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## Rich and Rare are the Gems They War: Holding De Beers Accountable for Trading Conflict Diamonds

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# Rich and Rare are the Gems They War: Holding De Beers Accountable for Trading Conflict Diamonds

Lucinda Saunders

## **Abstract**

This Note focuses on the accountability of corporations for indirectly fueling civil wars by purchasing diamonds from insurgent groups. While many corporations are involved in the diamond industry, De Beers controls a majority of the uncut diamond market, including mining, buying, and selling uncut diamonds. Therefore, this Note will analyze whether De Beers may be held liable for knowingly funding war criminals under the Alien Tort Claims Act ("ATCA"). Part I of this Note examines the trade in conflict diamonds in Angola and Sierra Leone and De Beers's involvement in this trade. Part II examines case law developments under the ATCA and obstacles to recovery against multinational corporations ("MNCs") under the ATCA. Part II also outlines efforts made by international organizations, the U.S. government, and MNCs to regulate the activities of MNCs in host countries. Part III argues that De Beers should be liable under the ATCA for complicity in war crimes and crimes against humanity by funding insurgent groups engaged in human rights violations. This Note concludes that the ATCA should be amended and offers a proposal for legislation to make MNCs liable for their involvement in human rights abuses. Under an amended ATCA, De Beers could be held accountable for its part in the conflict diamond trade.

## NOTE

### RICH AND RARE ARE THE GEMS THEY WAR: HOLDING DE BEERS ACCOUNTABLE FOR TRADING CONFLICT DIAMONDS

*Lucinda Saunders\**

#### INTRODUCTION

The insurgents<sup>1</sup> broke through the gate to Alpha's house in Freetown, the capital of Sierra Leone.<sup>2</sup> They had cuts on their faces covered with adhesive strips.<sup>3</sup> The insurgents put cocaine

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\* In loving memory of George V. Comfort. Much appreciation to Professor Chantal Thomas for her feedback on this Note, and to my family and friends for their support and patience during many long lectures on conflict diamonds.

1. See David Wippman, *Change and Continuity in Legal Justifications for Military Intervention in Internal Conflict*, 27 COLUM. HUM. RTS. J. 435, 441 (1997) (explaining difference between rebellion, insurgency, and belligerency). An insurgency exists when opposition to the legitimate government extends beyond riots to circumstances where the uprising is of serious proportion, organized with leaders, and offers a time effective resistance to legitimate government. See ANN V.W. THOMAS & A.J. THOMAS, JR., *NON-INTERVENTION: THE LAW AND ITS IMPORT IN THE AMERICAS* 216-17 (1956) (defining insurgency and characteristics associated with such circumstances). The conflict in Sierra Leone can be characterized as an insurgency because the opposition group has an organized structure and it has persisted for ten years. See Wippman, *supra*, at 441 (explaining characteristics of insurgency); JOHN L. HIRSCH, *SIERRA LEONE: DIAMONDS AND THE STRUGGLE FOR DEMOCRACY* 31, 36-40, 44-45, 58-59, 87 (2001) (reporting that Foday Sankoh is leader of Sierra Leone insurgents called Revolutionary United Front ("RUF") that fought throughout 1990s and boycotted efforts to hold democratic elections); see also Steve Coll, *The Other War: The Gratuitous Cruelties Against Civilians in Sierra Leone Last Year Rivalled Those Committed in Kosovo at the Same Time*, WASH. POST MAG., Jan. 9, 2000, at W8, W9 (explaining that RUF is insurgent army in Sierra Leone). The civil war in Sierra Leone began when the Revolutionary United Front ("RUF") rebelled against the government in 1991. See HIRSCH, *supra*, at 31 (commenting that civil war has ensued for most of decade following rebellion in 1991); EARL CONTEH-MORGAN & MAC DIXON-FYLE, *SIERRA LEONE AT THE END OF THE TWENTIETH CENTURY: HISTORY, POLITICS, AND SOCIETY* 126-27 (1999) (noting that RUF attacked territory in Sierra Leone in 1991); David Ott, *A Nation Sinks into Savagery: Racked by a Five-Year Civil War, Sierra Leone is Now the Scene of New, Barely Imaginable Outrages*, INDEPENDENT (London), May 5, 1999, at 14 (asserting that RUF attacks began in 1991); Human Rights Watch, *Sierra Leone: Getting Away with Murder, Mutilation, Rape: Background*, July 1999, available at [http://www.hrw.org/reports/1999/sierra/SIERLE99-02.htm#P142\\_28430](http://www.hrw.org/reports/1999/sierra/SIERLE99-02.htm#P142_28430) [hereinafter *HRW-Sierra Leone: Background*] (maintaining that RUF rebelled in 1991, attempting to overthrow Sierra Leone government).

2. See Coll, *supra* note 1, at W9 (reporting RUF invasion of Freetown).

3. See *id.* at W9 (claiming that adhesive strips covered incisions where soldiers in-

into their bloodstreams through these incisions.<sup>4</sup> They entered Alpha's house and demanded money from his parents.<sup>5</sup> Alpha's father handed over all the money he had in his possession.<sup>6</sup> The fighters then abducted Alpha and his two younger brothers, along with many other young people in the area.<sup>7</sup> They took their captives up a nearby hill where a young combatant named Tommy chopped off the captives' arms with an axe.<sup>8</sup> Alpha and his brother, Amadu, survived the amputations and were taken in by a family that cared for them.<sup>9</sup> Alpha later found out that his other brother, Dawda, died from loss of blood and that the insurgents burned his parents and sister alive in their house.<sup>10</sup>

This incident stands as one of many in an ongoing civil conflict in Sierra Leone.<sup>11</sup> Experts claim that political ideologies do

served cocaine into their bloodstream); Douglas Farah, *Children Forced to Kill; Sierra Leone's Ex-Fighters Try to Recover Stolen Youth*, WASH. POST, Apr. 8, 2000, at A1 (claiming that cocaine and gunpowder was put into cuts on child soldiers faces).

4. See Coll, *supra* note 1, at W9 (asserting that insurgents use various drugs to get high before going into battle); Michael Dynes, *West Side Boys are Jungle Brigands*, TIMES (London), Aug. 28, 2000, at 4 (maintaining that young fighters were given cocaine and alcohol to make killing easier); Douglas Farah, *Rebel Leader Captured: Sankoh's Arrest Sparks Jubilation in Sierra Leone's Capital*, WASH. POST, May 18, 2000, at A1 (reporting that Sierra Leone insurgents used children high on cocaine as fighters); Janine di Giovanni, *Girl's Seven Years as Slave of Rebel Forces*, TIMES (London), May 13, 2000, at 4 (telling story of teenage RUF girl soldier who regularly used drugs to prepare herself to kill others).

5. Coll, *supra* note 1, at W10.

6. *Id.*

7. See *id.* (reporting that children were forced into line and taken to nearby schoolyard).

8. See *id.* (stating that Alpha's neighbor was first to lose his arm and Alpha's younger brother was next); see also Sam Kiley, *In the Heart of Darkness*, TIMES 2 (London), May 10, 2000, at 6, 7 (stating that insurgents would ask their victims if they wanted "long sleeve or short sleeve" before cutting off their arms); Barbara Crossette, *In West Africa, a Grisly Extension of Rebel Terror*, N.Y. TIMES, July 30, 1998, at A1 (claiming that insurgents began amputating civilians' hands so that they would not be able to vote).

9. See Coll, *supra* note 1, at W24 (reporting that Alpha and his brother requested poison in order to commit suicide but family refused).

10. See *id.* (claiming that Alpha's half brother found Alpha and his brother and told them fate of other family members).

11. See, e.g., Giovanni, *supra* note 4, at 4 (describing 11 year old girl abducted by insurgents in Sierra Leone and forced to be combatant and sexual slave for seven years); Jeremy Vine, *The Victims of Sierra Leone's Rebels*, Mar. 18, 1999, at [http://news.bbc.co.uk/hi/english/world/africa/newsid\\_298000/298754.stm](http://news.bbc.co.uk/hi/english/world/africa/newsid_298000/298754.stm) (reporting story of ten year old and eight year old girls who lost their arms to insurgents in Sierra Leone); *Sierra Leone Peace Deal Signed*, July 7, 1999, at [http://news.bbc.co.uk/hi/english/world/africa/newsid\\_388000/388153.stm](http://news.bbc.co.uk/hi/english/world/africa/newsid_388000/388153.stm) (claiming that 100,000 people have been victims of mutilation in Sierra Leone conflict); *Conflict Diamonds: Americans Can Stop the Damage They Do*, STAR TRIB. (Minneapolis, Minn.), June 12, 2000, at 10A (telling story of small child whose arm was cut off by Sierra Leone insurgents).

not motivate this insurgent group.<sup>12</sup> Instead, they argue that control of diamond production is a root cause behind the war in Sierra Leone.<sup>13</sup>

Observers note that in several African nations insurgent groups use diamonds to fund civil wars.<sup>14</sup> The revenue that in-

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12. See Crossette, *supra* note 8, at A1 (asserting that insurgents in Sierra Leone have no political platform); Corinna Schuler, *A Rebel Leader of Rag-Tag Terrorists*, CHRISTIAN SCI. MONITOR, Sept. 17, 1999, at 7 (maintaining that Sierra Leone insurgents took up arms before developing political agenda); Phillip Van Niekerk, *Africa's Diamond Dogs of War*, OBSERVER, Aug. 13, 1995, at 19 (claiming that leader of Sierra Leone insurgents represents no political ideology); *60 Minutes: Diamonds* (CBS television broadcast, Feb. 18, 2001) [hereinafter *60 Minutes*] (noting Bob Simon asserting that rebellion in Sierra Leone has no political underpinnings).

