article shows how these initiatives fail to challenge the structural and political economic conditions that cause the problems they are intended to address. Further, it argues that, by framing the extractive industry as a 'partner' for peace, these legal instruments contribute to the legitimising of its continued operation in post-conflict countries, thereby stabilising the prevailing global structures of power in natural resource governance.

KEYWORDS Extractive industry; liberal peace; business and human rights; natural resources; transnational law

> 'Let's choose to unite the powers of markets with the authority of universal ideals.'
>
> UN Secretary General Kofi Annan, Davos (1999)
>
> 'dai diamanti non nasce niente
>
> dal letame nascono i fiori'
>
> Fabrizio De Andrè, *Via Del Campo* (1967)

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1. Introduction

Koidu Town is one of the largest cities in Kono District, Sierra Leone. Diamonds were first discovered in Koidu Town in the 1930s, when Sierra Leone was a colony of the British Empire. In 1935, the colonial authorities who controlled the diamond sector awarded the first mining contract to the De Beers' Sierra Leone Selection Trust (SLST), granting it a monopoly for ninety-nine years. When Sierra Leone gained independence from Britain in 1961, the newly elected president, Siaka Stevens, formed the National Diamond Mining Company and nationalised the SLST obtaining a 51 percent stake in it.[1] During the civil war that raged between 1991 and 2002, much of the fighting and related atrocities between opposing rebel groups and government forces occurred in the mining areas in the Kono District. Once considered the centre of the 'blood diamond' trade, since the end of the civil war, the Koidu mine has been operated by Koidu Holdings SA, a company owned by OCTÉA Limited. Its parent company is the Geneva-based Beny Steinmetz Group Resources Limited (BSGR) of the magnate Benjamin Steinmetz, who has been under investigation in several countries for alleged corruption-related offences.[2]

Since Koidu Holdings took control of the mine in 2003, hundreds of residents have been evicted from their homes to make way for the expanding diamond mine. Some families were included in the company's resettlement programme, while many were left homeless and destitute. Those who were rehoused soon discovered the company's promises of modern houses, running water, schools, and health clinics were not materialising once the mine had been established. In December 2007, community grievances erupted into riots that left two dead and several injured.[3] While the social costs of mining have been borne by local communities, the hundreds of millions of dollars generated by the diamond trade have continued to leave Koidu Town. The Panama Papers investigation revealed in fact that Koidu Holdings was registered in the British Virgin Islands by Mossack Fonseca, the law firm at the centre of the scandal.[4] In 2016, Sierra Leone's High Court ruled that, despite operating the largest diamond mining

[1] Kazumi Kawamoto, 'Diamonds in War, Diamonds for Peace: Diamond Sector Management and Kimberlite Mining in Sierra Leone' in Paivi Lujala and Siri Aas Rustad (eds) *High-Value Natural Resources and Peacebuilding* (Routledge 2012) 121.

[2] Global Witness, 'Israeli Police Arrest Beny Steinmetz Over Massive Guinea Bribery Case' (19 December 2016), online: www.globalwitness.org/en/press-releases/israeli-police-arrest-beny-steinmetz-over-massive-guinea-bribery-case/.

[3] For a detailed analysis of the 2007 clashes between local communities and Koidu Holdings, see Kawamoto (n 1) 134–141.

[4] International Consortium of Investigative Journalists, 'Panama Papers Trail Offers Hope to West African Villagers Seeking Compensation' (11 March 2019), online: www.icij.org/blog/2019/03/panama-papers-trail-offers-hope-to-west-african-villagers-seeking-compensation/ .

company in the country, Koidu Holding and OCTÉA were not required to pay taxes because they were not registered for business in Sierra Leone.[5]

This story is not new and certainly not unique to Sierra Leone. The ability of transnational corporations to evade responsibility for the negative impacts of their activities in the Global South is notorious. Yet, it serves as an illustration of the vicious circle of violence, resource dispossession, corruption, and abuses countries like Sierra Leone seem to be trapped in. It is the starting point for rethinking the relationship between legal regulation and global governance, on the one side, and extractivism and conflict, on the other, that is at the heart of this article. Rather than being a domestic problem, 'illegal' resource exploitation in conflict and post-conflict societies is increasingly seen in transnational terms, giving rise to international and transnational law-making that permeates the national systems.[6] In the collective imagination, the civil war in Sierra Leone is the archetype of resource-driven conflict, initiated and prolonged by greedy rebel groups exploiting the rich diamond mines. The documenting of human rights abuses by media and NGOs[7] during this armed conflict gave momentum to the development of regulatory frameworks and corporate standards which have, since then, become the mainstream response to trade in 'conflict minerals'.

This article argues for a critical recognition of the role of legal instruments in the distribution of natural resources in 'fragile', conflict, and post-conflict settings. It focuses on different regulatory regimes, namely the Kimberley Process Certification Scheme for Diamonds (KPCS), Extractive Industry Transparency Initiative (EITI), Organisation for Economic Co-operation and Development (OECD) Due Diligence Guidance on Responsible Supply Chain of Minerals from Conflict-Affected and High-Risk Area. These diverse regimes are part of a transnational legal process in which public and private actors have developed and applied legal norms, principles, and practices across a variety of legal systems to ensure that international

[5] Transparency International, 'Blood Diamond and Land Corruption in Sierra Leone' (2 August 2019), online: www.transparency.org/news/feature/blood_diamonds_and_land_corruption. In 2019, attorneys representing 83 households affected by Koidu Ltd's diamond mining activities filed proceedings to obtain the right to sue Octéa group companies over alleged human rights abuses, including displacement, land and water contamination, loss of income from farming, deaths, and injuries after violent repression of demonstrations. The plaintiffs relied on the Panama Papers to argue that Octéa and Koidu Ltd operated as one entity. In March 2019, the High Court of Sierra Leone recognised the plaintiffs' right to serve lawsuits against Octéa group at Koidu Ltd's registered address in Freetown, Sierra Leone. See Evelyn Zheng, 'Sierra Leone Communities Win Right to Sue Octéa Mining Companies Jointly in Local Courts' (14 March 2019), online: <https://advocatesforalternatives.org/2019/03/14/sierra-leone-communities-win-right-to-sue-octea-mining-companies-jointly-in-local-courts/>.

[6] See Gregory Shaffer, 'The New Legal Realist Approach to International Law' (2015) 28(2) *Leiden Journal of International Law* 189, 197. The author also argues that in a globalised world, 'international law is best viewed in transnational terms because one cannot understand international law empirically outside of the interaction of international, transnational, and national institutions and actors, be they public or private'. *Ibid*, 204.

[7] See eg Ian Smillie, Lansana Gberie, Ralph Hazleton, *The Heart of the Matter: Sierra Leone, Diamonds and Human Security* (Partnership Africa Canada 2000).

trade in certain commodities does not fuel conflict and human rights violations.[8] While often originating in the international sphere, such norms and discourses have had a strong influence on domestic and regional laws. Notable examples include Section 1502 of the United States Dodd Frank Act on conflict minerals originating from the DRC[9] and the European Union Regulation 2017/821, which lays down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, as well as gold originating from conflict-affected and high-risk areas.[10]

Although it is important to recognise that the interaction between the 'global' and 'local' can be bi-directional, or even cyclical, and that legal norms travel 'horizontally' as well as 'vertically',[11] the focus here lies in explaining how the shift from domestic to global regimes of governance of 'conflict minerals' brings in new forms of legal regulation in conflict and post-conflict countries. This is part of a broader trend. Since the end of the Cold War, a wide range of issues formerly understood to be political, and within the control of states, have been reframed as matters of economic governance and thus moved away from the purview of the state.[12] At the core of this process lies the development of alliances between state and corporate authorities, and the progressive expansion of private regulatory power.[13] How is the 'global' translated into 'local' settings? What material interests underpin the existing regulations of 'conflict minerals'? Using transnational law as an analytical framework and drawing upon a variety of critical traditions, this article will shed light on some political economic assumptions that have shaped the construction and circulation of legal measures aimed at curbing 'illegal' resource extraction. It will illustrate how these measures fail to challenge the structural conditions that help cause the 'human problem' at the core of this analysis: the reproduction of corporate abuses, dispossession, and armed violence. In doing so, this article will contribute to recent studies of the relationship between the law, resource distribution, and political economic dynamics.[14]

[8] On the concept of transnational legal processes, see Gregory Shaffer and Terence C Halliday (eds), *Transnational Legal Orders* (Cambridge University Press 2015).

