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From Kansas to the Congo: Why Naming and Shaming Corporations through the Dodd-Frank Act's Corporate Governance Disclosure Won't Solve a Human Rights Crisis

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FROM KANSAS TO THE CONGO: WHY NAMING AND SHAMING CORPORATIONS THROUGH THE DODD–FRANK ACT'S CORPORATE GOVERNANCE DISCLOSURE WON'T SOLVE A HUMAN RIGHTS CRISIS

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ABSTRACT

The Securities and Exchange Commission ("SEC") serves to protect investors, maintain fair and efficient markets, and facilitate capital formation. With the passage of Section 1502 of the Dodd–Frank Act regarding conflict minerals corporate governance disclosure, the agency has entered into the human rights arena. Any company, regardless of size, that files reports with the SEC must now ensure that they are not funding rebel groups engaged in rape, torture, the use of child soldiers, exploitation of child labor, or other activities that have, in part, led to one of the world's largest and most protracted humanitarian crises. This "name-and-shame" law, which does not actually make it illegal to source minerals from the Congo, aims to provide transparency to consumers and investors so that they can make informed choices about the companies with which they choose to do business. On the surface, this makes sense in an era in which companies are hyper-vigilant about their reputations. Whether a corporation takes a shareholder or stakeholder-centric point of view, no firm can afford to be associated with conscription of child soldiers or the rape of women and children.

This Article outlines corporate motivations for social responsibility programs; the various voluntary industry corporate citizenship initiatives; the state of corporate liability for human rights abuses prior to the Dodd–Frank Act; the level of sexual violence in the Congo which led to the legislation; the legislative history behind the conflict mineral rule, including the involvement of civil society groups; the legal

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challenges to the rule; and some alternatives to the rule. The Article contends that in a well-intentioned effort to help the people of the Congo, the drafters of the law oversimplified the causes of the violence and failed to adequately consider appropriate alternatives. Additionally, the implementer of the law—the SEC—failed to adequately consider costs and benefits. Companies, however, will conduct their own cost–benefit analyses as it relates to reputation and legal risk. Many companies will likely determine that pulling out of the Congo is in their best interest. As a result, the Dodd–Frank Act may likely cause a de facto boycott of buying minerals from the Congo, even if they are not tainted. Consumers and investors will ultimately determine whether name-and-shame really works.

The Article concludes that the Dodd–Frank conflict minerals rule is a poor choice for the United States' first foray into human rights legislation for corporations because the law's flaws will lead to unintended and devastating consequences for the very beneficiaries it intends to help—the Congolese people.

INTRODUCTION

For decades, academics and courts have debated the proper role of corporations in society. To many, the corporation serves only to maximize shareholder value.[1] Others criticize that definition as both one-dimensional and outdated. To them, the corporation owes duties to a broader group—the stakeholders, including employees, creditors, and consumers.[2] Still others argue that states need to enact legislation creating new corporate entities such as benefit corporations, low-profit limited liability companies ("L3Cs"), and flexible purpose corporations.[3]

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[1] *See generally* Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423 (1993); Leo E. Strine, Jr., *Our Continuing Struggle with the Idea That For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135 (2012); Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, § 6 (Magazine), at 32.

[2] *See* LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC 4, 6–7, 34–35 (2012).

[3] *See* Dana Brakman Reiser, *Benefit Corporations—A Sustainable Form of Organization?*, 46 WAKE FOREST L. REV. 591, 593–606 (2011) (describing benefit corporations); William H. Clark, Jr. & Elizabeth K. Babson, *How Benefit Corporations Are Redefining the Purpose of Business Corporations*, 38 WM. MITCHELL L. REV. 817, 838 (2012) (describing the need for benefit corporations); Susan Mac Cormac & Heather Haney, *New Corporate Forms: One Viable Solution to Advancing Economic Sustainability*, J. APPLIED CORP. FIN., Spring 2012, at 49, 55 (supporting the flexible purpose corporation); J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1 (2012) (examining whether benefit

They base their contentions in part on the fear that the pursuit of a social mission over profit-maximization subjects directors to additional liability, notwithstanding the existence of constituency statutes in several states and the fact that the law generally allows corporations to pursue lawful purposes including social benefits.[4]

In recent years, however, even the more traditional firms have spent significant sums publicizing their social missions through the use of corporate social responsibility ("CSR") programs.[5] In 1999, corporations issued about 500 nonfinancial reports, but, in 2003, corporations produced more than 1,500 such reports.[6] By 2010, nearly 5,500 corporate responsibility reports were being published each year.[7]

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corporations are really useful and proposing some improvements); J. Haskell Murray & Edward I. Hwang, *Purpose with Profit: Governance, Enforcement, Capital-Raising and Capital-Locking in Low-Profit Limited Liability Companies*, 66 U. MIAMI L. REV. 1, 4 (2011).

[4] *Compare* Clark & Babson, *supra* note 3, at 848–50 (describing how benefit corporations give directors flexibility to pursue social goals while simultaneously holding them accountable to those goals), *with* Murray & Hwang, *supra* note 3, at 35–36 (describing the latitude that directors have to act in favor of non-shareholders due to the business judgment rule and various constituency statutes).

[5] This Article defines CSR as the "commitment [of a business] to contribute to sustainable economic development, working with employees, their families, the local community, and society at large to improve their quality of life." WORLD BUS. COUNCIL FOR SUSTAINABLE DEV., CROSS-CUTTING THEMES 5 (2003), *available at* http://www.wbcsd.ch/DocRoot/7ApjAG0YjGBKx83eok6O/cross-cutting.pdf; *see also* Henri Servaes & Ane Tamayo, *The Impact of Corporate Social Responsibility on Firm Value: The Role of Customer Awareness*, MGMT. SCI. (forthcoming 2013), *available at* http://mansci.journal.informs.org/content/early/2013/01/08/mnsc.1120.1630.full.pdf (discussing various definitions of CSR but adopting the definition by the World Business Council for Sustainable Development). Another appropriate definition is "a business organization's configuration of principles of social responsibility, processes of social responsiveness, and policies, programs, and observable outcomes as they relate to the firm's societal relationships." Noam Noked, *Investing in Corporate Social Responsibility to Enhance Customer Value*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE & FIN. REG. (Feb. 28, 2011, 9:31 AM), http://blogs.law.harvard.edu/corpgov/2011/02/28/investing-in-corporate-social-responsibility-to-enhance-customer-value/ (quoting Donna J. Wood, *Corporate Social Performance Revisited*, 16 ACAD. MGMT. REV. 691, 693 (1991)).

[6] ASS'N OF CHARTERED CERTIFIED ACCOUNTANTS & CORPORATEREGISTER.COM, TOWARDS TRANSPARENCY: PROGRESS ON GLOBAL SUSTAINABILITY REPORTING 2004, at 8, *available at* http://www.corporateregister.com/pdf/TowardsTransparency.pdf. Nonfinancial reports include reports concerning CSR, the environment, sustainable development, and other social or community issues. *Id.* at 5.

[7] Press Release, CorporateRegister.com, Voting Opens for CR Reporting Awards 2012 (Oct. 24, 2010), *available at* http://www.corporateregister.com/crra/help/CRRA12PressRelease.pdf.

To varying degrees, these firms have tried to find a way to pursue a societal benefit while creating economic value.[8] Perhaps in recognition of the public benefit of adopting more of a stakeholder view, the CEO of one of the world's largest hospitality groups began his corporate responsibility report for 2011 by asking the question, "What is the role of hotels in 21st century society?"[9]

CSR programs vary by industry and may tout sustainable economic development, ethical sourcing, community engagement, fair working conditions, and other factors that either cause employees, consumers, and members of the public to have positive feelings about the corporation or help the firm rehabilitate a bruised corporate image.[10] At least publicly, CSR is now the "[n]ew [b]usiness [n]orm."[11]

Cynical observers have labeled some of these efforts "faux CSR,"[12] while others have studied the CSR "halo effect" in which consumers blindly make decisions about a company based solely on what they have heard about one aspect of a company's CSR program.[13] This halo effect may cause consumers, for example, to assume that a company that bottles its products in recycled plastic also treats its employees more fairly than other employers.[14]

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[8] *See* Michael E. Porter & Mark R. Kramer, *Creating Shared Value: How to Reinvent Capitalism—and Unleash a Wave of Innovation and Growth*, HARV. BUS. REV., Jan.–Feb. 2011, at 62, 64–65 (arguing that "societal needs, not just conventional economic needs, define markets" and that companies should have societal issues at the "core," not the "periphery").

[9] INTERCONTINENTAL HOTELS GRP., CORPORATE RESPONSIBILITY REPORT 1 (2012), *available at* http://www.ihgplc.com/files/pdf/2011_cr_report.pdf.

[10] *See generally* WORLD BUS. COUNCIL FOR SUSTAINABLE DEV., CORPORATE SOCIAL RESPONSIBILITY: MAKING GOOD BUSINESS SENSE 6–7, 10–11, 19 (2000), *available at* http://www.wbcsd.org/web/publications/csr2000.pdf.

[11] *See* Markus Funk & Elizabeth Banzhoff, *Corporate Social Responsibility: The New Business Norm*, CORP. COMPLIANCE INSIGHTS (Dec. 14, 2012), http://www.corporatecomplianceinsights.com/corporate-social-responsibility-the-new-business-norm/ (observing that, in addition to bribery and corruption laws, companies need to contend with the Executive Order on Strengthening Protections Against Trafficking in Persons in Federal Contracts, SEC conflict minerals rules, and the California Transparency in Supply Chains Act).

[12] *See, e.g.*, Miriam A. Cherry & Judd F. Sneirson, *Beyond Profit: Rethinking Corporate Social Responsibility and Greenwashing After the BP Oil Disaster*, 85 TUL. L. REV. 983, 985, 999–1009 (2011) (discussing corporate social responsibility and greenwashing in the context of the BP oil spill).

[13] *See* N. Craig Smith et al., *Consumer Perceptions of Corporate Social Responsibility: The CSR Halo Effect* 4, 16–17 (INSEAD Soc. Innovation Ctr., Working Paper No. 16, 2010), *available at* http://ssrn.com/abstract=1577000.

[14] *See id.* at 17 ("The CSR halo effect suggests consumers might extrapolate from a small number of examples of CSR-related practices.").

Despite questions from some skeptics about the motivations for CSR efforts and the fact that the literature is inconclusive as to the extent of the benefits, corporations generally gain some public relations advantage from discussing how they address the triple bottom line—people, profits, and planet.[15] But sometimes that effort may not be enough. Notwithstanding its comprehensive global responsibility reports touting awards for pursuing sustainability, respecting employees, and benefitting the environment,[16] Wal-Mart, the nation's largest employer,[17] has been besieged by employment lawsuits, foreign bribery investigations, and opposition from grassroots organizations against its antiunion stance and its opening of new stores.[18] Nonetheless, Wal-Mart still remains one of the most profitable companies in the world, and it is

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[15] *See* John Elkington, *Enter the Triple Bottom Line, in* THE TRIPLE BOTTOM LINE: DOES IT ALL ADD UP? 1, 1–2 (Adrian Henriques & Julie Richardson eds., 2004) (discussing the origin of the term "triple bottom line"). For example, some research indicates that businesses gain increased customer loyalty, the ability to charge higher prices, and lower reputational risk, which aids them in times of crisis, as a result of their CSR efforts, leading to increased profitability in the long run. Noked, *supra* note 5; *see also* Janet E. Kerr, *Sustainability Meets Profitability: The Convenient Truth of How the Business Judgment Rule Protects a Board's Decision to Engage in Social Entrepreneurship*, 29 CARDOZO L. REV. 623, 664–65 (2007) (reviewing studies measuring the relationship between CSR and consumer reactions to the company); Servaes & Tamayo, *supra* note 5, at 2 (observing that CSR and firm value are positively correlated for firms with high customer awareness based on advertising expenditures and that, for firms with low customer awareness, the relation is either negative or insignificant); Robert G. Eccles et al., *The Impact of a Corporate Culture of Sustainability on Corporate Behavior and Performance* 5–7 (Harvard Bus. Sch., Working Paper No. 12-035, 2011) (comparing ninety *"High Sustainability"* companies that were early and voluntary adopters of environmental and social policies and that use these measures as governance practices with ninety *"Low Sustainability"* companies or traditional companies, and finding that, over an eighteen-year period, sustainable firms outperform traditional firms in terms of both stock market and accounting performance).

[16] *See* WALMART, BEYOND 50 YEARS: BUILDING A SUSTAINABLE FUTURE 114–15 (2012) (listing Wal-Mart's 2011 awards and recognitions, including ones for environmental care, social responsibility, and sustainability).

[17] Lesley Wexler, *Wal-Mart Matters*, 46 WAKE FOREST L. REV. 95, 95 (2011).

[18] *See* GEOFFREY HEAL, WHEN PRINCIPLES PAY: CORPORATE SOCIAL RESPONSIBILITY AND THE BOTTOM LINE 113, 116, 128 (2008); *see also, e.g.*, Wal-Mart v. Dukes, 131 S. Ct. 2541, 2547 (2011) (addressing a class action suit against Wal-Mart); David Barstow, *Vast Mexico Bribery Case Hushed Up by Wal-Mart After Top-Level Struggle*, N.Y. TIMES, Apr. 22, 2012, at A1 (discussing allegations of bribery within Wal-Mart's Mexican subsidiary); Andrew Martin, *Female Wal-Mart Employees File a New Bias Case*, N.Y. TIMES, Oct. 28, 2011, at B3 (discussing discrimination cases against Wal-Mart). Wal-Mart products have also been linked to factories with sub-par safety standards resulting in the deaths of factory employees from fires. Steven Greenhouse, *Documents Indicate Walmart Blocked Safety Push in Bangladesh*, N.Y. TIMES, Dec. 6, 2012, at A16.

likely that its investments in CSR have benefited it.[19] Further, the evidence is mounting that despite what consumers say about their desires to do business with socially responsible enterprises, convenience and price eventually win out when it comes to actual purchasing decisions.[20]

Perhaps because of the public pressure to do more, many of the world's most powerful transnational corporations ("TNCs") engage in a number of voluntary initiatives on their own or with industry peers either to win public and consumer support or to forestall more onerous legislation in home or host countries. TNCs that sign on to voluntary industry initiatives, however, have no accountability other than public scrutiny or expulsion from the voluntary initiative.[21]

International human rights laws generally have focused on protecting citizens from their states, but we are now seeing a shift to focusing on TNCs' roles in protecting human rights.[22] Legally, at least, the states—not TNCs—have traditionally been charged with the main responsibility for protecting human rights.[23] But observers, such as nongovernmental organizations ("NGOs"), socially responsible investors controlling trillions in assets under management,[24] activists, media

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[19] *See* HEAL, *supra* note 18, at 114, 128–30 (discussing Wal-Mart's efficiency and recent steps toward social responsibility).

[20] *See* GUARDIAN, CONSUMER ATTITUDES AND PERCEPTIONS ON SUSTAINABILITY 8 (2010), *available at* http://image.guardian.co.uk/sys-files/Guardian/documents/2010/06/11/GSiJun2010.pdf (indicating that environmental factors are important, but that price, availability, and quality matter more to consumers).

[21] When reputation is an asset, firms are especially susceptible to pressure and scrutiny from activist groups. *See* VIRGINIA HAUFLER, A PUBLIC ROLE FOR THE PRIVATE SECTOR 27 (2001). The U.N. Global Compact, for example, has expelled over 3,000 companies for failing to report on their progress towards achieving the Compact's ten principles. *See UN Global Compact Has Expelled over 3,000 Companies*, UNITED NATIONS GLOBAL COMPACT (Feb. 9, 2012), http://unglobalcompact.org/news/188-02-09-2012. This, however, is a purely voluntary initiative, and there are no civil, criminal, or monetary penalties. *See infra* notes 83–87 and accompanying text.

[22] *See* SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY 3 (2010).

[23] Eric de Brabandere, *Non-state Actors and Human Rights: Corporate Responsibility and the Attempts to Formalize the Role of Corporations as Participants in the International Legal System*, *in* PARTICIPANTS IN THE INTERNATIONAL LEGAL SYSTEM: MULTIPLE PERSPECTIVES ON NON-STATE ACTORS IN INTERNATIONAL LAW 268, 271 (Jean d'Aspremont ed., 2011).

[24] *See* SOC. INV. FORUM FOUND., 2010 REPORT ON SOCIALLY RESPONSIBLE INVESTING TRENDS IN THE UNITED STATES 8 (2010), *available at* http://www.socialinvest.org/resources/pubs/trends/documents/2010TrendsES.pdf (noting that one out of every eight dollars invested in the United States is geared toward sustainable and socially responsible investing). The simplest form of socially responsible investing is portfolio-screening whereby an investor identifies ethically unacceptable investments and excludes those investments from her portfolio. Maria O'Brien Hylton, *"Socially*

outlets, consumers, and labor organizations, have long called on TNCs to re-examine their behavior in the states in which they operate.[25] Some use cooperative initiatives and some employ public "name-and-shame" campaigns.[26] Intergovernmental organizations, such as the Organisation for Economic Co-operation and Development ("OECD") and the United Nations ("U.N."), have issued influential, albeit nonbinding, guidance to TNCs as well.[27] While NGOs and intergovernmental organizations' focus on TNCs have typically been for environmental regulations, the spotlight has more recently turned to garnering TNC participation in human rights issues.[28]

TNCs no longer have the luxury of choosing to volunteer to be socially responsible, at least as it relates to human rights, because those that file reports under Sections 13(a) or 15(d) of the Securities Exchange Act ("Exchange Act")[29] and that meet certain other criteria described in this Article must now enter a new realm between the hard and soft law[30] governance. Prodded by former U.S. Senator Sam Brownback of Kansas,[31] the U.S. government recently enacted a law legislating human

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Responsible" Investing: Doing Good Versus Doing Well in an Inefficient Market, 42 AM. U. L. REV. 1, 7 (1992).

[25] *See* HAUFLER, *supra* note 21, at 11, 107 (discussing the power of activists and socially conscious consumers to influence businesses); DAVID VOGEL, THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS OF CORPORATE SOCIAL RESPONSIBILITY 9–10 (2005) (mentioning the shift of NGOs from lobbying politicians to lobbying executives).