13. See Ibrahim Abdullah & Patrick Muana, *The Revolutionary United Front of Sierra Leone: A Revolt of the Lumpenproletariat*, in AFRICAN GUERRILLAS, at 172, 192 (Christopher Claphem ed., 1998) (alleging that war in Sierra Leone continues because diamond trade is profitable for insurgents); HIRSCH, *supra* note 1, at 25 (maintaining that diamond trade is major cause of conflict in Sierra Leone and other African nations); Lansana Gberie, *Fighting for Peace: Sierra Leone*, U.N. CHRON., June 22, 2000, at 51, available at <http://www.un.org/Pubs/chronicle/2000/issue2/0200p51.htm> (maintaining that war in Sierra Leone is about greed for diamonds not politics); Justin Brown, *Why Africa's Wars Confound Us*, CHRISTIAN SCI. MONITOR, May 17, 2000, at 3 (claiming that conflict in Sierra Leone is effort to attain wealth and power through mining diamonds); Ed O'Loughlin, *Sierra Leone Ceasefire May Signal End to Nine-Year Civil War*, INDEPENDENT (London), Nov. 12, 2000, at 25 (claiming that control of diamonds is primary motivation behind insurgent movement in Sierra Leone); *Diamonds Are Sierra Leone War's Best Friend*, May 24, 2000, at <http://www.cnn.com/2000/WORLD/africa/05/24/sierra.leone/index.html> [hereinafter *War's Best Friend*] (asserting that war in Sierra Leone will not end until insurgents are forced out of diamond mining areas); Conciliation Resources, *Resources, Primary Industry, and Conflict in Sierra Leone*, Sept./Oct. 1997, at [http://www.c-r.org/occ\\_papers/briefing3.htm](http://www.c-r.org/occ_papers/briefing3.htm) (maintaining that diamonds are crucial to power in Sierra Leone and present chaos is conducive to control of diamond mining by insurgents). See generally Paul Collier, *Economic Causes of Civil Conflict and Their Implications for Policy*, June 15, 2000, available at <http://www.worldbank.org/research/conflict/papers/civilconflict.htm> (asserting that civil wars will persist where insurgent groups have financial incentive to continue fighting). Commentators also assert that the civil war in Angola revolves around controlling diamond production. See Bob Drogin, *Rebels, Soldiers and Freelancers Rush to Dig Up an Incomparable Treasure, Straining a Fragile Truce*, L.A. TIMES, Mar. 13, 1996, at A1 (maintaining that war in Angola is about control of diamond-producing areas); HUMAN RIGHTS WATCH, *ANGOLA: ARMS TRADE AND VIOLATIONS OF THE LAWS OF WAR SINCE THE 1992 ELECTIONS* 57 (1994) [hereinafter HRW-ANGOLA] (claiming that Angolan insurgent groups use diamonds to procure arms). But see *African Diamonds: Hearing Before Subcomm. on Trade of House Comm. on Ways and Means*, 106th Cong. 69 (2000) (statement of J.F. "Jack" Jolis, President, Rough Diamond Consultancy) (asserting that civil wars in Africa would continue even without diamonds).

14. See VICTORIA BRITAIN, *DEATH OF DIGNITY* 67, 74 (1998) (asserting that Angolan insurgents captured diamond mines and used diamonds to buy arms); HIRSCH, *supra* note 1, at 25 (maintaining that insurgents in Sierra Leone and Liberia use diamonds to sustain war effort); Abdullah & Muana, *supra* note 13, at 183 (claiming that insurgents

surgents obtain from smuggling diamonds across borders allows them to buy more arms and to continue fighting.<sup>15</sup> The fighting

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in Sierra Leone obtained some arms through sale of smuggled diamonds across Sierra Leone's borders); Lynne Duke, *Angola's Chaos Liberates Forces of Corruption*, WASH. POST, Jan. 1, 1999, at A27 (claiming that Angolan insurgent forces use diamonds to finance fighting); Blaine Harden, *Africa's Diamond Wars*, N.Y. TIMES, Apr. 6, 2000, at A1 (asserting that Angolan insurgents paid for offensive with diamond money); David Buchan et al., *The Deadly Scramble for Diamonds in Africa*, FIN. TIMES, July 10, 2000, at 6 (maintaining that insurgents in Sierra Leone use diamonds to pay for on-going civil war); Minh T. Vo, *A Conflict Rooted in Rebels and Diamonds*, CHRISTIAN SCI. MONITOR, May 15, 2000, at 7 (claiming that Sierra Leone insurgents control diamond mines and use money from sale of diamonds to fund continued war effort); Colin Nickerson, *'Conflict-Free' Diamonds Could Be Boon to Canada*, BOSTON GLOBE, Aug. 22, 2000, at A1 (reporting that diamonds in some African nations have been used to finance insurgency); Barbara Crossette, *Rwandan Leader, in U.S., Urges Push for Peace in Congo*, N.Y. TIMES, Feb. 5, 2001, at A4 (expressing concern that insurgents in Congo are fighting for control of diamond mining regions); *Diamond Leaders in Pact to Ban 'Conflict Gems' Funding African Wars*, July 19, 2000, at <http://www.cnn.com/2000/WORLD/europe/07/19/africa.diamonds.01.reut/index.html> [hereinafter *Diamond Leaders in Pact*] (explaining that diamonds from conflict zones have been used to fund wars); *In Africa, Diamonds as Gods' Tears*, Jan. 19, 2001, at <http://www.msnbc.com/news/518809.asp> (claiming that diamonds are exchanged for arms in Sierra Leone, Angola, and Democratic Republic of Congo); *60 Minutes*, *supra* note 12, at 20 (noting Bob Simon alleging that insurgents in Sierra Leone trade diamonds for cash and weapons); GLOBAL WITNESS, *CONFLICT DIAMONDS 2* (2000), available at <http://www.oneworld.org/globalwitness/reports/conflict/cover.htm> [hereinafter *CONFLICT DIAMONDS*] (claiming that insurgent movements in Angola, Sierra Leone, and Democratic Republic of Congo have used diamonds to pay for arms and fund war); HRW-ANGOLA, *supra* note 13, at 57 (reporting that Angolan insurgents obtain weapons through sale of diamonds).

15. See BRITAIN, *supra* note 14, at 67, 74, 81 (asserting that Angolan insurgents used diamonds to pay for South African and Zairian mercenaries and weapons); PAUL RICHARDS, *FIGHTING FOR THE RAINFOREST: WAR, YOUTH AND RESOURCES IN SIERRA LEONE* 42 (1996) (alleging that insurgents and government soldiers in Sierra Leone are concerned with controlling diamonds to trade for weapons in order to continue war); HIRSCH, *supra* note 1, at 15 (claiming that insurgent leader in Sierra Leone traded diamonds for arms); Crossette, *supra* note 8, at A1 (alleging that insurgents in Sierra Leone sell diamonds in exchange for weapons); Sheryl Dickey, *Sierra Leone: Diamonds for Arms*, 7 HUM. RTS. BRIEF 9, 9 (2000) (claiming that insurgents in Sierra Leone and other African nations use diamonds to procure arms and to obtain money); Douglas Farah, *Rebels Get Arms Through Burkina Faso, Sources Say*, WASH. POST, May 6, 2000, at A15 (claiming that insurgents in Sierra Leone and Angola obtain weapons from Burkina Faso through diamond trade); *Rocks That Kill*, ECONOMIST, May 29, 1999, at 42, 42 (maintaining that Angolan insurgents have bought many weapons through diamond sales); Robert Collier, *Glittering Currencies of African Warfare*, S.F. CHRON., Mar. 6, 2000, at A1 (reporting that in Angola, Democratic Republic of Congo, and Sierra Leone, insurgent groups have amassed arsenals through diamond trade, allowing them to continue fighting); Buchan et al., *supra* note 14, at 6 (asserting that insurgents in Angola and Sierra Leone obtain weapons through diamond sales); *60 Minutes*, *supra* note 12, at 20 (noting Bob Simon alleging that Sierra Leone insurgents use diamonds to obtain weapons and cash); Conciliation Resources, *supra* note 13 (claiming that many diamonds are directly exchanged for arms and ammunition); *Final Report of the Monitor-*

in these nations has led to extensive human rights abuses by these insurgent groups.<sup>16</sup> The insurgents would not have the money to buy arms and commit human rights abuses without the willingness of diamond buyers to trade with them.<sup>17</sup> For these

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*ing Mechanism on Angola Sanctions*, U.N. SCOR, para. 165, U.N. Doc. S/AC.31/2000/CRP.1 (2000) [hereinafter *U.N. Final Report*] (maintaining that financial power provided by control of diamond mines in Angola has permitted insurgents to obtain weapons and preserve their extensive network abroad).

16. See Dickey, *supra* note 15, at 10 (citing human rights abuses against civilians by insurgent group in Sierra Leone); Abdullah & Muana, *supra* note 13, at 182 (alleging that Sierra Leone insurgents victimized civilians to instill fear in them); Coll, *supra* note 1, at W14 (maintaining that insurgents in Sierra Leone engaged in deliberate attacks against civilians); Cindy Shiner, *Ravaged Angolan Town Trying to Rebuild as Truce Takes Hold*, WASH. POST, Nov. 23, 1999, at A16 (reporting that Angolan conflict is particularly dangerous for civilians because land mines now cover many fields where civilians used to farm); Caroline Hawley, *A Country Torn by Conflict*, Jan. 12, 1999, at [http://news.bbc.co.uk/hi/english/special\\_report/1999/01/99/sierra\\_leone/newsid\\_251000/251377](http://news.bbc.co.uk/hi/english/special_report/1999/01/99/sierra_leone/newsid_251000/251377) (reporting about civilian suffering in Sierra Leone conflict); Gberie, *supra* note 13 (claiming that Sierra Leone insurgents target civilians rather than armed opponents); AMNESTY INTERNATIONAL, *Sierra Leone*, in ANNUAL REPORT 2000, at 208, 209 (2000) (reporting that insurgent groups in Sierra Leone deliberately target civilians). See generally HRW-ANGOLA, *supra* note 13, at 88 (documenting human rights violations against civilian populations in Angola); Human Rights Watch, *Sierra Leone: Getting Away with Murder, Mutilation, Rape: Summary*, July 1999, available at [http://www.hrw.org/reports/1999/sierra/SIERLE99.htm#P2\\_0](http://www.hrw.org/reports/1999/sierra/SIERLE99.htm#P2_0) [hereinafter *HRW-Sierra Leone: Summary*] (exposing human rights abuses against civilians in Sierra Leone). Commentators also accuse the Sierra Leone and Angolan governments of human rights abuses. See DEP'T OF STATE, *Sierra Leone*, in COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1999, at 433, 434 (2000) [hereinafter DEP'T OF STATE, *Sierra Leone*] (reporting that Sierra Leone government forces engaged in extrajudicial killings and summary executions); DEP'T OF STATE, *Angola*, in COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1999, at 1, 2 (2000) [hereinafter DEP'T OF STATE, *Angola*] (asserting that security forces in Angola are responsible for multiple extrajudicial killings and acts of torture); HRW-ANGOLA, *supra* note 13, at 61 (claiming that Angolan government troops killed civilians, engaged in torture, and recruited child soldiers); *HRW-Sierra Leone: Summary*, *supra* (asserting that forces defending Sierra Leone government summarily executed rebel prisoners and suspected rebel collaborators).

17. See *U.N. Final Report*, *supra* note 15, at para. 160, (explaining that Angolan insurgents sell diamonds to foreign buyers); *U.N. Exposes Angola Diamond Trade*, at [http://news.bbc.co.uk/hi/english/world/africa/newsid\\_1082000/1082425.stm](http://news.bbc.co.uk/hi/english/world/africa/newsid_1082000/1082425.stm) (reporting that U.N. implicated De Beers and other foreign companies as participants in conflict diamond trade); Gberie, *supra* note 13 (claiming that military offensive against insurgents in Sierra Leone will not be effective without simultaneous economic measures); see also Barbara Crossette, *Sierra Leone Rebel Leader Reportedly Smuggled Gems*, N.Y. TIMES, May 14, 2000, at 14 (claiming that foreign companies negotiated with RUF insurgent leader to obtain diamonds); Mark Duffield, *Geography and the Boundaries of Confidence: Globalization and War Economies: Promoting Order or the Return of History?*, 23 FLETCHER F. WORLD AFF. 21, 29 (1999) (maintaining that global corporations aid criminal activity associated with modern day conflicts); *Diamond Traders Act on Africa War Issue*, N.Y. TIMES, Sept. 8, 2000, at C21 [hereinafter *Diamond Traders Act*] (recognizing diamond industry's responsibility to ensure that diamonds do not originate in conflict zones).

diamond buyers, the practice of indirectly funding human rights violations represents a possible violation of international law.<sup>18</sup>

This Note focuses on the accountability of corporations for indirectly fueling civil wars by purchasing diamonds from insurgent groups. While many corporations are involved in the diamond industry,<sup>19</sup> De Beers<sup>20</sup> controls a majority of the uncut dia-

18. See Report of the International Law Commission, U.N. GAOR, 5th Sess., Vol. 6, Supp. No. 12, at 11-14, U.N. Doc. A/1316 (1950) [hereinafter Nuremberg Principles] (stating that complicity in war crimes and crimes against humanity are violations of international law); see also Anita Ramasastry, *Secrets and Lies? Swiss Banks and International Human Rights*, 31 VAND. J. TRANSNAT'L L. 325, 336, 391-92 (1998) (noting that Holocaust victim litigation against Swiss banks considers funding war crimes as complicity in war crimes and, therefore, alleges that banks violated international law).

