OUT OF THE HEART OF DARKNESS: A NEW REGIME FOR CONTROLLING RESOURCE EXTRACTION IN THE CONGO

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They were no colonists; their administration was merely a squeeze, and nothing more, I suspect. They were conquerors, and for that you want only brute force … They grabbed what they could get for the sake of what was to be got. It was just robbery with violence, aggravated murder on a great scale, and men going at it blind – as is very popular for those who tackle darkness.

- Joseph Conrad, Heart of Darkness (1899)

I. INTRODUCTION

The Democratic Republic of the Congo (DRC), covering 2.3 million square kilometres, is the twelfth largest country in the world – almost as large as Ontario and Quebec combined. It is to be distinguished from its much smaller northern neighbour, the Republic of the Congo.

The DRC has substantial natural resources, including large deposits of gold, copper, zinc, tantalum (extracted from coltan), tin, cobalt, and diamonds. According to *African Business* the "total mineral wealth of the… DRC is estimated to be $24 trillion – equivalent to the GDP of [the European Union] and the United States combined." [1]

Currently 74% of all cobalt mined in continental Africa (49% of all production worldwide) comes from the DRC; 69% of tin;

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[1] M.J. Morgan, "DR Congo's $24 Trillion Fortune", *African Business* (1 February 2009), online: African Business <http://www.thefreelibrary.com/DR+Congo's+%2424+trillion+fortune.-a0193800184>.

roughly 50% of all tantalum; 17% of all copper; 11% of zinc; and 2% of all gold also comes from the DRC. [2] Exports in these minerals from the DRC were estimated to be $6.59 billion in 2008, up significantly from 2006. [3]

Some of these minerals, such as tantalum and tin, are highly sought after by developed nations. In fact more than 70% of tantalum is consumed by the electronics industry because it "permits the production of reliable capacitors of high volumetric efficiency used in compact electronics, such as laptop computers,… cellular telephones, [iPods, MP3 players and] … automotive electronics applications". [4]

Many of these minerals are extracted in the DRC using small-scale and artisanal mining techniques that are frequently labour-intensive, often employing a semi-skilled or unskilled workforce with low levels of mechanization, production, productivity, recovery, and efficiency. [5] These labourers usually lack the capital needed to allow for even rudimentary production efficiencies and they are often they are caught in "debt bondage

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[2] U.S., United States Geological Survey, *2007 Minerals Yearbook: Africa* (Washington, D.C.: United States Department of the Interior, November 2009) at 1.3, 1.5, 1.14, 1.15, 120, online: USGS <http://minerals.usgs.gov/minerals/pubs/country/2007/myb3-sum-2007-africa.pdf>.

[3] U.S., United States Geological Survey, *2008 Minerals Yearbook: Congo (Kinshasa)* (Washington, D.C., United States Department of the Interior, February 2010), at 11.1, 11.7 (Table 1), online: USGS <http://minerals.usgs.gov/minerals/pubs/country/2008/myb3-2008-cg.pdf>. "In 2008, the production of refined copper in Congo (Kinshasa) increased by 621%; niobium (columbium), by an estimated 254%; refined cobalt, by 137%; mined copper, by an estimated 64%; tantalum, by an estimated 41%; tin, by an estimated 33%; and mined cobalt, by an estimated 23%."

[4] U.S., United States Geological Survey, *2008 Minerals Yearbook: Niobium (Columbium) and Tantalum*, (Washington, D.C., United States Department of the Interior, March 2010), at 52.1, online: USGS <http://minerals.usgs.gov/minerals/pubs/commodity/niobium/myb1-2008-niobi.pdf> [USGS, *Minerals Yearbook - Tantalum*].

[5] AngloGold Ashanti, "AngloGold Ashanti's Approach to Artisanal and Small-Scale Mining" Report to Society (2006) at 124-25, online: AngloGold Ashanti <http://www.anglogoldashanti.com/subwebs/informationforinvestors/reporttosociety06/files/artisanal-mining.pdf>. See also "Artisanal Mining in the DRC" Briefing Note for the DRC Donor Coordination Meeting (August 2007) at 4, 5, online: Community and Small Scale Mining (CASM) <http://www.ddiglobal.org/login/Upload/CASM-%20ASM%20in%20DRC%20briefing%20note.pdf>.

and poverty traps, which prevent them from achieving little more than using a day's earnings to feed themselves and their families".[6]

The vulnerability of these labourers often results in them being exploited and subjected to inhumane working conditions by armed groups (including DRC military leaders) and rebel movements who are seeking to finance their operations (including the purchase of small arms and weapons) and to undermine or overthrow local governments. [7]

After examining these and other resource extraction practices, in 2002 the *Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo* [8] declared some 85 mining companies operating in the DRC contrary to the Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises. [9] Eight of these companies were Canadian. [10]

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[6] "It is estimated that 2 million people work as artisanal miners across the [DRC], producing 90% of the minerals exported from the country." Rachel Perks, "Contributing Towards a Post-Conflict Transition in the DRC: Addressing the Security of Artisanal Mining Women in Katanga and Oriental Provinces" Pact (2008) at 4, online: Pact <http://www.pactworld.org/galleries/default-file/Post%20Conflict%20Transtion,%20Mining,%20and%20Women-Final.pdf>. Also see CASM, "Artisanal Mining in the DRC" *ibid.*

[7] "Former rebels from the *Congrès national pour la défense du peuple* (CNDP) have established mafia style extortion rackets covering some of the most lucrative tin and tantalum mining areas in the eastern Democratic Republic of Congo (DRC)". Global Witness, "DR Congo: Ex-rebels Take Over Mineral Trade Extortion Racket", 11 March 2010, online: Global Witness <http://www.globalwitness.org/media_library_detail.php/937/en/dr_congo_ex_rebels_take_over_mineral_trade_extortion_racket>.

[8] Panel of Experts- the Democratic Republic of the Congo, *Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo*, UN SCOR, 2002, UN Doc. No. S/2002/1146, online: UN <http://www.un.org/Docs/journal/asp/ws.asp?m=S/2002/1146> [Panel of Experts, S/2002/1146]. Report revised and updated in 2003 (S/2003/1027) and 2005 (S/2005/699), online: UN <http://www.un.org/Docs/journal/asp/ws.asp?m=S/2003/1027> [Panel of Experts, S/2003/1027]; <http://www.un.org/Docs/journal/asp/ws.asp?m=S/2005/699>.

[9] Panel of Experts, S/2002/1146, *ibid,* at Annex III. For a current copy of the OECD Guidelines see *OECD Guidelines for Multinational Enterprises* (2000), online: OECD <http://www.oecd.org/dataoecd/56/36/1922428.pdf> [*OECD Guidelines*].

[10] Panel of Experts, S/2002/1146, *ibid*.

The Panel subsequently revised their list in 2003 after input from the named companies, resolving issues surrounding the voluntary compliance measures with seven of them (although they did not retract their original findings). [11]

Some of the specific allegations of misconduct made against the 85 companies included:

- ...direct assistance from combatants, such as those trading in minerals, which were mined using forced labour or those whose assets were protected by soldiers or militia;

- ...buying minerals from former foreign or rebel controlled areas without conducting due diligence tests as to where the minerals came from or who was profiting from the trade;

- ...indirectly involved in the trade in resources from former foreign army and rebel controlled areas of DRC;

- ...offering inducements or exercising anti-competitive influence at a time of great instability to secure lucrative concessions or contracts;

- ...profiting from lucrative joint ventures, mainly in government controlled areas, set up to exploit DRC's natural resources with little or no benefit going to the Congolese people;

- ...supplying arms to either rebel or government forces or even participating in military action;

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[11] Panel of Experts, S/2003/1027, *supra* note 8 at Annex I. Also see subsequent reports by the UN *Group of Experts on the Democratic Republic of the Congo,* UN Doc. S/2006/525; UN Doc. S/2007/40; and UN Doc. S/2009/603 (23 November 2009) which is the latest report of the Group of Experts on the DRC, online: UN <http://www.un.org/Docs/journal/asp/ws.asp?m=S/2006/525> [*Group of Experts,* S/2006/525], <http://www.un.org/Docs/journal/asp/ws.asp?m=S/2007/40> and <http://www.un.org/Docs/journal/asp/ws.asp?m=S/2009/603>.

- ...engaged in the smuggling of diamonds to supply international markets, money laundering and illegal currency transactions.[12]

The United Nations (UN) Security Council subsequently adopted a number of resolutions aimed at weakening rebel groups by cutting off the supply of illicit weapons to the DRC. Canada implemented these resolutions, making it an offence for "any person in Canada", or a "Canadian outside Canada", to "knowingly sell, supply or ship arms and related material" ("including technical assistance related to military activities") to any person in the DRC, or to cause, assist or promote any such act. [13]

Since 2002 Canadian mining companies have been playing a larger role in continental Africa, particularly with regard to mineral exploration. In fact, Canadian companies play a dominant role on the continent with close to $8.2 billion in assets at the end of 2006 and more than $20 billion projected by the end of 2010. [14] The value of Canadian mining assets in the DRC alone is "expected to exceed $3 billion by 2010". [15]

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[12] Rights and Accountability in Development, *Unanswered Questions: Companies, Conflict and the Democratic Republic of Congo* (May 2004), at 3, online: RAID <http://www.raid-uk.org/docs/UN_Panel_DRC/Unanswered_Questions_Full.pdf>.
[13] *United Nations Democratic Republic of the Congo Regulations*, SOR/2004-222, ss.3, 5 [*UN DRC Regulations*]. The regulations were passed pursuant to s. 2 of the *United Nations Act*, R.S.C. 1985, c. U-2, on the recommendation of the Minister of Foreign Affairs based on Resolution 1493 (2003) adopted by the United Nations Security Council, acting under Article 41 of the Charter of the United Nations on July 28, 2003; Resolution 1533 (2004) adopted on March 12, 2004 and Resolution 1552 (2004) adopted on July 27, 2004.
[14] Natural Resources Canada, "Canada's International Mining Presence" by Sylvie Brassard in *Canadian Minerals Yearbook* (2006) at 7.16-7.17, online: NRCAN <http://www.nrcan.gc.ca/smm-mms/busi-indu/cmy-amc/2006cmy-eng.htm>.
[15] *Ibid.* at 7.17. See also Paul Stothart, "Key Economic Points about the Canadian Mining Sector" *Republic of Mining* (14 March 2010), online: Republic of Mining < http://www.republicofmining.com/2010/03/14/key-economic-points-about-the-canadian-mining-sector-%e2%80%93-by-paul-stothart/> [*Key Economic Points about the Canadian Mining Sector*].

However, save for the *Rough Diamonds Act*, [16] which came into force on January 1, 2003 to address the role that rough diamonds were playing in the finance of rebel movements and their military activities -- fuelling conflicts and undermining the peace, safety, and security of the people in affected countries-there has been no similar legislation in Canada to curb the illicit trade in minerals.