[26] For example, change.org has launched several highly publicized online campaigns to promote citizen activism against well-known firms. *See* CHANGE.ORG, http://www.change.org (last visited Mar. 8, 2013). In another example, European NGOs have asked Apple, Samsung, and others to disclose how they source their tin from Indonesia's Bangka Island because of the potential deforestation and the effect on the local fishermen's livelihoods following a six-month investigation by Friends of the Earth. FRIENDS OF THE EARTH, MINING FOR SMARTPONES: THE TRUE COST OF TIN 3–4 (2012), *available at* http://www.foe.co.uk/resource/reports/tin_mining.pdf.

[27] *See infra* Part I.B–C. The OECD has thirty-four member countries, including the United States, and supports policies improving the social and economic conditions of people worldwide, including people of nonmember states. Org. for Econ. Co-operation & Dev. [OECD], *Better Policies for Better Lives: The OECD at 50 and Beyond*, at 8 (2011), *available at* http://www.oecd.org/about/47747755.pdf. The U.N. currently has 193 member states. *Membership of Principal UN Organs*, UNITED NATIONS, http://www.un.org/en/members/pomembership.shtml (last visited Mar. 8, 2013).

[28] *See* Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45, 78 (2002).

[29] Securities Exchange Act of 1934 §§ 13(a), 15(d), 15 U.S.C.A. §§ 78m(a), 78o(d) (West 2009; Supp. 2012 & Supp. 1A 2012).

[30] Soft laws are neither legally binding "nor completely void of any legal significance." MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 52–53 (4th ed. 2003). Soft law is meant to be transitory, but when it hardens, it becomes customary international law. *See id.*

[31] 156 CONG. REC. S3,655–56 (daily ed. May 12, 2010).

rights through corporate governance disclosure—Section 1502 of the Dodd–Frank Wall Street Reform and Consumer Protection Act ("Dodd–Frank Act").[32] Unrelated to the Dodd–Frank Act's broader goal of preventing financial crisis, the conflict mineral provisions of the Dodd–Frank Act are meant to focus investor and consumer attention on potential corporate complicity in human rights abuses primarily in the Democratic Republic of the Congo ("DRC" or "Congo"),[33] a country with the world's largest concentration of U.N. Peacekeeping troops.[34]

On August 22, 2012, the United States Securities and Exchange Commission ("SEC") finalized Rule 13p-1, which requires domestic and foreign companies (regardless of size) that already file reports with the SEC to conduct due diligence and report on Form SD the origin of certain minerals in their products if those minerals originated in the DRC or adjoining countries.[35] The purpose of the reporting is to ensure that they are not funding dangerous rebel groups that engage in rape, torture, the use of child soldiers, exploitation of children, and other activities that have, in part, led to one of the world's largest and most protracted humanitarian crises.[36] This law, which went into effect on November 13, 2012,[37] aims to provide transparency to consumers and investors so that they can make informed choices about companies.[38]

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[32] *See* Dodd–Frank Wall Street Reform and Consumer Protection Act § 1502, 15 U.S.C. § 78m(p) (Supp. V 2011) [hereinafter Dodd–Frank Act].

[33] *See id.* § 1502(a); Conflict Minerals, 77 Fed. Reg. 56,274, 56,275 (Sept. 12, 2012) (to be codified at 17 C.F.R. pts. 240 & 249b). The Democratic Republic of the Congo will be called the "DRC" or "Congo" in this Article and is not to be confused with the adjacent country called the Republic of Congo.

[34] *Peacekeeping Fact Sheet*, UNITED NATIONS (Jan. 31, 2013), http://www.un.org/en/peacekeeping/resources/statistics/factsheet.shtml [hereinafter Peacekeeping Fact Sheet].

[35] Conflict Minerals, 77 Fed. Reg. at 56,275, 56,362, 56,356. The term "adjoining country" is defined in the Act as "a country that shares an internationally recognized border with the [DRC]." Dodd–Frank Act § 1502(e)(1). Presently, the adjoining countries of the DRC include Angola, Burundi, Central African Republic, the Republic of the Congo, Rwanda, South Sudan, Tanzania, Uganda, and Zambia. Conflict Minerals, 77 Fed. Reg. at 56,275 n.7.

[36] *See* Dodd–Frank Act § 1502(a); Conflict Minerals, 77 Fed. Reg. at 56,275–76, 56,365.

[37] Conflict Minerals, 77 Fed. Reg. at 56,274. Compliance with the rule must begin on January 1, 2013. *Id.*

[38] One article has called Section 1502 "a regulatory experiment in information extraction" because companies operating in the DRC may have to go all the way through their supply chains to get information because they themselves may lack the crucial information about the source of minerals in their products. Christiana Ochoa & Patrick J. Keenan, *Regulating Information Flows, Regulating Conflict: An Analysis of United States Conflict Minerals Legislation*, 3 GOETTINGEN J. INT'L L. 129, 140, 147–48 (2011) (noting also that, when companies discover that their minerals may contribute to the conflict, they may have disincentives to fully comply with reporting initiatives given the consequences,

Section 1502 of the Dodd–Frank Act was predicted to affect an estimated 6,000 companies[39]—almost half of all U.S. publicly traded companies directly subject to SEC regulation[40]—and hundreds of thousands of suppliers because almost every consumer product that requires electronics uses one of the four regulated minerals collectively known as the "3Ts+G."[41] Specifically, these are: (1) columbite-tantalite, from which tantalum may be extracted, which is used for cell phones, computers, surgical implants, and wind turbines; (2) cassiterite, from which tin may be extracted, which is used in coating for food cans, solders, catalysts, and stabilizers; (3) wolframite, from which tungsten may be extracted and used for light bulbs, aerospace components, and machine tools; or (4) gold, which is used as an electronic conductor, for jewelry, and in medical equipment and anti-lock brakes.[42] Large companies must make their first disclosures in May 2014 for activities occurring in calendar year 2013.[43] The reporting will have a dramatic effect on the companies because some companies can have 10,000 to 50,000 suppliers and several layers in their supply chains.[44]

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including, among other things, consumer boycotts, and that even though over time Section 1502 may eventually improve conditions in the DRC, companies may choose to divest from the region, which may lead to even more conflict).

[39] Conflict Minerals, 77 Fed. Reg. at 56,336.

[40] *See* KPMG INT'L, CONFLICT MINERALS AND BEYOND: PART TWO: A MORE TRANSPARENT SUPPLY CHAIN 1 (2012), *available at* http://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/conflict-minerals/Documents/conflict-minerals-beyond-part-two.pdf. The law did not make de minimis exceptions for the metals; accordingly, many more companies are affected than would otherwise have been impacted by the legislation. *See* MORGAN LEWIS, SEC ADOPTS RULES IMPLEMENTING THE DODD–FRANK REQUIREMENT FOR CONFLICT MINERALS REPORTING 2 (2012), *available at* http://www.morganlewis.com/pubs/Securities_WhitePaper_ConflictMineralsReporting_Sep2012.pdf.

[41] JOE DILEO ET AL., DELOITTE & TOUCHE LLP, CONFLICT MINERALS—THE SUPPLY CHAIN'S WEAKEST LINK? 3 (2011), *available at* http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Content/Articles/AERS/Financial%20Statement%20&%20Internal%20Control%20Audit%20%28FSICA%29/Accounting-Standards-Communications/us_aers_headsup_112911.pdf.

[42] *See* Conflict Minerals, 77 Fed. Reg. at 56,275; Opening Brief of Petitioners 6–7, Nat'l Ass'n of Mfrs. v. SEC, No. 12-1422 (D.C. Cir. Jan. 16, 2013); Edward Wyatt, *Behind the Blood Money: Debate Grows over Use of Minerals Mined in Strife-Torn Areas*, N.Y. TIMES, Mar. 20, 2012, at B1. Apple alone has identified 218 of its suppliers that use the affected minerals to manufacture components and the 175 smelters that those minerals come from. *See* APPLE, APPLE SUPPLIER RESPONSIBILITY: 2012 PROGRESS REPORT 11 (2012), *available at* http://www.apple.com/supplierresponsibility/pdf/Apple_SR_2012_Progress_Report.pdf.

[43] Conflict Minerals, 77 Fed. Reg. at 56,274.

[44] Opening Brief of Petitioners 9–11, *Nat'l Ass'n of Mfrs.*, No. 12-1422.

Additionally, their suppliers can have multiple levels and subcontractors themselves within their own supply chains.[45]

Significantly, the law does not *prohibit* the use of conflict minerals. It merely requires companies to *disclose* whether they are using them and, if so, perform a due diligence examination of the source of those minerals and provide a description of the products manufactured that are not "DRC conflict free."[46] This "name-and-shame" law depends on consumers and investors to pressure the firms—especially those that depend on CSR programs to enhance their images—to change their business practices.[47] Many industry groups representing businesses have sued the SEC, arguing, among other things, that the agency failed to take into account the appropriate cost–benefit analysis.[48]

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[45] *Id.*

[46] Dodd–Frank Act § 1502; Conflict Minerals, 77 Fed. Reg. at 56,274, 56,281, 56,363–64 (providing a temporary transition period during which issuers may use the term "DRC conflict undeterminable" if they cannot make the determination for one of two specified reasons).

[47] *See* DUDLEY W. MURREY ET AL., ANDREWS KURTH LLP, SEC ADOPTS DODD–FRANK CONFLICT MINERALS RULE 1 (2012), *available at* http://www.andrewskurth.com/assets/pdf/article_920.pdf. Naming and shaming has had mixed success in other contexts. Naming and shaming countries that enable human trafficking has been largely ineffective. *See* Karen E. Bravo, *Follow the Money? Does the International Fight Against Money Laundering Provide a Model for International Anti-human Trafficking Efforts?*, 6 U. ST. THOMAS L.J. 138, 140 (2008). California's Transparency in the Supply Chains Act of 2010 § 3, CAL. CIV. CODE § 1714.43 (West Supp. 2013), which examines slave labor and human trafficking in the supply chain, requires online disclosures, though a study found that one-quarter of apparel companies are noncompliant, and the majority make valueless vague disclosures. Univ. of Del., *Apparel Industry Study*, UDAILY (Apr. 12, 2012, 8:08 AM), http://www.udel.edu/udaily/2012/apr/ apparel-compliance-041212.html. As an example of naming and shaming being an ineffective means of deterrence, sex offender registries may actually increase crime by making a noncriminal lifestyle less appealing. *See* J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J.L. & ECON. 161, 192 (2011) (identifying sex offenders to local residents may increase recidivism, although mere registration of offenders might decrease crime). In fact, JohnTV (an organization that attempts to discourage street prostitution by filming and posting Johns with prostitutes online), *About*, JOHNTV.COM, http://johntv.com/about (last visited Mar. 8, 2013), is a particularly poor tool for rehabilitation and specific deterrence. *See* Courtney Guyton Persons, *Sex in the Sunlight: The Effectiveness, Efficiency, Constitutionality, and Advisability of Publishing Names and Pictures of Prostitutes' Patrons*, 49 VAND. L. REV. 1525, 1547 (1996). But hygiene grade cards in Los Angeles County were successful in decreasing food-borne illness by thirteen percent. *E.g.*, Paul A. Simon et al., *Impact of Restaurant Hygiene Grade Cards on Foodborne-Disease Hospitalizations in Los Angeles County*, J. ENVTL. HEALTH, Mar. 2005, at 32, 34. Public shame was also useful in changing international consensus for landmines. Lesley Wexler, *The International Deployment of Shame, Second-Best Responses, and Norm Entrepreneurship: The Campaign to Ban Landmines and the Landmine Ban Treaty*, 20 ARIZ. J. INT'L & COMP. L. 561, 572–74 (2003).

[48] *See* Petition for Review at 1–2, *Nat'l Ass'n of Mfrs.*, No. 12-1422 (D.C. Cir. Oct. 19, 2012). On November 21, 2012, the petitioners filed a Preliminary Statement of Issues.

This Article will proceed in four parts. Part I briefly discusses the current duties that U.S. corporations have in the human rights context and the quasi-legal landscape in which TNCs operated until the passage of the Dodd–Frank Act. Part II describes the human rights crisis in the DRC and the history behind the legislation. Part III argues that the law's flaws make it a poor choice for the United States' first foray into human rights legislation for corporations. This Part also outlines the legal challenges filed by business groups and the intervention by NGOs, and it points out that the SEC's failure to conduct an appropriate cost–benefit analysis will lead to severe unintended consequences that will harm the very people that the law was designed to help. As other countries and U.S. cities and college campuses are considering how they can help stem the tide of violence, they would do well to consider the impact that their solutions could have on the recipients of their assistance. Part IV concludes that a name-and-shame governance disclosure is a well-intentioned but wrong solution for a country as volatile as the DRC, due to the instability of the region, the fragility of the host state, and the failure of the international community to implement a comprehensive, multi-pronged sustainable approach to a humanitarian crisis.

Notably, to date, the European Union has not yet passed a similar law, nor have any Asian countries, which house many of the world's largest smelters and which play an integral role in the supply chain of the conflict minerals process. The lack of a coordinated global effort with measurable incentives for corporations to move beyond voluntary initiatives will also undermine the intent of the law.[49] If corporations are

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Preliminary Statement of Issues at 1–3, *Nat'l Ass'n of Mfrs.*, No. 12-1422 (D.C. Cir. Nov. 21, 2012). The petitioners argue that the SEC failed to meet its statutory obligations to consider the effects of its rule; misinterpreted the statute and arbitrarily rejected alternatives that would have significantly reduced costs; and enacted a rule that compels speech in violation of the First Amendment. *Id.*

The business groups succeeded on this cost–benefit analysis argument in a proxy-access case in 2011 when the United States Court of Appeals for the D.C. Circuit found that the SEC's rule was arbitrary and capricious under the Administrative Procedure Act. *See* Bus. Roundtable v. SEC, 647 F.3d 1144, 1148–49 (D.C. Cir. 2011). The author has signed on to an amicus brief in support of the petitioners in the conflict minerals litigation specifically as it relates to the unintended adverse effects on the Congolese people and not as it relates to the commercial interests of the business community. *See* Brief of *Amicus Curiae* Experts on the Democratic Republic of the Congo in Support of Petitioners, *Nat'l Ass'n of Mfrs.*, No. 12-1422 (D.C. Cir. Jan. 23, 2013).

[49] The European Union, however, will be meeting to consider Dodd–Frank Act type regulation of conflict minerals; moreover, for audit purposes, if the European Union imposes due diligence standards, it may allow the use of the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas. *See Resolution of 13 December 2012 on the Situation in the Democratic Republic of*

to have a role in stemming a humanitarian crisis, the role should be commensurate with the responsibility. Although the popular narrative surrounding the Dodd–Frank Act has focused on corporate and consumer demand for minerals that fund rebel forces engaged in rape, pillage, and conscription of child soldiers, the situation is much more complex, which makes the SEC's failure to have conducted the cost–benefit analysis all the more critical. If the government chooses to engage in future human rights governance legislation for businesses, the Dodd–Frank Act should not serve as the model.

I. LIFE FOR TNCS BEFORE THE DODD–FRANK ACT

A. Soft Law Governance and Corporate Responsibility for Human Rights

Forty-two out of the top 100 economic entities in the world are corporations,[50] yet they do not bear the responsibilities of nation-states. In many instances, TNCs have as much power and influence as a nation-state vis-á-vis the local population; yet, as one scholar has observed, they have the ability to act as mere bystanders.[51] When corporations, at least in the United States, enjoy some of the legal benefits of "personhood"[52] and the power of nation-states, what level of responsibility should they have for human rights abuses? Without specific laws to bind them, are voluntary industry initiatives or notions of moral responsibility enough to change corporate behavior? What is the role of the private, non-state

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the Congo, EUROPEAN PARLIAMENT (Dec. 13, 2012), http://www.europarl.europa.eu/document/activities/cont/201301/20130109ATT58700/20130109ATT58700EN.pdf. *See generally* OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* (2d ed. 2012), *available at* http://www.oecd.org/daf/inv/mne/ GuidanceEdition2.pdf.

Canada is also looking to legislate the use of conflict minerals. In March 2013, the New Democratic Party proposed a bill based on the OECD Guidelines and which aims to improve and build on the Dodd–Frank Act. Iain Marlow, *NDP to Introduce Federal Bill on Conflict Minerals*, GLOBE & MAIL (Mar. 26, 2013, 12:42 PM), http://www.theglobeandmail.com/technology/tech-news/ndp-to-introduce-federal-bill-on-conflict-minerals/article10319230/. A similar bill failed to pass in 2011. *Id.*

[50] This is based on an estimate from a 2010 study. *See* TRACEY KEYS & THOMAS MALNIGHT, GLOBAL TRENDS, CORPORATE CLOUT DISTRIBUTED: THE INFLUENCE OF THE WORLD'S LARGEST 100 ECONOMIC ENTITIES 2 (2010), *available at* http://www.globaltrends.com/?Itemid=87.

[51] *See* Jena Martin Amerson, *What's in a Name? Transnational Corporations as Bystanders Under International Law*, 85 ST. JOHN'S L. REV. 1, 5 (2011) (arguing that, at its heart, the TNC's bystander strategy maintains that TNCs, in the wake of accusations from human rights advocates, are merely bystanders (i.e., innocent third parties) to the underlying events, helpless to stop the tragedy from occurring).

[52] *See, e.g.*, Citizens United v. FEC, 130 S. Ct. 876, 900 (2010) (treating corporations as persons for the purpose of First Amendment free speech).

frameworks (also known as "civil regulations") relying on market-based penalties in governing TNCs and their supply chains?

While the states have duties to protect their citizens, under a minimalist approach, corporations are often seen as having negative duties to do no harm.[53] Prior to the Dodd–Frank Act, domestic law had less power to regulate these entities from a human rights perspective, notwithstanding the great power that the TNCs wielded overseas.[54] Similarly, international law provides no real answers for corporate culpability because TNCs have no direct obligations under international law.[55] Further, corporations cannot be prosecuted in international criminal courts, and currently there are no provisions in treaties creating international criminal courts for the prosecution of corporations.[56] The lack of accountability, particularly in developing

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[53] Florian Wettstein, *Silence as Complicity: Elements of a Corporate Duty to Speak out Against the Violation of Human Rights*, 22 BUS. ETHICS Q. 37, 38 (2012).

