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Article

Crushed by an Anvil: A Case Study on Responsibility for Human Rights in the Extractive Sector

Adam McBeth†

In October 2004, Congolese troops conducted violent reprisals for a minor uprising in the small town of Kilwa, engaging in summary executions, rape, torture, pillaging, and other human rights atrocities. Allegations that a multinational corporation, Anvil Mining, provided logistical assistance for the military's actions led to calls for the company and its employees to face legal responsibility. This article examines the deployment of the multitude of legal and quasi-legal accountability mechanisms available in the Anvil case, including civil and criminal avenues in the home and host states, the application of international criminal law and the use of international "soft law" mechanisms. In examining the way those avenues were used in the Anvil case, this article attempts to illustrate the practical relationship between the multiple avenues theoretically available for imposing human rights accountability on multinational corporations, including a consideration of non-legal factors affecting decisions on whether and how to assert jurisdiction within a given avenue. It concludes that the incoherence of a fragmented, ad hoc system, and the central importance of political will in invoking a given avenue, present serious problems for the effective enforcement of human rights responsibility for multinational corporations.

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I. INTRODUCTION

This is a story of mass killings, summary executions, rape, torture and pillaging. It is a story about the relationship between foreign investors and repressive regimes. Most of all, it is the story of the gaps that emerge in legal accountability when there are many jurisdictions that can exercise control over a case, but just as many excuses for authorities to defer to someone else. This article takes one episode of human rights atrocities in the Democratic Republic of the Congo, in which a multinational mining company, Anvil Mining, allegedly provided assistance, and uses that episode as a case study to examine how these different jurisdictional options are deployed in practice.

In any study of the human rights responsibility of multinational enterprises, examples from the extractive sector of both human rights abuses and attempts at regulation and oversight will abound, due to the convergence of a number of factors. The substantial infrastructure and exploration investments required for oil, gas, and mining ventures often mean that exploitation of resources in developing countries cannot proceed without the involvement of foreign enterprises. For many developing countries, the extractive operations conducted by multinational firms are a vital source of revenue, giving the local authorities a vested interest in protecting those operations, whether from protesters, pilferers, uncooperative landholders or insurgents. Many extractive operations are conducted in conflict zones or areas of political instability, given that the option of moving to a more stable operating environment is simply not available when the targeted resources remain firmly in the ground. Situations of conflict can in fact be exacerbated by the presence of lucrative extractive industries, as competing factions strive to control rents from the operation to fund their own struggles.¹

Multinational extractive enterprises can and do make a positive contribution to human rights, particularly through the provision of employment and livelihood for local communities, with all the associated benefits for economic and social rights that such prosperity brings. Extractive industries also sometimes contribute to human rights through the provision of infrastructure and other social programs in the local community.² However, involvement in human rights abuses is also well

1. GLOBAL WITNESS, OIL AND MINING IN VIOLENT PLACES: WHY VOLUNTARY CODES FOR COMPANIES DON'T GUARANTEE HUMAN RIGHTS 4 (2007), available at http://www.globalwitness.org/media_library_detail.php/580/en/oil_and_mining_in_violent_places.

2. For example, Anvil Mining holds ten percent of the equity of the Dikulushi mine, which is the subject of this case study, on trust for the benefit of the local community, including building schools, refurbishing the local hospital, and improving water infrastructure, among other projects. ANVIL MINING, ANNUAL INFORMATION FORM FOR FINANCIAL YEAR ENDED DECEMBER 31, 2006, at 10 (2007).

documented. This can include direct human rights violations by the corporations concerned. Perhaps the most common form of serious human rights violation in the course of multinational extractive industries, however, is the use of violence, including killing, rape, forced labor, forced evictions, and torture, at the hands of security forces, at the behest of, for the benefit of, or with the assistance of the extractive enterprise.

When it comes to accountability for such human rights violations, the situation is complicated by a web of jurisdictional claims, which can be sticky, fragile, and full of holes. The host state—that is, the state where the operation is located and where the human rights violation occurs—will normally have the strongest claim to jurisdiction. However, in developing countries that are either still immersed in or have recently emerged from conflict or instability, the legal processes and resources for investigation, trial, and enforcement in relation to alleged human rights abuses are often seriously lacking. Even if the processes and resources exist, there are serious questions about the impartiality and fairness of those processes in some countries, given the vested interest of the government in the extractive operation. Where the direct perpetrators are military or police, acting under government directives, there is even more reason to doubt the legitimacy of host state processes.

Beyond host state jurisdiction, one alternative is to look to the home state of the multinational enterprise. In certain circumstances, states have the capacity to hold their nationals, including both natural and juridical persons under some formulations, accountable for their conduct abroad. It might also be possible for the victims to seek redress through a civil suit in the enterprise's home state.

International law is yet another option. International criminal law might be invoked for human rights violations rising to the level of international crimes. International human rights law also has a role in defining the boundaries of human rights obligations, but must be used in conjunction with some other legal avenue if it is to be effective in achieving justice for victims, as international human rights law has no enforcement mechanism of its own in relation to the actions of non-state actors.

Non-binding "soft law" mechanisms could also be used. There is a growing collection of international regimes setting out guidelines for transnational commerce, including in relation to human rights responsibility, some of which include dispute resolution or complaint mechanisms.

It is important to note at the outset that there is no agreed hierarchy or order of proceeding that covers the deployment of each of these overlapping accountability mechanisms. As this case study demonstrates, the reluctance of various authorities to invoke their respective jurisdiction, for whatever reason, is a very real practical problem for victims seeking recourse. This article seeks to demonstrate that while the law—both municipal and international, civil and criminal, hard and soft—provides numerous recourse options, the political will to invoke those options and the manner in which they are invoked are every bit as significant for the

achievement of justice as the adequacy of the law itself.

Part II sets out the background for the case study. It begins with an introduction to the operations of Anvil Mining in the Democratic Republic of the Congo and lays out the events of what has come to be known, somewhat euphemistically, as the “Kilwa incident.” Part III then characterizes the alleged atrocities at Kilwa against international criminal law and international human rights law, laying the foundations for the following discussion about the legal avenues that have sought to invoke those and other laws.

The remaining parts of the article then examine the fora that have been invoked, or which might be invoked in the future, in pursuing accountability in this case. Part IV examines criminal proceedings that took place in the military courts of the Democratic Republic of the Congo and analyzes the implications of those trials for other proceedings. Part V then looks at proposed criminal and civil proceedings against Anvil in Australia, while Part VI considers the prospects of proceedings in other municipal jurisdictions. Part VII then turns from municipal law to international law, discussing the prospects of proceeding in the International Criminal Court, while Part VIII moves to the dimension of “soft law,” examining two non-legal accountability mechanisms that were invoked in this case.

II. ANVIL IN THE CONGO

Anvil Mining is a multinational enterprise, the parent company of which is incorporated in Canada, with the enterprise’s head office in Australia and mining operations in the Democratic Republic of the Congo and Zambia, as well as interests in mining operations in several other countries.³ Anvil is the largest copper producer in the Congo, although a relatively small player among multinational mining enterprises, recording an annual operational profit of U.S. \$ 107 million in 2006.⁴

The events discussed in this article relate to Anvil’s operations at the Dikulushi copper and silver mine near Kilwa in the province of Katanga in the southeast of the Democratic Republic of the Congo, which commenced operation in October 2002.

The Dikulushi mine is operated by a company called Anvil Mining Congo SARL, incorporated in the Democratic Republic of the Congo. Ninety percent of that company is owned by Anvil Mining Holdings Limited, incorporated in the United Kingdom, and the other ten percent by two trusts, the beneficiaries of which are the local communities affected by the Dikulushi mine. Both trustee companies and the U.K. company are wholly owned subsidiaries of Anvil Mining Management NL, incorporated in Australia. The Australian company is in turn a wholly owned

3. *Id.* at 4.

4. ANVIL MINING ANNUAL REPORT 2006, at 20 (2006).

subsidiary of Anvil Mining Limited, incorporated in Canada.⁵

The part of the Anvil enterprise involved in operating the Dikulushi mine thus consists of six separate companies, each one a separate legal person, incorporated in four different jurisdictions.

A. The Kilwa Incident

On October 14, 2004, a small group of rebels calling themselves the Mouvement Révolutionnaire pour la Libération du Katanga (MRLK) launched a minor insurrection in the mining town of Kilwa, which had a population of around 48,000.⁶ The insurgents met virtually no resistance in Kilwa, and announced the independence of the province of Katanga at a public meeting.⁷ They managed to recruit a group of fewer than 100 to the cause,⁸ some of whom were forcibly recruited, including some minors.⁹ A total of twenty-two weapons plus ammunition were taken from the local police station and military armory.¹⁰ Approximately 90% of the population fled at that point, without any opposition from the insurgents,¹¹ apparently fearing reprisals from the Congolese military.

The United Nations Mission in the Democratic Republic of the Congo (MONUC) reported after the incident:

The insurrection was orchestrated by fewer than 10 people, who were apparently naïve and poorly equipped and who claimed that they belonged to the . . . [MRLK]. This movement was not known

5. ANVIL MINING, *supra* note 2.

6. THE UNITED NATIONS MISSION IN THE DEMOCRATIC REPUBLIC OF THE CONGO, HUM. RTS. DIV., REPORT ON THE CONCLUSIONS OF THE SPECIAL INVESTIGATION INTO ALLEGATIONS OF SUMMARY EXECUTIONS AND OTHER VIOLATIONS OF HUMAN RIGHTS COMMITTED BY THE FARDC IN KILWA (PROVINCE OF KATANGA) ON 15 OCTOBER 2004 ¶¶ 1-3 (2005) (Rights and Accountability in Development (RAID) trans.), available at http://www.raid-uk.org/work/anvil_dikulushi.htm [hereinafter MONUC REPORT]. The MONUC report followed a verification mission conducted by the Special Investigations Unit in the Human Rights Division of MONUC one week after the Kilwa incident in October 2004. *Id.* ¶ 1.

7. *Id.* ¶ 13.

8. *Id.* ¶ 14 (finding that forty people had been recruited in advance of the initial attack, joining the group of six or seven after that initial attack; at least eight policemen, including the chief of police in Kilwa, were also believed to have joined the insurgents).

9. AFRICAN ASSOCIATION FOR THE DEFENCE OF HUMAN RIGHTS, KATANGA (ASADHO/KATANGA), REPORT ON HUMAN RIGHTS VIOLATIONS COMMITTED IN KILWA IN THE MONTH OF OCTOBER 2004, at 8 (2005), available at http://www.abc.net.au/4corners/content/2005/asadho_report_oct2004.pdf [hereinafter ASADHO/KATANGA REPORT]. The ASADHO/Katanga report is the result of an investigative mission in Kilwa and surrounding areas conducted in December 2004, in which investigators met with victims, families, other witnesses, and public officials. Military and police representatives declined to meet with the ASADHO/Katanga mission. The MONUC Report reports claims that some MRLK recruits were forcibly recruited and others coerced with cash payments, and that there were boys aged between fifteen and seventeen among the group, but does not reach a firm conclusion on that point. See MONUC REPORT, *supra* note 6, ¶ 14 n.2.

10. MONUC REPORT, *supra* note 6, ¶ 11.

11. *Id.* ¶ 15.

before the attack on Kilwa. . . . It is highly likely that the MRLK did not prepare this operation alone and that it was manipulated by other parties. However MONUC has been unable to find relevant proof regarding the group which commissioned and supported the MRLK. There are strong suspicions to indicate that high-ranking Congolese military officers may have been implicated in the incident.¹²

Most impartial observers seem to agree that the MRLK members were set up as pawns in a power play by certain Congolese politicians and military officers, leading them to believe that the group would have their support and encouraging the insurrection, only to move in and crush it.¹³

The leader of the MRLK, a twenty-year-old named Alain Kazadi Makalayi,¹⁴ asserted at the public meeting at which he proclaimed the independence of the province of Katanga, that the time of “pocketing money from the mines” was over for President Kabila and his associates.¹⁵ The armed rebels went to Anvil’s fuel depot in Kilwa, asking to talk to the “white people” at the company in Dikulushi, fifty kilometres away, although they “insisted on the fact that they had not come to disturb the company’s activities.”¹⁶ When the Anvil employees refused to negotiate, the rebels became aggressive¹⁷ and stole fuel, trucks, and batteries belonging to Anvil, as well as the personal effects of some of its drivers.¹⁸

The following day, a Congolese military contingent, commanded by Colonel Adémar Ilunga, launched a counter attack against the MRLK in Kilwa.¹⁹ The military bombarded Kilwa before entering it, destroying several houses.²⁰ Upon entering the town, the troops confronted the MRLK insurgents and managed to regain control of Kilwa in less than two hours without suffering any losses,²¹ reportedly killing around thirty of the

12. *Id.* ¶ 3.