Considering the extensive part Canadian mining companies play globally, their vested interest in extractive resources in the DRC, and Canada's role as humanitarians and peacekeepers internationally, the object of this paper is to consider possible measures that Canada can implement to stop the illicit trade in minerals. These include a trade waiver under GATT/WTO, similar to that adopted pursuant to the *Rough Diamonds Act,* or Title XV of the recently enacted *Dodd–Frank Wall Street Reform and Consumer Protection Act*. [17]

II. INTO DARKNESS

From 1885 until 1908 King Leopold II of Belgium ran the "Congo Free State" as his own private business interest, turning the local inhabitants into slaves to harvest rubber and ivory for his personal benefit. Pursuant to vast and exclusive concessions issued to business interests controlled solely or jointly by the King, such as the Anglo-Belgian India Rubber and Exploration Company (A.B.I.R.), Societe Anversoise du Commerce au Congo and the Comaine de la Couronne, the inhabitants were subject to sadistic beatings, dismemberment, and torture in order to extract these resources with little or no compensation. [18]

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[16] *Export and Import of Rough Diamonds Act*, S.C. 2002, c. 25, adopting United Nations Resolution 55/56 and subsequent amendments. In force January 1, 2003, see SI/2003-3. In the United States see the *Clean Diamond Trade Act*, Pub.L. 108-19, 117 Stat. 631(2003), (codified at 19 U.S.C. § 3901-3913), signed into law on April 25, 2003.
[17] *Dodd–Frank Wall Street Reform and Consumer Protection Act,* Pub.L. 111-203, (2010) [*Dodd-Frank Act*]. Signed into law July 21, 2010 by President Obama, the entire history of the legislation can be found online at <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:H.R.4173> or <http://www.govtrack.us/congress/bill.xpd?bill=h111-4173>.
[18] Adam Hochschild, *King Leopold's Ghost: A Story of Greed, Terror, and Heroism in Colonial Africa*, (Boston: Houghton Mifflin Co., 1999), at 160-61, 164-65. Also see

It has been estimated that as many as ten million died under Leopold's rule and that the population of the Congo was reduced from "20-30 million… at the beginning of the colonial era to 8.5 million [by] 1911." [19]

As far back as 1897 a young shipping clerk named Edmund Morel observed that "the Congo was exporting increasing quantities of rubber and ivory for which, on the face of the import statistics, the natives were getting nothing or next to nothing … [n]othing was going in [except soldiers and "prodigious quantities of ball cartridges and thousands of rifles and cap-guns consigned to the State"] to pay for what was coming out". [20] There was no 'trade'.

A Commission of Inquiry held in 1905 outlined the horrors that were occurring in the Congo. While a scathing report was released, most of the actual witness statements were sealed until the 1980s. Nevertheless the details of the butchery and slaughter motivated by greed for the Congo's riches were detailed by Sherlock Holmes' creator Sir Arthur Conan Doyle in his non-fiction book *The Crime of the Congo*. [21]

Originally published in 1905, Conan Doyle described the annihilation of thousands upon thousands of Congolese through murder, starvation, exhaustion, and exposure. Take for example the account of one officer (Lacroix) whose letter of April 10th, 1900, shed light upon what would befall those who failed to collect enough rubber:

> He told how he had been instructed by his chief to massacre all the natives of a certain village which had been slow in bringing its rubber. He had carried out the

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Madelaine Drohan, *Making A Killing: How Corporations Use Armed Force to Do Business - A Dramatic and Compelling Journey into the Dark Heart of Globalization*, (Guilford CT: The Lyons Press, 2003), at 51-54.

[19] Georges Nzongola-Ntalaja, *The Congo from Leopold to Kabila: A People's History*, (London: Zed Books, 2002) at. 22. See also, Hochschild *ibid.* at 226-233.

[20] Hochschild, *ibid.* at 180.

[21] Arthur Conan Doyle, *The Crime of the Congo*, (New York: Doubleday, Page & Company, 1909).

> order. Later, his chief had put sixty women in irons, and allowed nearly all of them to die of hunger because the village – Mummumbula – had not brought enough rubber. "I am going to be tried," he wrote, "for having murdered one hundred and fifty men, for having crucified women and children, and for having mutilated many men and hung the remains on the village fence." …. Moray, another agent [also wrote]… "At Ambas we were a party of thirty, under Van Eycken, who sent us into a village to ascertain if the natives were collecting rubber, and in the contrary case to murder all, including men, women and children. We found the natives sitting peaceably. We asked them what they were doing. They were unable to reply, thereupon we fell upon them all, and killed them without mercy." [22]

Shortly thereafter the Belgium government acquired the (Belgian) Congo from Leopold for the sum of 95.5 million francs and further agreed to assume 100 million francs' worth of debt. [23] While reform was anticipated, the forced labour and deaths continued along with the discovery of gold and the exploitation of the country's rich mineral resources. [24] While the government might have changed, "the prime beneficiaries of the new colonial order were the giant industrial trusts set up by Leopold in 1906 just before he lost his grip on the colony [such as] Union Miniere du Haut-Katanga". [25]

In 1960 Belgian colonial rule ended after a successful nation-wide independence movement. However, powerful and influential corporations such as Union Miniere remained and many state-controlled holdings were sold off to Belgian companies, thus ensuring Belgians would still continue to profit from the Congo's resources. Like King Leopold before them, Union Miniere and succeeding presidents ran the country as their own private business enterprise. The people and natural resources were

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[22] *Ibid.* at 41-42.
[23] Hochschild, *supra* note 18 at 259.
[24] *Ibid.* at 278-79.
[25] Drohan, *supra* note 18 at 97.

exploited for the benefit of the ruling class and political control was characterized by brutality, corruption, and mismanagement.[26]

In 1971 President Mobutu (formerly a colonel in Belgium's colonial army) renamed the Congo "Zaire", nationalizing all foreign owned commercial, industrial, and agricultural enterprises. Laws were passed so that all land and mineral rights belonged to the state and control over natural resources was decentralized, with military leaders given authority to exploit and trade resources within their territory. [27]

During the Cold War the economies of the Congo and other African countries were marginalized. The United States and the former Soviet Union ignored human rights violations by despotic leaders while "their entourage[s] were allowed to funnel billions of dollars in international economic development assistance and money amassed from exports of Africa's vast natural resources into their private Western bank accounts. Thus the economies of Western Europe and the US were subsidized by the riches of Africa, just as, during the earlier European invasions, they were by slavery, and colonial rule." [28]

By 1997, long after the Cold War rivalries subsided with the collapse of the former Soviet Union, the DRC was in disarray – it had little or no critical infrastructure, banking services had collapsed, the economy collapsed, soldiers were unpaid, there was civil unrest, and the government was in chaos. On May 17, 1997 Mobutu fled Zaire (DRC) and was replaced by Laurent-Désiré Kabila, a former guerrilla leader supported by the governments of Rwanda, Burundi, and Uganda. When he fled, it was estimated that Mobutu had foreign assets totaling $4 billion from systematically looting his country during his 30 year reign. 29

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[26] Christopher Mullins & Dawn L. Rothe, *"Blood, Power, and Bedlam: Violations of International Criminal Law in Post-Colonial Africa"* (New York: Peter Lang Publishing, 2008), at 144-45. See also War Child Canada, "The Colonial Legacy of the DRC", online: War Child Canada <http://www.getloud.ca/en/gpi_issues.asp?id=11>. See also Drohan, *supra* note 18, at 94-133 (Chapter 4: "Union Miniere in Katanga").
[27] Mullins, *ibid*.
[28] Margaret C. Lee, "The 21st Century Scramble for Africa" (2006) 24 J. Contemp. Afr. Stud. 303 at 304.
[29] U.S. Department of State Bureau of African Affairs, "Background Note: Democratic Republic of the Congo" (19 May 2010), online: U.S. Department of State,

However it was not long after that conflicts arose between Kabila and his former allies, Rwanda and Uganda. By the end of 1998 DRC soldiers were fighting alongside troops from Zimbabwe, Angola, Chad, and Namibia against forces from Rwanda, Uganda, Burundi, and Congolese rebels. [30] Although peace accords were signed in 2003 and 2008, fighting continues in the eastern areas, where more than 5 million people have died and another 45,000 die every month – making it the world's deadliest conflict since World War II. [31]

The continued violence in the DRC is fuelled by militias and armies warring over "conflict minerals," the ores that produce copper, gold, zinc, tantalum, tin, cobalt, and diamonds. [32] War profiteers, corrupt officials, and armed groups from the DRC, Rwanda, and Uganda finance themselves through the illicit trade in conflict minerals. They fight over control of mines and taxation points inside Congo – estimated to be in the hundreds of millions of dollars in 2008 alone. [33]

Notwithstanding the country's vast natural resources and mineral wealth, "the DRC is one of the poorest countries in the

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<http://www.state.gov/r/pa/ei/bgn/2823.htm> [Bureau of African Affairs, "Background"]. See also Transparency International, "Seize Mobutu's Wealth or Lose Your Money, Western Governments Told" (15 May 1997), online: Transparency International <http://www.transparency.org/news_room/latest_news/press_releases/1997/1997_05_16_mobutu>.

[30] *Ibid.*

[31] International Rescue Committee, "Special Report: Congo – Forgotten Crisis", *International Rescue Committee*, (January 2008), online: IRC <http://www.theirc.org/special-reports/special-report-congo-y>. Follow link to full report at <http://www.theirc.org/sites/default/files/migrated/resources/2007/2006-7_congomortalitysurvey.pdf>. For on-going reports of the situation in DR Congo see United States Holocaust Memorial Museum, "Preventing Genocide: DR Congo", *United States Holocaust Memorial Museum*, (September 2010), online: USHRM <http://www.ushmm.org/genocide/take_action/atrisk/region/dr-congo>.

[32] See Enough Project Team and the Grassroots Reconciliation Group, "A Comprehensive Approach to Congo's Conflict Minerals" *The Enough Project* (April 2009) at 17, online: !Enough <http://www.enoughproject.org/files/publications/Comprehensive%20Approach%20to%20Congo's%20Conflict%20Minerals.pdf>.

[33] *Ibid.*

world, with [a] per capita… income of… $171 in 2009." [34] While the *Group of Experts on the DRC* recommended in 2006 that the Security Council "declare all illegal exploration, exploitation, and commerce with the natural resources of the DRC be a sanctionable act", [35] they also stressed that care must be taken to ensure any trade measures taken would protect the livelihood of artisanal miners, allowing them to support their families and survive.

Suffice to say, more than 100 years after the Commission of Inquiry outlined the atrocities that were occurring in the Congo under King Leopold's rule, nothing had really changed.