[9] Dodd–Frank Wall Street Reform and Consumer Protection Act, 124 STAT 1376, Public Law 111–203. The Dodd-Frank is a massive piece of financial reform legislation passed in 2010 as a response to the financial crisis of 2008.

[10] The EU Regulation entered into force in January 2021 and can be accessed here online: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017R0821>. For an initial comment, see Phoebe Okowa, 'The Pitfalls of Unilateral Legislation in International Law: Lessons from Conflict Minerals Legislation' (2020) 69 *International and Comparative Law Quarterly* 685.

[11] Sebastien Jodoin, 'Transnational Legal Process and Discourse in Environmental Governance' (2019) 44 *Law and Social Inquiry* 1019, 1022–1023.

[12] Kerry Rittich, 'Theorizing International Law and Development' in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2016) 824.

[13] See Claire Cutler, 'Artifice, Ideology and Paradox: The Public/Private Distinction in International Law' (1997) 4 *Review of International Political Economy* 261.

[14] See eg Anna Chadwick, *Law and the Political Economy of Hunger* (Oxford University Press 2019); Surabhi Ranganathan, 'Ocean Floor Grab: International Law and the Making of an Extractive

The article proceeds in four steps. First, I present different legal instruments addressing 'conflict minerals' and suggest that two objectives have influenced their development: the need to securitise resource extraction in 'fragile' countries and to reform how natural resources are 'managed' in line with (neo)liberal tenets.[15] Second, I demonstrate how these normative regimes help construe the extractive industry as a 'partner' for peace, thereby legitimising its continuing operation in countries emerging from conflict. Third, I make the argument that these transnational arrangements, while often justified by the desire to mitigate human rights abuses associated with extractive activities in conflict settings, ignore distributive concerns at the root of these wars. Lastly, I contend that dominant legal discourses and practices on 'conflict minerals' frame bad governance, corruption, and violence as local dysfunctions. This approach not only distracts from global market processes of production and consumption but recreates an artificial distinction between the role of the 'public' and the 'private', which contributes to insulating corporate actors from scrutiny. To make this point, I consider the scope and definition of corruption in relevant transnational legal instruments.

2. The construction of a new field for transnational regulation: the problem of 'conflict minerals'

a. An overview of relevant transnational initiatives

Since the late 1990s there has been a proliferation of transnational initiatives aimed at addressing the connection between resource exploitation, violent conflict and human rights abuses, or what became known as the problem of 'conflict resources'.[16] This section will catalogue the most current

Imaginary' (2019) 30 (2) *European Journal of International Law* 573; Ntina Tzouvala, 'A False Promise? Regulating Land Grabbing and the Post-Colonial State' (2019) 32 (2) *Leiden Journal of International Law* 235; Henrietta Zeffert, 'The Lake Home: International Law and Global Land Grab' (2018) 8 (2) *Asian Journal of International Law* 432; Michael Fakhri, *Sugar and the Making of International Trade Law* (Cambridge University Press 2014).

[15] Neoliberalism is understood here as an intellectual, political, and economic project that emerged as a reaction to a crisis of classical liberalism and the rise of the redistributive state. According to one definition, neoliberalism is a 'theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterised by strong private property rights, free markets and free trade'. See David Harvey, *A Brief History of Neoliberalism* (Oxford University Press 2007) 2.

[16] There is no universally accepted definition of 'conflict resources', as different actors put an emphasis on different aspects of conflict-related resource exploitation. The NGO Global Witness is mostly concerned with the humanitarian impact of exploitation practices: 'conflict resources are natural resources whose systemic exploitation and trade in a context of conflict contribute to, benefit from, or result in the commission of serious violations of human rights, violations of international humanitarian law or violations amounting to crimes under international law'. The KPCS defines 'conflict diamonds' by focusing on their exploitation by non-state armed groups to finance conflict 'aimed at undermining legitimate government'. See Daniella Dam-de Jong, *International Law and the Governance of Natural Resources in Conflict and Post-Conflict Situations* (Cambridge University Press 2015) 26–27.

initiatives in place. Probably the most well-known instrument is the Kimberley Process Certification Scheme ('KPCS') for diamonds. In response to civil society campaigns against 'blood diamonds' and a United Nations General Assembly recommendation,[17] the KPCS was established in 2003 to regulate the 'legitimate' trade in diamonds and exclude 'conflict diamonds' from it.[18] The KPCS is an international certification scheme involving a system of import and export permits for rough diamonds. It is based on voluntary commitments undertaken by states, including the adoption of appropriate national legislation in addition to the establishment of systems of internal controls designed to eliminate 'conflict diamonds' from shipments of rough diamonds imported into or exported from their territory. Implementation of these minimum standards is a prerequisite for participation in the KPCS. If states fail to meet the minimum standards, they can be suspended from the Process.[19] This is a serious sanction, particularly for developing countries, as participants in the KPCS, who account for 99.8% of the worldwide production in rough diamonds and include all the major diamond trading countries, are not allowed to trade diamonds with non-participants or with participants that do not satisfy the basic requirements.[20]

While the KPCS is concerned with trade in 'conflict diamonds', the Extractive Industries Transparency Initiative ('EITI') has a broader scope. Building upon similar initiatives supported by the World Bank, industry, and civil society (eg the Publish What You Pay campaign), the EITI was launched in 2002 at the World Summit on Sustainable Development. It demands that the host state and companies operating therein disclose information on the governance of oil, gas and mining sectors, including the allocation of contracts and licences, exploration and production, revenue collection/payment and spending.[21] Countries intending to implement the EITI need to go through a process that includes engaging representatives from

[17] See General Assembly Resolution 55/56 (2000), UN Doc. A/RES/55/56, 19 January 2001.

[18] Kimberley Process, *Kimberley Process Certification Scheme (Core Document, 2002)* online: www.kimberleyprocess.com/en/kpcs-core-document.

[19] The KPCS introduced a peer-review system in order to monitor compliance by participating states of the minimum standards. Review visits, consisting of representatives of other participating states, the diamond industry and NGOs are regularly conducted in participating states. In case of 'credible indications of significant non-compliance' with the KPCS standards, the Plenary can further decide to conduct a review mission. This is how participants can demonstrate compliance with the requirements of the scheme and thereby prevent suspension. See Kimberley Process, '2019 Administrative Decision on Peer Review System', online: www.kimberleyprocess.com/en/system/files/documents/002_ad-_2019_ahcrr_ad_on_peer_review_22_nov_2019.pdf.

[20] KPCS participants are states and regional economic integration organizations that are eligible to trade in rough diamonds. As of November 2018, there are 55 participants representing 82 countries, with the European Community counting as a single participant. The participants include all major rough diamond producing, exporting, and importing countries. The diamond industry and civil society groups are also part of the KPCS, as 'observers'. These groups monitor the effectiveness of the certification scheme and provide technical and administrative expertise. See Kimberly Process, 'Find Answers to the Big Challenges We Face' online: www.kimberleyprocess.com/en/faq.

[21] The Extractive Industry Transparency Initiative, 'What We Do' online: <https://eiti.org/About>.

government agencies, civil society, and the extractive industry; the production of reports; and the adoption of EITI Standards. The latter set out the requirements countries need to satisfy to join the initiative (Candidate Countries) and to keep the status of implementing countries (Compliant Countries). They also determine how compliance is assessed and the consequences of non-compliance (ie temporary suspension or delisting).[22] Companies participate in EITI in two ways: as an EITI Supporting Company and/or where they are operating in EITI implementing countries. To become an EITI Supporting Company, businesses must merely publicly express their support for the EITI Principles and Criteria. There are no requirements on companies to report in order to attain or maintain the status of Supporting Company. However, companies operating in an EITI implementing country and making payments to the government are expected to report annually on such payments using the reporting template developed by the host government.[23] The key idea underlying the initiative is that the disclosure of revenues and expenditures relating to extractive activities raises awareness and empowers the public to use this information to hold the government and corporations accountable.[24] Although its impact on corruption remains unclear,[25] EITI and other similar initiatives have made revenue transparency a transnational legal norm, consequently receiving the support of international/domestic governance bodies, such as the United Nations.[26]

The Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas focuses on extractive corporations. The instrument was developed in 2011 by the Organisation for Economic Cooperation and Development (OECD) after consultation with governments, international organisations, civil society, and industry 'to help companies respect human rights and avoid contributing to conflict through their sourcing decisions, including the choice of their suppliers'.[27]

[22] See the Extractive Industries Transparency Initiative, 'EITI Standard 2016' (24 May 2017) online: <https://eiti.org/files/documents/the_eiti_standard_2016_-_english.pdf>. There are currently 52 implementing countries with different 'implementation status'. These countries are primarily located in the Global South. See Extractive Industries Transparency Initiative, 'Countries' online: <https://eiti.org/countries>.