13. *See, e.g.*, International Crisis Group, *Katanga: The Congo’s Forgotten Crisis*, 103 AFRICA REPORT 10 (2006).

14. MONUC REP., *supra* note 6, ¶ 10.

15. *Id.* ¶ 13.

16. *Id.* ¶ 14. The lack of hostility by the MRLK towards Anvil and its operations was confirmed in an Anvil Mining Ltd. press release:

The group in Kilwa is reported to comprise somewhere between 50-100 people, the leader of which is not dressed in uniform and wears sandals. In discussions Company security personnel had with the leader in Kilwa yesterday, it was clearly stated that the rebel group had no issues with Anvil, Anvil expatriate personnel, nor the Dikulushi mine. The rebel group appears to be a small band of disaffected individuals seeking representation.

Press Release, Anvil Mining Ltd., Advice on Rebel Activity in Village of Kilwa, DRC (Oct. 15, 2004), <http://www.anvilmining.com/files/2004October15KilwaEvent.pdf>.

17. MONUC REP., *supra* note 6, ¶ 14.

18. ASADHO/KATANGA REP., *supra* note 9, at 13.

19. MONUC REP., *supra* note 6, ¶¶ 2, 16.

20. *Id.* ¶ 17.

21. *Id.*

rebels.²²

Once the military had prevailed over the MRLK, soldiers began house-to-house searches for insurgents and their sympathizers. Congolese non-governmental organization ASADHO/Katanga documented ninety-four cases of individuals summarily executed, noting that the actual number is likely to be higher.²³ Included in that figure is a massacre of forty-seven young men, some of whom had been recruited by the MRLK, who “were brought together by the soldiers and executed using a rocket at the Kabanga river on the orders of Colonel Adémar.”²⁴ Also included is an incident in which “23 people, mainly women, children and old people, who were fleeing Kilwa for Zambia, were arrested, bound and killed with machine-gun fire by soldiers who had taken them for rebels.”²⁵ Numerous individual victims, including many children, are also named and their executions described in both the ASADHO/Katanga and MONUC reports. The MONUC investigation was able to verify twenty-eight cases of summary execution among seventy-three confirmed dead.²⁶

The house-to-house searches also resulted in the looting of homes and shops.²⁷ ASADHO/Katanga documents the rape of three women by the Congolese soldiers, in one case by seven soldiers, and reports that several other women refused to give statements for fear of being rejected by their husbands.²⁸ MONUC reported that eleven suspected rebels were still being detained at the time of the MONUC visit, all of whom had been tortured, and two of whom subsequently died in custody, including Alain Kazadi.²⁹

B. Involvement of Anvil Mining

Anvil Mining has stated that requests for logistical support to the Congolese military for its operation in Kilwa were received from the Governor of Katanga and from Colonel Adémar, and that it complied with those requests.³⁰ That logistical support included the provision of Anvil vehicles and drivers, as well as airplanes chartered by Anvil, to transport Congolese troops.³¹ Anvil also acknowledged providing food rations to the

22. ASADHO/KATANGA REPORT, *supra* note 9, at 4 (quoting a report by Radio Okapi, a U.N.-run radio station in the Congo).

23. ASADHO/KATANGA REPORT, *supra* note 9, at 13-15.

24. *Id.* at 14.

25. *Id.*

26. MONUC REPORT, *supra* note 10, ¶ 24.

27. ASADHO/KATANGA REPORT, *supra* note 9, at 14-17; MONUC Report, *supra* note 6, ¶¶ 33-35.

28. ASADHO/KATANGA REPORT, *supra* note 9, at 14.

29. MONUC REPORT, *supra* note 6, ¶¶ 30-32.

30. *Id.* ¶ 39.

31. *Id.* ¶ 36; *Four Corners: The Kilwa Incident* (Australian Broadcasting Corp. television broadcast 6 June 6, 2005), available at

<http://www.abc.net.au/4corners/content/2005/s1386467.htm> (describing Mwanke as a former governor of Katanga province and a founding board member former director of a

soldiers and contributing to their payment.³² Eyewitnesses have reported that Anvil vehicles were also used to transport looted goods, corpses and detainees, some of whom were destined for execution,³³ although Anvil publicly maintains that it has no knowledge of how its resources were used by the military.³⁴

The origin of Anvil's agreement to provide vehicles and logistical support to the military operation is the central point of contention between the company and its accusers, and is likely to be a key issue in any future legal proceedings, as it was in the completed proceedings in the Congolese military courts, discussed below.

A documentary titled *The Kilwa Incident*, produced by the Australian Broadcasting Corporation's *Four Corners* program, was broadcast on Australian television on June 6, 2005. The program made a number of allegations about Anvil's role in the massacre and brought the incident to international attention.

Since June 7, 2005, the day after the documentary on the Kilwa incident aired, Anvil has consistently claimed that the vehicles were requisitioned by the military.³⁵ An example of that formulation is given in a document circulated by Anvil purporting to be a petition from the traditional chiefs of Kilwa:

It is true that Anvil Mining, at the request of Congolese government, gave some of its vehicles to be used by the Congolese Armed Forces (FARDC) for transport. The Company had no choice because the instruction was in accordance with the Congolese Law No 112/FP et No 170/AIMO of May 15, 1942. This sort of activity is not new in our Country and this type of thing happens all over the world during times of force majeure or times of war.³⁶

A retrospective letter from the Governor of Katanga province to Anvil Mining dated June 11, 2005, produced by Anvil to NGOs, stated:

I hereby confirm the instructions given by the Office of the

wholly owned subsidiary of Anvil Mining Ltd.) (interview with Bill Turner, CEO of Anvil Mining Ltd.).

32. MONUC REPORT, *supra* note 6, ¶ 36.

33. *Id.*; GLOBAL WITNESS, RIGHTS AND ACCOUNTABILITY IN DEVELOPMENT (RAID), ACTION CONTRE L'IMPUNITÉ POUR LES DROITS HUMAINS (ACIDH) AND ASADHO/KATANGA, KILWA TRIAL: A DENIAL OF JUSTICE - CHRONOLOGY OCTOBER 2004 - JULY 2007, at 17 (July 2007) [hereinafter KILWA TRIAL].

34. *Four Corners: The Kilwa Incident*, *supra* note 31 (interview with Bill Turner, CEO of Anvil Mining Ltd.); Drew Hasselback, *Mining Company Denies Helping With Deadly Attack in Congo*, FIN. POST, June 23, 2005.

35. MONUC REPORT, *supra* note 6, ¶ 39; KILWA TRIAL, *supra* note 33, at 12.

36. ANVIL MINING LTD., EXTRACTS OF THE PETITION OF KILWA TRADITIONAL LEADERS (2005), available at

<http://www.anvilmining.com/files/2005August23ExtractfromPetitionofKilwaChiefs.pdf>

(quotation marks omitted).

Governor of the Province to M. Pierre Mercier, the Representative of your company in Lubumbashi, on 14 October 2004 Your Representative was given firm instruction to place at the disposal of the elements of the 6th Military Region logistical means for the transport of troops from Lubumbashi and Pweto to Kilwa and also to the interior of Kilwa.³⁷

The MONUC report highlighted apparent inconsistencies between the insistence that the vehicles and other support were commandeered and the earlier responses given by Anvil representatives during interviews for the *Four Corners* documentary and in Anvil's own reports and press releases.³⁸ The report of the OECD's consultant, by contrast, accepted the claim that the vehicles had been requisitioned, and phrased the pertinent question as follows:

The army division requisitioned Anvil trucks and other equipment, by order of the Governor of the Province, to transport FARDC troops who did the killing and the question is whether Anvil did everything it could to avoid providing these army contingents with its equipment. Should Anvil have done more, short of risking lives, to keep the army from having access to trucks and other vehicles? Should Anvil have suspected what the outcome might have been?³⁹

It is beyond dispute that the atrocities committed by the Congolese military in Kilwa could not have been carried out in the way that they were without the assistance provided by Anvil, whether that assistance was willingly provided or commandeered by the military. MONUC reports that the commander of the relevant military region "informed MONUC that FARDC's intervention, which was conducted to re-establish safety in Kilwa, had been made possible thanks to the logistical efforts provided by

37. RIGHTS AND ACCOUNTABILITY IN DEVELOPMENT (RAID), CONGOLESE MILITARY JUDGE CALLS FOR THE PROSECUTION OF FORMER ANVIL MINING STAFF FOR COMPLICITY IN WAR CRIMES: BACKGROUND BRIEF ON THE KILWA INCIDENT AND ANVIL MINING 3 (2006) [hereinafter BACKGROUND BRIEF].

38. MONUC REPORT, *supra* note 6, ¶ 40. Compare Anvil Mining Ltd., *supra* note 16, with Press Release, Anvil Mining Ltd., Anvil Mining to Resume Operations at Dikulushi Mine, DRC (Oct. 18, 2004), <http://www.anvilmining.com/files/2004october18kilwaevent.pdf> (reporting on the Kilwa incident; neglecting to mention the use of Anvil vehicles or resources by the military, requisitioned or otherwise); Press Release, Anvil Mining Ltd., Report for Quarter Ended December 31, 2004, Jan. 28, 2004, www.anvilmining.com/files/-2006%20January%2016%20%20Asx%20December%20Quarterly%20Report.pdf (same). See also KILWA TRIAL, *supra* note 33, at 12. The World Bank's Compliance Advisor/Ombudsman also noted that the Multilateral Investment Guarantee Agency "had not been notified of . . . [the] October 2004 requisitions until after the *Four Corners* report was screened." COMPLIANCE ADVISOR OMBUDSMAN (CAO), CAO AUDIT OF MIGA'S DUE DILIGENCE OF THE DIKULUSHI COPPER-SILVER MINING PROJECT IN THE DEMOCRATIC REPUBLIC OF THE CONGO 6 (2005).

39. JIM FREEDMAN, OECD AUDIT OF ANVIL MINING LIMITED 2 (2006), available at <http://www.anvilmining.com/download.cfm?B-C29E-198E-8F8DBC083/FFFDFFD>.

Anvil Mining.”⁴⁰

There is some implied suggestion in the reports of MONUC and some non-government organizations active on this issue that Anvil may have had some prior knowledge of the impending military operation, or may have offered to support a military response to the insurgency.⁴¹ However, no allegations along those lines are made directly, and there appears to be little substantial evidence on the public record to support a claim that Anvil was involved in the commission of the atrocities beyond the provision of logistical support.

III. CHARACTERIZATION OF THE ACTS

Given that the events described above have formed the basis of completed and proposed legal and non-legal proceedings, which are discussed in subsequent parts of this article, it is necessary to pause briefly to assess the events against the relevant legal categories. For the purpose of the following legal analysis, the events and allegations set out above are presumed to be true and capable of being proved by evidence admissible in court. That is of course no small assumption and may obscure a significant practical hurdle to pursuing some of the avenues discussed below.

A. International Crimes

The atrocities committed by the Congolese military in the Kilwa incident occurred in the context of armed conflict within the territory of the Democratic Republic of the Congo. They therefore potentially fall within two categories of international crimes: war crimes in a non-international armed conflict and crimes against humanity.

1. War Crimes

Common Article 3 of the four Geneva Conventions applies to both international and non-international armed conflict, and prohibits a range of actions including murder, mutilation, cruel treatment, torture, hostage-taking, and extra-judicial executions.⁴² Common Article 3, which

40. MONUC REPORT, *supra* note 6, ¶ 37.

41. ASADHO/KATANGA, ACIDH & RAID, ANVIL MINING LIMITED AND THE KILWA INCIDENT: UNANSWERED QUESTIONS 18 (2005) [hereinafter UNANSWERED QUESTIONS] (pointing to an Anvil press release from the day the incident began, before the military arrived in Kilwa, stating that it expected “the situation to be resolved within the next 72 hours” and confirming that “the DRC Government has advised Anvil they are moving quickly to return the situation to normal”). See also MONUC REPORT, *supra* note 6, ¶¶ 37, 40.

42. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3(1), Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea art. 3(1), Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva

constitutes customary international law and is therefore binding on all states, does not, however, apply to “unorganized and short-lived insurrections . . . which are not subject to international humanitarian law.”⁴³ Additional Protocol II to the Geneva Conventions, which applies, *inter alia*, to conflicts between government forces and dissident forces, similarly requires protracted armed conflict between the two forces. It also requires at least a level of organization on the part of the dissidents sufficient to carry out planned military operations, impose discipline on its members, occupy a sufficient part of the territory and be in a position to implement the Additional Protocol.⁴⁴

The equivalent provisions in the Rome Statute of the International Criminal Court do not apply “to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.”⁴⁵ Rather, they apply only “to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.”⁴⁶

It is doubtful whether a forty-eight hour insurgency by initially fewer than ten, and at its peak fewer than 100, lightly-armed and disorganized individuals—described in an Anvil press release as “a small band of disaffected individuals seeking representation and the leader of which is not dressed in uniform and wears sandals”⁴⁷—meets the necessary threshold. It is therefore doubtful whether any of the events in the Kilwa incident could be classified as war crimes.

If the Kilwa uprising were nevertheless considered a non-international armed conflict sufficient to invoke international humanitarian law, a number of war crimes could be applicable. On the side of the MRLK, the conscription of children⁴⁸ and the looting of houses of government officials in Kilwa⁴⁹ may amount to war crimes.

On the side of the Congolese military, a large number of war crime categories could be applicable if the threshold of an armed conflict is met. Among the potentially applicable war crimes are: murder of civilians or

Convention Relative to the Treatment of Prisoners of War, art. 3(1), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 3(1), Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Conventions].

43. KRIANGSAK KITTICHAISAREE, INTERNATIONAL CRIMINAL LAW 189 (2001) (footnote omitted).

44. *Id.* at 189-90.

45. Rome Statute of the International Criminal Court art. 8(2)(d), (f), opened for signature July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

46. *See Id.* art. 8(2)(f).

47. Anvil Mining Ltd., *supra* note 16.

48. The offense of conscription of children varies from one regime to another. The Rome Statute, *supra* note 49, art. 8(2)(e)(vii), puts the age limit at fifteen, which appears to be younger than the age of any of the MRLK recruits according to available witness reports. Other regimes, such as Australia, set the age limit at eighteen for forces other than the national armed forces. *See, e.g.*, Criminal Code Act, 1995 § 268.88 (Austl.).

49. *See, e.g.*, Rome Statute, *supra* note 45, art. 8(2)(e)(v).

persons taking no active part in the conflict,⁵⁰ torture,⁵¹ summary execution,⁵² attacking civilians,⁵³ pillaging,⁵⁴ and rape.⁵⁵

2. Crimes Against Humanity

The more plausible characterization of the events in Kilwa,⁵⁶ at least in relation to the actions of the military after the insurgency had been quelled, is “a widespread or systematic attack directed against a civilian population.”⁵⁷ International criminal law provides that a series of enumerated crimes, when committed in the context of such an attack, will constitute a crime against humanity. “Attack against a civilian population” is further defined in the Rome Statute as “a course of conduct involving the multiple commission of [enumerated] acts . . . against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.”⁵⁸

In that context, Colonel Adémar’s forces are potentially liable for the crimes against humanity of murder,⁵⁹ unlawful imprisonment,⁶⁰ torture,⁶¹ rape,⁶² and enforced disappearance.⁶³

50. See, e.g., Geneva Conventions, *supra* note 42, art. 3(1)(a); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 4(2)(a), June 8, 1977, 1125 U.S.T.S. 609 [hereinafter Additional Protocol II], art. 4(2)(a); Rome Statute, *supra* note 45, art. 8(2)(c)(i).

51. See, e.g., Geneva Conventions, *supra* note 42, art. 3(1)(a); Additional Protocol II, *supra* note 50, art. 4(2)(a); Rome Statute, *supra* note 45, art. 8(2)(c)(i).

52. Geneva Conventions, *supra* note 42, art. 3(1)(d); Additional Protocol II, *supra* note 50, art. 4(2)(a) and 6(2); Rome Statute, *supra* note 45, art. 8(2)(c)(iv).

53. Rome Statute, *supra* note 45, art. 8(2)(e)(i).

54. *Id.* art. 8(2)(e)(v).

55. *Id.* art. 8(2)(e)(vi).

56. However, note contradictory authority from the United States District Court for the Northern District of California in the analogous case of *Bowoto v. Chevron*, No. C 99-020506SL, 2006 WL 2455752 (N.D. Cal. Aug. 22, 2006), discussed below. Allegations of killings by the Nigerian military, allegedly facilitated by Chevron, were found not to amount to crimes against humanity for the purposes of the Alien Tort Claims Act. That decision relied on the conclusion that the victims were targeted because they were protesters, rather than merely because they were civilian residents of a particular area (distinguishing the decision of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v. Galic*, Case No. ICTY-98-29, Judgment (Dec. 5, 2003)). The facts in the Kilwa incident probably align more closely to *Galic* than to *Bowoto* in terms of targeting a civilian population, therefore overcoming the barrier to characterization as a crime against humanity identified in *Bowoto*.

57. Rome Statute, *supra* note 45, art. 7(1). See also Statute of the International Criminal Tribunal for Rwanda art. 3, Nov. 8, 1994, 33 I.L.M. 1598; Statute of the International Criminal Tribunal for the Former Yugoslavia art. 3, Sept. 25, 1991, 32 I.L.M. 1203.

58. Rome Statute, *supra* note 45, art. 7(2)(a).

59. *Id.* art. 7(1)(a).

60. *Id.* art. 7(1)(e).

61. *Id.* art. 7(1)(f).

62. *Id.* art. 7(1)(g).

63. *Id.* art. 7(1)(i).

3. Anvil's Culpability for Aiding and Abetting

Anvil Mining and its employees and officers have never been accused of directly perpetrating any of the crimes listed above. However, Anvil's provision of logistical support to the military operation potentially constitutes aiding or abetting war crimes or, more plausibly, crimes against humanity committed by Colonel Adémar's forces at Kilwa. Under the Rome Statute, a defendant will be criminally responsible if that person, "[f]or the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission . . ."⁶⁴

It is not disputed that Anvil provided the means for the commission of the military's actions. Therefore, if the actions thus facilitated constitute crimes, then the *actus reus* for aiding and abetting those crimes on the part of Anvil and/or its employees or officers is established. What remains to be established is the *mens rea*. Under customary international law and the jurisprudence of the International Criminal Tribunals of Rwanda and the Former Yugoslavia, the accessory must have knowledge that "his actions assist the perpetrator in the commission of the crime."⁶⁵ It is not necessary that the accessory share the intention of the principal perpetrator to commit the crime.⁶⁶ Therefore, if the conduct of the military constitutes an international crime, and if the provision of logistical support by Anvil was made with awareness that criminal conduct was likely to result, or at least with recklessness as to whether criminal conduct would result, culpability for aiding and abetting such crimes will be made out in the absence of any applicable defenses.

4. Defenses

Although compliance with superior orders has not been available as a general defense in international criminal law since the Nuremberg trials, compliance with an order of the government will operate as a defense if the defendant was legally obliged to obey that order, did not know that the order was unlawful, and the order was not manifestly unlawful.⁶⁷ If indeed Anvil's provision of logistical support was in response to a mandatory order of the government,⁶⁸ the availability of the defense will turn on the lawfulness of the order, and if it was unlawful, the knowledge on the part of Anvil or its officers or employees that the order was unlawful.

64. *Id.* art. 25(3)(c).

65. Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶ 236 (Dec. 10, 1998).

66. *Id.* ¶ 236; ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 188 (2003); KITTICHAISAREE, *supra* note 43, at 244.

67. Rome Statute, *supra* note 45, art. 33(1).

68. Anvil maintains that it was obliged to comply with the alleged request "because the instruction was in accordance with the Congolese Law No 112/FP et No 170/AIMO of May 15, 1942." Anvil Mining Ltd. *supra* note 36, at 1.

If an order was given, and the order was lawful—which is doubtful given the purposes to which the vehicles and other logistical support were deployed—Anvil’s obedience to that order will fall within this defense as it is constructed in the Rome Statute. If the order was unlawful, in that it was beyond the power of the authority that gave it because the requisition was for the purpose of committing the atrocities described above, there would be no legal obligation to obey it.

The questions of the degree to which Anvil’s provision of assistance was voluntary, and the knowledge on the part of Anvil and its officers or employees of the likely effects of providing such assistance, are therefore vital to the assessment of criminal culpability. However, the determination of that factual point, and with it the condemnation or exoneration of Anvil, is not the purpose of this article, which is focused instead on the adequacy of the jurisdictional avenues that have been deployed (or not deployed) in response to the allegations. For present purposes, it should simply be noted that the circumstances in which the assistance was provided is a contested and crucial point in all the proceedings discussed here.

Another possible defense would be duress, which is available if the criminal conduct is committed in response to a “threat of imminent death or of continuing or imminent serious bodily harm against that person or another person”⁶⁹ For duress to be available, the response must be proportionate in the sense that the defendant, in responding to the threat, did not intend to cause harm greater than the harm that was threatened.⁷⁰

A media report from October 2006 reported:

Anvil confirmed it loaned a plane and vehicles to the army, but said it “had absolutely no choice” but to accede to a government request for logistical support. “When the army arrives with AK-47s . . . you give them what they want,” said Anvil spokesman Robert LaValliere, recalling that troops had commandeered vehicles at gunpoint in a previous clash with rebels earlier that year.⁷¹

The inference is that a threat to life for not complying with the requisition request relating to the Kilwa incident was implied by the context of a recent acrimonious requisition of Anvil vehicles by the Congolese military.⁷² If taken at face value, such an implication could provide an arguable case for duress, although the question of

69. Rome Statute, *supra* note 45, art. 31(1)(d).

70. *Id.*

71. Kelly Patterson, *African Tribunal Cites Canadian Company for Role in Massacre*, NAT’L POST, Oct. 17, 2004.

72. See also Press Release, Anvil Mining Ltd., *Anvil Confirms Denial of Unfounded Allegations* (June 21, 2005), <http://www.anvilmining.com/go/investor-relations/news-releases> (“Given Anvil’s previous experience with rebel activity in the Kilwa area, during which Anvil’s vehicles were, after initial resistance, commandeered at gunpoint, Anvil had absolutely no choice but to provide the transport required by the DRC Military . . .”).

proportionality would still be problematic if the massacre ultimately carried out by the Congolese troops was considered to have been foreseeable. However, as discussed above, the manner in which the logistical support was provided remains a matter of dispute.⁷³

B. Violations of International Human Rights Law

The actions in Kilwa of the Congolese soldiers, as state agents, violate a large number of human rights drawn from instruments to which the Democratic Republic of the Congo is a party and from customary international law. Among those human rights violated in the Kilwa incident are the right not to be arbitrarily deprived of one's life,⁷⁴ freedom from torture, inhuman or degrading treatment,⁷⁵ freedom from arbitrary arrest or detention,⁷⁶ and the right to property.⁷⁷

The responsibility of non-state actors, including individuals and corporations, for human rights under international law is more controversial. While the legal accountability of such non-state actors is currently a matter of vigorous debate among scholars and within international organizations,⁷⁸ it is beyond doubt that the actions of non-state actors are capable of infringing the human rights of individual victims. In the Kilwa incident, it is not disputed that over one hundred victims were deprived of their lives, or were tortured, or were unlawfully detained, or were raped, or had their belongings looted as a result of the actions of the Congolese military, facilitated by the logistical support provided by Anvil.

If corporations and their agents are to have legal responsibility for human rights under international law, the character of that responsibility must be different from that of states, given the very different roles of the two types of entity. To that end, the United Nations Sub-Commission on the Promotion and Protection of Human Rights compiled in 2003 the Norms on the Responsibilities of Transnational Corporations and Other

73. See *supra* notes 39-43 and accompanying text.

74. Convention on the Rights of the Child art. 6(1), Sept. 2, 1990, 1577 U.N.T.S. 3; African Charter on Human and Peoples' Rights, art. 4, Oct. 21, 1986, 1520 U.N.T.S. 217 [hereinafter AfCHPR]; International Covenant on Civil and Political Rights art. 6(1), Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR].

75. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, arts. 2, 16, June 26 1987, 1465 U.N.T.S. 85; ICCPR, *supra* note 74, art. 7.

76. AfCHPR, *supra* note 74, art. 6; ICCPR, *supra* note 74, art. 9.

77. AfCHPR, *supra* note 78, art. 14.

78. See Commission on Human Rights, *Human Rights and Transnational Corporations and Other Business Enterprises*, CHR Res. 2005/69, in U.N. Doc. E/CN.4/2005/L.20/Add.17 (Apr. 20, 2005); John Ruggie, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, U.N. Doc. A/HRC/4/035 (Feb. 9, 2007). For a comprehensive scholarly examination of the issue, see ANDREW CLAPHAM, *HUMAN RIGHTS OBLIGATIONS OF NON-STATE*

ACTORS (2006).