III. THE WTO

The *World Trade Organization* (WTO) was designed to provide a common institutional framework for the conduct of trade relations among its member states. [36] It came into existence on January 1, 1995, replacing the existing institutional framework of the 1947 *General Agreement on Tariffs and Trade* (but not the agreement itself). [37]

As parties to the *General Agreement on Tariffs and Trade 1994* (GATT 1994), WTO members must, under Article I:1 of GATT and Article II:1 of the *General Agreement on Trade and Services*, [38]

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[34] Bureau of African Affairs , "Background", s*upra* note 29.
[35] *Group of Experts,* S/2006/525, s*upra* note 11 at 33.
[36] *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, art. II, online: WTO <http://www.wto.org/english/res_e/booksp_e/analytic_index_e/wto_agree_01_e.htm#articleII>. Implemented in Canada by the *World Trade Organization Agreement Implementation Act*, S.C. 1994, c. 47 [WTO, *Agreement*].
[37] *General Agreement on Tariffs and Trade*, 30 October 1974, 58 U.N.T.S. 187, Can. T.S. 1947 No. 27, as adopted by GATT 1994 and being included as part of Annex 1A of the Agreement Establishing the World Trade Organization, *World Trade Organization*, online: WTO <http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf>.
[38] WTO, *The General Agreement on Trade and Services,* 15 April 1994, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (entered into force January 1 1995) [*GATS*], online: WTO <http://www.wto.org/english/docs_e/legal_e/26-gats.pdf> being Annex 1B to the Agreement Establishing the World Trade Organization, 15 April 1994, 33 I.L.M. 1143 (entered into force January 1995), online: WTO <http://www.wto.org/english/docs_e/legal_e/04-wto.pdf>.

grant immediate and unconditional most-favored-nation treatment to the products of other member states with respect to: customs duties, import charges, internal taxes, regulations, and other trade-related matters. This means that the conditions applied to a member's most favoured trading nation (i.e. the one with the fewest restrictions) apply to all trading nations.

The theory behind these WTO and GATT trade practices is that "friendly relations among nations" can be instrumental in achieving social, economic, and political stability and that the "beggar-thy-neighbour policies" of the 1930's, "which included competitive devaluations and the imposition of high, discriminatory, and protectionist trade barriers," contributed to raising unemployment, poverty, and eventually the devastation of World War II. [39]

The WTO relies on the premise that trade liberalization generates economic growth and better standards of living -- "if goods don't cross borders, armies will." [40] This objective is reflected in the preamble of the *Agreement Establishing the World Trade Organization*:

> Recognising that... [member states] relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a

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[39] Farkhanda Zia Mansoor, "Trade Versus Peace: A Contextual Analysis of Core Labour Standards in the Global Trading Community" (2005) 5 Asper Rev. of Int'l Bus & Trade Law 133 at 150, 152.

[40] Gustavo Ferreira Ribeiro, "Navigating the Turbulent Waters Connecting the World Trade Organization and Corporate Social Responsibility" (2009) 16 Ind. J. Global Legal Stud. 249 at 251 fn 7. The quotation is often attributed to Frederic Bastiat, a noted 19th Century liberal theorist and political economist.

> manner consistent with their respective needs and concerns at different levels of economic development. [41]

While the Agreement does not extend to the protection of human rights, the objective is clear that through trade, exploitation can be reduced and standards of living can be increased, thus alleviating some of the underlying conditions that led to world instability in the past. [42] In fact, in 2001 during the Doha round of talks, the following Ministerial Declaration was made:

> International trade can play a major role in the promotion of economic development and the alleviation of poverty. We recognize the need for all our peoples to benefit from the increased opportunities and welfare gains that the multilateral trading system generates. The majority of WTO Members are developing countries. We seek to place their needs and interests at the heart of the Work Programme adopted in this Declaration. Recalling the Preamble to the [WTO] Agreement, we shall continue to make positive efforts designed to ensure that developing countries, and especially the least-developed among them, secure a share in the growth of world trade commensurate with the needs of their economic development. In this context, enhanced market access, balanced rules, and well targeted, sustainably financed technical assistance and capacity-building programmes have important roles to play. [43]

Nevertheless corruption and bribery are not issues specifically addressed under GATT or by any other WTO Agreement. In fact there are no WTO commitments to deter, prevent or combat bribery and corruption at the national or international level. While the OECD and United Nations General

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[41] WTO, *Agreement, supra* note 36 at preamble [emphasis added].
[42] *Mansoor*, *supra* note 3939 at 136-37.
[43] WTO, Ministerial Conference, *Ministerial Declaration* (14 November 2001), WTO Doc. WT/MIN(01)/DEC/1, 4th Sess., adopted in WTO, *Agreement*, *supra* note 36, XXVII Doha Texts A:2, online: *World Trade Organization*, online: WTO <http://www.wto.org/english/res_e/booksp_e/analytic_index_e/wto_agree_04_e.htm#fntext583> [emphasis added].

Assemblies have adopted Conventions on bribery and corruption, [44] "corrupt practices that do not violate [general] WTO obligations fall outside the scope of existing WTO disciplines. …Furthermore it must be recognized that the WTO applies to member states [and] not directly to individuals, businesses or other private parties". [45]

Currently the WTO has 153 members, including Canada and the DRC. As the Agreement is based on the "*unconditional most favored nation principle*", implementing trade restrictions against another member state or their products is incompatible with the principles stated therein. However the unrestricted free flow of resources from the DRC has not enhanced peace, economic efficiency, harmony, health, welfare, or improved core labour standards there.

Nevertheless, as Martin Wolf has pointed out, businesses make profits by looking for opportunities to turn something cheap into something more expensive – to add value. The better it is at identifying opportunities and knowing how to add value, the more successful it will be. "[However] it is not true that when opportunities are exploited in poor countries, their citizens are made worse off… Economic life is about beneficial mutual exploitation" – the business exploits the worker hoping to make a profit and the worker exploits the company hoping to obtain higher pay, better training and more opportunities. [46]

However local profiteers, gunrunners, and smugglers can only survive if they have a linkage to international capital. As noted by Laurence Juma:

> The war in Congo illustrates rather starkly how globalization engenders what Nzongola-Ntalaja calls the "logic of plunder," and which he defines as the "growing tendency for states, Mafia groups, offshore banks and transnational mining companies to enrich themselves from crisis." Thus, whereas the role of the international

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[44] *Op Cit.*, note 95.
[45] OECD, Trade Directorate, *Potential Anti-Corruption Effects of WTO Disciplines*, Doc. No. TD/TC (2000) 3/FINAL (2000) at paras. 4, 7.
[46] Martin Wolf, *Why Globalization Works* (New Haven, Conn.: Yale University Press, 2004) at 230.

> system may be conceived as that of erecting a buffer between elements prone to war and pursuits of peace, the Congo civil war unveils its ineffectiveness when confronted with entrenched economic interests. In Congo we see how war becomes business and business becomes war: a fusionary *modus vivendi* that minimizes the prospect for peace as globalization and the race for profits becomes the operating mantra of the wielders of power. [47]

While there is a difference between the rights promoted by the WTO and those advanced by international human rights law, there may be a process within the WTO/GATT system that promotes economic development, raises standards of living, alleviates poverty, enhances market access, and promotes sustainable development, *while still ensuring* a profitable market for businesses involved in the extractive mining industry.

IV. KIMBERLY PROCESS

Notwithstanding that the WTO Agreement is based on the "*unconditional most favored nation principle*", the General Council did adopt procedures allowing nations to waive provisions of the WTO under Articles IX:3 to IX:5. Specifically, "[i]n exceptional circumstances, the Ministerial Conference may decide to waive an obligation imposed" on Member states provided that at least three fourths of the members approve. In granting such a waiver the decision must "state the exceptional circumstances justifying the decision, the terms and conditions governing the application,... and the date on which the waiver shall terminate." [48]

In effect, trade restrictions against another member state or their products are possible. However, considering such waivers are contrary to the important most favoured national principle, the WTO's appellate body has stated that such waivers should only be used in the most exceptional circumstances and even then they should be narrowly constructed:

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[47] Laurence Juma, "The War in Congo: Transnational Conflict Networks and the Failure of Internationalism" (2006-07) 10 Gonz. J. Int'l L. 97, at 103 [internal citations omitted].

[48] *WTO Agreement, supra* note 36, arts. IX, 3-5.

Although the *WTO Agreement* does not provide any specific rules on the interpretation of waivers, Article IX of the *WTO Agreement* and the *Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994*, which provide requirements for granting and renewing waivers, stress the exceptional nature of waivers and subject waivers to strict disciplines. Thus, waivers should be interpreted with great care. [49]

One such waiver was the adoption of the *Kimberley Process*, an international initiative established in Kimberley, South Africa, to sever the link between the illicit trade in rough diamonds and armed conflict in such areas as Liberia, Angola, Sierra Leone, and the DRC. Numerous reports and studies had concluded that the trade in such diamonds was having a devastating effect on peace, safety, and security in affected countries, and was directly linked to the fuelling of armed conflict, the proliferation of armaments, and gross human rights violations in those areas.

To curb the trade in these "conflict diamonds" the UN General Assembly adopted Resolution 55/56, urging all member states "to find ways to break the link". One of the results was an international certification scheme implemented to tighten controls over the diamond trade without impeding the "legitimate trade in diamonds or impos[ing] an undue burden on [g]overnments or industry." [50]

The *Kimberley Process* includes approximately 48 participants, representing 74 countries (the European Union counts as one participant) that produce, process, import, and

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[49] WTO, *European Communities – Regime for the Importation and Distribution of Bananas*, Report of the Appellate Body, WTO Doc. WT/DS27/AB/R, at para. 185, online: World Trade Law <http://www.worldtradelaw.net/reports/wtoab/ec-bananas(ab).pdf> [*Banana III case*].

[50] *The Role of Diamonds in Fuelling Conflict: Breaking the Link between the Illicit Transaction of Rough Diamonds and Armed Conflict as a Contribution to Prevention and Settlement of Conflicts*, GA Res. 175, UN GAOR, 55th sess., UN Doc. A/Res/55/56 (2001) at preamble, 2, online: UN <http://www.un.org/Docs/journal/asp/ws.asp?m=A/RES/55/56>. See also GA Res. 10, UN GAOR, UN Doc. A/Res/61/28 (2007), online: UN <http://www.un.org/Docs/journal/asp/ws.asp?m=A/RES/61/28>.

export rough diamonds, accounting for 98 percent of global trade and production. The requirements of the scheme are that each shipment of rough diamonds crossing an international border should be (1) transported in a tamper resistant container, and (2) accompanied by a tamper proof government-validated certificate attesting that the diamonds have not been imported from, or exported to, non-participant countries.

Export permits from participating countries must also state the location of exploration, extraction and destination of the diamonds.