[23] However, unless a Candidate or Compliant Country chooses to implement the EITI requirements through law or investment contracts or other measures, there is no legal obligation to report. Some EITI countries such as Nigeria and Norway have introduced legislation to implement the reporting requirements. See Penelope Simons, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage* (Routledge 2014) 156.

[24] Pavli Lujala, Siri Aas Rustad and Sarah Kettenmann, 'Engines for Peace? Extractive Industries, Host Countries, and the International Community in Post-Conflict Peacebuilding' (2016) 7 *Natural Resources* 239, 245.

[25] Simons (n 23) 157.

[26] See generally Andrea Bianchi and Anne Peters (eds), *Transparency in International Law* (Cambridge University Press 2013).

[27] OECD, *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Third Edition* (2016) online:www.oecd.org/daf/inv/mne/OECD-Due-Diligence-Guidance-Minerals-Edition3.pdf 3.

The Guidance is for use by any company sourcing minerals or metals (eg tin, tantalum, tungsten, and gold) from conflict-affected and high-risk areas.[28] It provides a framework for risk-based due diligence for responsible supply chain of minerals that companies should integrate into their management system.[29] The document also identifies some risks (or adverse impacts of a company's operation) that may be associated with extracting, trading or exporting minerals from conflict-affected or high risk areas as well as measures to respond to/mitigate them. Such risks include contributing to or facilitating serious human rights violations and international crimes, providing support—either directly or indirectly—to non-state armed groups or security forces that illegally control mining sites, and engaging in bribery or fraudulent misrepresentation of the origin of minerals.[30] Measures to be taken encompass suspending trade with dubious suppliers, using leverage to compel suppliers to adhere to the standards, working together with the local authorities to impose and enforce standards, and following up on breaches.[31] Like the EITI and the KPCS, the OECD Due Diligence Guidance has become a global standard and is referenced in several legal instruments adopted at the domestic and regional levels, notably the EU Regulation 2017/821 recalled above. The Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains is also based on the OECD Guidance. The US Securities and Exchange Commission recognised the OECD Guidance as an international framework for due diligence measures undertaken by companies that are required to file a conflict minerals report under the final rule implementing Section 1502 of the Dodd-Frank Act.[32]

Even if the provisions in these regulatory instruments are of a 'soft law' nature, they have shaped perceptions and practices at different levels.[33] An indication of their prominence can be found in the practice of the UN Security Council (UNSC). Over the past couple of decades, the UNSC has intensified the use of commodity or targeted sanctions to end wars fuelled by the

[28] The Guidance defines the two terms as follows: 'Conflict-affected and high-risk areas are identified by the presence of armed conflict, widespread violence or other risks of harm to people. Armed conflict may take a variety of forms, such as a conflict of international or non-international character, which may involve two or more states, or may consist of wars of liberation, or insurgencies, civil wars, etc. High-risk areas may include areas of political instability or repression, institutional weakness, insecurity, collapse of civil infrastructure and widespread violence. Such areas are often characterised by widespread human rights abuses and violations of national or international law'. *Ibid,* 13.

[29] The framework consists of five-steps: the establishment of strong company management systems, the identification and assessment of supply chain risks, the design and implementation of strategies to respond to identified risks, the performance of independent third-party audits, and annual reporting on supply chain due diligence. *Ibid,* Annex I.

[30] *Ibid,* Annex II.

[31] *Ibid*.

[32] An International Standard: OECD Due Diligence Guidance for Responsible Mineral Supply Chains, online: <http://mneguidelines.oecd.org/an-international-standard-oecd-due-diligence-guidance-for-responsible-mineral-supply-chains.htm>.

[33] Martin-Joe Ezeudu, 'From a Soft Law Process to Hard Law Obligations: the Kimberley Process and Contemporary International Legislative Process' (2014) 16(1) *European Journal of Law Reform* 104.

exploitation of resource commodities.[34] Sanctions have been imposed often in association with panels of experts appointed to monitor their implementation and peacekeeping missions to ensure compliance with a given sanction regime.[35] More recently, relying on evidence suggesting a correlation between transparent and accountable natural resource management, on the one side, and conflict prevention, on the other, UNSC commodity-focused interventions have been directed at transforming resource governance in post-conflict countries. As such, not only did the UNSC express support for certification schemes and other governance interventions discussed above, but in some cases it subordinated the lifting of sanctions to the accession to a particular initiative, *de facto* transforming the voluntary nature of these instruments.[36] The UNSC made use of sanctions to compel countries emerging from conflict to introduce legal reforms in the management of the forestry sector (eg Liberia)[37] and to join the KPCS (eg Ivory Coast, Sierra Leone).[38]

b. The underlying logic: between securitisation and economic liberalisation

Through a combination of soft and hard initiatives, the regulation of issues that traditionally belonged to the state's domain, notably the way in which entire sectors of the national economy are managed, has thus been 'globalised' and, as we shall see in the remainder of this article, 'privatised'. The shift from domestic/public to global/private regimes of governance has been facilitated by the circulation of two assumptions about the problem and what needs to be done to solve it.

The first is the idea that 'illegal' resource exploitation in fragile or conflict-affected countries represents a 'threat' to peace and security. Based on the finding that rebel and terrorist groups make use of revenues from resource

[34] For instance, with Resolution 1306 (2000), the UNSC imposed commodity sanctions against diamonds originating from Sierra Leone, with the exception of diamonds controlled by the government. As such, sanctions were directed at rebel groups fighting the 'legitimate' government. The sanctions regime against the Democratic Republic of the Congo was intended to target non-state armed groups fighting in the Eastern part of the country (See Resolution 1493 (2001) [28], introducing an arms embargo and condemning the illegal exploitation of natural resources), as well as individuals and entities supporting those illegal groups 'through the illicit trade of natural resources' (Resolution 1857 (2008) [4(g)]).

[35] Dam-de Jong, (n 16) 329–342.

[36] Daniella Dam-de Jong, 'Standard-Setting Practices for the Management of Natural Resources in Conflict-Torn States', in Carsten Stahn, Jens Iverson, and Jennifer S Easterday (eds), *Environmental Protection and Transitions from Conflict to Peace* (Oxford University Press 2017) 190.

[37] See Resolution 1521 (2003), particularly [7, 9, 11–13]. The timber and diamond sanctions were eventually lifted after Liberia's implementation of the proposed reforms of the forestry sector (with Resolution 1689, 2006) and successful accession to the KPCS (with Resolution 1753, 2007).

[38] In Côte d'Ivoire the diamond embargo was lifted in 2014 'in light of progress made towards Kimberley Process Certification Scheme implementation and better governance of the sector'. See Resolution 2153 (2014), [13].

exploitation to sustain their military efforts, the UNSC resorted to the adoption of economic sanctions restricting trade in specific commodities, whose enforcement is supported by peacekeeping missions.[39] By curbing 'illegal' trade by rebel groups, the primary goal of these economic and military interventions has been to pacify conflicts and reinforce state security, political stability, and centralised power. The re-establishment of government control over its territory and the strengthening of state institutions is also instrumental to ensure a 'disciplined' extraction of minerals.

The second is the argument that weak, conflict, and post-conflict countries need to improve how natural resources are 'managed' by the government in order to avoid conflict relapse and reinforce the chances of a durable peace.[40] To that end, they are called to subscribe to the governance initiatives described above, the EITI, the KPCS, and the OECD Due Diligence Guidance, which promote a set of liberal values such as transparency, accountability (including of corporations through supply chain due diligence), and 'good governance'.[41] But how do transparency, accountability, and 'good governance' create the conditions for a durable peace?