[54] *See* Barnali Choudhury, *Serving Two Masters: Incorporating Social Responsibility into the Corporate Paradigm*, 11 U. PA. J. BUS. L. 631, 674 (2009) ("The growing dominance of multinational corporations has also given greater importance to issues of social responsibility. Multinational corporations have become as integral as states in protecting and respecting the rights of individuals."); Stephens, *supra* note 28, at 54 ("Multinational corporations have long outgrown the legal structures that govern them, reaching a level of transnationality and economic power that exceeds domestic law's ability to impose basic human rights norms."). In 2012, the Supreme Court of the United States had the opportunity to rule as a substantive matter on whether corporations could be held liable for human rights abuses abroad under the Alien Tort Statute, 28 U.S.C. § 1350 (2006), but chose to carry the case over to the following term for briefing on broader jurisdictional grounds. *See* Kiobel v. Royal Dutch Petroleum Co., 132 S. Ct. 1738, 1738 (2012) (mem.). The plaintiffs in this case claim that because international oil companies aided and abetted the Nigerian military's human rights abuses, those companies should face charges and civil liability in a U.S. court. Brief for Petitioners at 2–3, 8–9, *Kiobel*, 132 S. Ct. 1738 (Dec. 14, 2011). As of the time of this writing the case has not yet been decided. *See Docket for* Kiobel v. Royal Dutch Petroleum Co., SUP. CT. U.S., http://www.supremecourt.gov/Search.aspx?FileName=%2fdocketfiles%2f10-1491.htm (last visited Mar. 8, 2013). By 2010, in the United States, plaintiffs had filed more than 140 lawsuits against corporations under the Alien Tort Statute. *See* Jonathan Drimmer, *Human Rights and the Extractive Industries: Litigation and Compliance Trends*, 3 J. WORLD ENERGY L. & BUS. 121, 122 (2010).

[55] *See* Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, ¶ 1, Human Rights Council, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) (by John Ruggie) [hereinafter *Ruggie Report*] ("The international community is still in the early stages of adapting the human rights regime to provide more effective protection to individuals and communities against corporate-related human rights harm."); de Brabandere, *supra* note 23, at 271–72.

[56] Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 NW. U. J. INT'L HUM. RTS. 304, 315 (2008). Historically, individual culpability has been required for criminal prosecution. For example, after World War II, prosecutors tried officials from the German firms Farben and Krupp for war crimes

nations, allows some TNCs, which have the economic power of nation-states, to take advantage of the fact that the host-state government has lax or unenforced labor, freedom of association, and antidiscrimination laws. While, presumably, international law would apply to the TNC wherever it is, the domestic law in the host country may provide for fewer obligations or sanctions. Particularly in a weak or failing state, the host country may have less resources or political will to prosecute a large and powerful TNC that provides significant revenue and jobs for the local population.[57] Firms may choose to do business in the nations that are the most lax and that have in fact won the regulatory "race to the bottom."[58]

To be fair, TNCs can provide desperately needed employment, which would otherwise not exist for the local citizens.[59] But when a fire broke out in a Bangladesh factory in 2012 killing over a hundred workers sewing garments for Sears, Wal-Mart, and other well-known American and European companies, those firms, cognizant of their public images, rushed to distance themselves from the factory's poor safety practices and their own suppliers, which they claimed subcontracted the work without the knowledge or approval of the client companies.[60] Despite hundreds of workers being killed over the past decade, Bangladeshi garment factories have over four-million employees, and the industry is critical to the Bangladeshi economy.[61]

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related to strengthening the Nazi regime. Kyle Rex Jacobson, *Doing Business with the Devil: The Challenges of Prosecuting Corporate Officials Whose Business Transactions Facilitate War Crimes and Crimes Against Humanity*, 56 A.F. L. REV. 167, 183–89 (2005). The court required evidence of personal involvement and knowledge and held that liability needed to be predicated on evidence that "establishes some positive conduct" that "constitutes ordering, approving, authorizing or joining" in criminal acts. *Id.* at 183, 189. In doing this, the court refused to hinge individual convictions on the companies' actions as a whole. *Id.* at 184, 188–89.

[57] *See* de Brabandere, *supra* note 23, at 270 (describing powerful corporations in weak states).

[58] The regulatory race to the bottom is often considered a pejorative term assigned to nations that may or may not be member states of the World Trade Organization ("WTO"), where governments want to attract businesses to their jurisdictions and, therefore, lower taxes and relax environmental and labor regulations. *See* JOSEPH E. STIGLITZ, MAKING GLOBALIZATION WORK 196 (1st ed. 2006).

[59] *See* JOHAN NORBERG, IN DEFENSE OF GLOBAL CAPITALISM 211, 216–18 (Roger Tanner & Julian Sanchez trans., rev. ed. 2003) (discussing how multinational corporations provide important wage-earning opportunities).

[60] *See* Jim Yardley, *Recalling Fire's Horror and Exposing Global Brands' Safety Gap*, N.Y. TIMES, Dec. 7, 2012, at A1.

[61] Julfikar Ali Manik & Jim Yardley, *Bangladesh Finds Gross Negligence in Factory Fire*, N.Y. TIMES, Dec. 18, 2012, at A4.

The CSR efforts in the host countries may mask or compensate for more deeply entrenched or historical abuses. For example, ExxonMobil, one of the largest companies in the world,[62] has made the eradication of malaria in Africa and the empowerment of women in Africa (particularly in Chad) two of its social mission priorities.[63] However, some of ExxonMobil's past dealings in Africa belie its support of nation-building abroad. In 2006, it reportedly cooperated with the government of Chad to break funding covenants with both the World Bank and the U.S. government, which had sought to prohibit Chad from buying weapons with outside aid, because ExxonMobil's interests were better served by preventing a disruption to its supply of oil.[64] That year, ExxonMobil transferred about $774 million to the Chadian government.[65] By comparison, the entire U.S. budget for aid to Chad was only about one percent of ExxonMobil's revenue stream to the African nation.[66]

Firms operate with impunity in weak or fragile states because these host states do not have the power or will to respect their own citizens' rights or to enforce labor or environmental laws (to the extent they exist) against powerful TNCs.[67] Because the TNCs have such power and influence, many argue that TNCs should have commensurate responsibility regarding social issues, especially related to human rights.[68] In some instances, TNCs have entered into agreements with industry groups, intergovernmental organizations, or NGOs—nonbinding initiatives, which may not do as much as they should to help the indigenous peoples that are actually affected in the long term.[69]

CSR is rooted in the 1970s, when activists advocated greater government control of corporations to ensure responsibility.[70] Outside

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62 *The Global 2000*, FORBES, May 7, 2012, at 99, 99–100, 102.

63 *See* EXXONMOBIL, 2011 CORPORATE CITIZENSHIP REPORT 29 (2011), *available at* http://www.exxonmobil.com/Corporate/Files/news_pub_ccr2011.pdf; Community & Development, *Our Focus Areas*, EXXONMOBIL, http://www.exxonmobil.com/Corporate/community_women_focusarea.aspx (last visited Mar. 8, 2013).

64 *See* STEVE COLL, PRIVATE EMPIRE: EXXONMOBIL AND AMERICAN POWER 358, 362 (2012).

65 *Id.* at 352–53.

66 *Id.*

67 *See* de Brabandere, *supra* note 23, at 270.

68 *See supra* note 54 and accompanying text.

69 *See* VOGEL, *supra* note 25, at 155–56 (discussing financial companies that adopted voluntary principles to protect indigenous peoples).

70 *See* HAUFLER, *supra* note 21, at 15 (discussing the international trend towards regulating corporations in the 1970s); URSULA MÜHLE, THE POLITICS OF CORPORATE SOCIAL RESPONSIBILITY: THE RISE OF A GLOBAL BUSINESS NORM 18–19 (2010) (noting failed attempts in the 1970s to institutionalize CSR); Douglas M. Branson, *Corporate Governance*

forces also pressured companies to affect social change. For example, in one of the first CSR initiatives, companies opposed to apartheid in South Africa adopted the Sullivan Principles in the late 1970s and 1980s, and in 1999 the code evolved into the Global Sullivan Principles by which companies agreed to treat all employees the same regardless of race, color, or gender.[71] Around the same time, college students began pressuring universities to divest from companies that conducted business in South Africa, and cities and states began passing selective purchasing laws ending contracts with companies doing business in South Africa.[72] Today, the Global Sullivan Principles apply to economic situations worldwide.[73]

B. OECD Guidelines and National Contact Points

Companies also adhere to the OECD Guidelines for Multinational Enterprises, which are voluntary principles consistent with internationally recognized standards for governments to encourage responsible business practices.[74] Areas the guidelines cover include employment and industrial relations, human rights, environment, information disclosure, bribery, consumer interests, science and technology, competition, and taxation for participating governments and multinational enterprises operating in or from adhering countries.[75]

"Reform" and the New Corporate Social Responsibility, 62 U. PITT. L. REV. 605, 611 (2001) (discussing the origins of the CSR movement).

[71] *See* HAUFLER, *supra* note 21, at 17–18.

[72] *E.g.*, David G. Savage, *Students Favor Divestment but Shun Boycott of Products: Scope of S. Africa Protests Questioned*, L.A. TIMES, Apr. 16, 1986, Part II, at 1 (noting that thirty-nine colleges "divested themselves of all stock in companies" operating in South Africa and that some cities and states distanced themselves from South African products as well).

[73] Henry J. Richardson III, *Reverend Leon Sullivan's Principles, Race, and International Law: A Comment*, 15 TEMP. INT'L & COMP. L.J. 55, 70 (2001). The standards of other well-regarded soft law voluntary initiatives to which companies subscribe include those found in the Universal Declaration of Human Rights, ILO Conventions, and ISO 26000, but, due to space limitations, this Article will not discuss them. For an overview discussing businesses and human rights, see Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Addendum: Business Recognition of Human Rights: Global Patterns, Regional and Sectoral Variations*, ¶ 14, Human Rights Council, U.N. Doc. A/HRC/4/35/Add.4 (Feb. 8, 2007); ADRIAN HENRIQUES, STANDARDS FOR CHANGE?: ISO 26000 AND SUSTAINABLE DEVELOPMENT 31 (2012), *available at* http://pubs.iied.org/pdfs/16513IIED.pdf.

[74] *See* OECD, *Guidelines for Multinational Enterprises*, at 3 (2011) [hereinafter OECD, *Guidelines*], *available at* http://www.oecd.org/daf/internationalinvestment/guidelinesformultinationalenterprises/48004323.pdf.

[75] *Id.* at 27–63.

Adhering governments must provide National Contact Points, which serve as an avenue of redress for stakeholders.[76] Although the National Contact Points may conduct voluntary mediations or facilitate conciliations between parties, critics complain that there are no consequences for failing to comply and that TNCs often demand strict confidentiality in mediations, which means that the Guidelines are largely ineffective. Further, there are no global standards or uniform processes for National Contact Points. Critics contend that the OECD process, therefore, provides ample opportunity for some TNCs to appear socially responsible without true accountability.[77]

C. U.N. Global Compact, Draft Norms, and the Ruggie "Protect, Respect and Remedy" Framework

As early as 1972, the U.N. Economic and Social Council solicited a study on the role of the corporation and its impact on development.[78] In 1998, the U.N. Norms Working Group on the Working Methods and Activities of Transnational Corporations was established "[t]o make recommendations and proposals relating to the methods of work and activities of transnational corporations in order to ensure that such methods and activities are in keeping with the economic and social objectives of the countries in which they operate."[79] In January 1999, U.N. Secretary General Kofi Annan issued a call at the World Economic Forum in Davos, Switzerland for leaders to "initiate a global compact of shared values and principles, which will give a human face to the global market."[80] The resulting U.N. Global Compact became the world's largest corporate citizenship initiative, focusing on ten principles related

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[76] *Id.* at 68. In the United States, the national contact point is within the Bureau of Economic and Business Affairs. OECD, *OECD Guidelines for Multinational Enterprises: National Contact Points*, at 4 (Nov. 2012), *available at* http://www.oecd.org/daf/internationalinvestment/guidelinesformultinationalenterprises/2012NCPContactDetails.pdf.

[77] *See* EUROPEAN CTR. FOR CONSTITUTIONAL & HUMAN RIGHTS, A COMPARISON OF NATIONAL CONTACT POINTS—BEST PRACTICES IN OECD COMPLAINTS PROCEDURES 3, 9–10 (2011), *available at* http://www.ecchr.de/index.php/ecchr-publications/articles/a-comparison-of-national-contact-points-best-practices-in-oecd-complaints-procedures-1333.html (discussing different procedures at different National Contact Points); de Brabandere, *supra* note 23, at 275–76.

[78] E.S.C. Res. 1721 (LIII), ¶ 1, U.N. ESCOR, 53d Sess., Supp. No. 1, U.N. Doc. E/5209, at 3–4 (July 28, 1972).

[79] *See* Sub-Comm'n on Prevention of Discrimination & Prot. of Minorities Res. 1998/8, Rep. on its 50th Sess., Aug. 2–28, 1998, U.N. Doc. E/CN.4/1999/4–E/CN.4/Sub.2/1998/45, at 31–32 (Sept. 30, 1998).

[80] *See* Press Release, Secretary-General, Secretary-General Proposes Global Compact on Human Rights, Labour, Environment, in Address to World Economic Forum in Davos, U.N. Press Release SG/SM/6881 (Feb. 1, 1999).

to human rights, labor, the environment, and anticorruption.[81] The Global Compact has over 10,000 signatories from 145 countries around the world.[82]

But like the "greenwashing" initiatives in the environmental arena,[83] many companies signed on to U.N. compacts and engaged in "bluewashing" to appear as though they had official intergovernmental approval for their CSR programs, including those relating to labor and human rights.[84] In fact, the Global Compact's own Executive Director has publicly acknowledged that only fifteen percent of the Global 1000[85] companies participating in the program are likely "sincere" or "serious[]" about sustainability.[86] Further, critics complain that the core requirements are not stringent enough and that there are no independent monitoring requirements.[87]

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[81] *See* U.N. Secretary-General, *Rep. of the Secretary-General on the Work of the Organization*, ¶ 217, U.N. Doc. A/61/1 (Aug. 16, 2006); United Nations Global Compact, After the Signature: A Guide to Engagement in the United Nations Global Compact 13–14, 16–17 (Jan. 2012), http://www.unglobalcompact.org/docs/news_events/8.1/after_the_signature.pdf.

[82] United Nations Global Compact, Annual Review of Business Policies & Actions to Advance Sustainability: 2011 Global Compact Implementation Survey 3 (2012), http://www.unglobalcompact.org/docs/news_events/8.1/2011_Global_Compact_Implementation_Survey.pdf.

[83] Greenwashing refers to environmental claims made by companies that are false or misleading. RINA HORIUCHI ET AL., BSR & FUTERRA, UNDERSTANDING AND PREVENTING GREENWASH: A BUSINESS GUIDE 6 (2009), *available at* http://www.bsr.org/reports/Understanding_Preventing_Greenwash.pdf. The Federal Trade Commission has issued guidelines to help marketers avoid misleading claims. Guides for the Use of Environmental Marketing Claims, 77 Fed. Reg. 62,122, 62,124 (Oct. 11, 2012) (to be codified at 16 C.F.R. pt. 260).

[84] *See* Daniel Berliner & Aseem Prakash, *From Norms to Programs: The United Nations Global Compact and Global Governance*, 6 REG. & GOVERNANCE 149, 162 (2012) ("[V]oluntary programs which do not impose real obligations on firms or do not back them with sufficient monitoring—'bluewashes' or 'Astroturfs'—have a greater chance of failure."). For an early use of the term "bluewashing," see KENNY BRUNO & JOSHUA KARLINER, TRANSNATIONAL RES. & ACTION CTR., TANGLED UP IN BLUE: CORPORATE PARTNERSHIPS AT THE UNITED NATIONS 7 (2000), *available at* http://s3.amazonaws.com/corpwatch.org/downloads/tangled.pdf (discussing how corporations may participate in the Global Compact in order to appear socially responsible).

[85] These are the top 1000 performing companies in the world. Consider, for example, Russell Investment's "Global 1000 Index." RUSSELL INVS., RUSSELL GLOBAL INDEXES: CONSTRUCTION AND METHODOLOGY 52–53 (2012), *available at* http://www.russell.com/indexes/documents/Global_Indexes_Methodology.pdf.

[86] *See Only Fifteen Percent of Multinationals Serious About Sustainability*, CORP. CRIME REP., Apr. 23, 2012, at 3, 3.

[87] *See* Daniel Berliner & Aseem Prakash, Good Norm, Weak Program: Cross-National Diffusion of the United Nations Global Compact 36 (Sept. 2–5, 2010) (paper prepared for presentation at the annual meeting of the American Political Science Association, Washington, D.C.), *available at* http://papers.ssrn.com/sol3/

In light of the criticism of the nonbinding nature of the Global Compact, it is not surprising the U.N. tried to legally bind corporations for human rights violations in 2004; however, the U.N. was unsuccessful.[88] The U.N. Draft Norms attempted to legislate against corporate human rights abuses at the supranational level, so as to apply regardless of where TNCs operated.[89] The Draft Norms would have established positive duties to promote human rights and to assess human rights impacts, and would have forbade corporations from directly or indirectly contributing to or benefitting from human rights abuses or otherwise undermining efforts to promote human rights.[90] The NGOs, which had criticized the voluntary initiatives, applauded these efforts.[91] Not only did corporations object,[92] but even the United States itself objected, asserting that states—not corporations—are the traditional subjects of international law.[93] Others suggested that the Norms as drafted were vague and unenforceable.[94]

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papers.cfm?abstract_id=1642076 (observing that some believe the Compact represents "excessive compromise" and requires "only marginal 'beyond compliance' requirements on firms").

[88] KENAN INST. FOR ETHICS, DUKE UNIV., THE U.N. GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: ANALYSIS AND IMPLEMENTATION 4–5 (2012), *available at* http://kenan.ethics.duke.edu/wp-content/uploads/2012/07/UN-Guiding-Principles-on-Business-and-Human-Rights-Analysis-and-Implementation.pdf.

[89] *See* U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, Sub-Comm'n on the Promotion & Prot. of Human Rights, Economic, Social and Cultural Rights: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, ¶ 1, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003) ("Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous people and other vulnerable groups.").