Business Enterprises with Regard to Human Rights (U.N. Norms),⁷⁹ which aim to distill the human rights responsibilities of corporations into twelve substantive paragraphs. Under the regime envisioned by the U.N. Norms, states still retain the primary responsibility for the realization of human rights, but corporations have a concurrent responsibility to secure human rights within their respective spheres of activity and influence.⁸⁰

Most pertinent to the Kilwa incident is the following paragraph from the UN Norms:

Transnational corporations and other business enterprises shall not engage in nor benefit from war crimes, crimes against humanity, genocide, torture, forced disappearance, forced or compulsory labour, hostage-taking, extrajudicial, summary or arbitrary executions, other violations of humanitarian law and other international crimes against the human person as defined by international law, in particular human rights and humanitarian law.⁸¹

The U.N. Norms further provide: "Transnational corporations and other business enterprises shall refrain from any activity which supports, solicits, or encourages States or any other entities to abuse human rights."⁸² The commentary to the U.N. Norms states:

Transnational corporations and other business enterprises shall have the responsibility to use due diligence in ensuring that their activities do not contribute directly or indirectly to human abuses, and that they do not directly or indirectly benefit from abuses of which they were aware or ought to have been aware.⁸³

If the U.N. Norms are accepted as reflecting the human rights responsibilities of corporations, then the provision of logistical support to the Congolese military by Anvil in the Kilwa incident could amount to a violation if the manner in which the support was provided amounts to a failure to use due diligence to avoid complicity in human rights abuses by the military. Once again, the questions surrounding the character of the

79. United Nations Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003) [hereinafter *U.N. Norms*]. The *U.N. Norms* were adopted by the Subcommission on the Promotion and Protection of Human Rights on 13 August 2003 by resolution 2003/16, contained in U.N. Doc. E/CN.4/Sub.2/2003/L.11 at 52 (Aug. 13, 2003).

80. *Id.* ¶ 4.

81. *Id.* ¶ 5.

82. *Id.* ¶ 13.

83. United Nations Sub-Comm'n on the Protection and Promotion of Hum. Rts., *Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, ¶ 1(b), U.N. Doc. E/CN.4/Sub.2/2003/38/Rev.2 (Aug. 26, 2003).

provision of logistical support are crucial in identifying Anvil's responsibility.

However, it should be noted that even if the U.N. Norms are accepted as an accurate statement of human rights responsibilities for corporations, there is currently no mechanism available under international law to enforce those responsibilities. It is possible that some mechanisms under municipal law discussed below could provide an enforcement avenue, particularly the Alien Tort Claims Act in the United States, although that possibility remains speculative for the time being.

IV. CRIMINAL PROCEEDINGS IN THE CONGOLESE MILITARY COURTS

A. The Trial and the Appeal

In July 2005, following pressure from MONUC and civil society both in the Congo and internationally, Congolese authorities commenced an investigation into the possibility of criminal charges arising from the Kilwa incident. In October 2006, a military judge confirmed charges of war crimes and other violations of international humanitarian law incorporated into Congolese military law against Colonel Adémar and eight of his subordinates.⁸⁴ The charges against the military defendants included twenty-six instances of summary execution of victims who were not involved in the insurgency, arbitrary detention, rape, and looting.⁸⁵ Colonel Adémar was also charged with shelling the town with mortar bombs – destroying several homes – without assessing the threat.

Charges were also laid against three individual employees of Anvil Mining for knowingly facilitating the crimes perpetrated by the military, although the company itself was not charged.⁸⁶ In relation to the provision of vehicles, court documents alleged that the three Anvil employees “voluntarily failed to withdraw the vehicles placed at the disposal of the 62nd Brigade in the context of the counter-offensive of October 2004 to recapture the town of Kilwa.”⁸⁷ The Anvil employees were tried jointly with the military defendants in a trial before the Military Court of Katanga commencing on December 12, 2006.

While the trial was underway, five Congolese and British NGOs

84. Congolese Pub. Prosecutor v. Colonel Adémar Ilunga, Military Court of Katanga, Case No. RP 010/06 (2007).

85. KILWA TRIAL, *supra* note 33, at 9; David Lewis, *Congo Court Urges Massacre Trial for Foreign Miners*, REUTERS, Oct. 16, 2006; *War Crimes Trial Opens in DRC*, NEWS 24, Dec. 13, 2006, http://www.news24.com/News24/Africa/News/0,,2-11-1447_2044104,00.html (last visited June 5, 2008).

86. Earlier reports had implied that the company itself faced criminal charges until the situation was clarified by the prosecutor in pre-trial proceedings. The three individuals were Peter van Niekerk and Cedric Kirsten, both South African nationals who were reportedly in charge of Anvil's security at the Dikulushi mine at the time, and Pierre Mercier, a Canadian national and the former general manager of Anvil's Congolese subsidiary.

87. Global Witness, *supra* note 1, at 7, quoting *Décision de renvoi*, Colonel Magistrat Eddy Nzabi Mbombo, *Auditeur militaire supérieur près la cour militaire du Katanga* (Oct. 12, 2006).

criticized certain aspects of the trial process.⁸⁸ When the original prosecutor was transferred and replaced, NGOs denounced it as political interference and an obstruction of justice.⁸⁹ MONUC had earlier expressed concern that the prosecutor had been pressured to drop the charges against the Anvil Mining employees.⁹⁰ When the court hearings moved from Lubumbashi to Kilwa in May 2007, as the NGOs had been urging in order to facilitate the testimony of victims, the victims' lawyers were prevented from travelling to the remote village, leading NGOs to allege that the integrity of the trial had been undermined.⁹¹ MONUC trial observers also expressed concern about the impartiality of the presiding judge, the conduct of cross-examinations and the failure to summon key prosecution witnesses.⁹² Allegations were also made that the governor of the province had publicly urged witnesses not to make "gratuitous allegations" against Anvil, which "was working for their benefit," and pressured traditional chiefs to "dissuade victims from participating in the trial."⁹³

At the conclusion of the trial, the prosecutor reportedly called for life imprisonment for eight of the nine military defendants, but recommended that the ninth soldier and the three Anvil employees be acquitted.⁹⁴ In the case of the Anvil employees, the prosecutor reportedly "concluded that there was insufficient evidence to establish that Anvil Mining or its employees had participated in war crimes, so recommended that the three Anvil Mining employees be acquitted of the charge of complicity in war crimes in the absence of the element of intent."⁹⁵

On June 28, 2007, the court delivered a judgment acquitting all the defendants of all charges relating to the Kilwa incident, although Colonel Adémar and three other military defendants were convicted on charges relating to a separate incident included in the indictment.⁹⁶ The court concluded that the deaths in Kilwa were caused by fighting between rebels and the military and did not amount to war crimes.⁹⁷ The court further held that the Anvil employees had been coerced into handing over the

88. Press Release, Action Contre l'Impunité pour les Droits Humains (ACIDH), Human Rights Groups Denounce Obstruction of Justice Following Transfer of Kilwa Trial's Military Prosecutor (Mar. 12, 2007), http://www.raid-uk.org/docs/Press_Releases/PR_Kilwa_Trial_ENG_12MAR07.pdf.

89. *Id.* ("The NGOs . . . fear political interference and conflicts of interest could jeopardise the court's independence . . .").

90. U.N. HIGH COMM'R HUM. RTS., MONUC HUM. RTS. DIV., THE HUMAN RIGHTS SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO (DRC) JULY - DECEMBER 2006, ¶ 100 (2007).

91. KILWA TRIAL, *supra* note 33, at 18.

92. *Id.* at 23.

93. *Id.* (internal punctuation omitted).

94. *Id.* at 24 (internal citation omitted).

95. *Id.*

96. Trial Watch, Adémar Ilunga, http://www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/ademar_ilunga_618.html (last visited June 5, 2008). The separate incident involved the arbitrary detention and murder of two men in Pweto in January 2005. *Id.*

97. KILWA TRIAL, *supra* note 33, at 25.

vehicles and providing other support,⁹⁸ and therefore were not liable for aiding and abetting any crimes that may have been perpetrated with that support.

The court's verdict was promptly criticized by the United Nations High Commissioner for Human Rights. On July 4, 2007, the High Commissioner issued a press release which read: "I am concerned at the court's conclusions that the events in Kilwa were the accidental results of fighting, despite the presence at the trial of substantial eye-witness testimony and material evidence pointing to the commission of serious and deliberate human rights violations."⁹⁹ She then referred to the findings of the MONUC report that contradicted the court's conclusions. While making no direct reference to the role of Anvil Mining, the High Commissioner's press release "criticized the military court's assumption of jurisdiction over civilians in this case. 'It is inappropriate and contrary to the DRC's international obligations for military courts to try civilians. While military personnel can in principle be charged by court martial, civilians may not—they should be tried before fair and independent civilian courts.'"¹⁰⁰

The High Commissioner thus came as close as diplomatic language permits to labelling the Congolese military trial biased and its decision wrong. Referring to a prospective appeal, she proclaimed: "I am pleased that an appellate instance will have the opportunity to revisit these findings. I urge the appeal court to fully and fairly weigh all the evidence before it reaches the appropriate conclusions that justice and the rights of the victims demand."¹⁰¹

An appeal by Colonel Adémar and his co-defendants against their convictions on the charges not relating to Kilwa was heard by the Military Appeal Court on December 9, 2007, along with a separate appeal by the prosecutor and the victims of Kilwa. On December 21, 2007, the appellate court ruled that the scope of the appeal would be limited to the events which led to convictions,¹⁰² thus effectively excluding the prosecutor's appeal. At the time of writing, it remains unclear on what basis the court reached that decision, although NGOs have alleged that it was the result of improper interference by a different prosecutor to amend the original prosecutor's appeal.¹⁰³

The result of the criminal proceedings before the Congolese military courts is that no individuals have been convicted of any crimes, whether as direct perpetrators or aiders and abettors, arising from the Kilwa incident. While there have been confused reports about Anvil Mining Limited, as a

98. Trial Watch, *supra* note 94.

99. Press Release, U.N. High Comm'r Hum. Rts., High Commissioner for Human Rights Concerned at Kilwa Military Trial in the Democratic Republic of the Congo (July 4, 2007).

100. *Id.*

101. *Id.*

102. Press Release, Global Witness and RAID, Military Court of Appeal Succumbs to Political Interference in Kilwa Trial (Dec. 21, 2007).

103. *Id.*

juridical person, being charged¹⁰⁴ and later being “cleared,”¹⁰⁵ it seems clear that the criminal culpability of any of the Anvil companies themselves has never in fact been tested, even though three of Anvil’s employees were acquitted of criminal involvement in the Kilwa incident. However, there have been serious allegations from NGOs and the United Nations of impropriety in regard to the fairness of the trials and political interference.

In a broader context, U.N. human rights bodies have expressed grave concern about the Congolese military courts as appropriate institutions for the administration of justice. In its concluding observations on the 2006 periodic report of the Democratic Republic of the Congo under the International Covenant on Civil and Political Rights, the Human Rights Committee reported: “The Committee is concerned at the continued existence of military courts and at the absence of guarantees of a fair trial in proceedings before these courts.”¹⁰⁶ The committee went on to express concern about the “clearly insufficient number of active judges in the Democratic Republic of the Congo, and [] the low pay they receive, which frequently results in their corruption.”¹⁰⁷

The Special Rapporteur on the Independence of Judges and Lawyers, following his visit to the Democratic Republic of the Congo, reported the following conclusion:

Very alarmingly, most human rights violations are committed by the armed forces and the police and fall, under domestic legislation, within the jurisdiction of the military tribunals. International human rights standards require that cases of human rights violations by members of the armed forces, like trials of civilians, should be heard by civilian, not military courts. This is all the more important because the lack of independence particularly affects the military judicial system, which remains dependent on the military hierarchy. Military justice continues to be tarnished by a very high incidence of military and political interference in the form of refusals by senior officers to bring their men before military tribunals, and pressure and obstacles during the trial process.¹⁰⁸

104. ASSOCIACIÓ CATALANA D’INTEGRACIÓ I DESENVOLUPAMENT HUMÀ (ACIDH) ET AL., PROCEEDINGS OF THE MILITARY COURT OF KATANGA IN THE CASE OF THE CONGOLESE PUBLIC PROSECUTOR AND PARTIES CIVILES VERSUS COLONEL ADÉMAR ILUNGA AND ASSOCIATES: LEGAL UPDATE 2 (2005).