As these concepts are deliberately open-ended and mean different things to different people, there is no one right answer to this question. One powerful claim, which will be further discussed in the next section, is that transparency and accountability facilitate post-conflict recovery by incentivising foreign investments, which in turn generate state revenues and peace dividends.[42] This is based on the presumption, valid in peace and war times, that minerals are 'essential for modern living' and can provide a pathway to poverty alleviation and economic development.[43] However, governments

[39] Mark B Taylor and Mike Davis, 'Taking the Gun out of Extraction: UN Responses to the Role of Natural Resources' in Carl Bruch, Carroll Muffett, and Sandra S Nichols (eds) *Governance, Natural Resources, and Post-Conflict Peacebuilding* (Routledge 2016) 9/249.

[40] See Statement by the President of the UNSC, UN Doc S/PRST/2007/22 (25 June 2007), emphasising that 'in countries emerging from conflict, lawful, transparent and sustainable management -at local, national and international level and exploitation of natural resources is a critical factor in maintaining stability and in preventing a relapse into conflict'.

[41] For a discussion on the meaning of transparency and accountability in the context of transnational regimes of resource governance, see Danielle Dam-de Jong, '"A Rough Trade?" Towards a More Sustainable Minerals Supply Chain' (2019) 2 (1) *Brill Open Law* 8.

[42] The concept of 'peace dividends' is used in this context to indicate how well-managed resource extraction would contribute to restore peace and stability by providing people with new income sources, jobs, and improved infrastructure. The claim that more global regulation is a recipe for peace is, obviously, open to contestation. It has been shown that the US Dodd Frank Act produced a number of unintended consequences for mining communities in Eastern DRC. Following the announcement that American companies would no longer purchase from refiners and smelters of tin, tantalum and tungsten that accepted material which did not comply with the regulatory requirement under section 1502, many local businesses were forced to close, unemployment rose, and poverty levels worsened. According to the UN Group of Experts, tens of thousands of people who relied on the artisanal mining trade were adversely affected, and the economic output of the region as a whole declined. See Louise Arimatsu and Hemi Mistry, 'Conflict Minerals: The Search for a Normative Framework', International Law Programme Paper, Chatham House (2012) 35.

[43] United Nations Report of the World Summit on Sustainable Development, 26 August–4 September 2002, A/CONF.199/20, Resolution 2 [46]. This sentence was condemned by environmentalists and

need 'strong capacities to develop, manage and regulate their mining industries in the interest of sustainable development'.[44] A politically stable state with control over its territory is the prerequisite to ensuring that natural resources are effectively managed and to avoiding conflict relapse.[45] In this context, the extractive corporation, if compliant with the regulatory initiatives discussed in this section, becomes a key player in the transition from conflict to peace, from unregulated to disciplined resource exploitation.

3. Making the extractive corporation a 'partner' for peace

Commentators have noted that, in a globalised society, the private sector is increasingly assigned roles conventionally attributed to state authorities which contribute towards the realisation of public goods.[46] Such reconfiguration of the relationship between public and private authorities (specifically, extractive industries) gives rise to a paradox in countries emerging from conflict. While extractive corporations might have contributed to conflict and abuses, in the post-conflict phase they are construed as engines of durable peace. The following statement made by the think tank Swiss Peace is revealing:

> Extractive industries are of strategic importance to peacebuilding due to their ability to address conflict drivers, *transform a war into a peace economy*, boost rapid growth, attract large-scale investment, and generate state revenue. Economic opportunities offered by extractive industries may *produce a peace dividend* that motivates belligerents to end fighting and uphold peace. Extractive industries can provide jobs, skills and alternative livelihoods necessary to disarm, demobilize and reintegrate ex-combatants. Further jobs are created by mining-related infrastructure development, subsidiary industries and informal sector activities. By flushing revenues into depleted state coffers, extractive industries can *fund post-conflict reconstruction, peacebuilding projects, and reduce aid dependency*. By restoring investor confidence, they can trigger investment into other sectors and economic diversification.[47]

That corporations are crucial actors in the post-war economy is also recognised by the UN Security Council. In a Statement on natural resources and conflict, the President of the Council emphasised

affected communities' representatives at the 2002 World Summit in Johannesburg for justifying the consumption patterns in the Global North.

[44] See eg General Assembly, *The Future We Want* (27 July 2012) UN Doc. A/RES/66/288 [227–228].

[45] For a critique of this approach, see Tzouvala (n 14), arguing that legal instruments aiming to regulate land grabbing uphold a form of state-centrism and imagine the host state as internally unitary and externally independent, which is not the reality of many post-colonial states.

[46] See Cutler (n 13) 261. See also Doreen Lustig and Eyal Benvenisti, 'The Multinational Corporation as "the Good Despot": The Democratic Costs of Privatization in Global Settings' (2014) 15(1) *Theoretical Inquiries in Law* 125, arguing that privatisation in an era of globalisation means the delegation of public functions to private foreign actors.

[47] Michael Aeby, Sibel Gurler, Swiss Peace, 'Partners for Peace: Extractive Industries and Peacebuilding' online: www.swisspeace.ch/apropos/partners-peace-extractive-industries-peacebuilding/.

> the need for the private sector to contribute to the good governance and avoidance of illegal exploitation of natural resources in countries in conflict. In this regard, the Council also notes the important contribution voluntary principles and standards play in encouraging multinational enterprises to adopt a responsible business conduct such as provided for by OECD Guidelines for Multinational Enterprises and the OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones and the UN Global Compact.[48]

By joining voluntary normative standards and mechanisms, corporations can help curb the problem of illicit trade in 'conflict minerals' and reinforce the peacebuilding process. The Introduction to the OECD Due Diligence Guidance affirms in a similar vein that

> [i]n conflict-affected and high-risk areas, companies involved in mining and trade in minerals have the potential to generate income, growth and prosperity, sustain livelihoods and foster local development.[49]

It is also acknowledged that

> [i]n such situations, companies may also be at risk of contributing to or being associated with significant adverse impacts, including serious human rights abuses and conflict.[50]

Hence, the Guidance presents itself as the tool to 'help companies respect human rights and avoid contributing to conflict through their sourcing decisions, including the choice of their suppliers'.[51]

Framing the corporation (especially in its transnational form) as a tool for peace legitimises a set of principles, rules and practices aimed at increasing the capacity of the extractive industry to operate in countries emerging from conflict.[52] The EITI Principles, for example, underline 'the importance of transparency by governments and companies in the extractive industries and the need to enhance public financial management and accountability' and 'recognise the enhanced environment for domestic and foreign direct investment that financial transparency may bring'.[53] Transparency is thus encouraged not only because it fosters democratic checks upon institutions, but for its capacity to attract foreign investments. The KPCS is also premised on the idea that 'urgent international action is imperative to prevent the problem of conflict diamonds from negatively affecting the trade in legitimate diamonds, which makes a *critical contribution to the economies* of

[48] Statement by the President (n 40) 2.
[49] OECD Due Diligence Guidance (n 27) 12.
[50] *Ibid*.
[51] *Ibid*.
[52] This is in line with the tendency in mainstream development policy to see the private sector (as opposed to the state) as an engine to growth and source of welfare gains. On this point, see Rittich (n 12) 825.
[53] See EITI Principles, [5, 7], online: <https://eiti.org/document/eiti-principles>.

many of the producing, processing, exporting and importing states, especially developing states'.[54]

The emphasis on securing the extraction of minerals and improving resource governance through these standards, so as to make the post-conflict state 'safe for the market',[55] is in line with the 'liberal peace' agenda. The idea that a free-market economy and strong liberal political institutions are the most promising way to achieving sustainable peace within post-conflict societies has become very popular in the international plane.[56] The theoretical underpinnings of the 'liberal peace' are, however, increasingly called into question as it emerges that the promotion of the rule of law in post-conflict societies has become the means to reinforce the protection of property rights, and to promote open markets and export-driven growth.[57] Rules protecting foreign investment are an important element in the transition from conflict to peace and in the political economy of global resource regulation.[58] These rules commonly establish the principle of fair and equitable treatment of investors, protection from expropriation, free transfer of capital and security of investment.[59] They also construct natural resources located within a host state as commodities to be exploited in order to bring development, prosperity, and peace,[60] often failing to consider the adverse socio-ecological impacts of extractivist projects.