19. See CONFLICT DIAMONDS, *supra* note 14, at 3-7 (explaining structure of diamond industry). In Sierra Leone, private security firms have become involved in the diamond industry, providing protection to the government of Sierra Leone in exchange for diamond concessions. See Juan Carlos Zarate, *The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder*, 34 STAN. J. INT'L L. 75, 96, 100 (1998) (reporting that Executive Outcomes, South African-based security company, has been directly involved in Sierra Leone civil war, taking diamond mining concessions as part of its payment for mercenary services); Van Niekerk, *supra* note 12, at 19 (maintaining that Executive Outcomes obtained diamond mine concessions by providing services to Sierra Leone government); Coll, *supra* note 1, at W24 (claiming that Sierra Leone government paid Executive Outcomes partially through diamond mine concessions); Conciliation Resources, *supra* note 13 (maintaining that Executive Outcomes had close ties with diamond company called Branch Energies); see also IAN SMILLIE ET AL., THE HEART OF THE MATTER: SIERRA LEONE, DIAMONDS & HUMAN SECURITY 58-65 (2000), available at <http://www.partnershipafricacanada.org/english/esierra.html> (indicating that some minor diamond corporations have substantial connections with private security firms involved in Sierra Leone). See generally HIRSCH, *supra* note 1, at 37-40 (explaining role of Executive Outcomes in Sierra Leone war).

20. See generally STEFAN KANFER, THE LAST EMPIRE: DE BEERS, DIAMONDS, AND THE WORLD (1993). Cecil Rhodes created the De Beers Company in 1880 after gaining control of a diamond mine in South Africa called De Beers. See *id.* at 87 (noting that when Cecil Rhodes created De Beers Company in 1880, company had assets of £200,000); BRIAN ROBERTS, CECIL RHODES: FLAWED COLOSSUS 40 (1987) (reporting that Rhodes controlled important section of De Beers mine, allowing formation of De Beers Company); ANTONY THOMAS, RHODES 117 (1996) (explaining that initial aim of De Beers was to regulate diamond production and marketing). In 1888, Rhodes acquired the Kimberley diamond mine and formed De Beers Consolidated Mines. KANFER, *supra*, at 101-07; ROBERTS, *supra*, at 84, 90; THOMAS, *supra*, at 172-81; EDWARD JAY EPSTEIN, THE RISE AND FALL OF DIAMONDS 70-75 (1982); 60 Minutes, *supra* note 12, at 16-17. In 1926, Ernest Oppenheimer, owner of a gold mining operation called Anglo American Corporation of South Africa, Ltd., joined the board of De Beers and became the head of the diamond syndicate. KANFER, *supra*, at 180-84, 205-7; EPSTEIN, *supra*, at 83-84. Today, De Beers owns 35% of Anglo American. See Anglo American: Diamonds, at <http://www.angloamerican.co.uk/diamonds/> (stating that De Beers has 35% holding in Anglo American); see also Alex Duval Smith, *The Gem Trail: Diamonds—From Angolan Mine to Third Finger on Left Hand*, INDEPENDENT (London), Feb. 13, 1999, at 18 (maintaining that Anglo American and De Beers are intertwined with each owning about



mond<sup>21</sup> market, including mining, buying, and selling uncut diamonds.<sup>22</sup> Therefore, this Note will analyze whether De Beers may be held liable for knowingly funding war criminals under the Alien Tort Claims Act ("ATCA").<sup>23</sup>

Part I of this Note examines the trade in conflict diamonds<sup>24</sup> in Angola and Sierra Leone and De Beers's involve-

42% of other company). In 1990, De Beers split into two companies, De Beers Consolidated Mines, Ltd., based in South Africa, and De Beers Centenary AG, based in Switzerland. Anglo American: Diamonds, *supra*; Dale J. Montpelier, *Diamonds Are Forever? Implications of United States Antitrust Statutes on International Trade and the De Beers Diamond Cartel*, 24 CAL. W. INT'L L.J. 277, 285-86 (1994). In February, 2001, De Beers announced that Anglo American would buy the South African and Swiss corporations for US\$17,600,000,000. See Alan Cowell & Rachel L. Swarns, *\$17.6 Billion Deal to Make De Beers Private Company*, N.Y. TIMES, Feb. 16, 2001, at W1 (explaining that consortium called DB Investments, in which Anglo American and Oppenheimer family each have 45% stake, will buy out De Beers stockholders). As a result of the deal, De Beers and Anglo American will be merged into one privately held corporation run by Nicky Oppenheimer. See *id.* (stating that Anglo American will provide financial support for creation of new private De Beers).

21. See SMILLIE ET AL., *supra* note 19, at 26-27 (explaining that most rough diamonds are sent to De Beers's Central Selling Organization in London where they are sorted according to variety of categories, such as size, color, and quality). De Beers sells uncut, or rough, diamonds to diamond buyers who then cut and polish the gems into finished products for sale on the consumer market. See SMILLIE, *supra* note 19, at 26-27 (maintaining that De Beers's Central Selling Organization sells to pre-selected buyers at events called sites, which occur 10 times per year); see also Nicholas Stein, *Inside the Diamond Factory: How Rough Stones are Fashioned into Sparkling Gems in the Jewelry Store Window*, FORTUNE, Feb. 19, 2001, at 208, 208-09 (explaining process of cutting and polishing rough diamonds); *60 Minutes*, *supra* note 12, at 19 (noting Bob Simon examining De Beers' process of selling rough stones to buyers who then cut and polish stones for sale to consumers).

22. See Dickey, *supra* note 15, at 9 (maintaining that De Beers mines 50% of world's diamonds and controls 70 to 80% of sales from producers to diamond cutters and dealers); Collier, *supra* note 15, at A1 (claiming that De Beers controls diamond industry, participating in most mining itself and also buying diamonds wholesale on open market); Smith, *supra* note 20, at 18 (maintaining that De Beers sells 80% of all uncut diamonds, representing both diamonds from its own mines and diamonds extracted by others); SMILLIE ET AL., *supra* note 19, at 22 (asserting that De Beers is involved in mining majority of diamonds and acquires most diamonds produced). Commentators claim that De Beers controls between 60 and 80% of the trade in uncut diamonds. Compare Charles Pretzlik, *De Beers Finalising Deal with Luxury Group LVMH*, FIN. TIMES, Jan. 13, 2001, at 1 (asserting that De Beers controls 60% of uncut diamond trade), with Global Witness, *A Rough Trade, The Role of De Beers and the CSO in the Diamond Business Dec.* 1998, at <http://www.oneworld.org/globalwitness/reports/Angola/industry.htm> [hereinafter *De Beers and the CSO*] (claiming that De Beers controls 80% of global diamond sales through its Central Selling Organization).

23. See Alien Tort Statute, 28 U.S.C. § 1350 [hereinafter ATCA] (stating that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States").

24. See CONFLICT DIAMONDS, *supra* note 14, at 1 (stating that conflict diamonds are

ment in this trade. Part II examines case law developments under the ATCA and obstacles to recovery against multinational corporations<sup>25</sup> (“MNCs”) under the ATCA. Part II also outlines efforts made by international organizations, the U.S. government, and MNCs to regulate the activities of MNCs in host countries.<sup>26</sup> Part III argues that De Beers should be liable under the ATCA for complicity in war crimes and crimes against humanity by funding insurgent groups engaged in human rights violations.<sup>27</sup> This Note concludes that the ATCA should be amended and offers a proposal for legislation to make MNCs liable for their involvement in human rights abuses. Under an amended ATCA, De Beers could be held accountable for its part in the conflict diamond trade.

## I. THE HEART OF THE MATTER: DIAMONDS, DESTRUCTION, AND DE BEERS

### A. Conflict Diamonds: The Setting

Observers note that the conflict diamond trade occurs in regions where diamonds are mined by insurgent groups and then sold for arms or cash.<sup>28</sup> While commentators claim that ending the conflict diamond trade may be an important element

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gems that come from areas under control of forces that are opposed to legitimate government); see also Jackie Gillers, *Vintage Point—Dirty Diamonds*, BUS. DAY (S. Afr.), Apr. 7, 2000, at 11 (stating that some commentators refer to this trade as “gemocide,” describing theft of diamonds to fund insurgent wars).

25. See Saman Zia-Zarifi, *Suing Multinational Corporations in the U.S. for Violating International Law*, 4 UCLA J. INT’L & FOR. AFF. 81, 81 n.1 (1999) (stating that term multinational corporation (“MNC”) is used to describe private commercial company that controls production or service facilities in countries other than country in which it is based).

26. See Zia-Zarifi, *supra* note 25, at 86 & n.14 (stating that term MNC implies home country, meaning country of incorporation, and host country, meaning country of operation or production).

27. See Nuremberg Principles, *supra* note 18 (stating that “[c]omplicity in the commission of a crime against the peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law”).

28. See BRITAIN, *supra* note 14, at 67, 74 (asserting that Angolan insurgents buy weapons with diamonds); RICHARDS, *supra* note 15, at 42 (claiming that insurgents in Sierra Leone are concerned with controlling diamonds to trade for weapons in order to finance war); HIRSCH, *supra* note 1, at 15 (alleging that RUF leader in Sierra Leone traded diamonds for arms); Crossette, *supra* note 8, at A1 (maintaining that RUF soldiers in Sierra Leone sell diamonds to obtain weapons); Dickey, *supra* note 15, at 9 (claiming that insurgents in Sierra Leone and other African nations use diamonds to procure arms and obtain money); Duke, *supra* 14, at A27 (claiming that Angolan combatants finance war with diamonds); see also CONFLICT DIAMONDS, *supra* note 14, at 1

of ending the civil wars in Angola and Sierra Leone, there are serious difficulties with stopping these exchanges.<sup>29</sup> Particularly, no technology currently exists that can identify diamonds by their source once they are on the market.<sup>30</sup> Additionally, smuggling and trading through multiple intermediaries present obstacles to determining where a diamond originated.<sup>31</sup>

### 1. Clarifying the Terms

Conflict diamonds are diamonds mined or stolen by insurgent forces in opposition to the legitimate government.<sup>32</sup> Insur-

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(stating that conflict diamonds originate in territory held by rebel forces in opposition to legitimate government).