105. Press Release, Anvil Mining Ltd., Anvil and its Employees Acquitted in Kilwa Incident (June 28, 2007).

106. Human Rights Committee, *Concluding Observations on the Democratic Republic of the Congo*, ¶ 21, U.N. Doc. CCPR/C/COD/CO/3 (Apr. 26, 2006).

107. *Id.*

108. Leandro Despouy, *Report of the Special Rapporteur on the Independence of Judges and Lawyers: Preliminary Note on the Mission to the Democratic Republic of the Congo Delivered to the Human Rights Council and the General Assembly*, ¶ 4, U.N. Doc. A/HRC/4/25/Add.3 (May 24, 2007).

In relation to the Congolese judicial system in general, the Special Rapporteur observed: "Interference by the executive authorities and the army remains very common despite the express prohibition in . . . the Constitution."¹⁰⁹ His report concluded that "the judicial system is rarely effective and that human rights violations, the most frequent and serious of which are rapes, summary executions, arbitrary detention, and looting and destruction of property, generally go unpunished."¹¹⁰

Given the very serious misgivings at the highest international levels about the Congolese justice system in general, the use of military courts in particular, and the specific criticisms of the conduct of the trials in the Kilwa case, there is at least an arguable case that the processes followed in the Congolese military trials were flawed and that the acquittals that resulted were tainted. The conclusions reached on the propriety of the Congolese proceedings are critically important to the fate of other potential avenues for recourse examined below.

B. Double Jeopardy: Implications for Further Proceedings

The principle of double jeopardy, which operates both at the international level and in many municipal jurisdictions, operates to prevent a person from being prosecuted for a crime in relation to the same conduct for which he, she, or it has already been convicted or acquitted in the same jurisdiction. It is controversial whether double jeopardy applies across different jurisdictions to preclude prosecution in one state for conduct that has already been the subject of a prosecution in another state. Cassese suggests that it is doubtful that double jeopardy across jurisdictions constitutes a rule of customary international law and gives several examples of state practice in which double jeopardy has been disregarded.¹¹¹ The current consensus appears to be that states will not launch a fresh prosecution unless they have a particularly strong interest in the alleged offense. For instance, if an incident took place on that state's territory, or there were serious questions about the fairness of the original trial, a state may be more likely to revisit a matter that has already been prosecuted.¹¹²

In the Anvil case, the presumption would therefore be that other states would not exercise criminal jurisdiction over the matter unless there was either a strong interest of that state involved or serious misgivings about the Congolese proceedings, and in reality, probably both.

As discussed below in Part V, the Australian Federal Police began an investigation into possible criminal culpability of the company and/or its employees under Australian law in mid-2005. However, no charges were laid, and the police notified the company shortly after the acquittal in the

109. *Id.*

110. *Id.* ¶ 5.

111. CASSESE, *supra* note 66, at 319-20.

112. *Id.* at 320.

Congolese trial that the investigation had concluded.¹¹³ The timing of that notification strongly suggests that the Australian Federal Police were deferring to the verdict of the Congolese courts pursuant to the double jeopardy principle. However, even if Australian authorities considered that the double jeopardy principle should preclude them from charging the three individuals who were acquitted in the Congolese trial, it should not preclude charges against the company itself, which was never prosecuted in Congolese courts.

The jurisdiction of the International Criminal Court (ICC) generally yields to the principle of double jeopardy, or *ne bis in idem*, but makes exceptions in the case of sham trials or cases that otherwise fail to observe due process. Article 20, paragraph 3 of the Rome Statute provides:

No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or

(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.¹¹⁴

While it seems far-fetched to assert that the trial was essentially contrived to acquit the defendants and thereby shield them from the jurisdiction of the ICC, as Article 20, paragraph (3)(a) requires, the shortcomings in the trial process alleged by NGOs and the United Nations both during and after the trial could form the basis of at least a *prima facie* case that the trial was flawed in the manner described in paragraph (3)(b), particularly given that the trials occurred in the military system rather than civilian courts. If Article 20, paragraph (3)(b) were held to apply, individuals involved in the Kilwa incident could be charged before the ICC, although the Anvil corporation could not.¹¹⁵ This possibility is discussed in a separate section below.

While the proceedings in the Congolese military courts do not necessarily preclude fresh criminal trials in other states or in an

113. ANVIL MINING LTD., MANAGEMENT'S DISCUSSION AND ANALYSIS OF FINANCIAL CONDITIONS AND RESULTS OF OPERATIONS 15 (2007).

<http://www.anvilmining.com/files/07071113%20MDA%20Sep.pdf>.

114. *Id.*, art. 20(3).

115. *Id.*, art. 25(1) (providing that the ICC has jurisdiction only over natural persons).

international court, particularly if the Congolese proceedings are considered to fall short of the required standards of fairness and due process, at the very least the concluded criminal process in the Congo may dampen the enthusiasm of prosecutors in other jurisdictions. Persevering with the matter in another jurisdiction will demand political and diplomatic explanations, acting as a disincentive that will require strong motivation or competing pressure from another source to be overcome. That the Australian Federal Police investigation concluded without charges being laid appears to be a case in point. While double jeopardy is not an absolute legal bar to further proceedings against the acquitted defendants, and arguably no bar at all to proceedings against the corporation and its other officers and employees, it certainly operates as a political anchor dragging on any such proceedings.

The double jeopardy principle has no bearing whatsoever on non-criminal proceedings, and should therefore make no difference to civil actions or the use of non-legal recourse mechanisms. Even so, the acquittals from the Congolese military courts can provide cover for an authority that does not wish to investigate, on the basis that the matter has already been investigated and concluded, and that “forum shopping” ought to be discouraged. The acquittals also present a problem for further proceedings by creating the general impression that responsibility has been disproved in another forum. For these non-criminal avenues, the Congolese acquittals create no legal bar to proceeding but can cause significant political and psychological hurdles.

V. PROCEEDINGS IN AUSTRALIA

Meanwhile, steps have been taken under Australian law to seek to hold Anvil Mining and/or its employees and officers accountable for their involvement in the Kilwa incident on the basis of Australia’s jurisdiction as the home state of the enterprise. The following sections consider a police investigation as to whether to charge Anvil-related defendants under an Australian criminal law which incorporates international criminal law, followed by a proposal to initiate civil litigation against the enterprise in Australia.

A. Avenues Invoking International Criminal Law

In Australia, the extraterritorial offenses of genocide, crimes against humanity, and war crimes were enacted in the Commonwealth Criminal Code to give effect to the crimes within the ICC’s jurisdiction under Australian law.¹¹⁶ Whether by accident or by design,¹¹⁷ liability for those

116. Criminal Code Act, 1995, § 268 (Austl.), *amended by* International Criminal Court Act, 2002 (Austl.).

117. Joanna Kyriakakis queries whether parliament intended to extend the application of the new provisions to corporations, although that is clearly the effect of the statute as

offenses extends to corporations as well as natural persons by virtue of part 2.5 of the Criminal Code.¹¹⁸ As a result, Australian criminal law apparently goes where the Rome Statute feared to tread, imposing criminal liability upon corporations for gross human rights abuses committed abroad and conferring universal jurisdiction over such crimes.

The fact that the Anvil enterprise involved in running the Dikulushi mine comprises several separate legal persons incorporated in four different states is no obstacle to the prosecution of any or all of those companies under Australian law. Although for most crimes under Australian law there must be a jurisdictional nexus, such as the events occurring within Australian territory, having an effect within Australian territory, or being committed by an Australian national, the crimes in division 268 of the Criminal Code that mirror the Rome Statute expressly adopt an extended mode of jurisdiction equivalent to universal jurisdiction.¹¹⁹ The Australian legislation therefore asserts jurisdiction over not only the company incorporated in Australia, Anvil Mining Management NL, but also the other companies in the Anvil enterprise. The fact that the head office of the enterprise is in Australia¹²⁰ arguably provides sufficient practical justification for invoking that jurisdiction.

In June 2005, lawyers acting on behalf of Rights and Accountability in Development (RAID), an NGO active in relation to the Kilwa incident, asked the Australian Federal Police to investigate the potential culpability of Anvil Mining and/or its officers or employees for war crimes or crimes against humanity under the Commonwealth Criminal Code.¹²¹ A similar request was made by the Australian Department of Foreign Affairs and Trade in September 2005.

Given that the Australian legislation mirrors the Rome Statute, the offenses potentially applicable would be the same war crimes or crimes against humanity identified above.¹²² Any culpability attaching to a company within the Anvil Mining enterprise as a legal person, or to natural persons involved in directing or carrying out Anvil's operations,

constructed. Joanna Kyriakakis, *Australian Prosecution of Corporations for International Crimes*, 5 J. INT'L CRIM. JUST. 809, 815-16 (2007).

118. Criminal Code Act, 1995, Pt. 2.5 (Austl.) provides that the Code applies to "bodies corporate" in the same way as it applies to individuals, and makes the modifications in relation to issues such as knowledge, intention and punishments in lieu of imprisonment necessitated by applying criminal law to juridical rather than natural persons.

119. *Id.* §§ 15.4, 268.117.

120. Anvil Mining, *supra* note 4, at 65, describes the Australian office in Perth as the "principal place of business" of Anvil Mining Ltd.

121. *Radio National: The Law Report* (Australian Broadcasting Corp. radio broadcast Aug. 2, 2005), transcript available at <http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s1426935.htm>.

122. The equivalent provisions in the Criminal Code Act, 1995 (Austl.), for war crimes are sections 268.70 (murder), 268.72 (cruel treatment), 268.73 (torture), 268.76 (sentencing or execution without due process), 268.77 (attacking civilians), 268.81 (pillaging) and 268.82 (rape). The provisions for crimes against humanity are sections 268.8 (murder), 268.12 (imprisonment or other severe deprivation of physical liberty), 268.13 (torture), 268.14 (rape) and 268.21 (enforced disappearance of persons).

would be on the basis of aiding and abetting the principal offenders in the Congolese military.¹²³

One potentially significant difference between the Australian legislation and the Rome Statute is the construction of the defense for obeying superior orders. In relation to war crimes, the Criminal Code allows the defense of obeying a government order under similar circumstances to those specified in the Rome Statute.¹²⁴ However, in relation to genocide and crimes against humanity, the defense of superior orders is expressly excluded.¹²⁵ Given that the definition of committing an offense under the Criminal Code includes aiding and abetting the commission of that offense,¹²⁶ the defense of obeying a government order will not be available to a defendant charged with aiding and abetting the commission of a crime against humanity.

Although it is public knowledge that possible offenses under the Criminal Code were being investigated in relation to the Kilwa incident,¹²⁷ no announcement was ever made as to which companies or individuals were being investigated or which charges were being considered. Soon after the verdict of the Military Court of Katanga in June 2007 acquitting three Anvil employees in relation to the Kilwa incident, the Australian Federal Police concluded its investigation without laying any charges. That development was publicly reported by Anvil Mining in the following terms:

During the September quarter, the Company received notification from the Australian Federal Police that there was insufficient evidence to substantiate that the actions of Anvil in connection with military action by the Forces Armées de la République Démocratique du Congo at Kilwa in the Katanga province in October, 2004 amounted to an offence against the provisions of the Criminal Code Act 1995.¹²⁸

Aside from the statement by Anvil, there has been no public report on the outcome of the investigation. As noted above, the timing of the apparent conclusion of the Australian Federal Police investigation so soon after the acquittal of the defendants in the trial before the Military Court of Katanga suggests deference to the Congolese process. However, Australian law does not preclude fresh prosecution of the same individual

123. Liability for aiding and abetting is set out in the Criminal Code Act, *id.* § 11.2.

124. *Id.* § 268.116(3).

125. *Id.* § 268.116(1).

126. *Id.* § 11.2(1).

127. See, e.g., James Madden, *Aussie Mining Firm's 'Conflicting Stories' on Congo Bloodshed*, AUSTRALIAN, Sept. 29, 2005, at 6 (reporting that an investigation was launched by the Australian Federal Police in August 2005). See also Fergus Shiel, *Australian Miner Escapes Congo Kill Blame*, AGE, Feb. 8, 2006, at 3.

128. Anvil Mining Ltd., *supra* note 113, at 15.

defendants for the conduct that was the subject of the Katanga trial,¹²⁹ and it certainly does not preclude prosecution of the companies, which have yet to be prosecuted in any other jurisdiction. If indeed the Australian Federal Police investigation was dropped in deference to the acquittals in the Congo, as opposed to an independent conclusion about the merits of proceeding with a prosecution in Australia, that decision constitutes a triumph of political considerations over legal ones, giving credence to the suggestion that the content of applicable law and its theoretical coverage will be irrelevant in the absence of political will to apply that law.