While countries devastated by violent conflict may need to attract foreign investments to generate jobs and government revenues, which in turn would support the rebuilding of essential public services, an approach that promotes economic development without dealing with structural injustices is problematic. Scholars have observed that in Liberia and Sierra Leone post-conflict recovery has been understood as being dependent on the speedy resurgence of commercial mining and timber extraction, albeit under the

[54] Kimberley Process (n 18) 1 (emphasis added).

[55] Anne Orford and Jennifer Beard, 'Making the State Safe for the Market: The World Bank's World Development Report' 1997 (1998) 22 *Melbourne University Law Review* 195.

[56] See in general Chandra Lekha Sriram, 'Justice as Peace? Liberal Peacebuilding and Strategies of Transitional Justice' (2007) 21(4) *Global Society* 579. In a nutshell, the concept of 'liberal peace' indicates all activities implemented by international organizations, eg UN, international financial institutions, and NGOs to promote stability, democracy and development in countries emerging from violent conflict. See also Christine Chinkin and Mary Kaldor, *International Law and New Wars* (Cambridge University Press 2017), especially Chapter 9, 374–429.

[57] For a review of critical literature on liberal peacebuilding, see eg Padraig McAuliffe and Christine Schwobel-Pattel, 'Disciplinary Matchmaking: Critics of International Criminal Law Meet Critics of Liberal Peacebuilding' (2018) 16 *Journal of International Criminal Justice* 985. For an examination of the dark side of the 'rule of law', see Ugo Mattei and Laura Nader, *Plunder: When the Rule of Law is Illegal* (Wiley 2008).

[58] Sundhya Pahuja, 'Conserving the World's Resources?' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press 2012) 405.

[59] *Ibid*, 406.

[60] See eg Lorenzo Cotula, 'The New Enclosures? Polanyi, International Investment Law and the Global Land Rush' (2013) 34 (9) *Third World Quarterly* 1605, discussing how international investment law constructs land as a commercial asset and facilitates access to land for foreign investors.

reformed legal framework emphasising transparency, accountability and good governance.[61] Yet, the emphasis on marketisation of natural resources and export-driven economic growth in the two countries has been questioned for its capacity to marginalise and even reproduce inequalities important to conflict causation.[62]

In the case of Sierra Leone, commentators maintain that a more useful way to understand the problems caused by the abundant diamond reserve is in terms of structural inequality within the society. This inequality led to frustration among the sectors of the population who were excluded from the benefits of resource extraction.[63] Beevers contends that dominant narratives focusing on the ability of rebel militias or corrupt government officials to loot natural resources and prolong the war leave out the more complex roots of the conflict, including resentment toward exploitative land relationships and the decision to make illegal the alluvial diamond mining that people relied on for their livelihoods.[64] A number of authors have also linked the genesis of the conflict in Sierra Leone to the marginalisation and unemployment of the youth, following decades of economic stagnation and the neoliberal reforms introduced at the behest of the International Financial Institutions in the 1980s. The latter reinforced division and inequalities within the country, making the prospect of joining the Revolutionary United Front rebellion appealing.[65]

Thus, there seems to be a dissonance between the image of the extractive industry as a 'partner' for peace and its contribution to social inequality and violence. This is not to say that the possible involvement of transnational extractive companies in conflict and abuses is ignored. The UNSC-appointed panel of experts held, for instance, that the conflict in the Congo was mainly about 'access, control and trade'[66] of diamond, gold and other minerals, and identified those involved in the exploitation of the DRC's natural wealth in foreign armies and corporations, the latter defined as the 'engine of the conflict in the DRC'.[67] Indeed, the EITI and OECD Due Diligence Guidance move from the finding that transnational corporations may contribute to (or

[61] Michael D Beevers, 'Governing Natural Resources for Peace: Lessons from Liberia and Sierra Leone' (2015) 21 (2) *Global Governance* 227, 237.
[62] Michael D Beevers, 'Peace Resources? Governing Liberia's Forests in the Aftermath of Conflict' (2015) 22(1) *International Peacekeeping* 26.
[63] Se Young Jang, 'The Causes of the Sierra Leone Civil War: Underlying Grievances and the Role of the Revolutionary United Front', *E-International Relations* (25 October 2021) online:www.e-ir.info/2012/10/25/the-causes-of-the-sierra-leone-civil-war-underlying-grievances-and-the-role-of-the-revolutionary-united-front/.
[64] Michael D Beevers, *Peacebuilding and Natural Resource Governance after Armed Conflict: Sierra Leone and Liberia* (Palgrave 2019), especially Chapter 6, 123–144.
[65] See eg James Ahearne, 'Neoliberal Economic Policies and Post-Conflict Peace-Building: A Help or Hindrance to Durable Peace?' (2009) 2 *POLIS Journal* 1.
[66] Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, UN Doc. S/2001/357 (12 April 2001) [213].
[67] *Ibid* [215].

at least facilitate) 'serious adverse impacts'. Their purpose is precisely to prevent and address corporate violations. Yet, by doing so, they also achieve a metamorphosis in how the extractive industry is viewed throughout the transition from conflict to peace. The transnational regulatory frameworks under focus present themselves as the tool to transform the 'risk' of mineral extraction in conflict and fragile countries into 'opportunities' for investment and economic growth in the post-war environment. If operating in a stable and secure country, and subject to the international standards mentioned above, the extractive industry becomes a positive force, a 'partner' for peace.

Legal instruments addressing 'conflict minerals' rely on what has been called by Pahuja and Saunders an 'article of faith'–'that the core 'normal' activity of corporations [is] unquestionably 'good', and that a sphere of corporate freedom of action [is] therefore needed'.[68] In other words, a specific view of the relationship between transnational corporate actors, development, and peace underpins these norms. As the authors show in their analysis of the battles over the place of the transnational corporation within the international order between 1955 and 1974, more radical efforts of developing countries to address the negative distributional effects generated by corporations operating in the Third World have failed. Subsequent legal developments produced outcomes opposite to those sought by the Global South, ie the internationalisation of the protection of foreign investments and domestic regulation of transnational corporate activities.[69] We can see how the two ideas that emerged out of that struggle – that the domestic sphere (the post-conflict state) should be the one to ensure that the corporation can be held liable for harms and that any initiative at the international level would be in the form of non-binding code of conduct/guidelines – are still with us and at play with regard to 'conflict minerals'.

As the next section will argue, the EITI and the OECD Due Diligence Guidance can be situated within a broad range of corporate social responsibility initiatives, which see self-regulation as the preferred model of governance, rather than external regulation of corporate activity by public authority at the national or international level.[70] Although transnational normative frameworks governing extractive activities in conflict settings aim to achieve public goods (transparency, accountability, and ultimately peace), they

[68] Sundhya Pahuja and Anna Saunders, 'Rival Worlds and the Place of the Corporation in International Law', in Philip Dann and Jochen Von Bernstorff (eds), *The Battle for International Law*: *South-North Perspectives on the Decolonization Era* (Oxford University Press 2019) 141, 172.

[69] *Ibid*, 174.

[70] Other transnational governance initiatives, which are not considered here and provide standards for corporations operating in developing/conflict countries, include the Global Compact Guidance on Responsible Business in Conflict-Affected and High-Risk Areas, the Voluntary Principles on Security and Human Rights, the Equator Principles, the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests.

largely depend on voluntary procedures adopted by companies and privatised systems of governance.

4. Human rights and extractive activities: silencing distributive concerns

Over the last decades, as criticism from affected communities against transnational extractive projects has become stronger, initiatives regulating corporate activities in the Global South have multiplied and broadened their mandate.[71] Although international human rights law does not impose obligations directly upon corporations, a variety of self-regulatory instruments have been developed to address this governance 'gap'.[72] As observed by Simons, corporations have adopted policies, reporting processes and have signed on to multistakeholder standards as 'a risk management strategy to preserve or enhance their reputation, or to stave off possible future state regulation'.[73] Governments have also responded by supporting the development of a variety of global initiatives, which encourage–rather than compel–transnational corporations to comply with human rights norms.[74] Under the existing business and human rights framework, due diligence has emerged as the preferred tool to promote greater corporate accountability for human rights violations that may arise from business activities abroad. The standard is now incorporated into different soft-law instruments, notably the UN Guiding Principles on Business and Human Rights[75] and OECD Guidelines for Multinational Enterprises.[76] In a nutshell, human rights due diligence is the process through which business enterprises assess actual and potential human rights impacts; act to prevent and mitigate these impacts; track the effectiveness of responses; and communicate externally how impacts are addressed.[77] Likewise, transnational norms regulating resource extraction

[71] This dynamic is famously explained by Rajagopal through the idea of 'resistance-renewal': international law and institutions 'renew and grow more' as 'social movements resist more'. See Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge University Press 2003) 133–134.