29. See *African Diamonds: Hearing Before Subcomm. on Trade of House Comm. on Ways and Means*, 106th Cong. 43-44 (2000) (statement of Matthew A. Runci, Ph.D., President and Chief Executive Officer, Jewelers of America, Inc., on behalf of World Diamond Council) (asserting that curtailing trade in conflict diamonds will be difficult because scientists claim it is impossible to identify origin of diamond without destroying it and that only method for effectively curbing trade in conflict diamonds is establishment of systematic international tracking system requiring cooperation between diamond industry, governments, and international organizations); *African Diamonds: Hearing Before Subcomm. on Trade of House Comm. on Ways and Means*, 106th Cong. 73-74 (2000) (statement of William E. Boyajian, President, Gemological Institute of America) (claiming that tracking system to determine origin of diamonds will require increased cooperation on private, national, and international level and noting that identification technologies for determining origin of diamonds are not yet developed); SMILLIE ET AL., *supra* note 19, at 33-34 (noting lack of initiatives to combat smuggling in diamond industry, making tracking of diamonds difficult).

30. See *African Diamonds: Hearing Before Subcomm. on Trade of House Comm. on Ways and Means*, 106th Cong. 39 (2000) (statement of Matthew A. Runci, Ph.D., President and Chief Executive Officer, Jewelers of America, Inc., on behalf of World Diamond Council) (claiming that diamonds cannot be truly identified by original source without destroying diamond); *African Diamonds: Hearing Before Subcomm. on Trade of House Comm. on Ways and Means*, 106th Cong. 73 (2000) (statement of William E. Boyajian, President, Gemological Institute of America) (stating that technology for identifying diamonds by their source currently does not exist); see also CONFLICT DIAMONDS, *supra* note 14, at 8 (acknowledging that technological methodologies for identifying diamonds by source need further development but claiming that identifying diamonds by surface characteristics may be effective initially in determining origin of diamond).

31. See SMILLIE ET AL., *supra* note 19, at 33 (claiming that few paper trails exist to trace true source of diamonds); DAVID E. KOSKOFF, *THE DIAMOND WORLD* 3-4, 151 (1981) (asserting that smuggling is commonplace in diamond industry).

32. See *African Diamonds: Hearing Before Subcomm. on Trade of House Comm. on Ways and Means*, 106th Cong. 42 (2000) (statement of Matthew A. Runci, Ph.D., President and Chief Executive Officer, Jewelers of America, Inc., on behalf of World Diamond Council) (explaining that conflict diamonds are diamonds illegally extracted and sold by rebel movements in exchange for weapons); De Beers, *Written Testimony Before the United States Congress, House Committee on International Relations Subcommittee on Africa, Hearings into the Issue of 'Conflict Diamonds'* (May 9, 2000), at 4 [hereinafter *Hearing on Conflict Diamonds*], available at <http://www.debeersgroup.com/hotTopics/>

gent groups sell diamonds to buy arms and obtain cash flow for their war effort.<sup>33</sup> Commentators speculate that the conflict diamond trade comprises between four and fifteen percent of the world trade in diamonds.<sup>34</sup> Presently, conflict diamonds come from Angola, Sierra Leone, and the Democratic Republic of Congo.<sup>35</sup> Until recently, international law has not deterred traders from engaging in trade with rebels groups.<sup>36</sup>

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cdActions01.asp (offering definition of conflict diamonds stating that rebel groups mine or steal these diamonds); CONFLICT DIAMONDS, *supra* note 14, at 1 (stating that conflict diamonds are diamonds that originate in territory held by rebel forces in opposition to legitimate government).

33. See BRITTAIN, *supra* note 14, at 67, 74 (asserting that insurgents in Angola pay for South African and Zairian mercenaries and weapons with diamonds); RICHARDS, *supra* note 15, at 42 (alleging that insurgents and government soldiers in Sierra Leone are concerned with controlling diamonds to trade for weapons in order to continue war); HIRSCH, *supra* note 1, at 15 (claiming that insurgent leader in Sierra Leone traded diamonds for arms); Crossette, *supra* note 8, at A1 (alleging that insurgents in Sierra Leone sell diamonds in exchange for weapons); Dickey, *supra* note 15, at 9 (claiming that insurgents in Sierra Leone and other African nations use diamonds to procure arms and obtain money); Farah, *supra* note 15, at A15 (claiming that insurgents in Sierra Leone and Angola obtain weapons from Burkina Faso through diamond trade); *Rocks That Kill*, *supra* note 15, at 42 (maintaining that Angolan insurgents have bought many weapons through diamond sales).

34. See, e.g., *African Diamonds: Hearing Before Subcomm. on Trade of House Comm. on Ways and Means*, 106th Cong. 10 (2000) (statement of Tony P. Hall, Rep. Ohio) (claiming that although conflict diamond trade makes up only between five and 15% of total diamond trade, conflict diamond trade produces 30% of all profits from diamond trade because diamonds from Angola and Sierra Leone have particularly high value); Kelly Kleiman, *Price is Too High for Some Gems, Groups Say*, CHI. TRIB., Feb. 7, 2001, at S1 (stating that De Beers estimates conflict diamond trade as four percent of total diamond trade); *African Diamonds: Hearing Before Subcomm. on Trade of House Comm. on Ways and Means*, 106th Cong. 42 (2000) (statement of Matthew A. Runci, Ph.D., President and Chief Executive Officer, Jewelers of America, Inc., on behalf of World Diamond Council) (claiming that 96% of diamonds come from legitimate sources); *60 Minutes*, *supra* note 12, at 21 (noting Bob Simon reporting that group working on conflict diamond issue claims trade is more than four percent of world diamond trade); Kleiman, *supra* (explaining that activist group claims conflict diamond trade comprises 10 to 15% of total diamond trade); Kate Dunn, *Tainted Gems Lose Sparkle as Prices Fall*, CHRISTIAN SCI. MONITOR, Oct. 27, 2000, at 1 (claiming that conflict diamonds represent somewhere between four and 15% of world diamond trade).

35. See Buchan et al., *supra* note 14, at 6 (reporting that rebels in Angola, Sierra Leone, and Democratic Republic of Congo sell diamonds in exchange for arms); Collier, *supra* note 15, at A1 (claiming that civil wars in Angola, Sierra Leone, and Democratic Republic of Congo are financed by conflict diamond trade); CONFLICT DIAMONDS, *supra* note 14, at 2 (noting that conflict diamond trade fuels wars in Angola, Sierra Leone, and Democratic Republic of Congo).

36. See *African Diamonds: Hearing Before Subcomm. on Trade of House Comm. on Ways and Means*, 106th Cong. 10 (2000) (statement of Tony P. Hall, Rep. Ohio) (noting that diamond traders were willing to trade with rebels throughout 1990s).

## 2. A Rock in a Hard Place

The United States has responded to the trade in conflict diamonds by proposing that all diamonds imported into the United States have certificates of origin.<sup>37</sup> Because many nations' economies profit from legitimate diamond trade, and only certain countries produce conflict diamonds, determining the origin of diamonds is preferable to a total ban on diamonds.<sup>38</sup> Thus, identification of a diamond's source is essential to stopping the conflict diamond trade in these countries.<sup>39</sup>

Representatives from the diamond industry have asserted the impossibility of identifying the source of individual rough diamonds without destroying the diamond.<sup>40</sup> Commentators al-

37. See Clean Diamonds Act, H.R. 918, 107th Cong. § 3(a)(1) (2001) (proposing that diamonds imported into United States have certificate stating country of origin); *African Diamonds: Hearing Before Subcomm. on Trade of House Comm. on Ways and Means*, 106th Cong. 34 (2000) (statement of William B. Wood, Principal Deputy Assistant Secretary, International Organization Affairs, U.S. State Department) (claiming that certificates of origin are only way to regulate diamonds until technology is developed to mark diamonds); see also Dickey, *supra* note 15, at 9 (claiming that under current system, diamonds' place of origin is registered as country it was exported from and observing that this registration does not always harmonize with country diamond actually originated in).

38. See *African Diamonds: Hearing Before Subcomm. on Trade of House Comm. on Ways and Means*, 106th Cong. 15 (2000) (statement of Frank R. Wolf, Rep. Va.) (explaining that Botswanan and South African economies, which produce legitimate diamonds, would suffer from consumer boycott of diamonds); *African Diamonds: Hearing Before Subcomm. on Trade of House Comm. on Ways and Means*, 106th Cong. 42 (2000) (statement of Matthew A. Runci, Ph.D., President and Chief Executive Officer, Jewelers of America, Inc., on behalf of World Diamond Council) (emphasizing importance of legitimate diamond trade to many countries); Clean Diamonds Act, H.R. 918 § 2(6) (recognizing damage that consumer boycott would do to legitimate diamond trade).

39. See CONFLICT DIAMONDS, *supra* note 14, at 8 (stating that identification of origin of each diamond is central to debate over conflict diamonds); see also Dickey, *supra* note 15, at 11 (asserting that critics of certificate of origin schemes claim that plan is too difficult to implement).

40. See *African Diamonds: Hearing Before Subcomm. on Trade of House Comm. on Ways and Means*, 106th Cong. 39 (2000) (statement of Matthew A. Runci, Ph.D., President and Chief Executive Officer, Jewelers of America, Inc., on behalf of World Diamond Council) (claiming that diamonds cannot be accurately identified by origin without destroying diamond); *African Diamonds: Hearing Before Subcomm. on Trade of House Comm. on Ways and Means*, 106th Cong. 73 (2000) (statement of William E. Boyajian, President, Gemological Institute of America) (stating that there is currently no practical way of identifying diamonds by their source); *African Diamonds: Hearing Before Subcomm. on Trade of House Comm. on Ways and Means*, 106th Cong. 69 (2000) (statement of J.F. "Jack" Jolis, President, Rough Diamond Consultancy) (claiming that there is uninformed discussion about marking diamonds, which, if possible, would destroy diamond in process).

lege, however, that experts can identify diamonds from different regions through a variety of techniques, including simply looking at their surface features.<sup>41</sup> Although identifying diamonds by surface features is not a precise science, a combination of identification techniques could be used to determine a diamond's origin.<sup>42</sup> At least one commentator argues that these methods may be equally useful to exclude those regions from where a diamond did not originate.<sup>43</sup>

### 3. Dealer in the Rough

Commentators note that tracing the origin of conflict diamonds is further complicated by the smuggling culture in the diamond business.<sup>44</sup> A recent U.N. report on the Angolan conflict diamond trade explains the complex organizational structure of modern day diamond smuggling.<sup>45</sup> Diamonds are sus-

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41. See CONFLICT DIAMONDS, *supra* note 14, at 10 (stating that surface features can be useful in identifying source of diamonds); see also SMILLIE ET AL., *supra* note 19, at 69 (recognizing that identifying diamonds by surface features can only be applied to rough gems); Robert Block, *Smashing Diamonds: Industry's Future Rests on Pinpointing Origin of Each Gem*, HOUSTON CHRON., July 23, 2000, at 4 (asserting that De Beers admits ability to recognize diamonds from broad areas by examining surface features). Diamonds have distinct surface features according to their region of origin, created either by the particular growth of the crystal or by external factors such as distinguishing scratches on the surface of the stone caused by abrasion from other stones. See CONFLICT DIAMONDS, *supra* note 14, at 10 (explaining surface features of diamonds as identifying characteristic).