B. Australian Tort Law

It has been widely reported that an Australian law firm representing some of the victims of the Kilwa incident is preparing civil litigation in Australia.¹³⁰ At the time of writing, proceedings had not yet been initiated, although the plaintiffs had sought preliminary discovery in the Supreme Court of Western Australia – the jurisdiction in which Anvil’s head office is located. The precise identity of the defendants, the cause of action and the specific allegations made against the defendants have therefore not yet been finally determined.¹³¹

From the victims’ point of view, the advantage of civil litigation is that it does not depend on the discretion of any public authority or decision-maker to be commenced. Accordingly, the fact that the prosecutions in the Congolese military court ended in acquittals will not have the chilling effect on the commencement of civil litigation that it might have had on the Australian police investigation and the soft law avenues described below, or on the likelihood of a prosecution before the ICC. Civil litigation is therefore probably the best remaining option for the victims, despite the fact that it requires a more convoluted approach than a criminal proceeding, given the difficulties likely to be imposed by the separate legal personality of each company within the enterprise, and by the need to prove a causal relationship between the plaintiffs’ harm and the specific company or companies named as defendants.

Civil litigation against Anvil in Australia is an attempt to exercise the jurisdiction of the home state of the enterprise in relation to harm suffered

129. The double jeopardy principle in section 268 of the Australian Criminal Code Act applies only “if the person has already been convicted or acquitted by the International Criminal Court for an offence constituted by substantially the same conduct as constituted the offence under this Division.” Criminal Code Act, 1995, § 268.118 (Austl.). It does not apply to convictions or acquittals in the municipal criminal or military courts of other states.

130. See, e.g., Samer Elatrash, *Making a Killing in the Congo*, MONTREAL MIRROR, June 22, 2006; Madden, *supra* note 127; James Madden, *Congolese Plan to Sue Aussie Firm Over Killings*, THE AUSTRALIAN, June 8, 2005; Australian Broadcasting Corporation, *The Law Report*, *supra* note 121.

131. The Rules of the Supreme Court of Western Australia permit discovery of documents before a writ is issued, for the purpose of identifying a prospective defendant, or for assisting the plaintiff in deciding whether to commence a proceeding. Supreme Court Rules O. 26A, r. 3.4 (W. Austl.).

in another state. However, in this case, the jurisdiction sought to be invoked is not necessarily extraterritorial in nature. The basis of the claim could be that the actions taken in Australia by those directing the actions of the enterprise—perhaps in the form of directions given to employees in the Congo, perhaps in the form of agreement reached with Congolese officers, or perhaps in the form of an omission to exercise proper supervision over the operations in the Congo—was itself tortious conduct. Under that formulation, the plaintiffs would be suing an Australian-based defendant for conduct occurring in Australia, which led to damage being suffered by the plaintiffs in the Congo.

A similar approach was taken in a series of cases in England for decisions taken in the head offices of multinational enterprises which led to harm suffered in developing countries.¹³² In *Lubbe v. Cape plc*, for instance, the English parent company was sued for its failure to take measures to reduce the exposure of workers employed by its foreign subsidiaries to asbestos. After the House of Lords held that the English courts had proper jurisdiction to hear the case, rejecting an application by the defendant company to the contrary,¹³³ the case settled out of court.¹³⁴ It has also been suggested that such an approach would be available in a civil law system.¹³⁵

Given that the allegations against Anvil do not involve the direct commission of harm, but rather facilitation of harm by the military, the most plausible ground of civil liability is the tort of negligence. Broadly speaking, for negligence to be established in most common law jurisdictions, a duty of care must be owed by the defendant to the plaintiff, and that duty must have been breached by the defendant in a manner that caused harm to the plaintiff. In relation to the Kilwa incident, the question of harm is beyond doubt. The question of breach of duty and of causation will revolve around the voluntariness of the supply of logistical support as discussed above, provided that a duty of care is established on the part of the company towards potential victims of the military operation that it

132. Connelly v. RTZ [1998] A.C. 854 (H.L.); Sithole v. Thor Chem. Holdings [1999] E.W.C.A. Civ. 706 (1999); *Lubbe v. Cape* [2000] 4 All E.R. 268 (H.L.). The facts behind each of these cases and the early stages of the litigation are described by the principal solicitor in each case: Richard Meeran, *The Unveiling of Transnational Corporations: A Direct Approach*, in HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS 164-69 (Michael Addo ed., 1999).

133. The defendant applied for a stay on the ground of *forum non conveniens*, asserting that the proper forum for the case was South Africa, where the asbestos exposure occurred and the damage was suffered. The House of Lords rejected the application. *Lubbe*, *supra* note 132.

134. As to the circumstances of the *Lubbe* settlement, see Press Release, Leigh, Day, & Co., South African Asbestos Victims Finally Get Their Money (June 30, 2003), <http://www.leighday.co.uk/doc.asp?cat=974&doc=108>.

135. Gerrit Betlem, *Transnational Litigation Against Multinational Corporations Before Dutch Civil Courts* 286, in LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW (Menno Kamminga & Saman Zia-Zarifi eds., 2000) (suggesting that jurisdictional problems relating to extraterritoriality “may be circumvented by constructing the whole case as one involving a lack of supervision by the head office of a multinational corporation over its subsidiary based abroad where the actual harmful conduct and its effects took place”).

facilitated.

In assessing the prospects of success for a tort claim under Canadian law for events similar to the Kilwa incident, which he describes as “militarized commerce,” Forcese summarizes the position in the following terms:

Accordingly, to be successful in a negligence action involving militarized commerce, the plaintiff must show that the company’s conduct was such that it was foreseeable to a reasonable observer that its actions put the victims in the path of harm, that, in so acting, the company placed the plaintiffs at unreasonable risk, and that the harm that befell the victim was of the general sort foreseeable.¹³⁶

Given that there are precedents for proceeding in tort in the home country of an enterprise for harm suffered in another jurisdiction,¹³⁷ civil litigation in Australia may prove to be an important accountability mechanism for the victims of the Kilwa incident, if their case is made out. If the plaintiffs ultimately succeed, or even if they succeed in establishing key points such as a duty on the part of those directing a multinational enterprise owed to those affected by the actions of a subsidiary in a foreign country, the case may emerge as an important precedent for the conduct of multinational commerce.

VI. POTENTIAL PROCEEDINGS ELSEWHERE

A. Canada

It may be plausible for civil litigation to be brought in Canada along similar lines to the approach speculated above in relation to Australia, on the basis that Anvil’s parent company is incorporated in Canada. The factual and jurisdictional hurdles are likely to be the same for Canadian litigation as they are for Australian litigation, although factual allegations concerning communications with corporate headquarters in Australia may provide a stronger nexus for exercising jurisdiction than exists in the case of Canada. A lower threshold for seeking a stay on the ground of *forum non conveniens* in Canada as compared with Australia¹³⁸ also makes Canada potentially less attractive for the plaintiffs as the focus of home state

136. Craig Forcese, *Deterring “Militarized Commerce”: The Prospect of Liability for “Privatized” Human Rights Abuses*, 31 OTTAWA L. REV. 171, 210 (2000).

137. See *Dagi v. Broken Hill Proprietary* (1995) 1 V.R. 428 for an Australian precedent.

138. *Forum non conveniens* allows a defendant to stay a proceeding on the basis that the forum chosen is not the appropriate one. For the general rule of *forum non conveniens* applied in most common law countries, including Canada, see *Spiliada Maritime Corp. v. Cansulex Ltd.*, [1987] A.C. 460; for the slightly different rule applied by Australian courts, namely that the forum is “clearly inappropriate,” see *Voth v. Manildra Flour Mills* (1990) 171 C.L.R. 538, and *Oceanic Sun Line Special Shipping Co. v. Fay* (1988) 165 C.L.R. 197.

jurisdiction over the Anvil enterprise.¹³⁹

Criminal charges could also potentially be brought against Anvil's parent company in Canada on the basis of aiding and abetting the war crimes or crimes against humanity allegedly committed by the Congolese military, following essentially the same argument as that set out above in relation to Australia.¹⁴⁰ Corporations are capable of prosecution under Canadian criminal law,¹⁴¹ and Anvil Mining Limited would be considered a Canadian national for that purpose.

To the author's knowledge, no civil proceedings or criminal investigations have been commenced in Canada in relation to the Kilwa incident.

B. United States

Discussions of legal accountability for violations of international human rights law by multinational corporations invariably invoke the U.S. Alien Tort Claims Act (ATCA).¹⁴² That 1789 statute enables claims in tort to be brought in the federal courts of the United States by non-U.S. nationals for actions "committed in violation of the law of nations or a treaty of the United States."¹⁴³ In other words, the ATCA potentially enlivens international law for non-U.S. nationals by providing a cause of action in domestic courts for serious violations of international law, including human rights law.

Courts have previously held that corporations could be held liable under the ATCA, including on the basis of aiding and abetting abuses carried out by a state military.¹⁴⁴ It has further been held that the term "violation of the law of nations" includes at least the most egregious human rights violations, such as war crimes, crimes against humanity and systematic racial discrimination, and may well extend further.¹⁴⁵ It is therefore possible under the ATCA to impose civil liability on a multinational corporation for gross violations of human rights committed in another country, although no case has yet reached a merits judgment in favor of the plaintiffs.¹⁴⁶

139. For further discussion of the attitude of the Canadian courts and executive towards extraterritorial jurisdiction, see Sara Seck, *Home State Responsibility and Local Communities: The Case of Global Mining*, 11 YALE HUM. RTS. & DEV. L.J. 177 (2008) in this volume.

140. Forcese examines the application of the equivalent Canadian criminal law to a generic case of "militarized commerce." Forcese, *supra* note 136, at 192-201. The applicable law is the Crimes Against Humanity and War Crimes Act, S.C., ch 24.

141. Canada Criminal Code, R.S.C., ch. C 46, § 2 (1985) (defining "every one" and "person").

142. Alien Tort Claims Act, 28 U.S.C. § 1350 (2000).

143. *Id.*

144. *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997) (denying the defendants' motion to dismiss the complaint).

145. *Sarei v. Rio Tinto*, 487 F.3d 1193, 1202 (9th Cir. 2007).

146. See, e.g., *Doe*, 963 F. Supp. 880; *Martinez v. Dow Chemicals*, 219 F. Supp. 2d 719 (E.D. La. 2002); *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117 (E.D.N.Y. 2000).

The ATCA is remarkable for its extraterritorial application, whereby incidents occurring wholly overseas can be litigated in United States courts. The courts must have a basis for exercising personal jurisdiction over a defendant in order to hear an ATCA claim, but no further jurisdictional nexus to the events appears to be necessary. That broad exercise of jurisdiction evidently troubles other states, as the governments of Australia, Switzerland and the United Kingdom filed a joint *amicus curiae* submission to the United States Supreme Court in *Sosa v. Alvarez-Machain*, arguing for the U.S. courts to require an appropriate connection to the United States before exercising jurisdiction under the ATCA.¹⁴⁷

Anvil would almost certainly be safe from the ATCA jurisdiction of the United States courts due to a lack of personal jurisdiction. As an enterprise incorporated in Canada, based in Australia and operating in the Democratic Republic of the Congo and Zambia, Anvil appears to have little if any substantive presence in the United States. In *Doe v. Unocal*, the plaintiffs sued both the U.S.-based Unocal and its French-based joint venture partner, Total, for human rights violations committed in the course of construction of a gas pipeline by the joint venture in Myanmar. Despite the operation of a number of Total subsidiaries in California, the court held that such a presence was insufficient to ground personal jurisdiction over the French parent company.¹⁴⁸ The case was therefore permitted to continue against the American defendant, Unocal, but discontinued against Total. While other ATCA cases have recognized U.S. jurisdiction over multinational enterprises based outside the United States, notably Shell¹⁴⁹ and Talisman Energy,¹⁵⁰ those cases still involved a more substantial presence in the United States than that of Anvil.

Even though Anvil Mining would be unlikely to be exposed to ATCA jurisdiction, a case study on legal accountability of extractive industries for violations of human rights should consider the ATCA as a potential avenue for future cases that do have the necessary jurisdictional nexus to the United States. Indeed, a case alleging a similar fact scenario to the Kilwa incident is currently being tried in the U.S. District Court for the Northern District of California.