[72] See Michael Elliot, 'Problematising the "Governance Gap": Corporations, Human Rights, and the Emergence of Transnational Law' (2021) *Transnational Legal Theory* (upcoming), arguing that the notion of the governance gap is, however, problematic.

[73] Simons (n 23) 79.

[74] *Ibid*, 79–80.

[75] *UN Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, UN Doc. HR/PUB/11/04 (2011), Principles 17–21. For an analysis of the different pillars of the UN Guiding Principles, and how they operate in conflict zones, see Daria Davitti, *Investment and Human Rights in Armed Conflict: Charting an Elusive Relation*, especially Chapter 5 (Hart 2019). The author argues that the home state has an obligation to regulate the activities of companies domiciliated in its territory which operate in conflict zones.

[76] For a critical review of the concept of human rights due diligence in international and domestic law, and how it may result in cosmetic forms of compliance by business actors, see Ingrid Landau, 'Human Rights Due Diligence and the Risk of Cosmetic Compliance' (2019) 20(1) *Melbourne Journal of International Law* 221.

[77] *Guiding Principle on Business and Human Rights* (n 75) Principle 17.

impose due diligence requirements upon companies operating in fragile or conflict affected countries to reduce the risk of contributing to or facilitating serious human rights violations and international crimes. The OECD Due Diligence Guidance and the EU Conflict Mineral Regulation are the best example of this approach at the supra-national level.[78]

While the need to address the adverse human, social, and environmental impacts of resource extraction is often invoked as a justification for these legal developments, a look at their drafting history raises questions about their capacity to do so. Indeed, in line with the tendency outlined above, these norms are often generated through processes driven by corporations or by the interests of rich countries in which they are incorporated.[79] The diamond industry, for instance, was a strong driving force behind the adoption of the KPCS. According to one commentator, its main rationale was precisely to protect the reputation of the diamond industry by eliminating the opportunities for armed groups to profit from the trade in rough diamonds.[80] The ability of corporations to shape transnational norms in line with their market interests is discussed in the literature and calls have been made to consider corporations as '*producers* of regulation or as governance institutions'.[81] Understanding the corporation as 'active regulator'; influencing and even creating transnational rules enables us to see the imbalances in power that exist among actors involved in the negotiation and implementation of regimes regulating extractive activities in conflict countries. While participation of civil society groups is encouraged, their capacity to shape decision-making at the global level depends on several factors, such as funding and level of participation in different networks.[82] Given these dynamics, the question of whether existing corporate governance mechanisms, such as codes of conduct and human rights standards, can produce meaningful social outcomes for peoples impacted by extractive projects or whether they are a form of 'blue-washing'[83] is open. As Banerjee notes, 'signing up to a code of human rights can easily become a substitute

[78] It is important to note that some European countries have introduced domestic legislation providing for mandatory corporate due diligence in their supply chain. See eg the French *Loi de devoir de vigilance*, adopted in 2017, the *Lieferkettengesetz*, which was recently debated in the German Parliament, and the Dutch proposal for *Responsible and Sustainable International Business Conduct Act*.

[79] Phoebe Okowa, 'Sovereignty Contests and the Protection of Natural Resources in Conflict Zones' (2013) 66 *Current Legal Problems* 33, 62.

[80] Daniella Dam-de Jong, 'The Role of Informal Normative Processes in Improving Governance over Natural Resources in Conflict-Torn States' (2015) 7 *Hague Journal of Rule Law* 219, 228.

[81] Dan Danielsen, 'Corporate Power and Global Order' in A. Orford (ed) *International Law and its Others* (Cambridge University Press 2006) 85.

[82] Subhabrata Bobby Banerjee, 'A Critical Perspective on Corporate Social Responsibility: Towards a Global Governance Framework' (2014) 10 *Critical Perspectives on International Business* 84, 88.

[83] Blue-washing refers to the practice of overstating a company's commitments to social responsibility by signing non-binding international compacts to enhance its corporate image, without necessarily enforcing relevant standards or following up on said commitments. Bede Nwete, 'Corporate Social Responsibility and Transparency in the Development of Energy and Mining Projects in Emerging Markets: is Soft Law the Answer?' (2007) 8(4) *German Law Journal* 311–340.

for ending human rights violations without questioning the dynamics of power that create the space for violations'.[84]

This argument is further developed by legal scholars writing within and in relation to the Global South.[85] One line of critique signals that, whereas the objective of standards for transnational corporations is to prevent, mitigate and account for human rights violations associated with their activities abroad, they still allow the normal execution of companies' operations. In other words, they leave unchallenged the broader legal, political, and economic context in which transnational corporations operate and make profits. Zeffert claims, for instance, with regard to land grabbing, that the 'pro-human rights instruments […] tacitly legitimize the same dispossessory path of economic growth promoted by the pro-investment regulation and fall within the now-familiar discipline and logic of capitalist land transformation'.[86] As such, existing regulatory frameworks seem to suffer from the contradiction that, on the one side, they support extractivist development strategies (which may exacerbate poverty and dispossession),[87] and on the other side, they promote respect for human rights and offer some (limited) avenues for redress.[88] Translated to our case, although the language of human rights is invoked by individuals, states, and international organisations to make extractive industries accountable for the negative impact of their activities in conflict zones, the problem is that human rights standards remain subject to the imperative of economic growth through liberalisation and marketisation of natural resources. The latter, as seen above, are the central tenets of the 'liberal peace' agenda, which has been implemented in countries emerging from conflict, such as Sierra Leone.

One way to understand this contradiction is to refer to the body of scholarship directing attention to the interrelation of human rights, neoliberalism, and a globalised economy. Upendra Baxi has famously stressed the emergence of a new paradigm of human rights, more 'trade-related and market-friendly', over the last few decades, which goes in tandem with the neoliberal orientation in international law.[89] This 'distorted' version of

[84] Banerjee (n 82) 87. See also B S Chimni, 'International Institutions Today: An Imperial Global State in the Making' 15(1) *European Journal of International Law* (2004) 14, arguing that 'the attempt to bluewash the image of the transnational corporation is not in the realm of the possibility, but a reality today'.

[85] See eg Sara L Seck, 'Transnational Corporations and Extractive Industries' in Shawkat Alam et al. (eds) *International Environmental Law and the Global South* (Cambridge University Press 2015) 397, contending that, to date, the structure of governance arrangements appears rarely in accordance with the desires of affected mining communities, who seek to prevent harm or access justice afterwards.

[86] Zeffert, (n 14) 432, 456.

[87] For an insightful discussion on the 'myth' that mining projects ameliorate the conditions of communities in the Global South and reduce poverty, see Bonita Meyersfeld, 'Empty Promises and the Myth of Mining: Does Mining Lead to Pro-Poor Development?' (2017) 2 *Business and Human Rights Journal* 31.

[88] See generally Zeffert (n 14).

[89] Upendra Baxi, 'Voice of Suffering and the Future of Human Rights' (1998) 8(2) *Transnational Law and Contemporary Problems* 125, 163–164.

human rights has become the instrument to legitimise globalisation and promote what he calls the 'collective rights of global capital' in ways that '"justify" corporate well-being and dignity over that of the human person'.[90] Susan Marks has also argued that human rights law and discourses were complicit in the rise of neoliberal capitalism in the 1970s and in displacing more radical demands for socio-economic transformations and substantive equality.[91] Along the same line, Robert Meister has pointed out that the problem with today's commitment to human rights is that, unlike previous demands for social justice, it 'seeks to postpone large-scale redistribution'.[92] The denunciation of physical atrocities by 'inhuman' perpetrators has become, since the end of last century, the foundation of mainstream human rights discourse.[93]

A full engagement with the critique of contemporary human rights approaches for their insufficient attention to questions of global redistribution is, clearly, beyond the scope of this article.[94] Yet, this literature helps make sense of the scarce attention that the legal instruments under focus pay to the structural economic conditions which paved the way for conflict. By doing so, it raises hard questions about the conflicting interests that have shaped discourses and regulatory efforts to tackle 'conflict minerals'. When reference is made to 'serious abuses' associated with conflict-related resource extraction, international institutions and governance bodies are primarily concerned with highly visible atrocities committed by state and non-state actors fighting each other. The OECD Due Diligence Guidance outlines the following forms of 'serious abuses':

> any forms of torture, cruel, inhuman or degrading treatment, any forms of forced or compulsory labour, the worst forms of child labour, other gross

[90] *Ibid,* 164.