[90] *See id.*; ECOSOC, Comm'n on Human Rights, Sub-Comm'n on the Promotion & Prot. of Human Rights, Economic, Social and Cultural Rights: Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, ¶ 1 cmt. b, U.N. Doc. E/CN.4/Sub.2/2003/38/Rev.2 (Aug. 26, 2003).

[91] *See* Isabella D. Bunn, *Global Advocacy for Corporate Accountability: Transatlantic Perspectives from the NGO Community*, 19 AM. U. INT'L L. REV. 1265, 1270–71, 1285 (2004).

[92] *See* ECOSOC, Comm'n on Human Rights, Sub-Comm'n on the Promotion & Prot. of Human Rights, Economic, Social and Cultural Rights: Joint Written Statement Submitted by the International Chamber of Commerce and the International Organization of Employers, Non-Governmental Organizations in General Consultative Status, at 3, U.N. Doc. E/CN.4/Sub.2/2003/NGO/44 (July 29, 2003) (stating that voluntary corporate action is superior to regulation as a means of achieving social progress).

[93] *See* United States Mission to International Organizations, Response from the Gov't of the U.S. to Dzidek Kedzia, Chief of Research and Right to Dev. Branch, Office of the United Nations High Comm'r for Human Rights, Note Verbale from the OHCHR of

In 2005, the U.N. appointed John Ruggie as its Special Representative on the Issue of Human Rights, Transnational Corporations, and Other Business Enterprises.[95] In that capacity, Ruggie issued two critical reports that have shaped the way in which TNCs view their obligations overseas. In 2008, Ruggie issued his "Protect, Respect and Remedy" framework in which he posited that (1) the state has a "duty to protect against human rights abuses by third parties" or non-state actors, including business entities; (2) the corporation has a "responsibility to respect human rights," including conducting due diligence, impact assessments, and auditing processes; and (3) there is a "need for more effective access to remedies" beyond the "patchwork" of flawed mechanisms.[96] In 2011, Ruggie responded to calls to "operationalize" his recommendations and issued the *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* ("Ruggie Guidelines"), which provided principles that were again voluntary and nonbinding,[97] but which were actually praised by the business and intergovernmental community, including the OECD, which ultimately adopted the U.N.'s recommendations.[98] Again, his efforts were criticized by some for not going far enough and for their nonbinding nature.[99]

August 3, 2004 (GVA 2537), at 2–3 (Sept. 30, 2004), *available at* http://www2.ohchr.org/english/issues/globalization/business/docs/us.pdf ("This exercise . . . circumvents all recognized law making processes by attempting to impose international obligations on entities that have neither accepted them nor played a part in their creation."); *see also* Carlos M. Vázquez, *Direct vs. Indirect Obligations of Corporations Under International Law*, 43 COLUM. J. TRANSNAT'L L. 927, 929 (2005) (observing that the U.S. Council for International Business believed "that the Norms would 'represent a fundamental shift in responsibility for protecting human rights—from governments to private actors, including companies—effectively privatizing the enforcement of human rights laws'").

[94] *See* Special Representative of the Secretary-General, *Promotion and Protection of Human Rights: Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, ¶¶ 59, 66–67, U.N. Doc. E/CN.4/2006/97 (Feb. 22, 2006) (by John Ruggie).

[95] *See* Press Release, Secretary-General Appoints John Ruggie of United States Special Representative on Issue of Human Rights, Transnational Corporations, Other Business Enterprises, U.N. Doc. SG/A/934 (July 28, 2005).

[96] *See Ruggie Report*, *supra* note 55, ¶¶ 9, 17, 25, 61, 63, 87.

[97] Special Representative of the Secretary-General, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, intro. ¶ 9, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (by John Ruggie) [hereinafter *Ruggie Guidelines*].

[98] *See* Jena Martin Amerson, *"The End of the Beginning?": A Comprehensive Look at the U.N.'s Business and Human Rights Agenda from a Bystander Perspective*, 17 FORDHAM J. CORP. & FIN. L. 871, 874–75 (2012). In 2011, the OECD updated its own Guidelines for Multinational Enterprises, adding a chapter on human rights consistent with the Ruggie

Both the Ruggie and OECD 2011 Guidelines stressed the importance of TNCs conducting due diligence, monitoring, auditing, and exerting pressure on their supply chains to prevent labor and human rights abuses.[100] These guidelines also foreshadowed key elements of Section 1502 of the Dodd–Frank Act.[101]

But despite these attempts, one study indicates that while 28% of 2,508 companies surveyed apply a human rights policy to their supply chains and 21% have plans to implement their policies, only 6% claim to monitor their supply chains for compliance and only 7% have enforcement mechanisms.[102] Further, TNCs often do not have as much leverage with their suppliers as one would think. Companies often lack bargaining power in their own supply chain because the supplier is under pressure from the TNC to keep costs low and may be operating in a host country with lax laws. Suppliers can often find another buyer with less onerous requirements that is not concerned about good business practices or audits. Switching suppliers is also very costly and time-consuming for the TNC and could impact local employees and, by extension, the local economy.[103]

In summary, corporations balance their various interests, including their public images and shareholder value. Prior to the passage of the Dodd–Frank Act, they were able to make the decisions that seemed sensible to them. Those that source minerals from the Congo or adjoining countries are now faced with additional choices as the Dodd–Frank Act adds new complications.

Guidelines. *See* OECD, *Guidelines*, *supra* note 74, at 3–4; *see also* Lene Wendland, Advisor on Bus. & Human Rights, Office of the U.N. High Comm'r for Human Rights, Statement at the OECD Roundtable on Corporate Responsibility 2 (June 29, 2011), *available at* http://www.oecd.org/daf/internationalinvestment/guidelinesformultinationalenterprises/48365284.pdf.

[99] *See* Amerson, *supra* note 98, at 877 (suggesting that although the Guidelines are weak, they are better than nothing at all).

[100] *See Ruggie Guidelines*, *supra* note 97, at Annex ¶¶ 4, 5 & cmt., 20 & cmt.; OECD, *Guidelines*, *supra* note 74, at 20, 22, 31, 33.

[101] *See supra* notes 46–47 and accompanying text (discussing the supply-chain monitoring that the Act and regulations require).

[102] *See* Aaron Bernstein & Christopher Greenwald, Benchmarking Corporate Policies on Labor and Human Rights in Global Supply Chains 11, 14 (Pensions & Capital Stewardship Project Labor & Worklife Program, Harvard Law Sch., Occasional Papers No. 5, 2009), *available at* http://www.law.harvard.edu/programs/lwp/pensions/publications/occpapers/occasionalpapers5.pdf.

[103] *See* U.N. Conference on Trade and Development, World Investment Report 2012 Overview: Towards a New Generation of Investment Policies 21–22 (July 2012), http://www.unctad-docs.org/files/UNCTAD-WIR2012-Overview-en.pdf.

II. THE HUMAN RIGHTS CRISIS IN THE CONGO—IS THE CONFLICT OVER MINERALS?

A. Background

> The conflict in the Democratic Republic of the Congo has become mainly about access, control and trade of five key mineral resources: coltan, diamonds, copper, cobalt and gold. The wealth of the country is appealing and hard to resist in the context of lawlessness and the weakness of the central authority.[104]

The DRC lies in central Africa and is the size of Western Europe. The country's "resource curse" is nothing new and is not unique.[105] Under this theory, resource-rich countries tend to be poorer than countries without natural abundance due to shortsightedness of policymakers, instability of international commodity markets, the dominance of foreign multinationals in resource extraction, poor linkages between the resource and non-resource sectors of the economy, "Dutch Disease" (the hardship associated with exports), and/or the state's inability to enforce property rights.[106]

The country has vast mineral riches including oil, rubber, gold, copper, uranium, diamonds, cassiterite, wolframite, tantalum, and cobalt.[107] Despite its natural resources, the DRC ranked as the poorest country in the world in 2008, 2009, and 2010.[108] Additionally, notwithstanding a gross domestic product ("GDP") of $15.66 billion (USD) in 2011, its per capita GDP was only $216 (USD).[109] In fact, only Somalia ranks worse than the DRC on the 2012 Failed State Index, which compares 177 states by considering twelve primary social,

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[104] U.N. Secretary-General, Letter dated Apr. 12, 2001 from the Secretary-General addressed to the President of the Security Council, ¶ 213, U.N. Doc S/2001/357 (Apr. 12, 2001).

[105] The term was popularized by Richard Auty. *See* RICHARD M. AUTY, SUSTAINING DEVELOPMENT IN MINERAL ECONOMIES: THE RESOURCE CURSE THESIS 1 (1993).

[106] *See* Michael L. Ross, *The Political Economy of the Resource Curse*, 51 WORLD POL. 297, 298 (1999) (summarizing various economic and political theories of the resource curse).

[107] Laura E. Seay, *What's Wrong with Dodd–Frank 1502? Conflict Minerals, Civilian Livelihoods, and the Unintended Consequences of Western Advocacy*, at text accompanying n.3 (Ctr. for Global Dev., Working Paper No. 284, 2012), *available at* http://www.cgdev.org/content/publications/detail/1425843/.

[108] *The Poorest Countries in the World*, GLOBAL FIN., http://www.gfmag.com/tools/global-database/economic-data/12147-the-poorest-countries-in-the-world.html#axzz2NGd46kog (last visited Mar. 8, 2013).

[109] *Report for Selected Countries and Subjects*, INT'L MONETARY FUND, http://www.imf.org/external/pubs/ft/weo/2012/01/weodata/weorept.aspx?pr.x=78&pr.y=9&sy=2011&ey=2011&scsm=1&ssd=1&sort=country&ds=.&br=1&c=636&s=NGDPD%2CNGDPDPC&grp=0&a= (last visited Mar. 8, 2013).

economic, and political indicators.[110] The DRC ranks 155th out of 167 countries in the 2010 Democracy Index[111] and lies at the bottom of the 2011 U.N. Human Development Index.[112]

The DRC is not only a failed state. It has been called a "predatory" structure in which the government abuses the citizenry "to maintain power and control[] the resources of the state for the benefit of a few" rather than for the benefit of the citizens collectively.[113] But this is not a recent phenomenon. Over one hundred years ago, Belgium's King Leopold II annexed the Congo Free State, as he called it, as his own personal fiefdom.[114] From 1880 to 1920 during King Leopold's reign and its immediate aftermath, an estimated 10 million Africans died after having been beaten to death, having their hands chopped off for failing to meet quotas, starving, or succumbing to disease as Leopold earned today's equivalent of $1 billion (USD) trading in ivory, rubber, and other resources mined through slave labor.[115] Belgium maintained control of the colony until 1960.[116]

Since achieving independence from Belgium in 1960, a series of corrupt leaders have ruled the country. Despite the moniker of a "democratic" republic, observers note that the government is dysfunctional; there is a lack of rule of law; corruption runs rampant through all branches of government; and the country has a poor human rights record, particularly related to gender-based and sexual violence.[117]

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[110] NATE HAKEN ET AL., THE FUND FOR PEACE, FAILED STATES INDEX 2012, at 3–4 (2012), *available at* http://www.fundforpeace.org/global/library/cfsir1210-failedstatesindex2012-06p.pdf. "Failed states" are those generally unable or unwilling to provide their citizens with the basic functions typically associated with government, such as protection, basic public services, and essential infrastructure. *Id.* at 12. The Failed State Index assesses 177 countries. *Id.* at 3.

[111] THE ECONOMIST, DEMOCRACY INDEX 2010: DEMOCRACY IN RETREAT 7 (2010), *available at* http://graphics.eiu.com/PDF/Democracy_Index_2010_web.pdf.

[112] U.N.D.P., Human Development Report 2011: Sustainability and Equity: A Better Future for All, at 134 (2011), *available at* http://hdr.undp.org/en/media/HDR_2011_EN_Contents.pdf.

[113] ARVIND GANESAN & ALEX VINES, *Engine of War: Resources, Greed, and the Predatory State*, *in* HUMAN RIGHTS WATCH, WORLD REPORT 2004: HUMAN RIGHTS AND ARMED CONFLICT 301, 305 (2004) (discussing the creation of predatory governments in resource-rich countries).

[114] ADAM HOCHSCHILD, KING LEOPOLD'S GHOST: A STORY OF GREED, TERROR, AND HEROISM IN COLONIAL AFRICA 87 (1998).

[115] *Id.* at 225–27, 230, 233, 277, 301.

[116] *Id.* at 301.

[117] *See* BERTELSMANN STIFTUNG, BTI 2012: CONGO, DR COUNTRY REPORT 4, 11, 17 (2012), *available at* http://www.bti-project.de/fileadmin/Inhalte/reports/2012/pdf/BTI%202012%20Congo%20DR.pdf (evaluating 128 developing countries); ABI DYMOND, THE SCOTTISH CATHOLIC INT'L AID FUND, ENDING MASS RAPE IN THE DEMOCRATIC REPUBLIC OF CONGO: THE ROLE OF THE INTERNATIONAL COMMUNITY 6, *available at* http://

In 2011, the country held only its second multiparty election—a process tainted by allegations of illegitimacy from around the world—in which President Joseph Kabila was re-elected.[118]

One of the difficulties facing the DRC government in maintaining order is that the capital, Kinshasa, is 1600 kilometers away from one of the most important cities, Goma, in the eastern part of the country, which has been ravaged by war since the 1990s. The government has never had complete control over the eastern part of the country, particularly the Kivu region, where Goma is located, due to distance and occupation from various armed groups.[119] Since 1998, as a result of wars (at one time involving up to eleven neighboring nations), millions of people have been displaced, and over 5 million people have died from malnutrition, disease, and violence, making it the deadliest conflict since World War II.[120] Although the war officially ended in 2003, the U.N.'s peacekeeping presence in the DRC is one of the largest in the world with over 19,000 uniformed personnel as of January 2013.[121] The force has

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www.congoweek.org/pdf/ending_mass_rape.pdf; HUMAN RIGHTS WATCH, THE WAR WITHIN THE WAR: SEXUAL VIOLENCE AGAINST WOMEN AND GIRLS IN EASTERN CONGO 8 n.3 (2002) [hereinafter THE WAR WITHIN THE WAR], *available at* http://www.hrw.org/reports/2002/drc/Congo0602.pdf (defining the difference between gender-based and sexual violence as human rights abuses in the DRC).

[118] *See, e.g.*, Adam Nossiter, *President of Congo Denies Reports of Election Fraud*, N.Y. TIMES, Dec. 13, 2011, at A15 (noting widespread criticism of the presidential results); *Chaotic Congo Vote Count Mars Credibility of Result: EU Says Congo Results Lack Transparency*, REUTERS, Dec. 13, 2011, *available at* http://www.reuters.com/article/2011/12/13/congo-democratic-election-idUSL6E7ND6472011 1213; *DR Congo Election: Joseph Kabila 'Re-elected': President Joseph Kabila Has Won the Democratic Republic of Congo's Election, Provisional Results Show*, BBC NEWS (Dec. 9, 2011), http:www.bbc.co.uk/news/world-africa-16114824 (noting general international protests and, specifically, European Union observer mission reports that the polls contained "numerous irregularities, sometimes serious").

[119] *See* DYMOND, *supra* note 117, at 3, 6.

[120] JASON K. STEARNS, DANCING IN THE GLORY OF MONSTERS: THE COLLAPSE OF THE CONGO AND THE GREAT WAR OF AFRICA 4–5 (2011); Simon Robinson, *The Deadliest War in the World*, TIME, June 5, 2006, at 38, 39. For comprehensive descriptions of the history of the Congo and the Congolese wars, see generally SÉVERINE AUTESSERRE, THE TROUBLE WITH THE CONGO: LOCAL VIOLENCE AND THE FAILURE OF INTERNATIONAL PEACEBUILDING (Christian Reus-Smit & Nicholas J. Wheeler eds., 2010); PETER EICHSTAEDT, CONSUMING THE CONGO: WAR AND CONFLICT MINERALS IN THE WORLD'S DEADLIEST PLACE (2011); HOCHSCHILD, *supra* note 114.

[121] *See* Peacekeeping Fact Sheet, *supra* note 34.

officially extended its mission until June 2013.[122] As of the end of June 2012, over 2.2 million people remain displaced in the DRC.[123]

Notwithstanding the significant number of peacekeepers and the spotlight of the world, local and international rebel groups have continued to attack military and civilians alike, causing the DRC to remain in a state of war. These armed groups include the National Congress for the Defense of the People ("CNDP");[124] the Lord's Resistance Army ("LRA");[125] the Hutu rebels involved in the Rwandan genocide known as the Forces Démocratiques de Libération du Rwanda ("FDLR");[126] the citizen militia Mai-Mai;[127] the M23, purportedly backed by the Rwandan government (which denies involvement);[128] and other groups.[129] Armed groups fight for a number of reasons including

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[122] Press Release, Security Council, Security Council Extends Mandate of UN Mission in Democratic Republic of Congo Until 30 June 2013, Unanimously Adopting Resolution 2053 (2012), U.N. Press Release SC/10687 (June 27, 2012).

[123] UNICEF, UNICEF Humanitarian Action Update: Democratic Republic of the Congo, at 2 (Aug. 4, 2012), http://www.unicef.org/hac2012/files/UNICEF_DRC_Humanitarian_Action_Update_2012.pdf.

[124] Chair of the Security Council Committee Concerning the Democratic Republic of the Congo, Letter dated Nov. 29, 2011 from the Chair of the Security Council Committee Concerning the Democratic Republic of the Congo to the President of the Security Council, ¶ 36, U.N. Doc. S/2011/738 (Nov. 29, 2011) [hereinafter Nov. 29, 2011 Letter].

[125] *Id.* ¶¶ 66–68.

[126] *Id.* ¶ 69; Int'l Refugee Rights Initiative & Soc. Sci. Research Council, *Who Belongs Where? Conflict, Displacement, Land and Identity in North Kivu, Democratic Republic of Congo* (Open Soc'y Inst., Working Paper No. 3, 2010), *available at* http://www.refugee-rights.org/Publications/Papers/2010/Who%20Belongs%20Where.EN.March2010.pdf.

[127] Nov. 29, 2011 Letter, *supra* note 124, ¶¶ 160–61.