42. See CONFLICT DIAMONDS, *supra* note 14, at 10 (claiming that combination of surface characteristics techniques could help to develop methodology for identifying diamonds by place of origin). Currently, experts are developing technologies for identifying the exact place of origin of diamonds. See *id.* at 13-15 (outlining various methods that can be used to identify birthplace of diamonds). But see *African Diamonds: Hearing Before Subcomm. on Trade of House Comm. on Ways and Means*, 106th Cong. 19 (2000) (statement of Donald M. Payne, Rep. N.J.) (asserting that it is incredible that De Beers, with amount of diamonds they handle, has not developed technology to mark diamonds).

43. See CONFLICT DIAMONDS, *supra* note 14, at 15 (quoting Royal Canadian Mounted Police stating that identification technologies may provide conclusive evidence that diamonds did not originate in particular location).

44. See SMILLIE ET AL., *supra* note 19, at 33 (asserting that there are few paper trails to trace true source of diamonds); KOSKOFF, *supra* note 31, at 3-4, 151 (claiming that smuggling is commonplace in diamond industry); RICHARDS, *supra* note 15, at 50 (maintaining that smuggling is common because diamonds are easy to conceal); *African Diamonds: Hearing Before Subcomm. on Trade of House Comm. on Ways and Means*, 106th Cong. 14 (2000) (statement of Frank R. Wolf, Rep. Va.) (claiming that at least US\$40,000,000,000 worth of diamonds has been smuggled out of conflict diamond countries).

45. See U.N. *Final Report*, *supra* note 15, para. 150-206 (examining system of smug-

ceptible to smuggling because they are small and easy to conceal.<sup>46</sup> Observers state that the diamond industry's lack of transparency makes it difficult to combat smuggling.<sup>47</sup> Smuggling usually involves trading diamonds through multiple buyers, or intermediaries, which presents further difficulties in tracing diamond trade routes.<sup>48</sup>

### B. *The Civil Wars: The Carat and the Stick*

The civil wars in Angola and Sierra Leone are examples of insurgent movements using diamonds to finance wars against official governments.<sup>49</sup> The civil war in Angola has continued on

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gling diamonds by insurgents in Angola in exchange for arms and cash); Barbara Crossette, *U.N. Study of Diamonds-for-Arms Deals Focuses on Shadowy Trader*, N.Y. TIMES, Dec. 22, 2000, at A12 (reporting that trade of diamonds for arms in Angola is internationally organized, well connected, and well funded); see also RICHARDS, *supra* note 15, at 50 (asserting that conditions of civil war make tracking diamonds even more difficult).

46. See KOSKOFF, *supra* note 31, at 3 (claiming that portability of diamonds makes diamond trade ungovernable with respect to smuggling); Buchan et al., *supra* note 14, at 6 (maintaining that diamonds are often smuggled because they are small, easy to hide, and quick source of cash); Dickey, *supra* note 15, at 9 (stating that diamonds are easy to smuggle because they are tiny).

47. See Buchan et al., *supra* note 14, at 6 (asserting that diamond industry is largely self regulated with few formal contracts, therefore, preventing trade in conflict diamonds is difficult); *African Diamonds: Hearing Before Subcomm. on Trade of House Comm. on Ways and Means*, 106th Cong. 13 (2000) (statement of Mayer Herz, Vice-President, Diamond Acquisitions MONDERA.com) (commenting that corruption and bribery are normal in diamond world); Collier, *supra* note 15, at A1 (noting that diamond industry is called secretive and insular); Mark Honigsbaum & Chris Gordon, *Diamonds Are a Guerrilla's Best Friend*, OBSERVER, June 13, 1999, at 23 (maintaining that there is little transparency in diamond trade); Global Witness, *A Rough Trade, Business is Business*, Dec. 1998, at <http://www.oneworld.org/globalwitness/reports/Angola/business.htm> (claiming that diamond industry has refused to ensure transparency and accountability for eliminating trade in conflict diamonds). *But see* Interview by Martin Rapaport with Nicky Oppenheimer, Chairman of De Beers Consolidated Mines, London (July 27, 2000) (citing Oppenheimer who claimed external audit of diamond sources is unnecessary because De Beers guarantees that its diamonds are not from conflict zones and such guarantees are not made lightly).

48. See *De Beers and the CSO*, *supra* note 22 (asserting that number of intermediaries involved in diamond trade inhibits effective tracking of diamonds); *African Diamonds: Hearing Before Subcomm. on Trade of House Comm. on Ways and Means*, 106th Cong. 59 (2000) (statement of Jeffrey Fischer, President, Diamond Manufacturers and Importers Association of America) (commenting that diamonds can be sold and re-sold many times before reaching retail market).

49. See BRITAIN, *supra* note 14, at 67, 74 (claiming that Angolan insurgents bought weapons with revenue from diamond sales for continuation of war); Farah, *supra* note 15, at A15 (reporting that insurgents in Sierra Leone and Angola use diamonds to buy weapons from Burkina Faso in order to continue fighting); *Rocks That Kill*, *supra* note 15, at 42 (claiming that Angolan insurgents have financed recent return to war through

and off since the 1960s,<sup>50</sup> and diamonds are essential to maintaining the insurgent war effort there.<sup>51</sup> The civil war in Sierra Leone is more recent, beginning in 1991,<sup>52</sup> and insurgent groups there also use diamonds to buy weapons for use in the fighting.<sup>53</sup> Commentators assert that the trade in conflict diamonds has prolonged the length of the violence in Angola and Sierra Leone.<sup>54</sup>

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sale of diamonds); Collier, *supra* note 15, at A1 (asserting that insurgents in Angola and Sierra Leone use money from diamond sales to buy weapons and maintain war effort); Dickey, *supra* note 15, at 9 (asserting that Sierra Leone insurgents are able to continue war offensives through financing from diamond sales).

50. See JAMES CIMENT, *ANGOLA AND MOZAMBIQUE, POSTCOLONIAL WARS IN SOUTHERN AFRICA* 39 (1997) (noting that uprising in Luanda, capital of Angola, in 1961 was beginning of war in Angola); JOHN MARCUM, *THE ANGOLAN REVOLUTION VOLUME I: THE ANATOMY OF AN EXPLOSION (1950-1962)*, at 123-26 (1969) (examining initial violence in Angola in 1961); INGE TVEDTEN, *ANGOLA: STRUGGLE FOR PEACE AND RECONSTRUCTION* 36-44 (1997) (describing fighting between Popular Movement for the Liberation of Angola ("MPLA") and National Union for the Total Independence of Angola ("UNITA") in Angola between 1975 and 1990 as Second War of Liberation and explaining that war continued through 1990s with breakdown of peace agreement in 1992); HRW-ANGOLA, *supra* note 13, at 8 (claiming that Angolan civil war has continued since independence).

51. See U.N. *Final Report*, *supra* note 15, at para. 165 (claiming that Angolan insurgents' ability to continue fighting is provided through sale of diamonds); BRITAIN, *supra* note 14, at 67, 74, 81 (maintaining that insurgent soldiers in Angola buy arms through sale of diamonds and that diamonds are essential to survival of insurgent movement); Duke, *supra* note 14, at A27 (claiming that Angolan insurgents finance war with diamonds mined from territory that they occupy); Drogin, *supra* note 13, at A1 (alleging that diamond smuggling by insurgent forces in Angola provides revenues for guns and food for soldiers).

52. See CONTEH-MORGAN & DIXON-FYLE, *supra* note 1, at 126-27 (noting that initial violence in 1991 was result of conflict in neighboring country, Liberia); Zarate, *supra* note 19, at 95 (stating that RUF has been at war against government since 1991).

53. See HIRSCH, *supra* note 1, at 25 (maintaining that insurgents in Sierra Leone use diamonds to sustain war effort); Buchan et al., *supra* note 14, at 6 (claiming that RUF soldiers in Sierra Leone use diamonds to finance civil war); Vo, *supra* note 14, at 7 (noting that insurgents in Sierra Leone control many diamond mines and use revenues from mines to pay for weapons).

54. See BRITAIN, *supra* note 14, at 89 (asserting that Angolan insurgent group's delay in peace negotiations allowed immense profit through conflict diamond sales); Abdullah & Muana, *supra* note 13, at 192 (alleging that partnership between insurgent fighters and illicit diamond miners is fundamental reason for continuation of war in Sierra Leone); Drogin, *supra* note 13, at A1 (maintaining that illicit diamond trade may prevent lasting peace in Angola); Dickey, *supra* note 15, at 9 (claiming that conflict diamond trade has extended war in Sierra Leone, allowing more human rights abuses to occur); see also Duffield, *supra* note 17, at 28-29 (theorizing that chaos caused by conflict provides opportunity for criminals to make considerable profits through smuggling).



## 1. Angola

The Portuguese colonized Angola and controlled the region until 1975 when the Portuguese government granted Angola's independence.<sup>55</sup> Since Angola's independence, civil war has engulfed Angola as insurgent forces struggle against the Popular Movement for the Liberation of Angola<sup>56</sup> ("MPLA"), the ruling party in Angola.<sup>57</sup> The insurgent forces, called the National Union for the Total Independence of Angola<sup>58</sup> ("UNITA"), occupied a majority of the diamond producing areas in Angola in the 1990s<sup>59</sup> and have used revenues from diamond mining and trading to buy more arms for continued fighting.<sup>60</sup>

### a. History of Angola

For most of the twentieth century, the Portuguese con-

55. See *ANGOLA: A COUNTRY STUDY* 3, 159 (Thomas Collelo ed., 1989) (stating that Portugal granted independence to Angola in 1975); MARGARET JOAN ANSTEE, *ORPHAN OF THE COLD WAR* 8 (1996) (reporting that Angola achieved independence in 1975).

56. See CIMENT, *supra* note 51, at 11 (explaining that MPLA, founded in 1956, has dominated government in Angola since independence and detailing broad history of MPLA); *ANGOLA: A COUNTRY STUDY*, *supra* note 55, at 170-71 (explaining background of MPLA); FERNANDO ANDRESEN GUIMARÃES, *THE ORIGINS OF THE ANGOLAN CIVIL WAR* 37-48 (1998) (examining history and development of MPLA).

57. See TVEDTEN, *supra* note 50, at 32-44 (explaining that Angola has been at war since independence except for brief period of peace from 1991 until 1992); HRW-ANGOLA, *supra* note 13, at 8 (noting that war has continued in Angola since 1975 except for brief peace in early 1990s).

58. See CIMENT, *supra* note 50, at 94-95 (explaining that UNITA was officially founded in 1966 by Jonas Savimbi after he became disillusioned with other nationalist groups in Angola); *ANGOLA: A COUNTRY STUDY*, *supra* note 55, at 32, 187 (examining history of UNITA).