[91] Susan Marks, 'Four Human Rights Myths' (October 2012) *LSE Law, Society and Economy Working Papers*. See also Jessica Whyte, *The Morals of the Market: Human Rights and the Rise of Neoliberalism* (Verso 2019) exposing the role of human rights in neoliberal attempts to develop a moral framework for a market society; Samuel Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press 2010), claiming that the human rights movement rose to prominence in 1970s within Western societies, although he does not identify a causal nexus with the rise of neoliberalism. For a critical review of Moyn's book, see Antony Anghie, ''Whose Utopia?' Human Rights, Development, and the Third World' (2013) 22 *Qui Parle: Critical Humanities and Social Sciences* 63.

[92] Robert Meister, *After Evil: A Politics of Human Rights* (Columbia University Press 2011) 1. David Kennedy has presented a similar critique of the capacity of human rights to effectively address systemic inequalities. He writes, 'human rights foregrounds problems of participation and procedure, at the expense of distribution, implicitly legitimating the existing distributions of wealth, status and power in societies once rights have been legislated, formal participation in government achieved, and institutional remedies for violations provided.' David Kennedy, 'The International Human Rights Movement: Part of the Problem?' (2002) 15 *Harvard Human Rights Journal* 101, 109.

[93] Meister, *Ibid,* 6.

[94] For a recent discussion about the extent to which human rights do, can or should attend to economic inequality, see Daniel Brinks, Julia Dehm and Karen Engle, 'Introduction: Human Rights and Economic Inequality' (2020) 10(3) *Humanity* and the different contributions to the special issue. See also John Linarelli, Margot Salomon, and Muthucumaraswamy Sornarajah, *The Misery of International Law*, especially Chapter 7 (Oxford University Press 2018).

> human rights violations and abuses such as widespread sexual violence, and war crimes or other serious violations of international humanitarian law, crimes against humanity or genocide.[95]

Without denying that these are severe human rights violations, the emphasis on physical abuses inflicted by perpetrators against the 'bodies' of victims leaves out less visible, but more pervasive forms of violence.[96] Further, by focusing on the 'pure suffering' of victims, the OECD Guidance reinforces the idea that violation of human rights are a failure of national governance, and have nothing to do with historical legacies, the operation of the extractive industry, and systemic dynamics of exploitation.[97] The 'minimalist' conceptualisation of human rights in transnational legal practices addressing 'conflict minerals' has come at the expense of more emancipatory engagement with the violence associated with extractive activities. The risk is that, by turning a blind eye to socio-economic grievances that are integral to conflict causation and demands for more equitable benefit sharing, existing regulatory approaches leave unchallenged and may even legitimise ongoing patterns of resource dispossession.

5. Localising the problem and its solutions: the case of corruption in resource governance

As already noted, one purpose of the regulatory measures under focus is to establish 'good governance' over mineral resources, based on the assumption that ineffective management of valuable commodities is linked with the onset, continuation, and recurrence of violent conflict. While the concept of 'good governance' does not have a specific meaning in transnational law, transparency, civil and political rights, and the rule of law have emerged as major issues of governance.[98] In a compelling critique of the term, Antony Anghie maintains that 'good governance', although formulated as an abstract and universal ideal, has been developed primarily in relation to the Third World, based on the view that a lack of development is attributed

[95] OECD (n 27) 59. Likewise, the definition of 'gross human rights abuses' in the UN Guiding Principles on Business and Human Rights covers 'genocide, slavery and slavery-like practices, summary or arbitrary executions, torture, enforced disappearances, arbitrary and prolonged detention, and systematic discrimination'. The Framework recognises that violations of economic, social and cultural rights, can also count as gross violations, but only if they are 'grave and systematic, for example violations taking place on a large scale or targeted at particular population groups'. United Nations Human Rights Office of the High Commissioner *The Corporate Responsibility to Respect Human Rights An Interpretive Guide* (2012) online: <www.ohchr.org/Documents/publications/hr.puB.12.2_en.pdf> 6.

[96] I develop this argument in another article. See Eliana Cusato, 'International Law, the Paradox of Plenty, and the Making of Resource-Driven Conflict' (2020) 33 *Leiden Journal of International Law* 649. See also Kamari Maxine Clarke, 'The Rule of Law Through Its Economies of Appearances: The Making of the African Warlord' (2011) 18 *Indiana Journal of Global Legal Studies* 7.

[97] Marks (n 91) 13.

[98] Rittich (n 12) 834.

to the absence of 'good governance'.[99] The concept (or ideal) has been invoked by international financial institutions to justify reforms and interventions in developing countries inspired by a neoliberal development agenda.[100] Even if those policies are increasingly under scrutiny for their adverse impact on socio-economic rights, by focusing on the supposed lack of 'good governance' of the recipient countries, international financial institutions can blame the Third World for being poor and underdeveloped.[101] Anghie's critique directs attention to the tendency in academic and policy circles to frame ineffective resource governance, corruption, and conflict as local problems, which arise from factors that are endogenous to the developing world.[102] This rhetoric not only fails to recognise the historical processes that led to the current situation of corruption and malgovernance in the Global South, but obscures the global political economic structures that create the conditions for resource-related conflict to break out.[103]

Isolating the problem (local) from its causes (global) becomes the justification for external interventions in the forms of UN Security Council sanctions and 'good governance' initiatives, such as EITI and KPCS, to re-establish peace, security, the rule of law, and foster economic development in the post-conflict state. As argued by Anne Orford, international actors and institutions are thus represented as the hero of the story, whereas the post-conflict state is portrayed as corrupt, undemocratic, or unable to govern itself.[104] Striving for 'good governance' may also become a distraction, diverting resources from efforts to change the systemic factors that enable poverty, exploitation, and violent conflict over natural resources. Transnational normative regimes meant to improve mineral governance offer limited solutions, as they focus on technical reforms and enforcement actions to be taken by the state, leaving the larger framework unchallenged and untouched. The KPCS, for instance, requires states to introduce

[99] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005) 249.

[100] *Ibid,* 261. In this way, 'good governance' initiatives championed by international financial institutions and other organisations reproduce the 'civilising mission' that has characterised international relations since colonial times. *Ibid,* 262.

[101] *Ibid,* 249.

[102] See eg Paul Collier, *The Bottom Billion: Why the Poorest Countries Are Failing and What Can Be Done* (Oxford University Press 2008). For a critique, see Susan Marks, 'Human Rights and the Bottom Billion' (2009) 1 *European Human Rights Law Review* 37.

[103] Kuntala Lahiri-Dutt, 'May God Give Us Chaos So That We Can Plunder': A Critique of 'Resource Curse' and Conflict Theories' (2006) 49(3) *Development* 14. See also Cyril Obi, 'Oil as the 'Curse' of Conflict in Africa: Peering through the Smoke and Mirror' (2010) 37(126) *Review of African Political Economy* 483. For an analysis of the processes that create poverty in the Global South and the role of the law within these processes, see Jason Beckett, 'Creating Poverty' in Anne Orford and Florian Hoffmann (eds) *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2016).