[128] *See* Coordinator of the Group of Experts on the DRC, Letter dated Nov. 26, 2012 from the Coordinator of the Group of Experts on the DRC to the Chairman of the Security Council Committee Concerning the Democratic Republic of the Congo, U.N. Doc S/AC.43/2012/COMM.64 (Nov. 27, 2012) (stating publicly that the Rwandan government, with assistance from the government of Uganda, has backed and financed the M23 rebel forces, which captured the key city of Goma in the eastern part of Congo on November 20, 2012); Press Release, Security Council, Sanctions Committee Concerning Democratic Republic of Congo Adds Two Individuals, Two Entities to Sanctions List, U.N. Press Release SC/10876 (Dec. 31, 2012) (adding M23 to the U.N. official Sanctions List on December 31, 2012, stating that the group "has been complicit in and responsible for committing serious violations of international law involving the targeting of women and children in situations of armed conflict in the DRC including killing and maiming, sexual violence, abduction, and forced displacement"). In February 2013, eleven African leaders signed a U.N.-backed peace agreement aimed at stabilizing Eastern Congo, reforming the Congolese state, and ending regional interference. *See DR Congo: African Leaders Sign Peace Deal*, BBC (February 24, 2013, 5:57 ET), http://www.bbc.co.uk/news/world-africa-21563949. The peace deal did not address the armed groups, however, and the fighting between rebel forces persisted.

[129] Nov. 29, 2011 Letter, *supra* note 124, ¶¶ 41, 219, 238.

disputes over land, identity (who is Congolese and who is not), and citizenship rights.[130] The international community has focused on the fight for access to the vast mineral resources as the primary cause of the violence, although not all commentators agree.[131]

B. The Use of Rape as a Weapon of War

Margot Wallström, the U.N.'s Special Representative on Sexual Violence in Conflict, has branded the DRC as the "rape capital of the world."[132] In fact, the scale of sexual violence in the DRC qualifies the actions as crimes against humanity under Article 7(1)(g) of the Rome Statute of the International Criminal Court.[133]

There are a number of reasons that perpetrators in the DRC engage in gender-based and sexual violence, and a comprehensive analysis is beyond the scope of this Article. Because, however, the NGO community and key legislators tied the fight over conflict minerals to the pervasiveness of rape (as this Article discusses in Part III), it is important to discuss the scope of the problem in some detail.

Because Congolese society values virginity, marriage, and childbearing, sexual violence weakens and destroys community bonds and leaves the community in constant fear.[134] Perpetrators often gang-rape women and girls, use crude objects to penetrate them in full view of their family members, or force family members to participate in the rape in an effort to dehumanize the family as well as the survivors.[135] Rapists beat, stab, or mutilate women and children, and an estimated 22% of rape survivors contract HIV.[136] In many instances, rape of the local

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[130] *See* Int'l Refugee Rights Initiative & Soc. Sci. Research Council, *supra* note 126, at 5, 17.

[131] Seay, *supra* note 107, at text accompanying n.1 ("In the United States, the issue of conflict minerals has become one of the dominant narratives about the crisis.").

[132] U.N. Secretary-General, *Women and Peace and Security: Rep. of the Secretary-General*, at 4, U.N. Doc. S/PV.6302 (Apr. 27, 2010).

[133] Rome Statute of the International Criminal Court, art. 7(1)(g), *opened for signature* July 17, 1998, 2187 U.N.T.S. 3.

[134] *See* Marleen Bosmans, *Challenges in Aid to Rape Victims: The Case of the Democratic Republic of the Congo*, 4 ESSEX HUM. RTS. REV. 1, 4–6 (2007) (discussing the fact that "child victims of rape . . . los[e] whatever possibilities for marriage they may have"); DYMOND, *supra* note 117, at 5 ("The deeply intimate nature of the violence . . . weakens and destroys community bonds. Sexual violence provokes tension within and between communities and leaves behind long lasting fear and suspicion.").

[135] Gaëlle Breton-Le Goff, *Ending Sexual Violence in the Democratic Republic of the Congo*, 34 FLETCHER F. WORLD AFF. 13, 16–17 (2010).

[136] Special Rapporteur on Violence Against Women, Its Causes and Consequences, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural, Including the Right to Development: Rep. of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Addendum: Mission to the Democratic*

women provides a means of creating more children belonging to the perpetrators' ethnic group, thus altering the region's national, ethnic, and religious identities.[137] Systematic rape also serves as a form of ethnic cleansing by driving people from their homes and villages.[138]

Some rapists kidnap women on the way to the market or the forests where they gather wood to serve as sex slaves and laborers often for days or even months.[139] Many survivors avoid returning to their farms or the markets to avoid future rapes,[140] which compounds family and community poverty given the fact that women's economic activity has a substantial effect on the overall economic development of the community.[141] The average age of rape survivors is dropping, and rapes of girls aged eight to thirteen are extremely common.[142]

It is difficult to obtain accurate and definitive data on sexual violence in part because many survivors are afraid to report rape due to stigma and the nonfunctioning Congolese justice system.[143] Further,

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Republic of the Congo, ¶ 55–56, 58, Human Rights Council, U.N. Doc. A/HRC/7/6/Add.4 (Feb. 28, 2008) (by Yakin Ertürk).

[137] M. Melandri, *Gender and Reconciliation in Post-Conflict Societies: The Dilemmas of Responding to Large-Scale Sexual Violence*, 5 INT'L PUB. POL'Y. REV. 4, 9–10 (2009), *available at* http://www.ucl.ac.uk/ippr/journal/downloads/vol5-1/M_Melandri.pdf.

[138] *Id.* at 10.

[139] *See, e.g.*, Ahuka Ona Longombe et al., *Fistula and Traumatic Genital Injury from Sexual Violence in a Conflict Setting in Eastern Congo: Case Studies*, 16 REPROD. HEALTH MATTERS 132, 132 (2008).

[140] *See* HUMAN RIGHTS WATCH, SOLDIERS WHO RAPE, COMMANDERS WHO CONDONE: SEXUAL VIOLENCE AND MILITARY REFORM IN THE DEMOCRATIC REPUBLIC OF CONGO 30 (2009) [hereinafter SOLDIERS WHO RAPE, COMMANDERS WHO CONDONE], *available at* http://www.hrw.org/sites/default/files/reports/drc0709web.pdf; Coco McCabe, *In Congo, Women Face Sexual Violence and Its Legacy of Shame and Hardship*, OXFAM INT'L (July 2008), http://www.oxfam.org/en/development/congo-women-face-sexual-violence-and-its-legacy-shame-and-hardship; *see also, e.g.*, Mark Tran, *"It Was Like Dying": A Raped Woman in Congo DRC Speaks Out*, GUARDIAN (Feb. 14, 2013), http://www.guardian.co.uk/global-development/2013/feb/14/dying-raped-woman-congo-drc.

[141] MARGOT WALLSTRÖM, ADDRESSING CONFLICT-RELATED SEXUAL VIOLENCE: AN ANALYTICAL INVENTORY OF PEACEKEEPING PRACTICE 23 (2010) (noting that women's economic activity can have "a powerful multiplier effect for recovery and development"); D. E. Tempelman, *Rural Women and Food Security: Current Situation and Perspectives*, FAO CORP. DOCUMENT REPOSITORY, tbl.1 (1998), *available at* http://www.fao.org/docrep/003/W8376E/w8376e03.htm.

[142] Michael Maya, *Reflections on ABA ROLI's Efforts to Combat the Rape Crisis in War-Torn Eastern Congo*, AM. BAR ASS'N (June 2011), http://www.americanbar.org/advocacy/rule_of_law/where_we_work/africa/democratic_republic_congo/news/news_drc_reflections_aba_roli_efforts_to_combat_the_rape_crisis_0611.html.

[143] Helen Liebling et al., *Women and Girls Bearing Children Through Rape in Goma, Eastern Congo: Stigma, Health and Justice Responses*, 4 ITUPALE ONLINE J. AFR. STUD. 18, 19 (2012), *available at* http://www.cambridgetoafrica.org/resources/Liebling_Slegh_and_Ruratotoye_Itupale_2012.pdf.

while there is no one source that compiles these statistics, according to the U.N. Population Fund, "an estimated 200,000 women and girls have been assaulted over the past 12 years, with more than 18,000 cases reported between January and February 2008 alone."[144] South Kivu alone recorded 45 rapes per day in 2008.[145] In the Shabunda region, researchers estimate that 70% of the females have been raped.[146] In 2011, a study estimated that between 1.69 to 1.80 million Congolese women aged fifteen to forty-nine had experienced rape in their lifetime.[147] Given the state of women's rights in the DRC and the fact that so many women have been displaced, have migrated, or have died since the conflict began, the number may be much higher than reported.

C. Government, U.N., and Civilian Involvement in Sexual and Gender-Based Violence

Despite Congo's riches, the central government does a poor job of compensating its employees. Police officers, judges, and members of the military sometimes work for months without receiving salaries.[148] Members of the military and the police often prey upon the citizens they are sworn to protect, while judges often accept bribes to compensate for the lack of salary.[149] Police officers and prison wardens often rape or prostitute women with impunity.[150] While militias, particularly the FDLR, commit a large number of the reported rapes, many rapists come from the Congolese military ("FARDC") or from the police force. The U.N. estimated in 2007 that the FARDC and the Congolese National Police Force committed 20% of the sexual violence.[151] Many members of the military do not have barracks and sleep outside or raid civilian homes for shelter, and they may commit rape as a crime of

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[144] *Secretary-General Calls Attention to Scourge of Sexual Violence in DRC*, UNFPA (Mar. 1, 2009), http://www.unfpa.org/public/News/pid/2181.

[145] DYMOND, *supra* note 117, at 3.

[146] *Id.* at 4.

[147] AMBER PETERMAN ET AL., IF NUMBERS COULD SCREAM: ESTIMATES AND DETERMINANTS OF SEXUAL VIOLENCE IN THE DEMOCRATIC REPUBLIC OF CONGO 1 (2011), *available at* http://www.stonybrookmedicalcenter.org/system/files/INCS_Congo_Brief_r6%20%281%29.pdf.

[148] *See* SOLDIERS WHO RAPE, COMMANDERS WHO CONDONE, *supra* note 140, at 44.

[149] *See* BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2011: DEMOCRATIC REPUBLIC OF THE CONGO 8–11 (2011), *available at* http://www.state.gov/documents/organization/186395.pdf.

[150] *See* Breton-Le Goff, *supra* note 135, at 19.

[151] *See* Press Release, U.N. Expert on Violence Against Women Expresses Serious Concerns Following Visit to Democratic Republic of Congo (July 30, 2007), http://www.unhchr.ch/huricane/huricane.nsf/0/B5D0053875B01B8CC1257328003A8FEE?opendocument [hereinafter Press Release, July 30, 2007].

opportunity.[152] Others commit rapes to penalize those they believe support rebel groups.[153]

In 2008, in the provinces of North and South Kivu, the U.N. registered 7703 cases of soldiers and others committing sexual violence, but judges convicted only twenty-seven soldiers of crimes of sexual violence.[154] In October 2010, the U.S. Department of State estimated that members of armed groups, the police, and the Congolese military were responsible for 81% of all reported cases of sexual violence in the conflict zones and almost a quarter of the rapes in non-conflict zones.[155]

The U.N. itself does not have clean hands—U.N. peacekeepers have reportedly sexually exploited the Congolese through "survival" and "transactional" sex.[156] Further, survivors have accused civilians, members of the clergy, and teachers of rape.[157] According to one estimate, 30% of the perpetrators of child rape were civilians.[158] In some cities such as Shabunda and Fizi, a study found that civilians committed approximately 70% of the reported sexual violence.[159] Further, researchers report civilians joining in with the military on "rape raids."[160] Some believe that the reintegration of armed forces into the civilian population with impunity for past crimes, coupled with the complete lack of rule of law and normalization of rape, has led to the increase in civilian criminality.[161]

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[152] *See* SOLDIERS WHO RAPE, COMMANDERS WHO CONDONE, *supra* note 140, at 44.

[153] Press Release, July 30, 2007, *supra* note 151.

[154] SOLDIERS WHO RAPE, COMMANDERS WHO CONDONE, *supra* note 140, at 6.

[155] *Congo (Kinshasa) (10/08/10)*, U.S. DEPT. OF STATE (Oct. 8, 2010), http://www.state.gov/outofdate/bgn/congokinshasa/160840.htm.

[156] CITIZENS FOR GLOBAL SOLUTIONS, THE UNITED NATIONS RESPONDS TO SEXUAL ABUSE BY PEACEKEEPERS IN THE DEMOCRATIC REPUBLIC OF CONGO (2005) (reporting allegations that U.N. personnel used "survival sex" to exploit "Congolese girls as young as 11 years of age in exchange for small amounts of money and scraps of food"); *UN Probing Charges of Sex Abuse in DR of Congo, Peacekeeping Official Says*, UNITED NATIONS NEWS CENTRE (Nov. 23, 2004), http://www.un.org/apps/news/story.asp?Cr=democratic&Cr1=congo&NewsID=12623#.UT5lNtF1808.

[157] *See* DYMOND, *supra* note 117, at 6 (accusing civilians of rape); THE WAR WITHIN THE WAR, *supra* note 117, at 21 (accusing teachers of rape).

[158] Breton-Le Goff, *supra* note 135, at 16.

[159] *See* DYMOND, *supra* note 117, at 7 (reporting a study that ran from January to March 2008).

[160] Bosmans, *supra* note 134, at 7.

[161] *See* OPEN SOC'Y INITIATIVE FOR S. AFR., HELPING TO COMBAT IMPUNITY FOR SEXUAL CRIMES IN DRC: AN EVALUATION OF THE MOBILE GENDER JUSTICE COURTS 17 (2012) (addressing the need to change the "normalization" of rape committed predominately by civilians), *available at* http://www.osisa.org/sites/default/files/open_learning-drc-web.pdf; Breton-Le Goff, *supra* note 135, at 19, 29 (noting that the reintegration of ex-militia members into the community and general corruption are aggravating factors of the violence in the DRC). Congo does have laws protecting women.

Combatants have used rape as a weapon of war throughout history, including most recently in Rwanda, Sierra Leone, Uganda, and the former Yugoslavia.[162] The DRC is no different, although the scale is reported to be unprecedented. The worldwide attention devoted to the use of rape by militias, coupled with the militias' involvement in the mineral trade, led to legislation in the United States to address the problem.

D. The Conflict over Minerals

By some estimates, mining "accounts for 80% of the exports, 72% of the national budget and 28% of [Congo's] GDP," and thus, for many families, particularly in the eastern part of the country, it is the only source of income.[163] But the amount of Congo's minerals as a percentage of worldwide totals has been wildly overstated by supporters of conflict mineral legislation. Although many claim that the Congo has 70 to 80% of the world's supply of coltan, studies indicate that the number is closer to 10%.[164]

But clearly, the country's riches have made its people vulnerable for over a hundred years, and, today, rebels, warlords, and corrupt members of the military extort "taxes" from the artisanal miners who dig the

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In 2006, the DRC, along with other states in the region, passed the seminal Protocol on the Prevention and Suppression of Sexual Violence against Women and Children, which prohibits forced pregnancy, sexual slavery, genital mutilation, forced prostitution, statutory rape, and forced sterilization. Protocol on the Prevention and Suppression of Sexual Violence Against Women and Children, International Conference of the Great Lakes Region, art. (1)(2)(g), Nov. 30, 2006, *available at* http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/381B8D820A51C229C12572FB002C0C5B/$file/Final%20protocol.Sexual%20Violence%20-%20En.pdf.

[162] *See* CASSANDRA CLIFFORD, RAPE AS A WEAPON OF WAR AND IT'S [SIC] LONG-TERM EFFECTS ON VICTIMS AND SOCIETY (2008) (listing countries where rape has been used as a weapon of war); WORLD HEALTH ORG., VIOLENCE AGAINST WOMEN AND HIV/AIDS: CRITICAL INTERSECTIONS: SEXUAL VIOLENCE IN CONFLICT SETTINGS AND THE RISK OF HIV 1, *available at* http://www.who.int/gender/en/infobulletinconflict.pdf.

[163] Aloys Tegera, Dir. of Research, Pole Inst., A Congolese Perspective on US Conflict Minerals Legislation, Keynote Speech to Roundtable Hosted by Judith Sargentini, Member of European Parliament (May 26, 2011), *in* ROUNDTABLE ON CONFLICT MINERALS LEGISLATION: TOWARDS PREVENTION OF TRADE IN CONFLICT MINERALS AND PROMOTION OF TRADE IN CLEAN MINERALS FROM CONGO 8, 8 (2011).

[164] *Compare The Devastating Crisis in Eastern Congo: Hearing Before the Subcomm. on Afr., Global Health, & Human Rights of the H. Comm. on Foreign Affairs*, 112th Cong. 3 (2012) (statement of Rep. Christopher H. Smith, Chairman, Subcommittee on Africa, Global Health, and Human Rights, Committee on Foreign Affairs) (claiming that DRC has 70% of the world's coltan and 30% of the world's diamond reserves), *with* EICHSTAEDT, *supra* note 120, at 140 (noting that the Congo only supplies about 10% of the world's coltan).

minerals by hand from the ground with their own tools.[165] Rebels and members of the military reportedly smuggle minerals through neighboring countries.[166] A U.N. group of observers has reported that rebels in the Congo's neighboring countries have in fact backed rebel forces.[167] Rebels loot, pillage, rape, and murder innocent civilians for a host of complex reasons, including for their minerals.[168] Reportedly, many civilians also fear the Congolese army as much as or more than the rebels.[169]

After decades of war involving international peacekeepers and significant international aid, NGOs and the U.S. government finally sought a legislative solution to the crisis in the Congo.

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[165] Nov. 29, 2011 Letter, *supra* note 124, at 113–14.

[166] *See id.* (noting that smuggling through illegal border crossings is a common problem in the DRC and that ex-CNDP commanders, the FARDC, and other officers and members of the police continue to smuggle minerals across borders).

[167] Coordinator of the Group of Experts on the DRC, *supra* note 128 ("[T]he Group [of Experts] has repeatedly concluded that the Government of Rwanda (GoR), with the support of allies within the Government of Uganda, has created, equipped, trained, advised, reinforced and directly commanded the M23 rebellion.").