While the scheme is soft law and not legally binding on participating countries, the *Rough Diamonds Act*, which implements UN Resolution 55/56 in Canada, carries penalties on indictment to a term of imprisonment not exceeding ten years or "a fine in an amount that is in the discretion of the court". [51]

However, because the *Kimberley Process* effectively discourages trade between at least 75 non-participating WTO countries, it is contrary to the "*unconditional most favored nation principle*" under the WTO Agreement. As such, Canada submitted a proposal to obtain "a WTO waiver relating to the Kimberley Process. Specifically, the request [sought] to institute 'a waiver from the provisions of Article I:1 [Most Favoured Nation Treatment], Article XI:1 [Elimination of Quantitative Restrictions] and Article XIII:1 [Non-Discriminatory Administration of Quantitative Restrictions] of the GATT 1994 between January 1, 2003 and December 31, 2006. [52]

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[51] *Rough Diamonds Act, supra* note 16, s. 41. See also the *Export and Import of Rough Diamonds Regulations*, S.O.R./2003-15, regarding the manner and application of certificates under the Act.

[52] International Centre for Trade and Sustainable Development, "Canada et al. Request WTO Waiver for Diamond Certification" *Bridges Weekly* 6:41 (28 November 2002), at 7, online: ICTSD <http://ictsd.org/downloads/bridgesweekly/bridgesweekly6-41.pdf>; ICTSD, "WTO Goods Council Approves Kimberley Process Waiver" *Bridges Weekly* 7:7, (27 February 2003), at 3-4, online: ICTSD <http://ictsd.net/downloads/bridgesweekly/bridgesweekly7-7.pdf>. The WTO decision, G/C/W/432/Rev.1, and the waiver request G/C/W/431, are available online: UN <http://docsonline.wto.org>.

On February 26, 2003 the WTO Council for Trade in Goods approved Canada's request. Ten other Members (Australia, Brazil, Israel, Japan, Korea, Philippines, Sierra Leone, Thailand, the United Arab Emirates, and the United States) were also granted a waiver from WTO rules for the Kimberley Process rough diamonds certification scheme. [53]

The General Council subsequently gave its formal approval for a waiver from WTO rules, and dispute settlement proceedings alleging violations of those rules, for the Kimberley Process. The exceptional circumstances justifying the waiver were that "the trade in conflict diamonds is a matter of serious international concern, which can be directly linked to the fuelling of armed conflict, the activities of rebel movements aimed at undermining or overthrowing legitimate governments, and the illicit traffic in, and proliferation of, armaments, especially small arms and light weapons". [54]

Since implementation, the Kimberley Process has played a critical role in stemming the tide of diamond-funded wars, particularly in Liberia where the United Nations Security Council has lifted its ban on Liberian diamonds (although other restrictions still apply). [55]

However Liberia, with an area of just over 110,000 square kilometres, is 20 times smaller than the DRC and has considerably fewer uncontrolled areas. In addition, the Kimberley Process has not been the only force at work in recent years: Liberia has also established a Truth and Reconciliation

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[53] *Ibid.* "The waiver was scheduled to have effect from January 1, 2003 through December 31, 2006. On December 19, 2006, the WTO General Council adopted a decision to extend the waiver through December 31, 2012." Barack Obama, "Message to the Congress on Continuation of Waiver Certification under the Clean Diamond Trade Act" D.C.P.D. No. DCPD200900792, (8 October 2009), online: GPO <http://www.gpoaccess.gov/presdocs/2009/DCPD-200900792.pdf>.

[54] *Ibid.*

[55] See United Nations Security Council Resolution 1753, SC Res. 1753, UN SCOR, 5668th Mtg., S/Res/1753(2007), online: UN SC <http://www.un.org/Docs/sc/unsc_resolutions07.htm>. This resolution was adopted on April 27, 2007, lifting the ban on imports of rough diamonds from Liberia.

Commission; [56] Charles Taylor, the former National Patriotic Front of Liberia guerrilla, warlord, and eventual President of Liberia is currently on trial before the International Criminal Court in The Hague for war crimes, crimes against humanity, and other serious violations of international humanitarian law; [57] and his son (Charles Taylor, Jr.) was recently sentenced to 97 years in prison in the United States for torture and conspiracy to torture for his role as head of Liberia's savage Anti-terrorism Unit (also known in Liberia as the "Demon Forces"). [58] Therefore, "hard law" may have played as much a role in Liberia as "soft law".

There have been critics of the *Kimberley Process* as well. For example the definition of "conflict diamonds" in Resolution 55/56 is unduly restrictive in that it only applies to "*rough diamonds".* There is no certificate of origin required for cut or polished diamonds that may have been initially rough diamonds smuggled out of a neighbouring country. [59] In addition:

- it only applies to "rebel movements" whereas "the identity of legitimate governments" may be hard to determine even thought they may use the diamonds for illegal activities;

- there is no "on-the-ground" inspection system in conflict areas;

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[56] "Liberia: War-battered nation launches truth commission" *IRIN News* (21 February 2006), online: IRIN <http://www.irinnews.org/report.aspx?reportid=58220>.
[57] *The Prosecutor v. Charles Ghankay Taylor*, court proceedings online: The Special Court for Sierra Leone <http://www.sc-sl.org/CASES/ProsecutorvsCharlesTaylor/tabid/107/Default.aspx>.
[58] *U.S. v. Roy M. Belfast, Jr. (a.k.a. Chuckie Taylor, a.k.a. Charles McArthur Emmanuel, a.k.a. Charles Taylor, Jr. a.k.a. Charles Taylor, II)*, 22 Fla. L. Weekly Fed. c 1179, (11th Cir. 2010), aff'ing *United States of America v. Charles* Emmanuel, 20 Fla. L. Weekly Fed. D 973 (S.D. Fla. 2007) [*U.S. v. Roy M. Belfast Jr.*]. Although the offences occurred in Liberia, the U.S. *Torture Act*, 18 U.S.C. § 2340, passed pursuant to the United Nations *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, (10 Dec. 1984), 1465 U.N.T.S. 85, applies extraterritorially to anyone "*outside the United States* who commits or attempts to commit torture …" [emphasis added].
[59] *Ibid.* See also Alexandra R. Harrington, "Faceting the Future: The Need for and Proposal of the Adoption of a Kimberley-Process-Styled Legitimacy Certification System for the Global Gemstone Market" (2009) 18 Transnat'l L. & Contemp. Probs. 353 at 362.

- determining the actual origin of a diamond is next to impossible;

- the scheme is not mandatory and compliance is voluntary (members states are "*encouraged*" to participate);

- at least half the nations in the WTO are not members of the certification scheme;

- and domestic legislation must be enacted to impose the terms of the agreement within each member's jurisdiction. [60]

As there is no overarching international law to ensure compliance, stateless actors and terrorist groups are still using diamonds as a "liquid, fungible and untraceable asset" to finance their activities. [61] While the strength of the process depends on moral suasion and public backlash, which in turn may be economically damaging to companies identified as trading in conflict diamonds, this does little to discourage stateless actors operating outside the legitimate market. [62]

Furthermore, notwithstanding the outrage and condemnation for the manner in which King Leopold ran the Congo at the turn of the last century, little has changed; new actors just took his place. Without meaningful sanctions, public shaming may not be enough. [63]

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[60] See generally Seth A. Malamut, "A Band-Aid on the Machete Wound: The Failures of the Kimberley Process and Diamond-Caused Bloodshed in the DRC" (2005) 29 Suffolk Transnat'l L. Rev. 25. See also Global Witness, *Making it Work: Why the Kimberley Process Must Do More to Stop Conflict Diamonds* (Global Witness, 2005), online: <http://www.globalwitness.org/media_library_detail.php/143/en/making_it_work_why_the_Kimberley_process_must_do_mo>.

[61] Joseph Hummel, "Diamonds Are a Smuggler's Best Friend: Regulation, Economics, and Enforcement in the Global Effort to Curb the Trade in Conflict Diamonds" (2007) 41 Int'l Law 1145 at 1158.

[62] *Ibid,* at 1157-58. See also Harrington*, supra* note 59; and Tracey Michelle Price, "The Kimberley Process: Conflict Diamonds, WTO Obligations, and the Universality Debate" (2003) 12 Minn. J. Global. Trade 1.

[63] See generally Andrea Reggio, "Aiding and Abetting in International Criminal Law: The Responsibility of Corporate Agents and Businessmen for 'Trading with the Enemy' of Mankind" (2005) 5 Int'l Crim. L. Rev. 623, for an example of how the International Criminal Court (ICC) could be utilized in this conflict. Also see the trial of Thomas

Considering the amount of literature that has been produced in recent years regarding the connection between violence and human rights abuses in the DRC and resource extraction,[64] soft law alone may be insufficient in breaking these linkages.

V. OUT OF DARKNESS

Based on the substantial volume of material connecting the continued violence and human rights abuses in the DRC with the illicit trade in "conflict minerals", the UN Security Council has adopted a number of resolutions aimed at weakening armed groups in the DRC who are trafficking in weapons. Canada has adopted these resolutions, making it an offence for any person in Canada, or a Canadian outside Canada, to knowingly sell, supply or ship arms and related material (including technical assistance related to military activities) to any person in the DRC, or to cause, assist or promote any such act. [65]

Dyilo, a Congolese rebel militia leader accused of conscripting child soldiers during the conflict in the DRC. Unfortunately the trial was halted on July 8, 2010 after the prosecution refused to disclose the identity of an informer. Complete trial details can be found online: Lubanga Trial <http://www.lubangatrial.org/category/trial-reports/> [Lubanga Trial].

[64] See Global Witness, *Lessons UN Learned: How the UN and Member States Must do More to End Natural Resource-Fuelled Conflict*, (Global Witness, 2010); Global Witness *Faced With a Gun What Can You Do: War and the Militarisation of Mining in Eastern Congo*, (Global Witness, 2009); DanWatch, *Bad Connections: How Your Mobile Phone is Linked to Abuse, Fraud and Unfair Mining Practices in DR Congo*, (2008); Sara Nordbrand & Petter Bolme, *Powering the Mobile World: Cobalt Production for Batteries in the DR Congo and Zambia*, (SwedWatch, 2007); Human Rights Watch , *The Curse of Gold: Democratic Republic of Congo*, (New York: Human Rights Watch, 2005); Amnesty International, *Democratic Republic of the Congo: "Our Brothers Who Help Kill Us"*, (Amnesty International, 2003); and Michael Renner, World Watch Paper 162, *The Anatomy of Resource Wars*, (Danvers, MA: WorldWatch Institute, 2002).

[65] *UN DRC Regulations, supra* note 13, ss. 3, 5. Similar regulations have been passed pursuant to the *United Nations Act*, R.S.C. 1985, c. U-2, regarding the supply of arms to neighbouring Sierra Leone (SOR/98-400), Liberia (SOR/2001-261), Sudan (SOR/2004-197); Ivory Coast (SOR/2005-127), Somalia (SOR/2009-92) and until 2009 Rwanda (SOR/94-582). Section 3 of the *United Nations Act* makes any contravention of the regulations a dual procedure offence, punishable

(a) on summary conviction, to a fine of not more than $100,000 or to imprisonment for a term of not more than one year, or to both; or

(b) on conviction on indictment, to imprisonment for a term of not more than 10 years.