59. See Duke, *supra* note 14, at A27 (asserting that UNITA controlled most Angolan diamond fields in late 1990s); Drogin, *supra* note 13, at A1 (stating that UNITA produced majority of Angolan diamonds in 1996); Judith Matloff, *Going for the Glint: Diamonds Keep War in Angola Alive*, *CHRISTIAN SCI. MONITOR*, Oct. 18, 1995, at 1 (claiming that UNITA occupied majority of diamond mines in Angola in 1992); Christopher McDougall, *In Angola, Diamonds are a Struggling Smuggler's Best Friend*, *L.A. TIMES*, June 13, 1993, at A9 (reporting that insurgent groups in Angola control diamond mines).

60. See *U.N. Final Report*, *supra* note 15, at para. 165 (maintaining UNITA has ability to continue fighting through diamond sales); BRITAIN, *supra* note 14, at 67, 74, 81 (claiming that UNITA purchases weapons through diamond sales and that diamonds are integral part of UNITA survival); Duke, *supra* note 14, at A27 (claiming that UNITA uses revenue from diamond trade to finance war effort); Drogin, *supra* note 13, at A1 (alleging that revenues from diamond trade provide weapons and nourishment for UNITA soldiers).

trolled Angola.<sup>61</sup> Although the first Portuguese explorer arrived in Angola in 1483,<sup>62</sup> the Portuguese did not establish a colony in Angola until 1576 when they founded their first town in Angola, called Luanda.<sup>63</sup> Portugal subsequently used Angola as its primary source of slaves in the seventeenth and eighteenth centuries.<sup>64</sup> Portugal continued to gain control over Angolan territory throughout the nineteenth century and by 1930, Portugal considered Angola an important Portuguese colony.<sup>65</sup>

The war in Angola began in 1961 as a war of independence against Portuguese colonialism.<sup>66</sup> In the 1950s and 1960s, anti-colonialist sentiment gave rise to three nationalist movements.<sup>67</sup>

61. See ANGOLA: A COUNTRY STUDY, *supra* note 55, at 3, 159 (stating that Angola escaped Portuguese rule in 1975); ANSTEE, *supra* note 55, at 8 (reporting that Angola received independence in 1975); GUIMARÃES, *supra* note 56, at 93 (explaining agreement that set independence date as November 11, 1975); Chas W. Freeman, *The Angola/Namibia Accords*, FOREIGN AFF., Summer, 1989, at 126, 127 (noting that Portugal granted independence to Angola in 1975).

62. See ANGOLA: A COUNTRY STUDY, *supra* note 55, at 7 (claiming that Diogo Cão, Portuguese explorer, arrived in Angola in 1483); MARCUM, *supra* note 50, at 1 (noting that Diogo Cão appeared in Angola in 1483 and took return trip to Angola in 1485); TVEDTEN, *supra* note 50, at 17 (maintaining that Diogo Cão reached mouth of Zaire River in 1483).

63. See ANGOLA: A COUNTRY STUDY, *supra* note 55, at 9 (claiming that Portugal did not begin to establish control in Angola until 1576 because its attention was on Asia and Americas); MARCUM, *supra* note 50, at 2 (noting that Luanda developed as major slave port for Portugal in 1576); TVEDTEN, *supra* note 62, at 19 (claiming that Portuguese established system where Portuguese citizens could acquire property in Angola on condition that they pay expenses of settling and defending land, allowing these citizens to meet these expenses by taxing local population).

64. See ANGOLA: A COUNTRY STUDY, *supra* note 55, at 11 (claiming that slave trade was main economic incentive for Portuguese expansion in Angola); MARCUM, *supra* note 50, at 2 (asserting that Portugal exported 3,000,000 Angolans as slaves between 1580 and 1836); TVEDTEN, *supra* note 50, at 18 (noting that Angola suffered heavier loss of population due to slave trade than any other African nation).

65. See TVEDTEN, *supra* note 50, at 23-26 (examining Portuguese expansion in Angola and Portuguese Colonial Act of 1930, declaring Angola integral part of nation); MARCUM, *supra* note 50, at 4 (asserting that Portuguese controlled Angolan territory by 1930 and that in 1930s Portugal's colonies gained importance on national agenda).

66. See CIMENT, *supra* note 50, at 39 (explaining that although there were minor uprisings prior to 1961 against Portuguese colonialists in Angola, uprising in Luanda, capital of Angola, was beginning of war in Angola); MARCUM, *supra* note 50, at 123-26 (examining first explosion of violence in Angola in 1961); Scott MacLeod, *Angola: Where Blossoms and Bullets Grow*, TIME, Oct. 17, 1988, at 43, 43 (noting that fighting in Angola began in 1961 as war of independence against Portugal).

67. See CIMENT, *supra* note 50, at 38-39, 94 (explaining origins of MPLA, UNITA, and National Front of Liberation of Angola ("FNLA")); GUIMARÃES, *supra* note 56, at 31-33, 82 (examining nationalist character of anti-colonialist movements in Angola and stating that by mid- to late-1960s three nationalist movements had clear presence in

The MPLA, founded in 1956,<sup>68</sup> drew support from urban dwellers<sup>69</sup> and professed a Marxist ideology.<sup>70</sup> The National Front of Liberation of Angola<sup>71</sup> ("FNLA"), originally known as the Union of the Peoples of Northern Angola and subsequently the Union of Angolan Peoples,<sup>72</sup> was composed mostly of Kikongo, or Bakongo, people and had significant ties to Zaire.<sup>73</sup> The third nationalist group in Angola is UNITA, founded by Jonas Savimbi in 1966.<sup>74</sup> UNITA drew most of its support from the

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Angola against Portuguese rule). Although the three groups adhered to different political platforms, they shared the common goal of ending imperialism in Angola. See generally GUIMARÃES, *supra* note 56, at 37-82 (examining three nationalist groups in pre-independence Angola).

68. See GUIMARÃES, *supra* note 56, at 42 (stating that official history of MPLA claims that party was founded on December 10, 1956); CIMENT, *supra* note 50, at 39 (stating that MPLA began in 1956).

69. See ANGOLA: A COUNTRY STUDY, *supra* note 55, at 161 (asserting that most MPLA support was in urban centers); CIMENT, *supra* note 50, at 11 (claiming that MPLA supporters were urban and intellectuals); Freeman, *supra* note 61, at 127 (maintaining that MPLA drew support from people in Luanda, capital of Angola); *Why Angola's Rebels Will Fight On. And On.*, ECONOMIST, Nov. 23, 1997, at 42, 43 (stating that MPLA support is cosmopolitan and urban-centered).

70. See TVEDTEN, *supra* note 50, at 44 (stating that MPLA was strongly influenced by Marxist thought); CIMENT, *supra* note 50, at 11 (claiming that MPLA's ideology was socialist and nationalist); ANGOLA: A COUNTRY STUDY, *supra* note 55, at 27 (asserting that MPLA drew Marxist tendencies from influence of Portuguese Communist Party).

71. See CIMENT, *supra* note 50, at 12 (noting that FNLA was founded in 1957 and that movement did not survive long after independence when forces were defeated by MPLA forces with Cuban assistance); GUIMARÃES, *supra* note 56, at 48-57 (explaining history of FNLA); ANGOLA: A COUNTRY STUDY, *supra* note 55, at 27, 161 (reporting that FNLA was founded in 1954). See generally MARCUM, *supra* note 50, at 49-100 (explaining historical roots of FNLA).

72. See CIMENT, *supra* note 50, at 12 (stating that FNLA took its name in 1961, dropping regional aspects of previous names); ANGOLA: A COUNTRY STUDY, *supra* note 55, at 161 (explaining name changes of FNLA); GUIMARÃES, *supra* note 56, at 55 (claiming that formation of FNLA was effort to represent more ethnic groups within Angola).

73. See CIMENT, *supra* note 50, at 12 (asserting that FNLA consistently drew support from Kikongo people, many of whom lived in Zaire, and that leader of FNLA had close ties to Zairian dictator, Joseph Mobutu); ANGOLA: A COUNTRY STUDY, *supra* note 55, at 27 (claiming that FNLA initially advocated for restoration of Bakongo kingdom, which overlapped with Zaire, but later adopted Angolan nationalist agenda); TVEDTEN, *supra* note 50, at 29 (asserting that FNLA drew most support from Kongo people in northern provinces of Angola); Freeman, *supra* note 61, at 127 (stating that FNLA supporters were Bakongo and that FNLA leader was related by marriage to Zairian dictator, Joseph Mobutu, leading to considerable backing for FNLA from Zaire).

74. See GUIMARÃES, *supra* note 56, at 76 (stating that UNITA was founded in 1966 by Jonas Savimbi); ANGOLA: A COUNTRY STUDY, *supra* note 55, at 32 (claiming that UNITA emerged in 1966 with its attack on Vila Teixeira de Sousa, Angolan town now renamed Luau).

Ovimbundu people, the largest ethnic group in Angola.<sup>75</sup> Commentators note that the ideology of UNITA is largely an expression of Savimbi's own ideals, which have changed over the years from Maoist to anti-communistic.<sup>76</sup>

After years of war between Angolan nationalist groups and Portuguese colonialists, Portugal granted independence to Angola on November 11, 1975.<sup>77</sup> In the time preceding the date of independence, the three nationalist groups turned against each other in a struggle to gain control over Luanda, the capital, by November 11.<sup>78</sup> The MPLA eventually gained control.<sup>79</sup> The FNLA joined forces with UNITA, realizing that neither group could defeat the MPLA alone, and the combined forces declared

75. See GUIMARÃES, *supra* note 56, at 76 (claiming that prior to emergence of UNITA, Ovimbundu people were not represented in Angolan nationalist movements); CIMENT, *supra* note 50, at 12 (stating that Savimbi established UNITA base in central Angola in Ovimbunduland); ANGOLA: A COUNTRY STUDY, *supra* note 55, at 32 (claiming that UNITA represented Ovimbundu people, who comprised one third of Angolan population); Freeman, *supra* note 61, at 127 (maintaining that UNITA represents Ovimbundu, who are two fifths of Angolan population, and Balunda, who are about one sixth of Angolan population).

76. See CIMENT, *supra* note 50, at 12 (stating that UNITA's agenda has been recognized as little more than expression of Savimbi's personal opinions and explaining that initially Savimbi was self-proclaimed Maoist, but later he claimed anti-communist ideology and in 1990s expressed commitment to multi-party democracy); BRITAIN, *supra* note 14, at 11 (stating that Savimbi professed Maoist ideology at one time and shifted ideologies to anti-communism).

77. ANGOLA: A COUNTRY STUDY, *supra* note 55, at 159; ANSTEE, *supra* note 55, at 8; BRITAIN, *supra* note 14, at 1; GUIMARÃES, *supra* note 56, at 93; Freeman, *supra* note 61, at 127; Alfredo E. Castro, *The Forgotten War of Angola*, AMERICA, Dec. 11, 1993, at 6, 6; Tom Fennel & Stefan Lovgren, *The Diamond War: Canada Tries to Halt the Illegal Sales Fuelling a Brutal Conflict*, MACLEAN'S, Mar. 22, 1999, at 18, 19; HRW-ANGOLA, *supra* note 13, at 8.