[168] The standard narrative given for the reason behind the conflict minerals law is that consumer demand for electronics drives corporations to source minerals from DRC, which has mines controlled by rebels who use revenues from corporations to fund their rebellions, often involving child soldiers, and who engage in raping, pillaging, and looting. However, there are other possible hypotheses for M23's motives, including "historic grievances, ethnic tensions, economic gain, and political control." INT'L PEACE INFO. SERV., MAPPING CONFLICT MOTIVES: M23, at 4 (2012) [hereinafter MAPPING CONFLICT MOTIVES]. The International Peace Information Service ("IPIS") compiles comprehensive research to analyze the complex motives driving wars and conflicts. *Mapping Conflict Motives in War Areas*, INT'L PEACE INFO. SERV., http://www.ipisresearch.be/mapping.php (last visited Mar. 8, 2013). In analyzing M23's motives, IPIS noted that although M23's initial push was to implement an agreement between the CNDP and the Congolese government, M23 has consistently moved in the direction of advocating for national political control. MAPPING CONFLICT MOTIVES, *supra*, at 9–10. IPIS research revealed that control over minerals seemed not to be a driving factor for M23 because, although many important mining sites are within M23's reach, none of M23's recent operations have sought control over these important mining sites. *Id.* at 14. M23 has political motivations both within the DRC and without. Within, M23 has sought the support of other Congolese armed groups and President Kabila's opposition. *Id.* at 16. Outside the DRC, M23 has received backing from rebels in Rwanda and Uganda. Coordinator of the Group of Experts on the DRC, *supra* note 128. In March 2013, a key leader of the head of M23, ex-Congolese army general Bosco Ntaganda, turned himself in to the International Criminal Court, where he was sought for war crimes. *Bosco Ntaganda in the ICC: Profile of the Terminator*, TELEGRAPH (Mar. 26, 2013, 10:15 AM), http://www.telegraph.co.uk/news/worldnews/africaandindianocean/democraticrepublicofcongo/9953920/Bosco-Ntaganda-in-the-ICC-profile-of-the-Terminator.html.

[169] *See, e.g.*, Gregory Warner, *Congo Fighting Leaves a Fragile City on Edge*, NPR, Dec. 31, 2012, http://www.npr.org/2012/12/31/168345346/congo-fighting-leaves-a-fragile-city-on-edge (observing that while some people in a displaced persons camp fled the M23 rebel group, others fled the Congolese army).

III. THE CONSTITUENCY OF CONSCIENCE: HOW THE "NAME-AND-SHAME" LEGISLATION WAS BORN

A. Early Measures

American lawmakers have tried for years to stop the bloodshed in the Congo. In 2005, then U.S. Senator Barack Obama introduced the DRC Relief, Security, and Democracy Promotion Act of 2006 ("DRC Act"),[170] which was signed into law by President Bush.[171] The legislation established fifteen U.S. policy objectives addressing humanitarian needs, social development, economic and natural resource management, and governance and security sector reform concerns in the DRC.[172] The DRC Act highlighted the Congo's strategic importance as a large country that had been destabilized by a number of wars and that was located in the center of Africa surrounded by a number of other countries that were either also unstable or could capitalize on DRC's instability.[173] The American government was primarily focused on fighting terrorism, which was closely linked to addressing the humanitarian crisis of internally displaced persons, disease, war, and poverty.[174]

Although the DRC Act did not use the term "conflict minerals," mindful of the connection between mineral riches and funding of rebel forces, it did require the DRC's commitment to manage its natural resources responsibly, "to hold accountable individuals who illegally exploit the country's natural resources," and "to implement the Extractive Industries Transparency Initiative by enacting laws requiring disclosure and independent auditing of company payments and government receipts for natural resource extraction."[175] As required by the Act, approximately 70% of the hundreds of millions of dollars of U.S.

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[170] Democratic Republic of the Congo Relief, Security, and Democracy Promotion Act of 2005, S. 2125, 109th Cong. (2005). Hillary Clinton, during the time she was a senator, also supported the bill and later joined as a co-sponsor of the Act. 152 CONG. REC. 9, 11,699 (2006).

[171] Democratic Republic of the Congo Relief, Security, and Democracy Promotion Act of 2006, Pub. L. No. 109-456, § 102, 120 Stat. 3384, 3385–87.

[172] *Id.* (indicating that one of the policy objectives of "assisting the Government of the Democratic Republic of the Congo to establish a viable and professional national army and police force that respects human rights and the rule of law, is under effective civilian control, and possesses a viable presence throughout the entire country").

[173] *Id.* at § 101(3)–(4).

[174] *Id.* at § 101(1)–(2).

[175] *Id.* at § 102(8)(B)(ii)–(iii). The Extractive Industries Transparency Initiative is globally developed and implemented by "a coalition of governments, companies, civil society groups, investors and international organisations" and promotes transparency of revenue payments for natural resources at the local level. *What is the EITI?*, EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE, http://eiti.org/eiti (last visited Mar. 8, 2013).

funding in the fiscal years 2006 and 2007 went toward humanitarian and social efforts, and 30% went toward economic and natural resource management, governance, and security objectives.[176] According to the Government Accountability Office ("GAO"), which was tasked with reviewing whether programs met the policy objectives, corruption, failed governance, lack of basic infrastructure, and mismanagement of natural resources hampered reform efforts.[177]

The U.S. government, of course, was not alone in trying to resolve issues in the Congo. NGOs around the world were also working to solve the crisis in the Congo. Ironically, Congo has been called both the rape and international humanitarian aid capital of the world.[178] For years, organizations such as the Eastern Congo Initiative,[179] Human Rights Watch,[180] Oxfam,[181] Amnesty International,[182] and Global Witness[183] have highlighted the lack of government infrastructure, the need for

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[176] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-562T, THE DEMOCRATIC REPUBLIC OF THE CONGO: MAJOR CHALLENGES IMPEDE EFFORTS TO ACHIEVE U.S. POLICY OBJECTIVES; SYSTEMATIC ASSESSMENT OF PROGRESS IS NEEDED 7 (2008).

[177] *Id.* at 12.

[178] Personal internet conversation on December 10, 2012, with Vava Tampa, founder of Save the Congo, a U.K.-based campaigning organization working to "raise awareness of, and tackle the impunity, insecurity, institutional failure and [i]llicit trade of minerals that funds the wars in Congo." *See* SAVE THE CONGO, http://www.savethecongo.org.uk/ (last visited Mar. 8, 2013).

[179] *About ECI*, E. CONGO INITIATIVE, http://www.easterncongo.org/about (last visited Mar. 8, 2013); *What We Do*, E. CONGO INITIATIVE, http://www.easterncongo.org/about/what-we-do (last visited Mar. 8, 2013) (explaining that Eastern Congo Initiative funds local Congolese organizations for survivors of sexual and gender-based violence, funds peace and reconciliation programs, promotes children's health, and also works to effect policy change in Washington); *see also The Democratic Republic of the Congo: Securing Peace in the Midst of Tragedy: Hearing Before the Subcomm. on Afr., Global Health & Human Rights of the H. Comm. on Foreign Affairs*, 112th Cong. 50–54, 88–89 (2012) (noting that the founder of the Eastern Congo Initiative, actor Ben Affleck, has testified before Congress on Congo).

[180] *About Us*, HUM. RTS. WATCH, http://www.hrw.org/about (last visited Mar. 8, 2013); *DR Congo: US Should Urge Rwanda to End M23 Support: Sanction Rwandan Officials Backing Abusive Congolese Rebels*, HUM. RTS. WATCH (Nov. 8, 2012), http://www.hrw.org/news/2012/11/20/dr-congo-us-should-urge-rwanda-end-m23-support (reporting on its investigations into human rights abuses and its recent focus on the M23 rebel group and calling on the United States to publicly support sanctions against the Rwandan government).

[181] *Democratic Republic of Congo*, OXFAM INT'L, http://www.oxfam.org/drc (last visited Mar. 8, 2013) (focusing on short-term emergency relief and longer-term development projects in Congo, particularly involving internally displaced persons).

[182] *Democratic Republic of Congo*, AMNESTY INT'L, http://www.amnestyusa.org/our-work/countries/africa/democratic-republic-of-congo (last visited Mar. 8, 2013) (focusing on human rights violations by the military and armed groups and promoting compliance with mineral regulation legislation).

[183] *Our Work*, GLOBAL WITNESS, http://www.globalwitness.org (last visited Mar. 8, 2013) (focusing on natural-resources related to human rights issues).

security sector reform, the health crisis, and the plight of the internally displaced persons. The most vocal and successful advocate for the conflict mineral legislation, Enough Project, was founded in 2007 to work on issues related to Africa and, through its Raise Hope for Congo campaign, has worked with activists around the world.[184] The various entities are well aware of the complexities of Congo's multilayered problems and know that the blame does not lie solely with rebel forces. As Oxfam pointed out, "government soldiers, armed rebels, police, and civilian authorities are all vying for the right to exploit local communities and extort money or goods from [citizens], pushing people further into poverty and undermining their efforts to earn a living."[185]

Nonetheless, although earlier strategy papers focused on broader issues similar to those raised in the DRC Act, from a CSR perspective, Enough Project eventually realized that tying rape to electronics was a simpler and more media-savvy method of focusing international media, governments, corporations, and consumers on the complex and intractable crisis in the Congo.

> In April 2009, Enough Project released a report, declaring that [t]he time has come to expose a sinister reality: Our insatiable demand for electronics products such as cell phones and laptops is helping fuel waves of sexual violence . . . . There are few other conflicts in the world where the link between our consumer appetites and mass human suffering is so direct.[186]

Enough Project developed and publicized a company ranking system holding the twenty-four leading electronics companies publicly accountable for their progress on ridding their products of conflict minerals, spearheaded a conflict-free campus initiative, and advocated

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[184] *See About Us*, ENOUGH PROJECT, http://enoughproject.com/about (last visited Mar. 8, 2013); *see also About the Campaign*, RAISE HOPE FOR CONGO, http://www.raisehopeforcongo.org/content/about/about-the-campaign (last visited Mar. 8, 2013). John Prendergast, Enough Project's co-founder, testified on Congo-related matters on Capitol Hill at the House Foreign Affairs Subcommittee on Africa on March 8, 2011, advocating for a special envoy to the Congo and reporting on the realized benefits in the DRC since implementation of the Dodd–Frank Act. *The Democratic Republic of the Congo: Securing Peace in the Midst of Tragedy: Hearing Before the Subcomm. on Afr., Global Health & Human Rights of the H. Comm. on Foreign Affairs*, 112th Cong. 79–88 (2011) (statement of John Prendergast, Co-founder, Enough Project). Prendergast also testified again before Congress on December 11, 2012. *The Devastating Crisis in Eastern Congo: Hearing Before the Subcomm. on Afr., Global Health & Human Rights of the H. Comm. on Foreign Affairs*, 112th Cong. 47–57 (2012) (statement of John Prendergast, Co-founder, Enough Project).

[185] STEVEN VAN DAMME, OXFAM INT'L, COMMODITIES OF WAR: COMMUNITIES SPEAK OUT ON THE TRUE COST OF CONFLICT IN EASTERN DRC 1 (2012), *available at* http://www.oxfam.org/en/policy/commodities-war-drc.

[186] JOHN PRENDERGAST, ENOUGH PROJECT, CAN YOU HEAR CONGO NOW? CELL PHONES, CONFLICT MINERALS, AND THE WORST SEXUAL VIOLENCE IN THE WORLD 1 (2009).

for "conflict-free" cities.[187] Companies that engaged with Enough Project and its mission were favorably featured in its social media and other campaigns.[188]

Video campaigns by other activists went viral through social media, including a British documentary entitled "Blood in the Mobile," which encouraged interested viewers to contact Raise Hope for Congo and other NGOs and encourage them to take action.[189] Raise Hope for Congo worked with socially responsible investors and companies to argue that the only way to solve the crisis in the Congo was to change corporate and consumer behavior and to stop the funding of rebel groups through the purchase of conflict minerals.[190] NGOs also pressured lawmakers in Washington for legislative action to stop corporate complicity.[191]

Meanwhile, because the DRC Act did not focus solely on minerals, some legislators in Congress also wanted freestanding conflict mineral legislation, perhaps prodded by NGOs, but also based upon personal experience in the region. Former Senator Sam Brownback of Kansas had traveled to Congo with Senator Dick Durbin of Illinois in the past, and in the same month as the Enough Project cell phone campaign, Brownback introduced the Congo Conflict Minerals Act of 2009 ("Brownback Bill"), co-sponsored by Senator Dick Durbin and Senator Russ Feingold of Wisconsin.[192] In his press release announcing the legislation, Brownback explained,

> Metals derived from inhumanely mined minerals go into electronic products used by millions of Americans. In the Democratic Republic of Congo, many people—especially women and children—are victimized by armed groups who are trying to make a profit from mining 'conflict minerals.' The legislation introduced today brings accountability and transparency to the supply chain of minerals used in the manufacturing of many electronic devices. I hope the legislation will help save lives.[193]

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[187] *Our Programs*, RAISE HOPE FOR CONGO, http://www.raisehopeforcongo.org/content/our-programs (last visited Mar. 8, 2013).

[188] *See* ENOUGH PROJECT, GETTING TO CONFLICT-FREE: ASSESSING CORPORATE ACTION ON CONFLICT MINERALS 1–4 (2010) ("These rankings [of companies by their conflict mineral engagement] are an effort to provide consumers with the information they need to purchase responsibly, as well as a means of encouraging companies to continue to move forward in good faith.").

[189] *See The Power Is in Your Pocket—Take Action*, BLOOD MOBILE, http://bloodinthemobile.org/take-action (last visited Mar. 8, 2013).

[190] *See supra* note 184 and accompanying text.

[191] *See supra* notes 180, 184 and accompanying text.

[192] Congo Conflict Minerals Act of 2009, S. 891, 111th Cong. (2009).

[193] *Brownback, Durbin, Feingold Introduce Conflict Minerals Act: Press Release*, PROJECT VOTE SMART (Apr. 24, 2009), http://votesmart.org/public-statement/419962/brownback-durbin-feingold-introduce-congo-conflict-minerals-act#.UOfaYInjlpk.

This press release came only days after members of his campaign staff participated in the "RAISE Your Voice Activist Conference Call," led by field managers of Enough Project, to discuss upcoming conflict mineral legislation.[194]

The Brownback Bill began by discussing the prevalence of rape as a weapon of war in Congo and the fact that the mismanagement of natural resources has contributed to conflict among rebel forces and the militias.[195] The Brownback Bill also referred to U.N. Security Council Resolution 1857,[196] which encouraged member countries to ensure that companies exercise due diligence when sourcing minerals from the DRC.[197] Among other things, the Brownback Bill directed the Secretary of State to produce a Conflict Minerals Map, showing which mines were under control of rebel forces,[198] and to

> work with other member states of the United Nations and local and international [NGOs] to provide guidance to commercial entities seeking to exercise due diligence on their suppliers to ensure that the raw materials used in their products do not—
>
> (1) directly finance armed conflict;
>
> (2) result in labor or human rights violations; or
>
> (3) damage the environment.[199]

Notably, the Brownback Bill proposed amending Section 13 of the Exchange Act[200] to require companies to disclose to the SEC "the country of origin of columbite-tantalite, cassiterite, or wolframite" if the country of origin is the DRC or an adjoining country or involves the funding of the armed groups perpetuating the human rights violations described in the Act.[201]

Nonetheless, the Brownback Bill died[202] even though Secretary of State Hillary Clinton clearly believed there was a connection between

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[194] *Raise Your Voice Activist Conference Call*, ENOUGH PROJECT (Apr. 15, 2009), http://www.enoughproject.org/events/congo-challenge-advocacy-training-call.

[195] S. 891, § 2(4)–(5).

[196] S.C. Res. 1857, ¶ 15, U.N. Doc. S/RES/1857 (Dec. 22, 2008) (renewing measures on arms embargo against all nongovernmental entities and individuals operating in the DRC).

[197] S. 891, § 9.

[198] This provision survived within Section 1502 of the Dodd–Frank Act, but the most recent State Department map is from May 2012 as of March 2013. HUMANITARIAN INFO. UNIT, U.S. DEP'T OF STATE, DEMOCRATIC REPUBLIC OF THE CONGO MINERAL EXPLOITATION BY ARMED GROUPS & OTHER ENTITIES (2012), *available at* https://hiu.state.gov/Products/DRC_Conflict Minerals_2012May23_HIU_U540.pdf.

[199] S. 891, § 4(b)–(c).

[200] 15 U.S.C. § 78m (Supp. V 2011).

[201] S. 891, § 5.

[202] *See Congo Conflict Minerals Act of 2009*, GOVTRACK.US, http://www.govtrack.us/congress/bills/111/s891 (last visited Mar. 8, 2013).

minerals and human rights abuses. In August 2009, Secretary Clinton visited the DRC and explicitly linked conflict minerals to rape when she noted that the conflict in the DRC was over illegal mining of minerals and then declared, "Women are being turned into weapons of war."[203]

Meanwhile, members of the U.S. House of Representatives also wanted a freestanding bill focused solely on conflict minerals. Representative Jim McDermott of Washington had served as a medical officer in the Foreign Service in central Africa in the 1980s and then in 2007, and he was astounded by the human rights abuse when he visited the Congo and talked with rape victims.[204] In November 2009, he introduced the Conflict Minerals Trade Act (the "McDermott Bill").[205] The McDermott Bill, among other things, was strikingly similar to the Brownback Bill but would have prohibited the import of certain articles and would have imposed penalties under Section 592 of the Tariff Act of 1930.[206] There were no SEC disclosure requirements under the McDermott Bill. Enough Project, through its parent organization, Center for American Progress, supported the McDermott Bill, as did Human Rights Watch, other NGOs, and the Information Technology Industry Council.[207] This bill also failed to pass.[208]

Despite the setbacks, these resolute lawmakers finally found an opportunity through a very unlikely vehicle to achieve what had been so elusive. Representative Jim McDermott summed up their philosophy by saying, "You get bills passed any way you can."[209]

B. The Dodd–Frank Act and Corporate Disclosures

The financial crisis of 2008 became the unlikely vehicle for Brownback, McDermott, and the NGO community to achieve their respective ends. In 2010, Congress passed the Dodd–Frank Act.[210] The

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[203] Jeffrey Gettleman, *Clinton Presses Congo on Minerals*, N.Y. TIMES, Aug. 11, 2009, at A7.