[104] See eg Anne Orford, 'Locating the International: Military and Monetary Interventions after the Cold War' (1997) 38 *Harvard International Law Journal* 443; Anne Orford, 'Muscular Humanitarianism: Reading the Narratives of the New Interventionism' (1999) 10(4) *European Journal of International Law* 679.

appropriate national legislation, in addition to setting up a system of internal controls designed to eliminate 'conflict diamonds' from shipments of rough diamonds imported into or exported from their territory. States signing up for the EITI need to implement its Standards, which include publicly disclosing revenues and expenditures relating to extractive activities. The message sent by these initiatives is that 'if only bad procedures, rules and ideas were replaced and good ones adhered to, the miseries with which human rights are concerned would go away'.[105] The reality of exploitation is unfortunately much more complex. As put by Susan Marks, rather than being a 'local dysfunction', which may be corrected by better rules, exploitation (in all its forms, including for our purposes mineral exploitation) is functional to the current global political economic system.[106]

The law's emphasis on the 'local', and its limitations, can be best illuminated by an examination of how corruption in the extractive sector is addressed. Corruption is indeed a serious problem, which deprives developing countries of money necessary for development and poverty alleviation.[107] While corruption can happen (and does happen) at any stage of the global supply chain, it is significant that rules proscribing it focus on the places of origin of natural resources. Transnational legal efforts to fight corruption include the 1997 OECD Anti-Bribery Convention;[108] the 1999 Criminal[109] and Civil Law Conventions of the Council of Europe,[110] and the 2003 Conventions of the African Union[111] and the United Nations.[112] Despite the understanding that the fight against corruption needs cooperation between different actors, for the most part, these instruments require state parties to implement measures to prevent and address offences committed within their territory, ie where the encounter between the corrupter and the corrupted takes place. This assumes that 'corrupt practices' can be localised and can be fought by changing the legal landscape in corrupt countries.[113]

[105] *Ibid*, 71.
[106] Susan Marks, 'Exploitation as an International Legal Concept', in Susan Marks (ed) *International Law on the Left* (Cambridge University Press 2008) 281.
[107] According to the World Bank, corruption in the forms of bribery and theft by government officials costs developing countries between $20 billion and $40 billion each year. On this point, see Jason Hickel, *The Divide* (Windmill Books 2018) 223.
[108] *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, 17 December 1997, 37 ILM 1 (Entered into force 15 February 1999).
[109] *Council of Europe, Criminal Law Convention on Corruption,* 27 January 1999, 2216 UNTS 225 (Entered into force 1 July 2002).
[110] *Council of Europe, Civil Law Convention on Corruption*, 4 November 1999, 2246 UNTS 3 (Entered into force 1 November 2003).
[111] *African Union Convention on Preventing and Combating Corruption,* 11 July 2003, 2860 UNTS 113 (Entered into force 5 August 2006).
[112] *United Nations Convention against Corruption*, 9 December 2003, 2349 UNTS 41 (Entered into force 14 December 2005).
[113] Lys Kulamadayil, 'When International Law Distracts Reconsidering Anti-Corruption Law', (2018) 7 *European Society of International Law Reflections*. online: <https://esil-sedi.eu/institutional_member-fields>.

Thus, countries are required to introduce criminal law provisions, create a system of civil liability, or disclose payments received by extractive corporations and how revenues are spent (notably, by joining initiatives such as the EITI).

Resource rich-countries in the Global South are considered as particularly vulnerable to the risk of corruption, hence in need to implement reforms and policies to strengthen their anti-corruption efforts.[114] However, if we think about grand corruption (ie the abuse of high-level power) in the extractive value chain, the presumption that corruption is captured by the relationship between the corrupter (often a national of a wealthy nation) and the corruptible public official of a developing country is debatable. Further, this approach distracts from the potential of legal reforms in jurisdictions where stolen wealth is managed or spent. Sharman, notably, points out that dirty money passes through clean channels and is mostly spent on goods and services sold in the jurisdictions of developed states.[115] Despots, he explains, fancy driving German sports cars, owning real estate in London and Paris, shopping in Miami, wearing Swiss watches and having their wealth managed by New York-based lawyers. Most of this spending requires financial transactions, which could be used as entry points for alternative strategies, including the application of transnational regulations on money laundering and on financial checks in jurisdictions where stolen wealth is spent.[116]

A related critique calls attention to the partial definition of corruption in existing transnational anti-corruption instruments, which targets primarily transactions involving the bribery of public officials. The definition excludes transactions in which foreign corporations deprive developing states of revenue by failing to pay taxes and other monies due.[117] James Thuo Gathii argues that corruption should be redefined to encompass illicit financial flows, ie money that is 'illegally earned, transferred or used'.[118] In his view, corruption should cover transactions like trade misinvoicing, abusive transfer pricing, base erosion and profit shifting, which are legally permissible. Expanding the definition of corruption would help illustrate more clearly the involvement of transnational corporate actors in illicit dealings. Gathii traces the primary reason for the focus on public sector

[114] See eg Annie Barbara Chikwanha, 'Combating corruption in the extractive industry in Africa' (2016), online: <https://issafrica.s3.amazonaws.com/site/uploads/iss-sida-1.pdf>.

[115] See J C Sharman, *The Despot's Guide to Wealth Management: On the International Campaign against Grand Corruption* (Cornell University Press, 2017).

[116] Kulamadayil (n 113).

[117] Global Financial Integrity calculates that each year, up to $1.1. trillion flows illegally out of the developing world and into foreign banks and tax havens. Of this enormous sum, only 3% has to do with corruption of government officials, whereas 65% is commercial tax evasion. Hickel (n 106), 223.

[118] James Thuo Gathii, 'Recharacterizing Corruption to Encompass Illicit Financial Flows', Symposium on New Direction in Anticorruption Law, (2019) 113 *American Journal of International Law Unbound* 336.

corruption in legal instruments (ie the UN Convention Against Corruption and to some extent the OECD Convention recalled above) to the dominance of the Washington Consensus's distrust of governments, especially those in the Global South, as inevitably susceptible to corruption.[119] He maintains that the rise of the anticorruption agenda was closely related to the agenda of privatisation and deregulation, under which the private sector was regarded as a better alternative to governments in their ability to efficiently allocate resources.[120] It is telling that, as observed above, similar ideas prevail regarding the role of the extractive industry in the transition from conflict to peace.

Current debates on the limitations of legal efforts to tackle transnational corruption illustrate how the host state is often blamed for corrupt resource governance and carries the burden to resolve it, while corporate power is often left at the margin of the picture. The law thus recreates a divide between the role of the public (state) and the private (corporations),[121] which leaves unaddressed the structural causes of bad resource governance in conflict countries. In so doing, global anti-corruption instruments end up insulating extractive industries from scrutiny and perpetuating grievances over resource distribution, which may feed into further conflict.

6. Conclusion

The impact of extractive activities in conflict and 'fragile' countries is increasingly under the radar and resulted in the development of public and semi-private legal arrangements. This article examined how transnational regulatory initiatives, such as the EITI, KPCS and OECD Due Diligence Guidance, have sought to securitise and transform mineral governance in countries experiencing or emerging from violent conflict. It has been argued that existing legal norms rest on several assumptions that limit their capacity to challenge the structural political economic conditions that help cause the problems they are meant to address and to respond to the concerns of affected communities.

The analysis demonstrated that, first, these regulatory regimes promote a view of the extractive industry as a 'partner' for peace, in line with the liberal

[119] For instance, the World Bank argued that 'underlying the litany of Africa's development problems is a crisis of governance. By governance is meant the exercise of political power to manage a nation's affairs. Because countervailing power has been lacking, state officials in many countries have served their own interests without fear of being called to account'. See World Bank Group, *Sub-Saharan Africa: From Crisis to Sustainable Growth: A Long-Term Perspective Study* (1989) 60.

[120] Gathii (n 118) 337.

[121] Cutler (n 13) 2279–280, arguing that the public/private distinction was instrumental to the emergence of liberal market economies and, in law, formed the foundation for territorially individuated state authority. While empirically artificial, the separation of public/private spheres is reproduced in legal practices and discourses to obscure private power and insulate private actors from democratic scrutiny.

peace agenda, overlooking its role in generating grievances integral to the causation of conflicts and legitimising its continued operation. Second, they support a narrow, de-politicised understanding of human rights, at the expense of more radical engagement with collective demands for resource redistribution. Third, they frame the problem of malgovernance and corruption as local dysfunctions, thereby reproducing the public/private divide which insulates corporate actors from scrutiny. Paying attention to the material interests underpinning current legal practices enables us to see how corporate power is reinforced, extractivist development models are reproduced, and distributive concerns are marginalised. Moving forward, more research is needed to further illuminate the translation of legal authority between the global and the local, and how the interaction of public and private actors shapes the 'transition' from conflict to peace. This initial study suggests that the dynamics of transnational law can help bring more understanding of why present efforts to regulate extractive activities and account for their socio-environmental impacts have not succeeded in challenging the transfer of wealth and dispossession of communities in the Global South.

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