78. See ANGOLA: A COUNTRY STUDY, *supra* note 55, at 159 (reporting that there was effort to form coalition government at time of independence but it failed and civil war began); BRITAIN, *supra* note 14, at 2 (claiming that transitional power sharing agreement between nationalist groups collapsed in January 1975); TVEDTEN, *supra* note 50, at 36 (asserting that inability of nationalist groups to work together was result of mutual distrust and suspicion rather than difference in political ideology); ANSTEE, *supra* note 55, at 8 (noting that conflict broke out between MPLA, FNLA, and UNITA almost immediately with transition to independence); HRW-ANGOLA, *supra* note 13, at 8 (claiming that nationalist groups in Angola fought against each other in battle to control capital city).

79. ANGOLA: A COUNTRY STUDY, *supra* note 55, at 162; CIMENT, *supra* note 50, at 51; BRITAIN, *supra* note 14, at 3; Castro, *supra* note 77, at 6; J.E. Spence, *Southern Africa in the Cold War: Post World War II Southern Africa*, HISTORY TODAY, Feb. 1999, at 43, 47; Jon Lee Anderson, *Letter from Angola: Oil and Blood*, NEW YORKER, Aug. 14, 2000, at 46, 50-51.

full-scale civil war against the Angolan government.<sup>80</sup>

Angola had democratic elections in 1992 as a result of a short-lived peace agreement.<sup>81</sup> The war resumed after Savimbi rejected the election results.<sup>82</sup> In November 1994, UNITA and the government signed the Lusaka Protocol,<sup>83</sup> attempting to end the war, but fighting continues.<sup>84</sup>

### b. Two Months Salary: Funding a Civil War

Commentators claim that UNITA controlled the majority of diamond production and exportation in Angola in the 1990s.<sup>85</sup> UNITA used the revenue generated from the sale of diamonds

80. See TVEDTEN, *supra* note 50, at 37 (claiming that FNLA and UNITA formed alliance and declared civil war); ANSTEE, *supra* note 55, at 8 (noting that FNLA and UNITA attempted to establish separate regime in Huambo, another city in Angola); CIMENT, *supra* note 50, at 62 (asserting that South Africa recruited many members of FNLA troops and integrated them into combined UNITA/South African force); ANGOLA: A COUNTRY STUDY, *supra* note 55, at 40, 162 (claiming that FNLA and UNITA joined together in effort to establish rival government against MPLA).

81. John Battersby, *Angolan Rebels Win Concessions After War Gains*, CHRISTIAN SCI. MONITOR, Apr. 22, 1993, at 8; Steven A. Holmes, *Ending Long Hostility, U.S. Plans Ties with Angola's Government*, N.Y. TIMES, May 19, 1993, at A1; see also ANSTEE, *supra* note 55, at 2 (explaining that peace agreement called Bicesse Accords called for ceasefire and multiparty elections).

82. Buchan et al., *supra* note 14, at 6; Zarate, *supra* note 19, at 94; BRITAIN, *supra* note 14, at 58-59; TVEDTEN, *supra* note 50, at 41; HRW-ANGOLA, *supra* note 13, at 12; Castro, *supra* note 77, at 7; see also ANSTEE, *supra* note 61, at 199-238 (describing election from viewpoint of U.N. Special Representative to Angola during that period).

83. See Lusaka Protocol, Nov. 15, 1994, available at [http://www.angola.org/politics/p\\_lusaka.htm](http://www.angola.org/politics/p_lusaka.htm) (calling for cease-fire and new elections); see also TVEDTEN, *supra* note 50, at 43 (observing that Lusaka Protocol provided for cease-fire, release of prisoners, establishment of U.N. peacekeeping operation, and participation of UNITA in Angolan government).

84. See Rachel L. Swarns, *Angola's Goal: Stepping Back From the Abyss*, N.Y. TIMES, Dec. 24, 2000, at 1 (claiming that Savimbi returned to war in 1998); Global Witness, *A Rough Trade, Year by Year*, Dec. 1998, at <http://www.oneworld.org/globalwitness/reports/Angola/year.htm> (asserting that Angolan violence continued in 1998); HUMAN RIGHTS WATCH, ANNUAL REPORT 2001, at 31 (noting that war continued in Angola into early 2000).

85. See Duke, *supra* note 14, at A27 (asserting that UNITA occupied most of diamond fields in Angola in late 1990s); Drogin, *supra* note 13, at A1 (maintaining that UNITA was largest diamond producer in Angola in 1996); Matloff, *supra* note 59, at 1 (claiming that UNITA gained control of majority of Angolan diamond mines in 1992); McDougall, *supra* note 59, at A9 (reporting that Angolan insurgent groups control diamond mines, while Angolan government controls oil fields); Global Witness, *A Rough Trade, Brief Overview of the Trade in Angolan Diamonds*, Dec. 1998, at <http://www.oneworld.org/globalwitness/reports/Angola/overview.htm> (asserting that UNITA controlled 90% of diamond exports between 1992 and 1994).

extracted from their occupied territory to fund the war effort.<sup>86</sup> Commentators speculate that UNITA made several billion dollars in revenue in the 1990s in diamond trade alone.<sup>87</sup>

In June 1998, the U.N. Security Council passed Resolution 1176,<sup>88</sup> accelerating Resolution 1173, responding to the conflict diamond trade.<sup>89</sup> These resolutions combined to prohibit the export of diamonds from Angola that are not certified by the government.<sup>90</sup> Nevertheless, there are significant loopholes, through which conflict diamonds may still reach the outside market.<sup>91</sup>

86. See U.N. *Final Report*, *supra* note 15, at para. 165 (asserting that financial ability of UNITA to continue fighting is provided through sale of diamonds); BRITAIN, *supra* note 14, at 67, 74, 81 (claiming that UNITA buys arms through sale of diamonds and that diamonds are essential to survival of UNITA); Duke, *supra* note 14, at A27 (claiming that UNITA finances war effort with diamonds mined from occupied territory); Drogin, *supra* note 13, at A1 (alleging that diamond smuggling allows UNITA forces to continue fighting because revenues provide weaponry and food for soldiers); Global Witness, *A Rough Trade, The Role of Diamonds in Angola in the 1990s*, Dec. 1998, at <http://www.oneworld.org/globalwitness/reports/Angola/role.htm> [hereinafter *Diamonds in Angola*] (asserting that UNITA uses diamond sales to procure arms); HRW-ANGOLA, *supra* note 13, at 57 (maintaining that UNITA is able to buy weapons with revenue from diamond sales).

87. See U.N. *Final Report*, *supra* note 15, at paras. 152, 171 (estimating that UNITA made US\$800,000,000 profit from diamond trade in 1996 and more than US\$150,000,000 in 1999); Peter Hawthorne, *Diamonds In The Rough*, TIME, Dec. 6, 1999, at 64, 64-65 (claiming that UNITA made US\$2,500,000,000 in diamond trade between 1992 and 1997); *Diamonds in Angola*, *supra* note 86 (claiming that UNITA made US\$3,720,000,000 from diamond trade between 1992 and 1998); Nicholas Shaxson, *Savimbi's Diamonds May Not Be Forever*, FIN. TIMES, Feb. 13, 1998, at 3 (asserting that UNITA made about US\$666,000,000 in diamond sales in 1996); BRITAIN, *supra* note 14, at 89 (maintaining that UNITA's profit from conflict diamond trade in mid-1996 was about US\$1,000,000 per day). *But see Hearing on Conflict Diamonds*, *supra* note 32, at 4 (claiming that US\$4,000,000,000 estimate of diamond revenue made by UNITA is inaccurate and disregards fact that diamond fields in Angola often switched hands between UNITA and government forces in 1990s).

88. See S.C. Res. 1176, U.N. SCOR, 3894th mtg., para. 2, U.N. Doc. S/RES/1176 (1998) (invoking Resolution 1173 to impose sanctions on Angola more quickly).

89. See S.C. Res. 1173, U.N. SCOR, 3891th mtg., para. 11, U.N. Doc. S/RES/1173 (1998) (calling for freeze of UNITA assets and prohibiting diamond trading with UNITA forces).

90. See S.C. Res. 1176, *supra* note 88, at para. 2 (accelerating Security Council Resolution 1173); S.C. Res. 1173, *supra* note 89, at para. 12(b) (forbidding import of Angolan diamonds without official certificate of origin).

91. See U.N. *Final Report*, *supra* note 15, at para. 197 (commenting that, despite UN sanctions on diamond trade in Angola, smugglers are still able to sell diamonds obtained from insurgents in Angola); Dickey, *supra* note 15, at 11 (maintaining that diamond trade with UNITA forces continues despite U.N. sanctions); Global Witness, *A Rough Trade, The U.N. Security Council Embargo on Unofficial Angolan Diamonds*, Dec. 1998, at <http://www.oneworld.org/globalwitness/reports/Angola/unsc.htm> [hereinafter

## 2. Sierra Leone

The British colonized Sierra Leone as a settlement sight for freed slaves.<sup>92</sup> In 1961, Sierra Leone achieved independence from the British<sup>93</sup> and functioned as a one party state for many years.<sup>94</sup> The civil war in Sierra Leone began in 1991 as a *coup d'état* organized by the Revolutionary United Front ("RUF").<sup>95</sup> The RUF insurgents have occupied many of the diamond producing areas in Sierra Leone<sup>96</sup> and they use the profits from diamond sales to finance their continued fighting.<sup>97</sup>

### a. History of Sierra Leone

The history of Sierra Leone is unique because Britain's initial involvement with the nation was an effort to repatriate slaves

*UNSC Embargo*] (claiming that U.N. sanctions have had minimal effect on UNITA diamond trade). For example, Angolan diamonds require a certificate of origin while diamonds exported from neighboring countries may only require a customs declaration. *UNSC Embargo, supra*. If the diamonds are smuggled across the Angolan border, they will not be subject to the same scrutiny as when they are exported directly from Angola. *See id.*; *see also* Hawthorne, *supra* note 87, at 65 (calling U.N. sanctions "ineffective"); *Rocks That Kill, supra* note 15, at 42 (explaining that diamond dealers obtain Angolan diamonds easily through neighboring countries).

92. *See* HIRSCH, *supra* note 1, at 23 (stating that in 1787, British established Freetown, capital of Sierra Leone, as settlement area for repatriated slaves in 1787); MARTIN KILSON, *POLITICAL CHANGE IN A WEST AFRICAN STATE: A STUDY OF THE MODERNIZATION PROCESS IN SIERRA LEONE I* (1966) (noting that British oversaw resettlement of freed slaves in Freetown).

93. *See* CONTEH-MORGAN & DIXON-FYLE, *supra* note 1, at 75 (noting that British granted independence to Sierra Leone in 1961); Fred M. Hayward & Jimmy D. Kandeh, *Perspectives on Twenty-Five Years of Elections in Sierra Leone*, in *ELECTIONS IN INDEPENDENT AFRICA* 25, 29 (Fred M. Hayward ed., 1987) (stating that Sierra Leone received independence in 1961).

94. *See* Hayward & Kandeh, *supra* note 93, at 32-39 (explaining that Sierra Leone was one party state from 1978 until 1986); HIRSCH, *supra* note 1, at 29 (noting that one party state was established in 1977).