[204] *See* Ben Protess, *Dodd–Frank Strays Far from Street*, N.Y. TIMES, July 14, 2011, at B1.

[205] Conflict Minerals Trade Act, H.R. 4128, 111th Cong. (2009).

[206] *Id.* § 9(a); *see also* Tariff Act of 1930 § 592, 19 U.S.C. § 1592 (2006 & Supp. V 2012).

[207] Seay, *supra* note 107.

[208] *See Conflict Minerals Trade Act*, GOVTRACK.US, http://www.govtrack.us/congress/bills/111/hr4128 (last visited Mar. 8, 2013).

[209] Protess, *supra* note 204.

[210] Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). The Act includes corporate governance and executive compensation reforms, new rules for credit rating agencies, new registration requirements for hedge fund and private equity fund advisers, heightened regulation of over-the-counter

Dodd–Frank Act contained a number of sleeper provisions that most investors did not notice. A conflict minerals provision was one of them, inserted days before the Dodd–Frank Act was passed.[211] Another related provision was Section 1504, the resource-extraction provision, which was also heavily promoted by the NGO community.[212] Known as "publish what you pay," this provision requires affected companies to disclose to the SEC all payments above $100,000 made to either the United States or a foreign government for the extraction of oil and minerals.[213]

In adding Section 1502 as a human rights provision to the financial reform law, legislators explained that "[i]t is the sense of Congress that the exploitation and trade of conflict minerals originating in the Democratic Republic of the Congo is helping to finance conflict characterized by extreme levels of violence . . . particularly sexual- and gender-based violence, and contributing to an emergency humanitarian situation therein."[214] Congress, therefore, sought to "reduce funding for the armed groups contributing to the conflict" and "put pressure on such groups to end the conflict."[215] Essentially, Section 1502 requires the SEC to promulgate rules forcing issuers to disclose pertinent facts regarding the origin of minerals.[216] Section 1502 adopted much of what Brownback proposed but was not without controversy, and the Act took two years for final passage.

When the SEC published its proposed rules, it received over 400 comment letters, and it held 130 meetings with interested investors, business groups, NGOs, and members of the public.[217] Although the

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derivatives and asset-backed securities, and significantly increased oversight and regulation of banks and other financial institutions. *Id.*

[211] Brownback attached Section 1502 as an amendment, which was adopted by the Senate by voice vote. 156 CONG. REC. S3865–66 (daily ed. May 18, 2010).

[212] *See* PUBLISH WHAT YOU PAY, COMMENTS ON SECTION 1504 OF THE DODD–FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT 1, 7 (Nov. 22, 2010), *available at* http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-82.pdf (commenting, with the support of 600 organizations, that "Section 1504 of the Act embodies a significant contribution to the development of a global standard that will build upon the efforts elsewhere and help address some lingering gaps").

[213] 15 U.S.C. § 78m(q)(2)(A) (2006 & Supp. V 2011); Disclosure of Payments by Resource Extraction Issuer, 77 Fed. Reg. 56,365, 56,368 (Sept. 12, 2012) (to be codified at 17 C.F.R pts. 240, 249).

[214] Dodd–Frank Act § 1502(a), 124 Stat. at 2213.

[215] Conflict Minerals, 77 Fed. Reg. 56,274, 56,276 (Sept. 12, 2012) (to be codified at 17 C.F.R. pts. 240, 249b).

[216] Dodd–Frank Act § 1502(b), 124 Stat. at 2213.

[217] *See Proposed Rule: Conflict Minerals*, SEC. & EXCH. COMM'N, http://www.sec.gov/comments/s7-40-10/s74010.shtml (last visited Mar. 8, 2013). Many of the comment letters were form letters signed on behalf of thousands of "concerned consumers." *E.g.*, Letter from 13,660 Concerned Consumers to the U.S. Securities and

business groups that objected to the law almost universally lauded the goal of stemming the tide of violence in the Congo,[218] their concerns generally focused on the perceived vagueness of the requirements and the costs of compliance.[219]

While lobbyists and NGOs argued about the law's details in Washington, DRC President Joseph Kabila initiated a mining embargo from September 2010 to March 2011, which devastated the artisanal miners and the surrounding communities, even after the embargo was lifted.[220] In fact, in the DRC, President Obama and the "Obama Law," as the Dodd–Frank Act was called, took the blame for the plunging fortunes of the miners.[221]

Exchange Commission (Feb. 17, 2011), *available at* http://www.sec.gov/comments/s7-40-10/s74010-305.pdf.

[218] For example, one of the most vocal critics of the law and a petitioner in the lawsuit, the National Association of Manufacturers ("NAM"), began its comment letter to the SEC stating, "We support the underlying goal of Sec. 1502 to address the atrocities occurring in the Democratic Republic of Congo (DRC) and adjoining countries and are actively working with other stakeholders to help address the problem." Letter from Stephen Jacobs, Senior Dir., Int'l Econ. Affairs, Nat'l Ass'n of Mfrs., to Mary L. Schapiro, Chairman, Sec. & Exch. Comm'n (Mar. 2, 2011), *available at* http://www.nam.org/~/media/DE6DA95D7CA5475BB24F80869A643CD3/NAM_Comments_on_Conflict_minerals_3_2_11_as_submitted.pdf.

[219] Many critics cite the report by Chris Bayer and Dr. Elke de Buhr. *See generally* CHRIS BAYER & ELKE DE BUHR, A CRITICAL ANALYSIS OF THE SEC AND NAM ECONOMIC IMPACT MODELS AND THE PROPOSAL OF A 3RD MODEL IN VIEW OF THE IMPLEMENTATION OF SECTION 1502 OF THE 2010 DODD–FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT 3 (2011), *available at* http://lawprofessors.typepad.com/files/tulane-study.pdf (concluding that the SEC's $71.2 million figure underestimated the cost of implementation and did not "take into account the range of actors affected by the statutory law," while NAM's figure of $9–16 billion overstated the costs and did not take efficiencies into account, and estimating the true cost of compliance at closer to $7.93 billion for affected companies and first-tier suppliers); Letter from Erik O. Autor, Vice President, Int'l Trade Counsel, Nat'l Retail Fed'n, to Mary L. Schapiro, Chairman, Sec. & Exch. Comm'n (Nov. 1, 2011), *available at* http://www.sec.gov/comments/s7-40-10/s74010-386.pdf.

[220] *See* David Aronson, *How Congress Devastated Congo*, N.Y. TIMES, Aug. 8, 2011, at A19 (arguing that the Dodd–Frank Act caused a de facto embargo on mineral mining even before the final law had passed); Seay, *supra* note 107, at text accompanying n.24.

[221] Editorial, *Africa and 'Obama's Embargo,'* WALL ST. J., July 18, 2011, at A12; *see also* Laura Heaton, *Congolese Living in Mining Region Blame 'Obama's Law' for Economic Struggles*, CHRISTIAN SCI. MONITOR (Apr. 25, 2011), http://www.csmonitor.com/World/Africa/Africa-Monitor/2011/0425/Congolese-living-in-mining-region-blame-Obama-s-law-for-economic-struggles (indicating that, even though the Dodd–Frank Act was not yet in effect and did not call for an embargo, Kabila enacted an embargo "to show that he was doing something" and that local Congolese blamed Obama and were "living in misery" during the ban).

Under the final rule promulgated on August 22, 2012, affected companies[222] must compile data for calendar year 2013 and file their first report by May 31, 2014.[223] Although every SEC reporting company must determine whether it uses conflict minerals, the rule applies to companies only if "conflict minerals are necessary to the functionality or production of a product" that a public company manufactures or contracts to be manufactured.[224] First, a company must determine if its products rely on conflict minerals.[225] Next, a company must determine, using a "reasonable country of origin inquiry," if minerals it uses may have originated in the DRC or an adjoining country.[226] If the metals did not originate in the covered nations or are considered scrap or recycled, a company still must report how it determined that the metals were scrap or recycled in a new specialized disclosure Form SD and provide a link to the company's website providing the disclosure.[227] If a company has reason to believe that the minerals may have come from a covered nation, then the company must disclose on the Form SD whether the company has determined the source to be "DRC conflict free," "not DRC conflict free," or, for the next two years, "DRC conflict undeterminable."[228] In addition, the company must obtain an independent, private-sector, third-party audit of its conflict mineral report of (1) the facilities used to process the conflict minerals; (2) the country of origin; (3) the efforts used to determine the mines with specificity; (4) the steps the company took to mitigate the risk that its use of conflict minerals will benefit armed groups; and (5) any steps it has taken to improve its due diligence process.[229] At this time, the OECD Guidance is considered an acceptable third-party standard for due diligence.[230] Because these reports are filed with the SEC, firms could be

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[222] The law provides important roles for the State and Commerce Departments as well, but in the interest of space, this Article does not discuss those provisions.

[223] Conflict Minerals, 77 Fed. Reg. 56,274 (Sept. 12, 2012) (to be codified at 17 C.F.R. pts. 240, 249b).

[224] *Id.* at 56,290. For the purposes of this Article, only a very brief description follows of the law's requirements.

[225] *Id.* at 56,310.

[226] *Id.* at 56,275, 56,310.

[227] *Id.* at 56,312, 56,315.

[228] *Id.* at 56,333–34.

[229] *Id.* at 56,320–21. The SEC has granted a two-year transition period for companies that cannot determine the country of origin or if the due diligence process cannot determine if the minerals came from armed groups. These products would be considered "DRC conflict undeterminable." For smaller companies, the SEC has granted a four-year transition period. The company must still file a conflict mineral report but is not required to file an audit report. *Id.* at 56,334.

[230] *Id.* at 56,324.

held liable for "false or misleading" statements under Section 18 of the Exchange Act.[231]

IV. WILL THE CONFLICT MINERALS LEGISLATION SUCCEED, AND ARE THERE MORE EFFECTIVE WAYS TO END THE HUMANITARIAN CRISIS?

A. The Law of Unintended Consequences

The SEC exists to "protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation."[232] When Congress passed comprehensive securities legislation reform in 1933 and 1934, it intended to ensure that publicly traded companies disclosed material information to investors.[233] But as discussed above, Section 1502's legislative history makes it clear that the conflict mineral law is not designed to protect or inform investors of material information but, rather, to stop a humanitarian crisis.

The Dodd–Frank Act, however, is not the first time that the agency has tackled social issues. In February 2010, the SEC issued guidance regarding exposure and expenditures related to climate change.[234] Although some public figures believed that the SEC had overstepped its bounds then,[235] investors clearly have a right to know whether firms face significant environmental regulation, litigation, or liabilities.

In the case of conflict minerals, although the Dodd–Frank Act does not prohibit the use of these minerals, the law does require companies to disclose whether they use them by May 2014.[236] One company, Cisco, has already received a shareholder's resolution asking for a feasibility study to determine whether the minerals can be removed from Cisco's entire

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[231] Securities Exchange Act of 1934, 15 U.S.C. § 78r(a) (2006).

[232] *The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/about/whatwedo.shtml (last visited Mar. 8, 2013).

[233] *See* Securities Act of 1933, chap. 38, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a–77aa (2006)); Securities Exchange Act of 1934, chap. 404, 48 Stat. 881 (codified as amended at 15 U.S.C. § 78a (2006)).

[234] *See* Commission Guidance Regarding Disclosure Related to Climate Change, Securities Act Release No. 9106, Exchange Act Release No. 61469, FR-82, 75 Fed. Reg. 6290 (Feb. 8, 2010); *see also* 17 C.F.R § 229.101(c)(1)(xii) (2011).

[235] *See, e.g.*, John Broder, *S.E.C. Adds Risk Related to Climate to Disclosure List*, N.Y. TIMES, Jan. 28, 2010, at B1 (quoting Commissioner Kathleen L. Casey as saying, "I can only conclude that the purpose of this release is to place the imprimatur of the commission on the agenda of the social and environmental policy lobby, an agenda that falls outside of our expertise and beyond our fundamental mission of investor protection"); Editorial, *Climate Change and the S.E.C.*, N.Y. TIMES, Jan. 31, 2010, at WK9 (expressing the frustrations of Representative Joe Barton that the SEC should be focusing on "investor protection" instead of promoting environmental groups' "social agendas").

[236] Conflict Minerals, Release No. 67716 (Nov. 13, 2012).

supply chain altogether.[237] This question posed by Cisco's shareholders will not be the last as more socially responsible investors examine their portfolios and the conflict minerals reports filed in 2014 and beyond. The question compounds the fears of many of the law's opponents that firms will determine that it is easier to source the minerals elsewhere, thereby leaving artisanal miners with no livelihood whatsoever—similar to what occurred during the 2010 Kabila embargo. Boards and executive managers exercising appropriate risk management over the enterprise must ask the question as to whether they should and could source their minerals from other parts of the world.

As for return on shareholder value, the first academic study to consider the issue found that legislators' and stakeholders' demands for increased social transparency can have tangible costs to shareholders when the disclosure rules induce significant changes in management and customer decision making.[238] Again, assuming that similar results from this preliminary study are replicated, responsible board members may use this as another reason to source their materials elsewhere, removing the source of income from the Congolese miners. Indeed, according to the head of a regional mining provision in Congo, tens of thousands of miners have already lost their jobs as companies have left the country, and an architect of the U.N. due diligence procedures has admitted that smuggling was still a problem as late as the end of 2012.[239] Even the OECD reported that many of the participants in its due diligence pilot program found that many of its suppliers wanted to boycott the Congo because of the law's requirements.[240]

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[237] *See* Cisco Sys., Inc., Proxy Statement Pursuant to Section 14(a) of the Securities Exchange Act of 1934 (Sch. 14A), 27 (Sept. 26, 2012).

[238] *See* PAUL A. GRIFFIN ET AL., SUPPLY CHAIN SUSTAINABILITY: EVIDENCE ON CONFLICT MINERALS, at ii (2012) ("Based on companies with conflict minerals disclosures . . . and a size- and industry-matched control sample of non-disclosers, . . . shareholder value decreases for both samples for up to three weeks following the event dates of the discloser companies."). It is too early to tell whether this will be replicated with other companies as more companies make these disclosures, but these early findings may raise concerns with board members.

[239] *See* Katrina Manson, *Central Africa: The Quest for Clean Hands*, FIN. TIMES (Dec. 18, 2012, 8:40 PM), http://www.ft.com/intl/cms/s/0/b69124a4-394f-11e2-8881-00144feabdc0.html#axzz2HlfyFe5G.

[240] OECD, *Downstream Implementation of the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas Supplement on Tin, Tantalum, and Tungsten*, 16 (2013), *available at* http://www.oecd.org/daf/inv/mne/DDguidanceTTTpilotJan2013.pdf.

B. Does Complying with the Dodd–Frank Act Raise Other Compliance Risks?

Even if Congo was not plagued with dozens of rebel groups and was not in a state of civil war, corporations and their agents, auditors, and suppliers attempting to comply in good faith with the Dodd–Frank Act must contend with underpaid police officers, members of the military, and bureaucrats who often expect to supplement their meager salaries with bribes because they go for months without pay.[241] Transparency International ranks Congo as the 160th most corrupt country out of 176 countries in the world.[242]

Firms must also comply with both Section 1504, requiring TNCs to publish what they pay to governments for access to oil, gas, and minerals,[243] and the Foreign Corrupt Practices Act ("FCPA"), which has no affirmative defense for the actions of a rogue agent or employee even if a company has provided explicit training or instructions to comply with the law.[244] Section 1504 ostensibly covers both legal and illegal payments. The FCPA has two main provisions. First, it prohibits bribery of foreign officials.[245] Second, it requires companies to keep accurate books and records.[246] Some TNCs must also comply with the United Kingdom's Bribery Act of 2010, which imposes strict liability for bribing a "foreign public official."[247]

Given all of the steps and all of the people involved within the supply chain, there are significant risks that TNCs acting in good faith will have agents who, in following local customs, may violate U.S., U.K., and other laws just to get clients' products out of the country, regardless of the TNC's instructions to the contrary. Even with exercising due diligence, ensuring that bribes are not used may be practically impossible when tracing the route of gold, for example, from artisanal miners digging gold by hand from river beds or minerals from the mines to the middle men and those transporting bags of minerals from villages to cities through various countries to boats to refineries or smelters in

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[241] Even the U.N. peacekeepers are not immune. During a research trip to Bukavu, DRC, in September 2011, the author personally witnessed U.N. personnel trading bags of minerals for donated clothes with miners. The clothes were supposed to be given to the miners and local villagers for free.

[242] *Corruption by Country: Democratic Republic of the Congo*, TRANSPARENCY INT'L, http://www.transparency.org/country#COD (last visited Mar. 8, 2013).

[243] Dodd–Frank Act § 1504, 15 U.S.C. § 78m(q)(2)(A) (2006 & Supp. V 2011).

[244] Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78m, 78dd-1 to -3, 78ff (2006).

[245] § 78dd-1(a).

[246] *Id.* § 78m(b)(2)(A).

[247] Bribery Act, 2010, c. 23, §§ 6(1), 7(1) (U.K.).

Asia (where there may also be corruption issues).[248] It is unlikely that these kinds of payments would constitute the "facilitating payments" allowed under certain circumstances by the FCPA, but which are still frowned upon by the OECD and illegal in almost every country in the world.[249]

Violating the FCPA has significant civil and criminal penalties that can also lead to debarment from government contracts as well as worldwide jurisdictional enforcement.[250] The Department of Justice and the SEC have made enforcement of the anti-bribery statutes a key priority and have even allowed a whistleblower "bounty" of 10–30% of recoveries over one million dollars.[251] Thus, boards considering the best interests of their shareholders would likely weigh the risks of being able to get accurate certifications and disclosures to their investors and consumers and the reputational concerns of doing business in the Congo. Again, they may determine that it is in their best interests to do business elsewhere, further exacerbating the plights of the local Congolese.[252]

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[248] This is a such a well-founded concern that companies like KPMG, an audit, tax and advisory firm, warn clients of the stages during the mining and transportation processes at which bribery and smuggling can occur based on OECD and other sources. *See, e.g.*, KPMG INT'L, CONFLICT MINERALS AND BEYOND: PART TWO: A MORE TRANSPARENT SUPPLY CHAIN 6–7 (2012), *available at* http://www.kpmg.com/US/en/IssuesAndInsights/ArticlesPublications/Documents/more-transparent-supply-chain.pdf.