In *Bowoto v. Chevron*, Nigerian victims are suing Chevron for its involvement in two incidents involving the Nigerian military. In the first incident, in 1998, more than 100 local people travelled to a Chevron

147. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). As the Supreme Court held that the facts of *Sosa* did not amount to a violation of the law of nations, it did not find it necessary to rule on the requirements for a connection to the jurisdiction. See Donald Donovan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 AM. J. INT'L L. 142, 147 (2006).

148. *Doe v. Unocal*, 27 F. Supp. 2d 1174, 1189 (C.D. Cal. 1998), *aff'd*, *Doe v. Unocal*, 248 F.3d 915 (9th Cir. 2001). See also SARAH JOSEPH, CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION 85 (2004).

149. *Wiwa v. Royal Dutch Petroleum*, 226 F.3d 88, 95-99 (2d Cir. 2000). See also JOSEPH, *supra* note 148, at 86.

150. *Presbyterian Church v. Talisman Energy*, 244 F. Supp. 2d 289, 330-31 (S.D.N.Y. 2003). See also JOSEPH, *supra* note 148, at 86.

offshore mining platform and occupied it in protest. After three days, Chevron allegedly asked the Nigerian military to intervene. The military then flew in Chevron helicopters to the platform, killing at least one protester, shooting at least two others, and taking another into custody and torturing him.¹⁵¹ In the second incident, in 1999, two villages where a number of people opposed to Chevron's operations lived were attacked by the Nigerian military, civilians were shot and large parts of the villages were burned to the ground.¹⁵² Chevron helicopters and pilots were allegedly used in the attacks, and Chevron allegedly paid the soldiers who took part in the attacks.¹⁵³ The plaintiffs alleged violations of international law, including summary executions, torture, crimes against humanity, and serious violations of human rights law.¹⁵⁴ In addition to the ATCA claim, the plaintiffs also claimed liability under the torts of assault, battery, wrongful death and negligence, as well as under the Torture Victim Protection Act and the Racketeer Influenced and Corrupt Organizations Act.¹⁵⁵ The ATCA claims alleging crimes against humanity were dismissed by the District Court on the basis that the abuses committed by the military did not qualify as part of a widespread or systematic attack on a civilian population, although the other ATCA claims were permitted to proceed to trial.

For future cases involving enterprises with some presence in the United States and a similar fact scenario to that of the Kilwa incident, it is feasible (though still unproven) that the ATCA could provide an avenue of redress for victims and liability for the enterprise.

VII. EXPOSURE TO THE INTERNATIONAL CRIMINAL COURT

The crimes within the jurisdiction of the ICC that might be applicable to the Kilwa incident were discussed earlier in this article. Regardless of the prospects for success of such a prosecution, there are strong legal and political grounds to expect that no such prosecution will be commenced.

The Democratic Republic of the Congo, Australia, Canada, and South Africa are all states parties to the Rome Statute, giving the ICC jurisdiction over their nationals and over crimes committed on their territory.¹⁵⁶ The jurisdiction of the ICC is intended to be complementary to the jurisdiction

151. This summary of the allegations is taken from the court's opinion in *Bowoto v. Chevron*, No. C 99-020506-SI, 2006 WL 2455752 (N.D. Cal. Aug. 22, 2006). EarthRights International, representing the plaintiffs in the *Bowoto* litigation, claims that two protesters were killed and around eleven detained. Rick Herz & Marco Simons, EarthRights Int'l, *Bowoto v. Chevron Texaco* Case History, http://www.earthrights.org/site_blurbs/bowoto_v_chevrontexaco_case_history.html (Oct. 27, 2007).

152. *Bowoto*, 2007 WL 2455752.

153. Herz & Simons, *supra* note 151.

154. Eighth Am. Compl. ¶¶ 109-45, *Bowoto v. Chevron Texaco*, 312 F. Supp. 2d 1229 (N.D. Cal. 2004).

155. *Id.* ¶¶ 146-98.

156. Rome Statute, *supra* note 45, art. 13.

of municipal courts. Accordingly, a case will not be admissible in the ICC if it has already been the subject of prosecution in another state, unless that trial was a sham or was not independent, impartial, or sufficiently observant of due process.¹⁵⁷ The acquittal of the military defendants and the three Anvil employees by the Military Court of Katanga therefore prevents a trial of the same defendants unless the fairness of the process is denounced.

Furthermore, a case will not be admissible in the ICC if the case is being investigated by a state with jurisdiction over it, or if such an investigation has concluded with a decision not to prosecute the person concerned.¹⁵⁸ The exception is where "the State is unwilling or unable genuinely to carry out the investigation or prosecution."¹⁵⁹ The investigation by the Australian Federal Police and the subsequent decision not to prosecute potentially creates a hurdle for admissibility, provided that Australia is considered to have had jurisdiction over the crime within the meaning of that term in the Rome Statute.¹⁶⁰ That hurdle could only be cleared if the conclusion of the Australian investigation could be attributed to an unwillingness or inability to carry out a genuine investigation or to prosecute.

If the problems of admissibility are overcome, the ICC may exercise its jurisdiction if a situation is referred to the ICC Prosecutor by a state party or the UN Security Council, or if the prosecutor has initiated an investigation on his own motion.¹⁶¹ In March 2004, the Democratic Republic of the Congo referred to the ICC prosecutor the "situation of crimes within the jurisdiction of the Court allegedly committed anywhere in the territory of the DRC since the entry into force of the Rome Statute, on 1 July 2002."¹⁶² The ICC therefore has the legal capacity to investigate and prosecute the military perpetrators of war crimes or crimes against humanity in the Kilwa incident and to prosecute natural persons who aided or abetted those crimes. However, doing so would require that the proceedings in the Congo be declared a sham or seriously unfair, and depending on the identity of the individuals accused of aiding and abetting, might also require declaring the investigation by the Australian Federal Police to be insufficiently rigorous.

The political difficulties for a young institution such as the ICC in declaring a lack of confidence in the authorities of the Democratic Republic of the Congo and Australia are compounded by the provision for a state

157. *Id.* arts. 17(1)(c), 20(3).

158. *Id.* art. 17(1)(a)-(b).

159. *Id.*

160. It is arguable that state jurisdiction in this context means the state on the territory of which the conduct constituting the crime occurred, or the state of which the accused is a national. See, e.g., Rome Statute, *supra* note 45, art. 12(2). If that definition is applied, Australia only has jurisdiction in relation to allegations against its nationals.

161. *Id.* art 13.

162. Press Release, International Criminal Court, Prosecutor Receives Referral of the Situation in the Democratic Republic of the Congo (Apr. 19, 2004).

party to challenge the admissibility of a case on those grounds.¹⁶³ When the prosecutor is overwhelmed with the number of heinous international crimes within the jurisdiction of the court and is already required to be highly selective in commencing investigations and prosecutions,¹⁶⁴ a case which requires a public repudiation of the criminal process of two states parties has little to recommend it. The prospects of the Kilwa incident coming before the ICC are therefore very remote, although the barriers are political rather than legal.

VIII. PROCEEDINGS BEFORE “SOFT LAW” ENFORCEMENT BODIES

In addition to the “hard law” options, both civil and criminal, for seeking accountability for the human rights abuses in the Kilwa incident, two “soft law” options have also been invoked. Accountability procedures of the World Bank’s Compliance Advisor/Ombudsman and the OECD Guidelines for Multinational Enterprises were both pursued following pressure from diverse civil society groups in an effort to achieve recognition of the harm inflicted on the Kilwa victims and seek some form of redress outside the civil and criminal legal process.

A. World Bank Compliance Advisor/Ombudsman

The Multilateral Investment Guarantee Agency (MIGA), an arm of the World Bank, provides insurance to foreign investors and lenders operating in the developing world against “non-commercial risks,” such as war, civil disturbance and expropriation of assets, with the aim of encouraging financial activity in developing countries to boost their prosperity. On September 21, 2004, just over three weeks before the Kilwa incident, the MIGA Board approved two guarantees of U.S. \$ 6.6 million each in relation to Anvil’s Dikulushi mine: one to the parent company, Anvil Mining Limited, to cover its investment in the Congolese subsidiary that was developing the mine, and one to cover a loan from an unrelated lender, RMB International.¹⁶⁵ The contract negotiation phase then took a further six months, with contracts of guarantee concluded on May 26, 2005,¹⁶⁶ just over a week before the *Four Corners* documentary was broadcast.

Given that the World Bank is an international institution comprised of member states and dispensing public funds, it is appropriate that the institution at least have regard for the principles of international human rights law, and it is possible to argue that the institution itself could be bound to respect, protect and promote human rights under international

163. Rome Statute, *supra* note 45, art. 19(2)(b).

164. OFFICE OF THE PROSECUTOR, INTERNATIONAL CRIMINAL COURT, UPDATE ON COMMUNICATIONS RECEIVED BY THE OFFICE OF THE PROSECUTOR OF THE ICC 4 (2006).

165. CAO, *supra* note 38, at 1.

166. *Id.*

law.¹⁶⁷ Regardless of the conclusion on that point, the World Bank has, over time, accepted the legitimacy of imposing conditions on its lending and its guarantees with a view to improving positive outcomes for local communities, including protecting and promoting human rights in some circumstances.

At the time the Anvil guarantees were being considered, all projects proposed for coverage by MIGA had to undergo MIGA's Environmental and Social Review Procedures (ESRPs), which have since been replaced by the Performance Standards on Social and Environmental Sustainability.¹⁶⁸ The ESRPs required MIGA to undertake a preliminary assessment to categorize the project as high, medium, or low risk in terms of compliance with the so-called Safeguard Policies, which aimed to protect certain identified social and environmental interests, including sporadic consideration of some human rights issues.¹⁶⁹

This process was undertaken by MIGA in relation to the Dikulushi project during a period in which NGOs had flagged concerns about Anvil's interaction with the Congolese military and in which the Kilwa incident took place. Before the guarantees were approved by the MIGA board, a group of NGOs had raised questions with MIGA relating to Anvil's policies and practices on security and human rights, which had been triggered by the March 2004 incident in which Anvil vehicles had been requisitioned by the Congolese military.¹⁷⁰ When the Kilwa incident occurred, shortly after the guarantees were approved by the MIGA board but before the contracts of guarantee were concluded, MIGA was not notified by Anvil of any issues other than the temporary shutdown of the mine. There was no mention of providing logistical support to the military, whether voluntarily or under duress, and no mention of alleged human rights abuses until after the *Four Corners* documentary had come to MIGA's attention.¹⁷¹

In the initial screening process, the Dikulushi project was assessed by MIGA as Category A (high risk),¹⁷² meaning that more stringent

167. For an in-depth discussion of this question, see SIGRUN I. SKOGLY, *THE HUMAN RIGHTS OBLIGATIONS OF THE WORLD BANK AND THE INTERNATIONAL MONETARY FUND* (2001) and MAC DARROW, *BETWEEN LIGHT AND SHADOW: THE WORLD BANK, THE INTERNATIONAL MONETARY FUND AND INTERNATIONAL HUMAN RIGHTS LAW* (2003).

168. MULTILATERAL INVESTMENT GUARANTEE AGENCY, *PERFORMANCE STANDARDS ON SOCIAL AND ENVIRONMENTAL SUSTAINABILITY* (2007). For a critique from a human rights perspective of the Performance Standards of MIGA's sister agency, the International Finance Corporation, on which MIGA's Performance Standards are based, see HALIFAX INITIATIVE, *ONE STEP FORWARD, ONE STEP BACK: AN ANALYSIS OF THE INTERNATIONAL FINANCE CORPORATION'S SUSTAINABILITY POLICY, PERFORMANCE STANDARDS AND DISCLOSURE POLICY* (2006), available at <http://www.halifaxinitiative.org/updir/IFC-Analysis-HI-Final.pdf>.

169. See Adam McBeth, *Breaching the Vacuum: A Consideration of the Role of International Human Rights Law in the Operations of the International Financial Institutions*, 10 INT'L J. HUM. RTS. 385 (2006), for an analysis of the Safeguard Policies for their consistency with international human rights law.

170. CAO, *supra* note 38, at 6.

171. *Id.*

172. *Id.* at 15.

environmental and social management processes needed to be put in place. In the subsequent due diligence process, MIGA was ultimately satisfied that Anvil complied with the Safeguard Policies and the other requirements of the agency. As an additional requirement, MIGA expressly requested Anvil to undertake to comply with the Voluntary Principles on Security and Human Rights.¹⁷³

As the name suggests, the Voluntary Principles set out guidelines for the use of security, both private and governmental, by corporations operating in the extractive sector, with a view to ensuring respect for human rights.¹⁷⁴ An entire section of the Voluntary Principles is dedicated to measures designed to prevent companies from collaborating with public security forces in human rights abuses. The principles note that in some circumstances, "Companies may be required or expected to contribute to, or otherwise reimburse, the costs of protecting Company facilities and personnel borne by public security,"¹⁷⁵ and that despite the obligations on state actors to observe international human rights and international humanitarian law, "within this context abuses may nevertheless occur."¹⁷⁶ Among the specific principles contained in that instrument is the following: "Companies should, to the extent reasonable, monitor the use of equipment provided by the Company and to investigate properly situations in which such equipment is used in an inappropriate manner."¹⁷⁷ Companies are also required to document and report any allegations of human rights abuses in their area of operation. On any version of events, Anvil did not comply with those principles in relation to the Kilwa incident.