Another possible solution may be to implement a Kimberley-style certification process that takes into consideration some of the shortcomings identified in that process such as "on-the ground" verification. As suggested by the United States Geological Service (USGS), "[t]ransparency of material movement could contribute to the reduction of illicit material trade by permitting one to trace and audit the supply chain. Since those who trade in illicit minerals could reasonably be expected to hide the origin of their material," [66] on-the-ground verification is necessary and may be done through "mineral fingerprinting" which can readily distinguish between various sources of minerals such as tantalum.

In addition, the UN Security Council recently passed two resolutions aimed at breaking the link between the illicit trade in natural resources and the proliferation and trafficking of arms, "expressing its extreme concern at the deteriorating humanitarian and human rights situation, *condemning* in particular the targeted attacks against the civilian population, sexual violence, recruitment of child soldiers and summary executions". [67]

Resolution 1856 passed on December 22, 2008, broadened the mandate of UN peacekeepers in the DRC to include inspection capacities designed to "prevent the provision of support to illegal armed groups, including support derived from illicit economic activities", such as the illicit trade in natural resources. [68]

> The second resolution (1857) broadens UN sanctions to include "individuals or entities supporting the illegal armed groups…through illicit trade of natural resources". Furthermore the resolution "[*e*]*ncourages* Member States to take measures … to ensure that importers, processing industries and consumers of Congolese mineral products

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[66] USGS, *Minerals Yearbook - Tantalum, supra* note 4 at 52.2.
[67] SC Res. 1856, UN SCOR, 6055th Mtg., UN Doc. S/Res/1856 (2008) at 2, online: UN SC <http://www.un.org/Docs/journal/asp/ws.asp?m=A/RES/55/1856> [UNSC, Res. 1856]. See also the current ICC trial of Thomas Dyilo regarding his conscription of child soldiers in the DRC (Lubanga Trial, *supra* note 63).
[68] *Ibid.*

> under their jurisdiction exercise due diligence on their suppliers and on the origin of the minerals they purchase". [69]

The Group of Experts on the DRC had previously proposed a "[p]ilot study for an enhanced traceability system" which could lead to "better regulated exports of natural resources" from the DRC, "but since no mandate on the subject had been adopted" it was not pursued further. [70]

While there was some debate at the time as to whether a reliable methodology could be established, the Group of Experts had suggested that each mining site be sampled for unique geological chemical traces that could be entered into a database, making it possible to match each export with entries in the database. The matching system would confirm whether a shipment of minerals had come from a legal source, ultimately "certifying" that they had not come from a conflict area. [71]

The use of such a geo-chemical marker has its advantages over the Kimberley Process. While diamonds are small and can be smuggled across unsecure borders in small (but valuable) amounts, the value of tantalum bearing ores (for example) are usually in their substantially larger volumes and may be easier to stop and identify for that reason. [72]

Nevertheless, while Canada was one of the first countries involved in the *Kimberley Process*, it has not been as quick to become involved in the trade of conflict minerals. While a Private Member's Bill was sponsored by John McKay, M.P. (Scarborough-Guildwood: Liberal) in 2009 to promote environmental best practices and to ensure the protection and promotion of

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[69] SC Res. 1857, UN SCOR, 6056th Mtg., UN Doc. S/Res/1857 (2008) at 3, 4, online: UN <http://www.un.org/Docs/journal/asp/ws.asp?m=A/RES/55/1857>.
[70] *Group of Experts*, S/2006/525, *supra* note 11 at 30; See also Group of Experts on the Democratic Republic of the Congo, *Report of the Group of Experts on the Democratic Republic of the Congo*, UN SCOR, 2006, UN Doc. S/2006/53 at 27, online: UN <http://www.un.org.sc/committees/1533/egroup.shtml> [Group of Experts, S/2006/53].
[71] Group of Experts, S/2006/53, *ibid.* at 27.
[72] According to MetalPrices.com tantalite of African origin was selling for $46/lb (USD) or $101,412/MT (2205 lbs) at CIF Rotterdam, online: MetalPrices <http://www.metalprices.com/FreeSite/metals/ta/ta.asp#Tables>.

international human rights standards by Canadian extractive resource corporations operating in developing countries, [73] there has been little discussion in Parliament on the topic.

In fact the only comments to date have been those of Dr. Keith Martin, M.P. (Esquimalt-Juan de Fuca: Liberal) who, on May 26, 2010, made a notice of motion that "the government should table legislation modeled after the United States' *Conflict Minerals Trade Act* of 2009." Such an act would "create a system of audits and import declarations that would increase transparency and help break the link between the trade in minerals from the eastern Congo and the armed groups that are involved in the DRC and the surrounding region." [74]

Perhaps with the mining sector contributing $40 billion to Canada's GDP in 2009, employing 350,000 people, and paying approximately $13.5 billion in taxes and royalties, [75] Canada lacks the political will to regulate the mining sector as tightly as the gemstone industry? In fact during hearings on Bill C-300 by the *Standing Committee on Foreign Affairs and International Development* concern was expressed by several witnesses that the Bill would cause Canadian extractive companies to either forgo

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[73] Bill C-300, *An Act respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries,* 2d Sess., 40th Parl., 2009. The Act would require Canadian corporations to follow specific guidelines for mining, oil, or gas activities in developing counties that are consistent with international human rights and environmental standards. Companies that fail to follow the guidelines would be investigated by the Ministers of Foreign Affairs and International Trade, with the results of their investigation published in the *Canada Gazette*. Such companies would be ineligible to receive *Canada Pension Plan Investment Board* monies or any assistance from the *Export Development Canada Corporation.*

[74] *Order Paper and Notice Paper*, 40th Parl. 3d sess., m-536 No. 50 (27 May 2010), at V (Hon. Keith Martin).

[75] Stothart, *supra* note 15 In addition, Canada has become a major player in the international extractive sector with more than 75 percent of the world's exploration and mining companies, accounting for 43 percent of global exploration expenditures, headquartered here in 2008. "At about $79.3 billion in 2007, mining and energy investment is the third-largest component of Canadian direct investment abroad (stocks), generating significant additional exports from Canada." Foreign Affairs and International Trade Canada, *Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Secto*r (March 2009) at Introduction and Overview, online: DFAIT <http://www.international.gc.ca/trade-agreements-accords-commerciaux/ds/csr-strategy-rse-stategie.aspx> [DFAIT, *CSR Strategy*].

investing in developing countries or move their base of operations outside of Canada. In either case Bill C-300 would cause significant harm to Canada's world-leading extractive companies, the broader business community, and Canada's overall reputation and economic competitiveness. [76]

Other witnesses, however, found such arguments to be without merit. As noted by Dr. Penelope Simons (Associate Professor, Faculty of Law, Common Law Section, University of Ottawa), voluntary principles on security and human rights have already been endorsed by the Canadian government and adopted by the major extractive companies. Furthermore international law already gives states extensive authority and capacity to regulate the conduct of corporate nationals that takes place outside of their territory. [77]

In fact, Canada does already regulate the activities of its nationals extraterritorially in a variety of circumstances. It has done so in a number of circumstances: for instance, to implement treaty obligations, such as the convention against torture, the Rome Statute of the International Criminal Court, and certain anti-terrorism laws.

But it has also extended its criminal jurisdiction where no treaty obligation was in place. So before the protocol to the Convention on the Rights of the Child came into place, Canada had already regulated the engagement of Canadian nationals abroad in sexual activities with children and in child prostitution… In addition, common law civil liability also applies extraterritorially, so this is an absolute possibility under

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[76] See for example the testimony of Mrs. Shirley-Ann George (Senior Vice-President, Policy, Canadian Chamber of Commerce), Canada, Standing Committee on Foreign Affairs and International Development, *Evidence*, 40th Parl. 3rd sess., No. 19 (25 May 2010) at 6-7, online: House of Commons <http://www2.parl.gc.ca/content/hoc/Committee/403/FAAE/Evidence/EV4547693/FAAEEV19-E.PDF>. Also see testimony of Mr. David Stewart-Patterson (Executive Vice-President, Canadian Council of Chief Executives), Canada, Standing Committee on Foreign Affairs and International Development, *Evidence*, 40th Parl. 3rd sess., No. 19 (3 June 2010), online: House of Commons <http://www.pdac.ca/c300/documents/bill-c-300-100603.pdf>.

[77] *Ibid.*

international law. Enacting this bill does not violate the sovereignty of developing states. [78]

While Dr. Stephen Lucas (Assistant Deputy Minister, Minerals and Metals Sector, Department of Natural Resources), was non-committal regarding the government's support for Bill C-300, he did advise the Committee that the Government of Canada had previously announced a new Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector. [79]

The mandate of the CSR Strategy being to "help Canadian mining, oil and gas companies meet and exceed their social and environmental responsibilities when operating abroad." [80] The specific initiatives include:

- Creating a new Office of the Extractive Sector Corporate Social Responsibility Counselor to assist in resolving social and environmental issues relating to Canadian companies operating abroad in this field. A competency-based selection process will be launched shortly to identify qualified candidates for this position. ...

- Continuing Canadian International Development Agency assistance for foreign governments to develop their capacity to manage natural resource development in a sustainable and responsible manner.

- Promoting internationally recognized voluntary guidelines for corporate social responsibility performance and reporting. [81]

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[78] *Ibid.*

[79] Canada, Standing Committee on Foreign Affairs and International Development, *Evidence*, 40th Parl. 2nd sess., No. 33 (20 October 2009), online: House of Commons <http://www2.parl.gc.ca/content/hoc/Committee/402/FAAE/Evidence/EV4148257/FAAEEV33-E.PDF>.

[80] *Ibid.* See also Foreign Affairs and International Trade Canada, Media Release, No. 77 "Minister Day Announces New Initiatives to Support Responsible Practices for Canadian Businesses Abroad" (26 March 2009), online: DFAIT <http://www.international.gc.ca/media_commerce/comm/news-communiques/2009/386970.aspx?lang=eng> [DFAIT, *CSR* Strategy].

[81] *Ibid.*, DFAIT, *CSR* Strategy.

The Guidelines are an integral part of the Declaration on International Investment and Multinational Enterprises originally promulgated by the Organization for Economic Co-operation and Development (OECD) in 1976 and substantially revised in 2000. [82]

The problem with such recommendations is that they are voluntary. As was made clear by the Canadian Centre for the Study of Resource Conflict (CCSRC), which undertook a study in 2006 to measure the level of CSR among Canadian extractive sector companies, "the adoption of voluntary CSR policies by Canadian oil, gas, mining and exploration companies with international interests was remarkably low… despite government efforts to promote specific CSR principles such as the OECD Guidelines". [83]

This could be why, as noted by Liberal M.P. Keith Martin, the United States Government introduced two bills to stop the illicit trade in minerals in 2009 rather than rely on unenforceable voluntary codes of business conduct. [84]

Bill S-891 introduced in the Senate on April 23, 2009 and the similarly styled Bill H.R.-4128, introduced in the House of

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[82] *OECD Guideline, supra* note 9 . The first version of the Guidelines was annexed to the *OECD Declaration on International Investment and Multinational Enterprises*, 21 June 1976 15 I.L.M. 967, at 969 (1976).