[249] Facilitating payments for routine, nondiscretionary tasks is allowed under 15 U.S.C. § 78dd-2(b) (2006). However, only Australia, Canada, South Korea, the United States, and New Zealand allow them. TRACE ANTI-BRIBERY COMPLIANCE SOLUTIONS, TRACE FACILITATIONS PAYMENTS BENCHMARKING SURVEY 2 (2009), *available at* https://secure.traceinternational.org/data/public/documents/FacilitationPaymentsSurveyResults-64622-1.pdf. In November 2009, the OECD called for a ban on them to help prevent and detect foreign bribery. *See* OECD, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, at § VI(ii) (2009), *available at* http://www.oecd.org/dataoecd/11/40/44176910.pdf. The United States is a signatory to the OECD Convention Against Bribery, and, therefore, the use may be limited even further in the future.

[250] *See* Marcia Narine, *Whistleblowers and Rogues: The Urgent Call for an Affirmative Defense to Corporate Criminal Liability*, 62 CATH. U. L. REV. (forthcoming fall 2013).

[251] *Welcome to the Office of the Whistleblower*, SEC. & EXCH. COMM'N, http://www.sec.gov/whistleblower (last visited Mar. 8, 2013).

[252] European and Asian companies that do not issue securities in the United States would have no such constraints and could still do business in the Congo. The European Union is likely to implement legislation in the near future on conflict minerals using the OECD Guidance under pressure from NGOs. *See supra* note 49 and accompanying text.

C. The Kimberley Process and the Clean Diamond Trade Act

A number of critics of Section 1502 have argued that a better solution for the crisis in the Congo would have been something akin to the Kimberley Process[253] and the Clean Diamond Trade Act ("CDTA").[254] In 2000, the U.N. adopted a process to unite the worldwide community to eradicate the funding of rebels in Angola and Sierra Leone through conflict diamonds.[255] In response, the Kimberley Process began in 2003 as a joint initiative by governments, civil society organizations, and industries to stem the flow of conflict diamonds into commerce and, like conflict minerals legislation, is meant to stop funding to rebel groups.[256] There are fifty-four participants from eighty countries, and each participant must implement legislation and controls, which have, according to the founders, reduced the number of conflict diamonds to 1% of diamonds in international trade.[257] The United States has enacted the CDTA, which prevents importation and exportation of any diamond that does not come through the Kimberley Process and subjects violators to civil and criminal penalties.[258]

Neither of these, however, are an ideal substitute for the Dodd–Frank Act. First, like many of the initiatives discussed earlier, membership in the Kimberley Process is voluntary. Although countries can be expelled if they do not comply, they must agree to be reviewed, there are no real penalties for transgressions, and there is no international enforcement.[259] The GAO has also determined that the

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[253] KIMBERLEY PROCESS, http://www.kimberleyprocess.com (last visited Mar. 8, 2013) ("The Kimberley Process (KP) is a joint government[], industry and civil society initiative to stem the flow of conflict diamonds—rough diamonds used by rebel movements to finance wars against legitimate governments.").

[254] Clean Diamond Trade Act, Pub. L. No. 108-19, 117 Stat. 631 (2003) (codified at 19 U.S.C. §§ 3901–3913 (2006)) (stating that one of the Acts purposes is "to stop trade in conflict diamonds"); *see also* Karen E. Woody, *Conflict Minerals Legislation: The SEC's New Role as Diplomatic and Humanitarian Watchdog*, 81 FORDHAM L. REV. 1315, 1345–51 (2012) (arguing that the Dodd–Frank Act will cause more harm than good and that more efficient regulatory models include the Clean Diamond Trade Act and Kimberley Process Certification Scheme); Shannon Raj, Note, *Blood Electronics: Congo's Conflict Minerals and the Legislation That Could Cleanse the Trade*, 84 S. CAL. L. REV. 981, 994–1000 (2011) (claiming that the government should have followed a customs-based approach similar to a Kimberley Process-style certification instead of using the SEC to enforce conflict minerals).

[255] G.A. Res. 55/56, U.N. Doc. A/RES/55/56 (Dec. 1, 2000).

[256] *See KP Basics*, KIMBERLEY PROCESS, http://www.kimberleyprocess.com/web/kimberley-process/kp-basics (last visited Mar. 8, 2013).

[257] *Id.*

[258] 19 U.S.C. § 3903(a) (2006).

[259] *See* Shannon K. Murphy, *Clouded Diamonds: Without Binding Arbitration and More Sophisticated Dispute Resolution Mechanisms, the Kimberley Process Will Ultimately Fail in Ending Conflicts Fueled by Blood Diamonds*, 11 PEPP. DISP. RESOL. L.J. 207, 218–

United States does not adequately enforce the CDTA or inspect diamond shipments under the Kimberley Process.[260] Global Witness, one of the advocates for the conflict minerals legislation and a co-nominee for the Nobel Prize for its work on conflict diamonds in 2003,[261] disassociated itself with the Kimberley Process in 2011 because the NGO determined that "[t]he Kimberley Process's refusal to evolve and address the clear links between diamonds, violence and tyranny has rendered it increasingly outdated."[262] Global Witness was particularly frustrated with the failure of the Kimberley Process in Venezuela, Cote d'Ivoire, and Zimbabwe, which it believed were still involved in inappropriate smuggling activities.[263]

At first blush, there is an appeal to rallying the world community to take action, particularly the European Union, which has not yet acted on conflict minerals legislation. While some action is better than none, the Kimberley Process and the CDTA have achieved less than optimal effectiveness.[264] Accordingly, there is no reason to believe that a multinational or customs-based regime modeled on existing schemes would be any more effective in enforcing a conflict minerals law.

D. Legal Challenges to the Law's Ultimate Success

In October 2012, the National Association of Manufacturers, Business Roundtable, and the Chamber of Commerce petitioned the D.C. Circuit for a review of the SEC's rule.[265] The parties argued, among other things, that the agency (1) failed to conduct an appropriate cost benefit

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20 (2011) (expressing concern over the voluntary nature of the Kimberley Process and the fact that countries face no repercussions for ignoring recommendations). *But see* Joseph Hummel, *Diamonds Are a Smuggler's Best Friend: Regulation, Economics, and Enforcement in the Global Effort to Curb the Trade in Conflict Diamonds*, 41 INT'L LAW. 1145, 1160 (2007) ("If a country does not comply with the Kimberley Process . . . , that country could be made subject to an investigation or face expulsion from certain diamond industry institutions.").

[260] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-978, CONFLICT DIAMONDS: AGENCY ACTIONS NEEDED TO ENHANCE IMPLEMENTATION OF THE CLEAN DIAMOND TRADE ACT 21 (2006).

[261] *Nobel Prize*, GLOBAL WITNESS, http://www.globalwitness.org/node/4097 (last visited Mar. 8, 2013).

[262] Press Release, Global Witness, Global Witness Leaves Kimberley Process, Calls for Diamond Trade to be Held Accountable (Dec. 5, 2011), *available at* http://www.globalwitness.org/sites/default/files/library/KPexity.pdf.

[263] *See id.*

[264] *See* Raj, *supra* note 254, at 997 ("In sum, without accountability, without a private right of action, and critically, without an independent monitoring system to ensure compliance, the Kimberley Process remains far less effective than it could and should be.").

[265] Petition for Review, Nat'l Ass'n of Mfrs. v. SEC, No. 12-1422 (D.C. Cir. Oct. 19, 2012).

analysis as required under the Administrative Procedures Act; (2) failed to exercise appropriate judgment by arbitrarily refusing to impose less burdensome requirements; (3) erroneously concluded that it could not create a de minimis exception to the rule; (4) created an unreasonably stringent "reasonable country of origin inquiry"; (5) should not have extended the rule to those who contract with others for the manufacture of products; (6) should have extended the same longer phase in period to larger companies as it did to smaller companies since the larger companies depend on smaller companies for disclosure purposes; and (7) created a rule that violated the First Amendment by requiring companies to stigmatize themselves by implicating themselves in human rights abuses.[266] An amicus brief filed by the author, Ambassador Jendayi Frazer, and Dr. Peter Pham argued that the law would negatively impact the Congolese people for many of the reasons stated in this Article, among others.[267] An industry coalition filed an amicus brief in support of the Petitioners citing examples of the kinds of problems caused by the failure to allow a de minimis exception and the lack of definitional certainty around certain terms both for themselves and their suppliers.[268] The SEC responded to the Petitioners and amici's arguments asserting that the agency does not have the authority to second guess congressional judgment about the humanitarian crisis in Congo or to propose alternatives that reduce costs that would undermine Congress's intent.[269]

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[266] Opening Brief of Petitioners at 23–24, *Nat'l Ass'n of Mfrs.*, No. 12-1422 (D.C. Cir. Jan. 16, 2013).

[267] *See* Brief of *Amicus Curiae* Experts on the Democratic Republic of the Congo in Support of Petitioners, *Nat'l Ass'n of Mfrs.*, No. 12-1422 (D.C. Cir. Jan. 23, 2013).

[268] *See* Industry Coalition Amici Brief in Support of Petitioners, *Nat'l Ass'n of Mfrs.*, No. 12-1422 (D.C. Cir. Jan. 23, 2013).

[269] *See* Initial Brief of the SEC, Respondent 2–3. *Nat'l Ass'n of Mfrs.*, No. 12-1422 (D.C. Cir. Mar. 1, 2013). Nonetheless, as the Petitioner's Brief notes, the dissents of Commissioners Gallagher and Paredes during the rulemaking process belie this argument. *See* Opening Brief of Petitioners, *supra* note 266, at 22–23. Commissioner Gallagher stated, "The statutory framework that establishes the SEC's economic analysis obligations does not permit the agency to infer benefits." *Statement at SEC Open Meeting: Proposed Rule to Implement Section 1502 of the Dodd-Frank Act—the "Conflict Minerals" Provision by Commissioner Daniel M. Gallagher*, U.S. SEC. & EXCH. COMM'N (August 22, 2012), http://www.sec.gov/news/speech/2012/spch082212dmg-minerals.htm. In his dissent, Commissioner Paredes noted that "the agency still must base its final rule on a reasoned assessment that considers the potential consequences of its judgments. Otherwise, one cannot determine whether the rule is likely to do more good than harm." *Statement at Open Meeting to Adopt a Final Rule Regarding Conflict Minerals Pursuant to Section 1502 of the Dodd-Frank Act by Commissioner Troy A. Paredes*, U.S. SEC. & EXCH. COMM'N (August 22, 2012), http://www.sec.gov/news/speech/2012/spch082212tap-minerals.htm. As of the time of this writing, the case had not been decided.

Many companies, perhaps hoping that the two-year delay in implementation would lead to the law's demise or at least significant compromise, have made little to no effort to comply.[270] On the other hand, some companies have made significant progress in bringing transparency to mineral sourcing.[271] Many TNCs also participate in "the Public-Private Alliance for Responsible Minerals Trade, a joint initiative by the Department of State and the United States Agency for International Development (USAID), formed on November 15, 2011," to harmonize strategies between stakeholders in order to promote a conflict-free supply chain for minerals.[272]

Some TNCs are members of socially conscious industry groups such as the Electronics Industry Citizenship Coalition ("EICC")[273] and the Global e-Sustainability Initiative ("GeSI").[274] EICC and GeSI have been working toward developing industry-wide schemes to implement Section 1502. Because some of these member companies are simultaneously members of the Petitioners in the action for review of the conflict minerals legislation, organizations such as Global Witness have argued that their membership is at odds with their participation in addressing conflict minerals issues and have called on them to clarify their positions regarding the lawsuit.[275] As of the time of this writing, the D.C. Circuit Court had not ruled on the merits of the lawsuit, and affected companies were moving forward with the implementation of the rule's requirements.

In any event, corporations should expect questions about transparency in their supply chains because consumers, investors, and municipalities will continue to demand it regardless of the success of

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[270] SASHA LEZHNEV & ALEX HELLMUTH, ENOUGH PROJECT, TAKING CONFLICT OUT OF CONSUMER GADGETS: COMPANY RANKINGS ON CONFLICT MINERALS 2012, at 1 (2012), *available at* http://www.enoughproject.org/files/CorporateRankings2012.pdf.

[271] *Id.*

[272] *Launch of Public-Private Alliance for Responsible Minerals Trade*, U.S. INST. PEACE, http://www.usip.org/events/launch-public-private-alliance-responsible-minerals-trade (last visited Mar. 8, 2013).

[273] EICC is a coalition of electronics companies that works to improve social, environmental, and ethical responsibility. *About Us*, ELECTRONIC INDUSTRY CITIZENSHIP COALITION, http://www.eicc.info/about_us.shtml (last visited Mar. 8, 2013).

[274] GeSI provides "resources and best practices for achieving integrated social and environmental sustainability" to information and communication technology companies. *Overview*, GLOBAL E-SUSTAINABILITY INITIATIVE, http://gesi.org/About_ICT_sustainability (last visited Mar. 8, 2013).

[275] *Companies Must Take Clear Position on Legal Threat to Conflict Minerals Provision*, GLOBAL WITNESS (Nov. 14, 2012), http://www.globalwitness.org/library/companies-must-take-clear-position-legal-threat-conflict-minerals-provision.

Section 1502.[276] A number of cities and dozens of college campuses have indicated their "preference" to do business with companies that are "conflict-free" or to consider that status as a factor in purchasing.[277] The age of name-and-shame is clearly here to stay, and there will continue to be consequences in the human rights arena even beyond the Dodd–Frank Act.

CONCLUSION

Many well-meaning advocates in civil society and Congress have tried to bring attention to the deadliest conflict since World War II for years but to no avail. Perhaps faced with no other options to get the world's attention, the NGO community has done an effective job of repackaging the crisis in the Congo into a simple narrative of rape as a weapon of war perpetrated by rebels, fueled by consumer demand for electronics, and funded by corporations buying minerals.[278] This oversimplified narrative has led to a number of proposed "solutions," one of which is the well-intentioned, but misguided, Dodd–Frank conflict minerals legislation. Fortunately, those NGOs and legislators have not given up on other proposals, and they argue that, while the Dodd–Frank Act may not be perfect, at least it is a start. NGOs know that reputation-sensitive corporations that spend millions building their brands can ill-afford to be affiliated with rebel forces raping innocent women and children.

Whether a firm's board of directors uses a shareholder or stakeholder view, it must conduct a cost–benefit analysis, even if, as the petitioners who have filed suit against the SEC allege, the agency failed

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[276] Even if the litigation does not succeed, the President may also terminate the requirements of Section 1502 after 2015 upon a determination "that no armed groups continue to be directly involved and benefitting from commercial activity involving conflict minerals." 15 U.S.C. § 78m(p)(4) (Supp. V 2011).

[277] Pittsburgh, Pennsylvania; Edina, Minnesota; and St. Petersburg, Florida, have passed conflict-free city resolutions indicating their preference to buy from companies that have conflict-free products. *Conflict-Free Cities*, RAISE HOPE FOR CONGO, http://www.raisehopeforcongo.org/content/conflict-free-cities (last visited Mar. 8, 2013). A number of colleges have also passed resolutions or made public statements that they have a preference for purchasing from companies that have conflict-free products, but they have not made divestment decisions yet. *Participating Schools*, RAISE HOPE FOR CONGO, http://www.raisehopeforcongo.org/content/participating-schools (last visited Mar. 8, 2013). It remains to be seen what effect the official conflict minerals reports will have on the university investment decisions once those are released.

[278] *But see* Séverine Autesserre, *Dangerous Tales: Dominant Narratives on the Congo and Their Unintended Consequences*, 111 AFR. AFF. 202, 204 (2012) ("While . . . the interveners had good reasons for adopting dominant, simple narratives, and for focusing on three of them [illegal exploitation of resources, sexual abuse, and extension of state authority], . . . this adoption had some positive results, but was damaging overall.").

to thoroughly conduct its own. Under a more restrictive shareholder view, reasonable board members may seek to source minerals elsewhere as they consider the actual monetary costs of compliance; the legal risks related to ensuring that agents conform to their mandates related to the FCPA, the U.K. Bribery Act, and Section 1504 of the Dodd–Frank Act; and the calls for greater transparency from socially responsible investors.

Under a more expansive stakeholder view, looking at the affected community of the local Congolese, the firm needs to ask itself a few questions. Assuming that consumers will pay attention to the disclosures and will actually change their purchasing decisions (and that is not at all clear), can the firm withstand a boycott? What will the reputational risk be to the CSR program? Is it more socially responsible to source minerals in the Congo and to try to solve an intractable crisis that the international community seems unable or unwilling to resolve when the evidence shows that the legislation has already had adverse effects and the corruption leaves doubts as to the viability of the process? Will the firm become complicit in the human rights crisis, given the evidence that civilians, members of the military, the police force, and the rebels participate in rape, looting, and violence and that members of the military also profit from trafficking in minerals? Is the socially responsible action to source the minerals from other countries even if it devastates the livelihoods of local Congolese if the companies no longer source their minerals from the DRC?

The final question is for Congress and the SEC. Is a corporate governance disclosure the right solution to a human rights crisis? Here the government has asked the SEC to address a geopolitical agenda that it is not equipped to manage.[279] While well-intentioned members of Congress capitalized on the Dodd–Frank Act to pass their stand-alone bills on conflict minerals, they would have better served the Congolese by focusing on true implementation of the DRC Act, which most of the NGOs advocating for the Dodd–Frank Act would have preferred. Delaying the implementation of the Dodd–Frank Act would be the responsible and humane thing to do given what is at stake. The delay would allow time for: (1) an appropriate cost–benefit analysis; (2) the European Union and Canada to develop their own parallel legislation; and (3) a re-evaluation to be conducted with the input of affected groups in the Congo. If the court allows the law to stand as it is, this law will

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[279] *See generally* Celia R. Taylor, *Conflict Minerals and SEC Disclosure Regulation*, 2 HARV. BUS. L. REV. ONLINE 105 (2012), http://www.hblr.org/wp-content/uploads/2012/01/Taylor-Conflict-Minerals.pdf (discussing the role of disclosure regulation and why the Dodd–Frank Act goes too far).

not "save lives" as Senator Brownback had hoped. To the contrary, it may continue to cost both livelihoods and lives.