The extent of MIGA's requirement that Anvil comply with the Voluntary Principles was to ask Anvil "to provide a representation as to whether Anvil considered itself to be compliant with the Voluntary Principles."¹⁷⁸ The response, by way of an email from Anvil's CEO to MIGA, indicated in the affirmative, while confessing not to be familiar with some of the instruments referenced in the Voluntary Principles.¹⁷⁹ That email was accepted by MIGA as a satisfactory undertaking, and no conditions relating to compliance with the Voluntary Principles were included in the MIGA contract.¹⁸⁰

In its audit of MIGA's due diligence process, the Compliance

173. *Id.* at 20.

174. VOLUNTARY PRINCIPLES ON SECURITY AND HUMAN RIGHTS (2000), available at <http://www.voluntaryprinciples.org>. The Voluntary Principles were an initiative of the United States and United Kingdom governments, NGOs and a group of multinational corporations operating in the extractive industries.

175. *Id.* at 3.

176. *Id.*

177. *Id.* at 5.

178. CAO, *supra* note 38, at 20.

179. *Id.* The other instruments referenced in the Voluntary Principles are the Universal Declaration of Human Rights; the UN Code of Conduct for Law Enforcement Officials; the UN Basic Principles on the Use of Force and Firearms; and the ILO Declaration on Fundamental Principles and Rights at Work, Voluntary Principles, *supra* note 174, at 4.

180. CAO, *supra* note 38, at 20.

Advisor/Ombudsman found that both MIGA and Anvil were essentially paying lip service to the Voluntary Principles without understanding the human rights component of security arrangements that the Voluntary Principles entail:

MIGA did not fully understand the implications for its client of implementing the principles nor assess whether its client had the capacity to do so. Neither MIGA nor Anvil recognized the critical distinction between conventional security, which deals with securing the safety and well-being of personnel and assets, and the Voluntary Principles, which recognize that conventional security provision can, in and of itself, present risks to the well-being of communities.¹⁸¹

The CAO's recommendations focused heavily on the Voluntary Principles as an appropriate tool for future projects operating in an environment analogous to the Dikulushi mine, including an insistence that MIGA satisfy itself that the client understands the principles and has the capacity to implement them in a systematic fashion, and that compliance be a contractual condition.¹⁸² However, the Voluntary Principles, like all codes in the corporate social responsibility field, cannot be viewed as a panacea. The system is entirely voluntary, relies heavily on the vigilance of signatory companies for its implementation, and carries no sanctions for noncompliance. While including compliance as a covenant in a MIGA contract is potentially an effective sanction imposed outside the Voluntary Principles system for compliance with its principles, such a sanction is only as effective as the enthusiasm of MIGA to enforce it.

It is not to be implied from criticisms of the MIGA process that Anvil's Dikulushi operation is necessarily a negative force from a human rights perspective, nor that the operation ought to have been denied coverage by MIGA. Rather, criticism focuses on the adequacy of safeguards sought by MIGA. The Safeguard Policies on their own did not address the issue of providing logistical support to the military at all. Even though MIGA purported to invoke an instrument that did address that issue, namely the Voluntary Principles, it was done in a very superficial manner. When noncompliance was ultimately demonstrated, no sanctions were available.

While the various safeguards imposed by World Bank agencies are certainly a positive development from a human rights perspective, compared with unfettered support from a public international institution for potentially harmful commercial operations, this episode demonstrates that such safeguards are not necessarily sufficient to prevent human rights violations from occurring or to address them once they do occur. Like all safeguards, the value of safeguards imposed by MIGA and other World Bank agencies is only as great as the interests they aim to protect and the

181. *Id.* at 22.

182. *Id.* at 23-24.

manner of their implementation and enforcement.

B. OECD Guidelines on Multinational Enterprises

The Organization for Economic Cooperation and Development (OECD), whose member states are home to the overwhelming majority of multinational enterprises, has developed a set of guidelines for the conduct of those enterprises around the world, known as the OECD Guidelines on Multinational Enterprises.¹⁸³ The OECD Guidelines, which describe themselves as “recommendations addressed by governments to multinational enterprises,”¹⁸⁴ are effectively a form of home state regulation, whereby the state where an enterprise is based asserts a degree of oversight over the conduct of that enterprise on the territory of other states. However, the Guidelines are limited to “soft law,” in that they are purely advisory and there are no legally binding sanctions attached to their violation.

The OECD Guidelines cover a wide range of issues, including labor and environmental standards, corruption, consumer protection, technology transfer, competition and taxation. The human rights provision is broad and non-specific, requiring multinational enterprises to “[r]espect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments.”¹⁸⁵ In addition to that general human rights obligation, more detailed principles in relation to labor rights are set out under a separate heading.¹⁸⁶ Specific content in relation to other human rights standards is not elaborated.

The OECD Guidelines have a system for lodging complaints and settling disputes. Anyone can lodge a complaint about a multinational enterprise’s activities to the National Contact Point (NCP) of the country where the relevant conduct occurred or the country where that enterprise is based if either of those countries have adopted the guidelines. If the NCP considers that a complaint warrants investigation, it will investigate the matter and attempt to facilitate resolution between the relevant parties in accordance with the guidelines. If resolution is not possible, the matter can be referred to the OECD Investment Committee¹⁸⁷ to issue a “clarification” of the application of the guidelines in the situation in question. Clarifications are made publicly available but generally will not name the enterprise involved and are therefore more conciliatory than

183. Organization for Economic Co-operation and Development, *The OECD Guidelines for Multinational Enterprises*, June 27, 2000, 40 I.L.M. 237 [hereinafter *OECD Guidelines*]. The *OECD Guidelines* are part of *The OECD Declaration on International Investment and Multinational Enterprises*, June 21, 1976, 15 I.L.M. 967.

184. *OECD Guidelines*, *supra* note 183, preface, ¶ 1.

185. *Id.* pt. II.

186. *Id.* pt. IV.

187. In April 2004, the OECD Committee on International Investment and Multinational Enterprises (CIME) and the Committee on Capital Movements and Invisible Transactions (CMT) merged to form the Investment Committee. Previously, the OECD Guidelines and clarification process was overseen by CIME.

punitive.

A Canadian NGO, the International Centre for Human Rights and Development, wrote to the Canadian NCP in June 2005 requesting an investigation into Anvil Mining's role in the Kilwa incident.¹⁸⁸ No investigation was launched by the Canadian NCP, and the request was not mentioned in annual reports of the OECD Guidelines in 2006 or 2007.¹⁸⁹

In July 2006, an external consultant was engaged by Anvil to conduct an audit of the company's operations in the Congo for compliance with the OECD Guidelines and the OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones.¹⁹⁰ Given the nature of the audit and the criteria it was assessing, its focus was on the policies and procedures of the enterprise rather than accountability or exoneration for any particular incident. The Kilwa incident was not prominent in the assessment of the various criteria, even though it was acknowledged as the catalyst for the report.¹⁹¹ Nevertheless, in the introductory commentary, the consultant expressed the following opinion of Anvil's role in the Kilwa incident:

Hardly anyone in Katanga holds Anvil accountable for these incidents in spite of the international media attention these events have received or the reports of human rights activists from the DRC and abroad. Other mining firms, international NGOs and senior government officials believe Anvil was a victim of Katanga's volatile political atmosphere in which a myriad of groups and a few powerful politicians oppose one another and compete for controlling the precious mineral trade. The general view is that Anvil was caught unawares at Kilwa and that international journalists, human rights activists and the United Nations' own questionable investigation have mistakenly tarred Anvil with the brush that might more appropriately have been applied to other far less respectable mineral trading firms whose comportment has been below the standard set by Anvil.¹⁹²

The results of the two different applications of the OECD Guidelines to

188. Letter from Jean-Louis Roy, International Centre for Human Rights and Democracy, to Vern McKay, Canadian National Contact Point for the OECD Guidelines for Multinational Enterprises (June 22, 2005) (on file with author).

189. Annual reports on the OECD Guidelines contain a table of all specific instances considered by each NCP, including those not resolved. Canada's NCP reported dealing with "Follow-up to allegations made in UN Experts Report on DRC." The list in that report is U.N. Sec. Council, *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, Annex III*, U.N. Doc. S/2002/1146 (Oct. 16, 2002). Anvil Mining was not one of the companies listed.

190. FREEDMAN, *supra* note 39.

191. The audit did note that two external reviews of Anvil's security policy were conducted following the Kilwa incident, and implied doubts about the adequacy of either review. *Id.* at 18.

192. *Id.* at 3.

this incident are not encouraging. The complaint to the NCP did not lead to any substantive engagement or investigation. An audit for compliance with the Guidelines initiated by the company, while laudable as an indication of a serious effort to effect good corporate practices in the future, is at best misleading in relation to the Kilwa incident, since the introductory commentary tends towards absolution of the company, even though the audit itself did not address questions of responsibility for that incident.

This episode seems destined to be cited in the future as another example to bolster the common criticisms of the OECD Guidelines as a toothless mechanism. The shortcomings in the OECD Guidelines process as an accountability mechanism are partly due to deliberate design elements, such as the intention that the process be a facilitative, problem-solving mechanism, rather than a recourse mechanism. However, such potential as the OECD process might still have as an accountability mechanism has been stymied, according to critics, by the manner in which individual NCPs have applied them. Some NCPs have been criticized for a lack of transparency, a reluctance to declare a breach or to name companies involved, a lack of political will to enforce the guidelines, inconsistency, and a tendency to apply a narrow interpretation of the guidelines.¹⁹³ As is the case for many of the avenues explored in this article, even the best intentioned and most promising accountability mechanism is of little value without the political will to deploy it in a meaningful way.

IX. CONCLUSION

It is of course possible that Anvil's actions did not constitute any legal wrong, as the company asserts, and that the civil litigation will reach that conclusion. It is possible that the acquittal in the Congolese military court and the decision of the Australian Federal Police not to lay charges were made impartially on that basis, although there is no publicly available evidence to evaluate that question. However, this case study has demonstrated that a multitude of avenues apparently available to victims of human rights violations involving multinational enterprises is of little use if the political will to invoke those avenues in a transparent and meaningful fashion is lacking. The main obstacles to the victims' claims in this case appear to be non-legal.

The fact that the fairness of the process in the Congolese military courts has been roundly condemned, not least by the U.N. High Commissioner for Human Rights, has not proved sufficient for Australian, Canadian or international authorities to exercise their jurisdiction, even though there appear to be compelling reasons to do so. On paper, the Anvil case appeared to be the perfect test for the theories of international jurists and academic commentators regarding the deployment of home state or

193. CHRISTIAN AID ET AL., FLAGSHIP OR FAILURE: THE UK'S IMPLEMENTATION OF THE OECD GUIDELINES AND APPROACH TO CORPORATE ACCOUNTABILITY 25 (2005), available at http://www.foe.co.uk/resource/reports/flagship_or_failure.pdf.

international jurisdiction to ensure the accountability of multinational enterprises for human rights violations and to prevent impunity for non-state actors that are complicit in human rights abuses committed by the state. While numerous avenues were open, every one that required the cooperation of an external authority – that is, someone other than the victims or their representatives – was discontinued or was never activated. Only the tort claims, which are perhaps the least suited to addressing the plaintiffs' claims, remain as a potential avenue for accountability – or indeed transparent vindication.

This article is not designed to offer the solution for this problem that arises from the disjointed nature of state-based regulation of transnational commerce. Rather, it sounds a warning that the solutions that have been mooted in pages of journals like this one over the past fifteen years will not automatically succeed. While human rights lawyers and academics have a tendency to respond to human rights failures with calls for ever more stringent legal regulation, the Anvil case demonstrates that the existence of legal and soft-legal regulation and accountability mechanisms will not be enough on their own. Despite the increasing possibility for multiple national, international, and quasi-legal bodies to assert jurisdiction over an event like the Kilwa incident, the fact remains that political will to assert that jurisdiction is at least as important as the legal capacity to do so.