[83] Ashraf Hassanein, et al., Canadian Centre for the Study of Resource Conflict, *Corporate Social Responsibility & the Canadian International Extractive Sector: A Survey* (Revelstoke, B.C.: Canadian Centre for the Study of Resource Conflict, 2006) at 3, online: CCSRC <http://www.resourceconflict.org/ccsrc_report_0906.pdf>. The report further notes that:

David Henderson [the former chief economist at OECD], has stated that CSR 'rests on dubious and false assumptions' and that the role of business remains to make profit. This view coincides with that of Milton Friedman, the Nobel Prize winning economist who holds, 'the business of business is business'; being that the ultimate outcome of business is strictly to generate wealth for shareholders.

Others have countered that the argument presented by Henderson fails to consider public opinion. In a global survey of business executives, McKinsley Quarterly found that the participants overwhelmingly believed that the social contract between corporations and society is far more complicated than simple fiduciary responsibility (p. 5).

[84] U.S., Bill S. 891, *Congo Conflict Minerals Act of 2009*, 111th Cong., 2009 and U.S., Bill H.R. 4128, *Conflict Minerals Trade Act of 2009,* 111th Cong., 2009.

Representatives on November 19, 2009, recommend the implementation of UN Resolution 1857, encouraging companies to trace and audit their supply chains, right down to the mine of origin. Such audits should contain:

- the name and location of the processing facility;
- the minerals being processed;
- the country of origin of the minerals purchased and processed, including specific regions or mines from which the minerals were sourced;
- determination of if any minerals processed were not credibly documented and verifiable chain of custody; and
- a public declaration that the facility is either "Conflict Mineral Free" or is a "Conflict Mineral Facility". [85]

The proposed U.S. legislation adopts some of the critiques of the of Kimberley Process in that commercial entities must exercise due diligence on the origin and chain of custody of their products from suppliers to ensure that the minerals do not (a) "directly finance armed conflict;" (b) "result in labor or human rights violations;" or (c) "damage the environment". [86] Furthermore, under the Senate Bill, any publicly traded company in the U.S. that is involved in the exploration, extraction, importation or sale of conflict minerals or that uses such minerals in the manufacture of products for sale, must annually disclose to the Securities and Exchange Commission the origin of those minerals (if they are from the DRC or an adjoining country). [87]

Both Bills were subsequently incorporated into the massive *Dodd–Frank Wall Street Reform and Consumer Protection Act* that was signed into law by President Barack Obama on July 21, 2010. [88] It is considered to be the most sweeping change to financial

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[85] Bill H.R. 4128, *ibid.,* s. 6.
[86] *Ibid.*, s. 4.
[87] Bill S. 891, *supra* note 84, s. 5. By tying the audit to corporate filings the government would ensure that failure to comply with the regulations could result in a companies shares being cease traded by the SEC. It would also allow the public to monitor the company and/or make ethical investment decisions – thus tying compliance with profits.
[88] *Dodd-Frank Act, supra* note 17.

regulation in the United States since the 1930's, affecting almost every aspect of the nation's financial services industry.

Section 1502 of the *Act*, adopting the Senate Bill, gives the Securities and Exchange Commission (SEC) nine months to promulgate regulations implementing the new law, requiring all publicly traded companies to provide audited reports certifying where specific minerals in their products (i.e. gold, columbite-tantalite, wolframite, cassiterite or their derivatives – tantalum, tungsten and tin) come from and what measures were taken to ensure those minerals did not directly or indirectly finance or benefit armed groups in the DRC or an adjoining country. [89]

The *Act* further requires the Secretary of State and the Administrator of the United States Agency for International Development to develop a strategy within six months "to address the linkages between human rights abuses, armed groups, mining of conflict minerals and commercial products", and "to promote peace and security" in the DRC. [90]

While the new law does not yet mention the penalty for using conflict minerals, where bribery of government or military officials is involved, the United States' *Foreign Corrupt Practices Act* (*FCPA*) would already apply. The anti-bribery provisions of the *FCPA* prohibit:

> Issuers, domestic concerns, and any person from making use of interstate commerce corruptly, in furtherance of an offer or payment of anything of value to a foreign official, foreign political party, or candidate for political office, for the purpose of influencing any act of that foreign official in violation of the duty of that official, or to secure any improper advantage in order to obtain or retain business. [91]

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[89] *Ibid.*, s. 1502(b)
[90] *Ibid.*, s. 1502(c).
[91] *Foreign Corrupt Practices Act of 1977*, 15 U.S.C. § 78m (1977), in force December 19, 1977. Current through *The International Anti-Bribery and Fair Competition Act of 1998 Pub. L. 105-366,* 112 Stat. 3302 (10 November 1998) [*FCPA*].

The meaning of foreign official is broad and would include anyone working for a government-owned or managed institution or enterprise, including a "public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization." [92]

Penalties for a corporation found in violation of the *FCPA*, are a fine not exceeding $2 million, while individuals may be subject to a fine not exceeding $100,000 and/or 5 years in prison. [93] One recent prosecution was that of ex-Louisiana Congressman William J. Jefferson, who was sentenced to 13 years in prison on November 13, 2009 for bribery, money laundering, and racketeering involving business ventures in Africa. [94]

Canada has somewhat similar legislation under the *Corruption of Foreign Public Officials Act* (*CFPOA*). [95] Under this legislation "exporters are required to sign anti-corruption declarations", which generally state: "We have not been and will not knowingly be party to any action which is prohibited by Canada's *Corruption of Foreign Public Officials Act* which makes it illegal for persons to, directly or indirectly, give, offer, or agree to offer a loan, reward, advantage or benefit of any kind to a foreign public official in order to obtain or retain an advantage in the course of business." [96]

However, while the *CFPOA* has been in place for over a decade, there has been little attempt to enforce it. So far there have been no cases referred to the Department of Foreign Affairs

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[92] U.S., *Foreign Corrupt Practices Act,* 15 U.S. C.78dd-3, s.104A(f); U.S., Department of Justice, Foreign Corrupt Practices Act Review, Opinion Procedure Release 97-01, online: U.S. Department of Justice <http://www.justice.gov/criminal/fraud/fcpa/opinion/1997/9701.html>.
[93] *Ibid*, at § 78dd-3(e).
[94] David Stout, "Ex-Louisiana Congressman Sentenced to 13 Years", *The New York Times* (14 November 2009) A14, online: The New York Times <http://www.nytimes.com/2009/11/14/us/politics/14jefferson.html>.
[95] S.C. 1998, c. 34, in force February 14, 1999, see SI/99-13 [*CFPOA*].
[96] Foreign Affairs and International Trade Canada, *Corporate Social Responsibility - Bribery and Corruption*, Tenth Report to Parliament (1 October 2009), online: DFAIT <http://www.international.gc.ca/trade-agreements-accords-commerciaux/ds/10-report-rapport.aspx?lang=en> [emphasis added].

and International Trade regarding allegations that a Canadian company or individual has bribed or attempted to bribe a foreign public official abroad. [97]

Furthermore, Canada will only try cases with a "real and substantial" link to Canada, which, practically speaking means that a portion of the illegal activities must be committed in Canada. However, on May 15, 2009 the Minister of Justice introduced Bill C-31 to remedy this defect and to respond to Canada's obligations under the OECD's *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, which Canada ratified in 1999. [98]

The proposed amendment to the *CFPOA* would allow Canada to prosecute an offence under the *Act* – or a conspiracy to commit, an attempt to commit, being an accessory after the fact in relation to, or any counseling in relation to, an offence under that section – if the person who is alleged to have committed the offence outside Canada is a Canadian citizen, a permanent resident who after the commission of the act or omission is present in Canada, or is a legal person created under the laws of Canada or a province. This change would allow prosecutions of foreign bribery cases based on the nationality principle. [99]

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[97] *Ibid.*

[98] Bill C-31, *An Act to Amend the Criminal Code, the Corruption of Foreign Public Officials Act and the Identification of Criminals Act and to make a Consequential Amendment to another Act,* 2nd Sess., 40th Parl., 2009, cl. 38. The complete text of the Convention can be found at *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,* 21 November 1997, online: OECD <http://www.oecd.org/dataoecd/4/18/38028044.pdf>. Also see the *United Nations Convention against Corruption*, GA RES. 58/4, UN ODC, 31 October 2003 (entered into force 14 December 2005), ratified by Canada on 2 October 2007, the full text of which can be found online at: UN <http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf>.

[99] Cynthia Kirkby, Parliamentary Information and Research Service, *Bill C-31: Legislative Summary* Ls-662E (Ottawa: Library of Parliament, 2009), online: Library of Parliament <http://www2.parl.gc.ca/Content/LOP/LegislativeSummaries/40/2/c31-e.pdf>.

While the CFPOA applies to any "person", [100] which is defined in the *Criminal Code of Canada* as including an organization, [101] it is somewhat limited by the requirement that the corrupt practice must be done in the course of business – which is defined as a "for profit" venture and would therefore not apply to non-profit actors. [102] No change to this definition was recommended in Bill C-31.

Unfortunately Bill C-31 died on the order table when Parliament ended on December 30, 2009 and it was not reintroduced when Parliament resumed in March 2010. Nevertheless and notwithstanding the government's failure to reintroduce Bill C-31, there is a strong argument that Canada's *Crimes Against Humanity and War Crimes Act* [103] and anti-terrorism legislation [104] could be used to hold corporations accountable for human rights violations where they knew or were willfully blind to the fact that their actions aided or abetted the commission of the offence.

For example, s. 3 of the *Crimes Against Humanity Act* defines a "*crime against humanity*" as including "murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group". Section 8 further states that the offence applies to any "person" who, "at the time the offence is alleged to have been committed… was a Canadian citizen… [or] the victim of the alleged offence was a Canadian citizen, or… after the time the offence is

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[100] *CFPOA*, *supra* note 95, s. 3. Section 2 further defines a "*person*" as having the meaning as defined in section 2 of the *Criminal Code*.
[101] *Criminal Code of Canada*, R.S.C. 1985, C-46, s 2 (see "*every one*"). An "*organization*" is defined as including "a public body, body corporate, society, company, firm, partnership, or trade union".
[102] *CFPOA*, *supra* note 95, s. 2 ("*business*").
[103] S.C. 2000, c. 24 [*Crimes Against Humanity Act*]. The *Act* was passed pursuant to the *Rome Statute of the International Criminal Court*, 17 July 1998, U.N. Doc. A/CONF.183/9, online: UN <http://untreaty.un.org/cod/icc/statute/romefra.htm> [*Rome Statute*].
[104] *Anti-Terrorism Act*, S.C. 2001, c. 41, as amending the *Criminal Code of Canada*, R.S.C. 1985, c. C-46.

alleged to have been committed, the person is present in Canada." [105]

By extending its laws extraterritorially, Canada has criminalized not only the conduct of natural persons, but also the conduct of business entities that are either incorporated or "headquartered in Canada, or whose direction and control is from Canada, for conduct occurring entirely outside of Canada." [106] Not only would the use or the threat of use against such legal persons "provide ex post facto accountability, but, arguably more importantly, a genuine threat of criminal liability would act as an effective deterrent in a corporate world shaped by strategic risk management, thereby serving a pre-emptive function." [107]

The principle of transnational corporate criminality has been around at least since the Nuremberg War Crime trials when the principals of *I.G. Farben Industries* and *Tesch and Stabenow* (the distributors of Zyclon B used in the Nazi gas chambers), were put on trial. The Court affirmed the principle that companies can be held liable for crimes against humanity. Although I.G. Farben itself was not indicted, it was alleged that all the principals had acted through Farben (Tesch and Stabenow was solely owned and controlled by Bruno Tesch). [108] However legal persons or corporations were not included in the *Rome Statute*, effectively leaving it to domestic courts to prosecute corporations. [109]

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[105] *Crimes Against Humanity Act, supra* note 103, ss. 3, 8. The *Criminal Code*, which applies to the *Crimes Against Humanity Act* pursuant to s. 2(2), defines a "person" as including an organization (see note 101).

[106] Debbie Johnston, "Lifting the Veil on Corporate Terrorism: The Use of the Criminal Code Terrorism Framework to Hold Multinational Corporations Accountable for Complicity in Human Rights Violations Abroad", (2008) 66:2 U.T. Fac. L. Rev. 137, at 145.

[107] *Ibid*, at 139.

[108] *The I.G. Farben Trial*, Case No. 57, 10 L. Rep. of Trials of War Crim. 1 (U.S. Military Tribunal, Nuremberg 1947-48) at 35, 52; *Trial of Bruno Tesch and Two Others (The Zyklon B Case)*, Case No. 9, 1 L. Rep. of Trials of War Crim. 93 (British Military Court, Hamburg 1947) at 94.

[109] *Rome Statute, supra* note 103. Article 25(1) states "[t]he Court shall have jurisdiction over natural persons pursuant to this Statute" [emphasis added]. However nothing limits domestic courts from exercising jurisdiction over corporate offenders for violations of international human rights law (i.e. war crimes, genocide, crimes against humanity, terrorism, etc).

While no prosecutions have been entertained against corporations in Canada, the Australian Federal Police were asked to investigate Anvil Mining Ltd. for their possible role in a number of killings that occurred in the DRC in 2004. Anvil was incorporated in Canada but had "major operations, including its principal headquarters, in Australia." [110]

According to news reports, Anvil Mining trucks and planes were used in a military attack on rebels. The attack took place in a village near Anvil's DRC mine. It resulted in the deaths of 100 people, 28 of which may "have been summarily executed by government troops", while "others were tortured and beaten to death". [111]

Similar to Canada, Division 268 of the Australian *Criminal Code Act* [112] was enacted under federal criminal legislation crimes against humanity and war crimes as a result of the *Rome Statute*. In addition, like Canada, the federal legislation applies to all legal persons, including corporations.

While no criminal charges were ever laid by the Australian Federal Police, a civil suit was filed by several individuals in the state of Western Australia. Their case was supported by RAID (Rights and Accountability in Development), whose principal aim is the protection and monitoring of human rights in developing countries such as the DRC, particularly in relation to the activities of corporations and businesses. RAID subsequently asked the court to discontinue the proceedings on May 19, 2008 after Congolese authorities prevented their lawyers' attempts to visit fifty-eight of the 61 applicants who lived in the DRC. As it was not likely permission to visit would be granted in the foreseeable

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[110] Joanna Kyriakakis, "Australian Prosecution of Corporations for International Crimes: The Potential of the Commonwealth Criminal Code" (2007) 5 J.I.C.J. 809 at 811-12.
[111] *Ibid.*; See also "Massacre victims to sue mining company" *The Age* (7 June 2005), online: TheAge.com <http://fddp.theage.com.au/news/Business/Massacre-victims-to-sue-mining-company/2005/06/07/1117910292411.html>.
[112] *Criminal Code Act 1995*, s. 268.8-286.101.

future and there was a real concern about harm being done to the claimants, RAID asked for the discontinuance. [113]

As noted by Reinhold Gallmetzer, in "a country ravaged by rebel groups and armed gangs", trying to conduct trials involving incidents in countries like the DRC can be problematic for a number of reasons including: inaccessibility of victims and witnesses who fear for their safety; unavailable or inadequate judicial structures; uncertain peace processes and politico-military agreements between warring parties; "lack of expertise in dealing with mass crimes and the collection and preservation of evidence", etc. [114]

However such prosecutions, both criminal and civil have been successful notwithstanding such problems.

For example, in *Prosecutor v. Van Anraat* the Netherlands' Supreme Court recently upheld the conviction of Dutch businessman Frans van Anraat. He was convicted as an accessory to war crimes for supplying Saddam Hussein's Iraqi regime with at least 1,160 tons of Thiodiglycol, used to make mustard gas between 1987 and 1988. [115]

Although Thiodiglycol has civilian applications, in the Court's view Van Anraat knew that it would be used for the production of mustard gas. While Van Anraat did not commit any war crimes, nor did he supply the weapons with which they were committed, for furnishing a precursor thereof he was convicted of making

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[113] *Pierre v. Anvil Mining Management NL*, [2008] WASC 30, and subsequent proceedings on May 19, 2008 (unreported), BC200809359 (QL). See also *The Presbyterian Church of Sudan v. Talisman Energy Inc.* 582 F.3d 244 (2nd Cir. 2009) at overview. Petition for certiorari was filed May 20, 2010, in which it was alleged that the Calgary based oil company allowed its company built roads and air strips in the Sudan to be used "by the Republic's military forces to stage bombing missions" "in short, that the company violated the United States *Alien Torts Statute* by aiding and abetting genocide, war crimes, and crimes against humanity."

[114] Reinhold Gallmetzer, "Prosecuting Persons Doing Business with Armed Groups in Conflict Areas" (2010) 8 J.I.C.J. 947 at 954, n. 32.

[115] *Prosecutor v. Frans van Anraat*, Netherlands Supreme Court, Judgment (in Dutch), 30 June 2009, LJN: BG4822, 07/10742, online: The Hague Justice Portal <http://www.haguejusticeportal.net/Docs/NLP/Netherlands/vanAnraat_Supreme_Court_Judgment_30-06-2009.pdf>.

"conscious" and "substantial" contributions to the extensive and extremely gross violations of international humanitarian law under Saddam Hussein.

The Netherlands' Court of Appeal affirmed the trial decision and, in finding that serious violations of the laws of war had been committed, they stated that "*People or companies that conduct (international) trade… in weapons or raw materials used for their production, should be warned that – if they do not exercise increased vigilance – they can become involved in most serious criminal offences. It should be made clear to them that they will face prosecution and long-term prison sentences.…*" [116]

On July 20, 2010, the European Court of Human Rights (ECHR) unanimously rejected Van Anraat's claims challenging the jurisdiction of the Dutch courts and the legal certainty of the criminal acts being prosecuted. The Court found that, at the time Van Anraat supplied Thiodiglycol to the Iraqi Government, a norm of customary international law existed prohibiting the use of mustard gas either against an enemy in an international conflict or against civilian populations affected by an international conflict. [117]

Alternately, human rights groups and victims have begun resorting to civil mechanisms to hold corporations accountable for their complicity in human rights abuses abroad. One of the most notable is the *Alien Tort Claims Act* [118] in the United States.

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[116] *People v. Van Anraat*, Court of Appeal The Hague, Judgment, 9 May 2007, LJN: BA4676, at para. 16, online: The Hague Justice Portal <http://www.haguejusticeportal.net/eCache/DEF/7/548.html>. See also Maya Brehm, "War Crimes: providing the means", *Disarmament Insight*– (10 July 2009), online: Disarmament Insight <http://disarmamentinsight.blogspot.com/2009/07/war-crimes-providing-means.html>.

[117] *Van Anraat v. the Netherlands*, no. 65389/09, [2010] European Court of Human Rights, online: ECHR <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=871497&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

[118] 28 U.S.C. § 1350. The Act reads that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States". In *Sosa v. Alvarez-Machain* 542 U.S. 692 (2004) the United States Supreme Court held that the Alien Tort Statute (ATS) may

Arguably such actions pose an effective deterrent to corporations who are concerned with profits, public image, and strategic risk management.

One only has to look at the recent settlement of $15.5 million by Royal Dutch Shell just days before the start of a trial in New York regarding Shell's activities in the Niger Delta. [119] Although the company denied any wrongdoing in settling the claim, the allegations could have been torn from the pages of Sir Conan Doyle's book *The Crimes of the Congo* one hundred years earlier:

> Allegedly, Shell Nigeria recruited the Nigerian police and military to attack local villages and suppress the organized opposition to its development activity. Saro-Wiwa and Kpuinen were repeatedly arrested, detained and tortured by the Nigerian government because of their leadership roles in the protest movement … According to the complaint, while these abuses were carried out by the Nigerian government and military, they were instigated, orchestrated, planned, and facilitated by Shell Nigeria under the direction of the defendants. The Royal Dutch/Shell Group allegedly provided money, weapons, and logistical support to the Nigerian military, including the vehicles and ammunition used in the raids on the villages, procured at least some of these attacks, participated in the fabrication of murder charges against Saro-Wiwa and Kpuinen, and bribed witnesses to give false testimony against them. [120]

While Canada has paid little attention to claims of human rights victims beyond its borders, a paper for the Law Commission of Canada posed this question – "ought Canadian courts to be

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provide a cause of action for violations of customary international norms that are "specific, universal, and obligatory". Courts have found torture; cruel, inhuman, or degrading treatment; genocide; war crimes; crimes against humanity; summary execution; prolonged arbitrary detention; and forced disappearance to be actionable under the *ATS*. See Steven R. Swanson, "Terrorism, Piracy and the Alien Tort Statute" (2008) 40 Rutgers L.J. 159, at 178 (listing cases).

[119] Jad Mouawad, "Shell to Pay $15.5 Million to Settle Nigerian Case" *The New York Times* (9 June 2009), online: The New York Times <http://www.nytimes.com/2009/06/09/business/global/09shell.html>.

[120] *Wiwa, et al v. Royal Dutch Petroleum*, 226 F.3d 88(2nd Cir. 2000), at 92-93 [*Wiwa*]. Certiorari was denied March 26, 2001. See also *Pierre v. Anvil Mining Management* and *The Presbyterian Church of Sudan v. Talisman Energy Inc., supra* note 113.

open to claims of human rights abuses that constitute violations of *erga omnes* [toward all] obligations whether committed by Canadian citizens or foreigners, whether perpetrated against Canadians or foreigners and whether committed within Canada or elsewhere?" [121] Arguably the answer is yes and the experience with the extraterritorial application of criminal law using the nationality principle could be used to justify civil court powers similar to those exercised by the United States under the *Alien Tort Claims Act*. [122]

One class action has been brought in Quebec against Cambior Inc., a Quebec corporation, after a faulty dam constructed by a subsidiary mining company in Guyana resulted in "[o]ne of the worst environmental catastrophes in gold mining history". "Some 2.3 billion litres of liquid containing cyanide, heavy metals and other pollutants spilled into two rivers, one of which is Guyana's main waterway, the Essequibo." Although the court found that it had jurisdiction "when the defendant is domiciled in Quebec" pursuant to Article 3134 of the Civil Code, it exercised its discretion to *exceptionally* decline its jurisdiction under Article 3135 finding that Guyana was the preferable forum. [123]

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[121] Steve Coughlan, et al., *Global Reach, Local Grasp: Constructing Extraterritorial Jurisdiction in the Age of Globalization* (Ottawa: Law Reform Commission of Canada, 2006) at 54-55.

[122] See e.g. House of Commons, FAAE 38-1,Government Response to the Fourteenth Report of the Standing Committee on Foreign Affairs and International Trade, "Mining in Developing Countries – Corporate Social Responsibility" (17 October 2005) in which the Canadian Government stated:
Legal Remedies to address environmental or human rights violations can also arise from civil rather than criminal law. To the extent that crimes or wrongs, such as damage to the environment or personal injuries, committed outside Canada also constitute claims of the sort cognizable as a tort, civil law remedies may be available to the foreign plaintiff in Canadian courts. As such, Canadian corporations or their directors and employees may be pursued in Canada for their wrongdoing in foreign countries.
Online: DFAIT
<http://cmte.parl.gc.ca/Content/HOC/committee/381/faae/govresponse/rp2030362/faae_rpt14_gvtrsp-e.htm>.

[123] *Recherches Internationales Québec v. Camboir inc.*, [1998] Q.J. No. 2554 (S.C.) at para. 1, 9-10 (QL).

While Cambior was a Canadian company, Maughan J. placed the onus on the plaintiffs (all Guyanese) to bring forward conclusive and objective evidence to substantiate its claim that Guyana was an inadequate forum. [124] While Maughan J. cited the common law doctrine of *forum non conveniens* as precedent (including *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981)), in *Wiwa* the Second Circuit Court of Appeals held that "[t]he defendant has the burden to establish that an adequate alternative forum exists and then to show that the pertinent factors 'tilt [ ] strongly in favour of trial in a foreign forum.' … *The plaintiff's choice of forum should rarely be disturbed*." [125]

Other factors cited in *Wiwa* included "the interests of the United States in furnishing a forum to litigate claims of violations of the international standards of the law of human rights" – as noted by the Court "universal condemnation of human rights abuses 'provides scant comfort' to the numerous victims of gross violations if they are without a forum to remedy the wrong." [126]

While concern has been expressed about the U.S. courts becoming "a magnet for the afflicted of the world", tying up scarce court resources litigating foreign tort or human rights violations, placing U.S. companies at a "world wide competitive disadvantage", [127] and indirectly interfering with foreign countries regulatory systems, [128] the failure to try such cases

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[124] *Ibid.* at para. 98.
[125] *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) at 508-09, cited in *Wiwa, supra* note 120 at 100.
[126] *Wiwa, supra* note 120 at 106. See also *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2003), where the court assumed a private domestic company could be liable to foreign nationals under the ACTA for a wide range of torts under international law, including violations of rights to "*life and health*" (at 160). See also *U.S. v. Roy M. Belfast, Jr., supra* note 58, regarding the extraterritorial application of the U.S. Torture Act for human rights abuses committed in Liberia by the son of former dictator Charles Taylor.
[127] Russell J. Weintraub, "International Litigation and Forum Non Conveniens" (1994) 29 Tex. Int'l L.J. 321 at 352. See also William L. Reynolds, "The Proper Forum for a Suite: Transnational Forum Non Conveniens and Counter-Suit Inunctions in the Federal Courts" (1992) 70 Tex. L. Rev. 1663.
[128] Alan Reed, "To Be or Not to Be: The Forum Non Conveniens Performance Acted out in Anglo-American Courtroom Stages" (2000) 29 Ga. Int'l & Comp. L. 31 at 65. See also Brooke Clagett, "Forum Non Conveniens in International Environmental Tort Suits: Closing the Doors of U.S. Courts to Foreign Plaintiffs" (1995-1996) 9 Tul. Envtl. L.J.

> raise[s] serious questions about the ethics of a legal system which permits [transnational corporations] to establish operations in developing countries, but at the same time restricts the victims of industrial and environmental hazards from seeking a remedy in the home country of the offending corporation. … The corporation is able to reap financial benefits that indirectly result from operating in a country where citizens are excluded from the political-legal system [while] [a]t the same time, the corporation is able to insulate itself from any actions that, in the rare instance, may be brought against the company in home country courts. [129]

In fact more recent commentary supports trying cases extraterritoriality where the courts and counsel are better equipped and where there may be less political interference, greater access to corporate assets of the defendant firm, and strong public interest in preventing human rights and environmental abuses abroad. [130]

That is not to say Maughan J. was wrong in the context of that case, however his decision should be read in light of Canada's international obligations, subsequent U.S. court decisions such as *Wiwa*, the Standing Committee on Foreign Affairs and International Trade: Mining in Developing Countries – Corporate

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513; Friedrich V. Juenger "Forum Shopping, Domestic and International" 63 (1988-1989) Tul. L.R. 553.

[129] Malcolm J. Rogge, "Towards Transnational Corporate Accountability in the Global Economy: Challenging the Doctrine of *Forum Non Conveniens* in *In Re*: Union Carbide, Alfaro, Sequihua and Aguinda" (2001) 36 Tex. Int'l L.J. 299 at 300-01.

[130] See for example Shin Imai, Ladan Mehranvar & Jennifer Sander, "Breaching Indigenous Law: Canadian Mining in Guatemala" (2007) 6 Indigenous L.J. 101; Caroline Kaeb, "Emerging Issues of Human Rights Responsibility in the Extractive and Manufacturing Industries: Patterns and Liability Risks" (2008) 6 Nw. J. Int'l Hum. Rts. 327; Marisa Anne Pagnattaro, "Enforcing International Labor Standards: The Potential of the Alien Tort Claims Act" (2004) 37 Vand. J. Transn'tl L. 203; Emeka Duruigbo, "Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges" (2008) 6 Nw. J. Int'l Hum. Rts. 222; Doug Cassel, "Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts" (2008) 6 Nw. J. Int'l Hum. Rts. 305; David Scheffer, "Closing the Impunity Gap in U.S. Law" (2009) 8 Nw. J. Int'l Hum. Rts. 30.

Social Responsibility, and the Supreme Court of Canada's own jurisprudence on the issue. [131]

VI. CONCLUSION

When Joseph Conrad first published *Heart of Darkness* in 1899 it was a thinly fictionalized account of his 1890 six-month journey up the Congo River as the captain of a cargo ship. It can be seen as a scathing indictment of the colonial attitudes Europeans had towards Africa at the time. This was most vividly portrayed by Kurtz, who had wielded 'ruthless power' and 'craven terror' upon the local inhabitants in his search for ivory. Like Kurtz, will we also cry out "The Horror! The Horror!" as we look back another 100 years from now at everything we have failed to do in the DRC? [132]

As noted by the *Panel of Experts,* little has changed over the past 120 years. Ivory and rubber are no longer the commodities of choice. They have been replaced by gold, copper, zinc, tantalum, tin, cobalt, and diamonds. Kurtz is now the face of countless rebel soldiers, corrupt military and political leaders, predatory mining corporations, parasitic individuals, and uncaring or unknowing

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[131] *In Amchem Products Inc. v.* B*ritish Columbia (Workers Comp.* B*d.),* [1993] 1 S.C.R. 897 at 31, citing *Antares Shipping Corp. v. The Ship "Capricorn",* [1977] 2 S.C.R. 422 at 448, the court stated that an overriding consideration in exercising its discretion by refusing to grant such an application must be the existence of some other appropriate forum for the pursuit of … "*securing the ends of justice*". Other considerations included:

(a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum,
(b) the law to be applied to issues in the proceeding,
(c) the desirability of avoiding multiplicity of legal proceedings,
(d) the desirability of avoiding conflicting decisions in different courts,
(e) the enforcement of an eventual judgment, and
(f) the fair and efficient working of the Canadian legal system as a whole.

See also *Teck Cominco Metals Ltd. v. Lloyd's Underwriters*, [2009] 1 S.C.R. 321 and *Club Resorts Ltd. v. Charron; Club Resorts Ltd. v. Breda*, [2010] O.J. No. 402 (C.A.), application for leave to appeal granted [2010] S.C.C.A. No. 174. The later cases involved accidents by Canadian tourists staying at a Cuban owned resort that was managed by a Cayman Island incorporated company.

[132] Joseph Conrad, *Heart of Darkness*, (Ria Press edition, 2005), at 32, online: Ria Press <http://www.riapress.com>.

end users of products made from resources mined thousands of miles away. What has not changed is the vulnerability of the land and the people to these influences.

Trade sanctions are unlikely to improve worker's rights in a country dependant on foreign investment, development, and export of natural resources. While Canada has some domestic laws addressing the corruption of foreign officials and the supply of arms to rebel groups, they are largely unenforceable (and unenforced) unless there is a "real and substantial" link to Canada. Without international action on the ground in the DRC in conjunction with domestic criminal and civil laws, there will likely be little change. However, considering Canada has the 14th largest economy in the world [133] and is home to many of the world's largest mining and exploration companies, Canada should be a leader in championing a Kimberley-style *Conflict Minerals Act* along with the United States.

While this might be overly paternalistic in relation to one country's domestic affairs, the exploitation of both human and natural resources in the DRC has been occurring for more than 120 years with little interruption. Simply enacting domestic legislation and *encouraging* other UN/WTO members to do the same will not "ensure that the mineral trade stops contributing to human rights violations, including killings of unarmed civilians and sexual violence, while at the same time developing mechanisms to allow the Congolese people to benefit from these resources" [134] – a tandem approach of international trade and effective criminal and civil law sanctions together will break the cycle and get the DRC out of the heart of darkness.

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[133] International Monetary Fund, World Economic and Financial Surveys, "World Economic Outlook Database, April 2010 Edition", online: IMF <http://www.imf.org/external/pubs/ft/weo/2010/01/weodata/index.aspx>. See also The World Bank, World Development Indicators Database, "Gross Domestic Product 2009, PPP", online: World Bank <http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP_PPP.pdf>.

[134] "Enough, Global Witness Welcome 2009 Congo Conflict Minerals Act" *The Enough Project* (May 14 2009), on-line: !Enough <http://www.enoughproject.org/blogs/enough-global-witness-welcome-2009-congo-conflict-minerals-act>.