95. *See* CONTEH-MORGAN & DIXON-FYLE, *supra* note 1, at 126-27 (stating that fighting in Sierra Leone began in 1991); Zarate, *supra* note 19, at 95 (noting that RUF war against Sierra Leone government started in 1991).

96. *See* Vo, *supra* note 14, at 7 (claiming that RUF has occupied diamond mining areas for long time); Ewen MacAskill, *Sierra Leone Crisis: Gems: How Precious Resource Has Stoked the Fires of Conflict*, *GUARDIAN*, May 9, 2000, at 4 (alleging that RUF controls majority of Sierra Leone diamond mines); Zarate, *supra* note 19, at 95 (maintaining that RUF dominated valuable diamond producing regions in early 1990s).

97. *See* HIRSCH, *supra* note 1, at 25 (claiming that RUF insurgents use profits from diamond sales to sustain war effort); Buchan et al., *supra* note 14, at 6 (asserting that RUF soldiers finance civil war with diamonds); Vo, *supra* note 14, at 7 (noting that RUF forces use revenues from diamond trade to purchase weapons).

from the Western World.<sup>98</sup> These repatriated slaves, known as Creoles,<sup>99</sup> settled in and around Freetown, a city in Sierra Leone, in the late 1700s.<sup>100</sup> The British claimed the Freetown area as a Crown Colony in 1808,<sup>101</sup> and later extended their control over inland areas, declaring the larger region a British Protectorate in 1896.<sup>102</sup> The British maintained control of Sierra Leone until 1961 when Sierra Leone achieved independence.<sup>103</sup>

Initially after independence, Sierra Leone experienced a brief period of democratic rule.<sup>104</sup> Siaka Stevens, representing the All People's Congress,<sup>105</sup> was elected prime minister in

98. See CONTEH-MORGAN & DIXON-FYLE, *supra* note 1, at 27 (stating British squadrons intercepted slave ships near Sierra Leone and freed slaves); JOHN R. CARTWRIGHT, *POLITICS IN SIERRA LEONE 1947-67*, at 15 (1970) (noting that in 1787, three hundred freed slaves from London arrived in Freetown); HIRSCH, *supra* note 1, at 23 (stating that Freetown became British post and settlement area for repatriated slaves in 1787); PETER KUP, *THE STORY OF SIERRA LEONE* 31 (1964) (asserting that effort to repatriate slaves was result of humanitarian movement in Europe); KILSON, *supra* note 92, at 1 (noting that freed slaves settled in Freetown under British supervision).

99. See CARTWRIGHT, *supra* note 98, at 15 (explaining that repatriated slaves were known as Creoles); HIRSCH, *supra* note 1, at 23 (explaining settlement of Freetown and stating that Creole community assumed dominant position relative to indigenous people); KUP, *supra* note 98, at 36 (reporting that Creoles descend from repatriated slaves).

100. See CONTEH-MORGAN & DIXON-FYLE, *supra* note 1, at 25, 27 (observing that many freed slaves settled in Freetown in 1792 and that population of Freetown grew significantly in early 1800s); KUP, *supra* note 98, at 31-36 (describing settlement of Freetown); CARTWRIGHT, *supra* note 98, at 15 (noting that population of Freetown increased substantially by 1850s).

101. See HIRSCH, *supra* note 1, at 23 (stating that Freetown became Crown Colony in 1808); CONTEH-MORGAN & DIXON-FYLE, *supra* note 1, at 31 (maintaining that British established Crown Colony in Sierra Leone in 1808); CARTWRIGHT, *supra* note 98, at 18-19 (reporting that British took over governing of Freetown region from Sierra Leone Company and that society in Freetown emerged as distinctly Creole); KILSON, *supra* note 92, at 2 (noting that Freetown area became Crown Colony in 1808); KUP, *supra* note 98, at 37 (claiming that people of Freetown became British subjects when area became Crown Colony).

102. See CONTEH-MORGAN & DIXON-FYLE, *supra* note 1, at 40 (reporting that British established Protectorate over interior of Sierra Leone in 1896 over protest of Creole representatives on impropriety of Protectorate declaration); KILSON, *supra* note 92, at 14 (claiming that British expanded their control in effort to gain access to Sierra Leone's resources); KUP, *supra* note 98, at 37, 47 (noting difference between British Crown Colony and Protectorate and stating that British administered Protectorate differently from Colony).

103. See CONTEH-MORGAN & DIXON-FYLE, *supra* note 1, at 75 (stating that Sierra Leone received independence in 1961); Hayward & Kandeh, *supra* note 93, at 25, 29 (commenting that Sierra Leone achieved independence in 1961).

104. See HIRSCH, *supra* note 1, at 28 (stating that Sierra Leone had democracy in early 1960s); Hayward & Kandeh, *supra* note 93, at 30-31 (claiming that elections in Sierra Leone in 1962 and 1967 were free and fair).

105. See CONTEH-MORGAN & DIXON-FYLE, *supra* note 1, at 69 (claiming that All Peo-



1967,<sup>106</sup> and he established a one party state in 1978.<sup>107</sup> In 1985, Stevens handed power over to his chosen successor, Major General Joseph Saidu Momoh.<sup>108</sup>

The civil war in Sierra Leone started in 1991 as an attempted *coup d'état* by the Revolutionary United Front<sup>109</sup> ("RUF").<sup>110</sup> The RUF never clearly expressed the political objectives of the insurgency.<sup>111</sup> Fighting continued in Sierra Leone

ple's Congress became principle opposition to Sierra Leone People's Party, dominant party in Sierra Leone before independence and ruling party from 1962 until 1967); Hayward & Kandeh, *supra* note 93, at 29 (stating that All People's Congress represented mostly northern people in Sierra Leone and was led by Siaka Stevens); HIRSCH, *supra* note 1, at 25 (noting that All People's Congress drew support from Temnes and Limbas, groups in north of Sierra Leone).

106. See CONTEH-MORGAN & DIXON-FYLE, *supra* note 1, at 79-80 (examining Stevens's assumption of power in 1967); HIRSCH, *supra* note 1, at 29 (claiming that Stevens was elected in 1967 and despite series of coups and counters that followed, Stevens was sworn in as prime minister in 1968); Hayward & Kandeh, *supra* note 93, at 31 (maintaining that Stevens assumed position of prime minister in 1967).

107. See Hayward & Kandeh, *supra* note 93, at 32-33 (describing Stevens's consolidation of government into one party state); HIRSCH, *supra* note 1, at 29 (noting establishment of one party state and claiming that people who opposed imposition of one party state were executed, exiled, or reduced to poverty); CONTEH-MORGAN & DIXON-FYLE, *supra* note 1, at 80-81 (reporting that Stevens established one party state in 1978).

108. See Hayward & Kandeh, *supra* note 93, at 35 (claiming that many were surprised by Stevens's choice of Momoh as successor); HIRSCH, *supra* note 1, at 30 (asserting that only reason for Momoh's appointment as new prime minister was that he was extremely loyal to Stevens).

109. See CONTEH-MORGAN & DIXON-FYLE, *supra* note 1, at 127 (stating that RUF insurgents claimed to be freedom fighters working for liberation of Sierra Leone); HIRSCH, *supra* note 1, at 31 (asserting that RUF agenda appeared to be populist and directed against government officials that squandered Sierra Leone's resources); Van Niekerk, *supra* note 12, at 19 (claiming that RUF recruits are mostly unemployed and young people); Abdullah & Muana, *supra* note 13, at 173-77 (explaining composition of RUF forces).

110. See CONTEH-MORGAN & DIXON-FYLE, *supra* note 1, at 126-27 (noting that initial fighting in 1991 was spillover from conflict in neighboring country, Liberia); HIRSCH, *supra* note 1, at 31 (asserting that Liberian warlord and now president, Charles Taylor, was instrumental in organizing coup); Zarate, *supra* note 19, at 95 (stating that RUF has been fighting against government since 1991).

111. See CONTEH-MORGAN & DIXON-FYLE, *supra* note 1, at 135 (claiming that RUF never pronounced any long term political objectives); Van Niekerk, *supra* note 12, at 19 (asserting that Sankoh has no political ideology); Schuler, *supra* note 12, at 7 (reporting that RUF never engaged in ideological discussion but simply aimed to seize power by any means); Crossette, *supra* note 8, at A1 (asserting that RUF has no political platform); Brown, *supra* note 13, at 3 (asserting that conflict in Sierra Leone is not based on political ideology but rather on gaining private control over wealth); *60 Minutes*, *supra* note 12, at 20 (noting Bob Simon reporting that RUF has no political aim beyond complete control of diamond mines in Sierra Leone).

throughout the 1990s<sup>112</sup> and, in May 1999, the RUF and the Sierra Leone government signed a cease-fire agreement called the Lomé Peace Accord.<sup>113</sup>

Under the peace agreement terms, Foday Sankoh, the leader of the RUF, became Chairman of the Commission on the Management of Strategic Resources, National Reconstruction and Development,<sup>114</sup> which officially gave him control over the diamond mines that his forces were already controlling.<sup>115</sup> Additionally, the Lomé agreement granted Sankoh and his insurgent fighters amnesty for their crimes.<sup>116</sup> Violence continues in Si-

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112. See Hawley, *supra* note 16 (reporting that civil war in Sierra Leone has continued since 1991); Orr, *supra* note 1, at 14 (claiming that RUF continued fighting even after it signed ceasefire agreement in 1996); James Rupert, *War-Wearry, Peace-Wary: Recalling Past Atrocities, Sierra Leoneans Uneasy about Return of Rebels to Capital*, WASH. POST, July 18, 1999, at A23 (stating that conflict in Sierra Leone has been ongoing for majority of 1990s); HRW-Sierra Leone: *Background*, *supra* note 1 (asserting that RUF fighters have consistently battled to overthrow successive governments of Sierra Leone throughout 1990s).

113. See Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, July 7, 1999, available at [http://www.rufp.org/Documents/lome\\_peace\\_accord/lome\\_peace\\_accord.htm](http://www.rufp.org/Documents/lome_peace_accord/lome_peace_accord.htm) [hereinafter Lomé Peace Agreement] (calling for ceasefire between RUF and government forces). See generally HIRSCH, *supra* note 1, at 71-84 (explaining negotiations of Lomé Peace Agreement between RUF and government).

114. See Lomé Peace Agreement, *supra* note 113, at art. 7(1) (stating that Commission on Management of Strategic Resources, National Reconstruction and Development is charged with "securing and monitoring the legitimate exploitation of Sierra Leone's gold and diamonds, and other resources that are determined to be of strategic importance for national security and welfare as well as cater for post-war rehabilitation and reconstruction").

115. See Lomé Peace Agreement, *supra* note 113, at art. 5(2) (establishing that Sankoh would assume position as Chairman of Commission on the Management of Strategic Resources, National Reconstruction and Development); see also Dickey, *supra* note 15, at 10 (claiming that Lomé Peace Agreement placed Sankoh in position as Chairman of Commission on the Management of Strategic Resources, National Reconstruction and Development and alleging that despite this appointment, he continues to engage in illegal diamond mining); Vo, *supra* note 14, at 7 (asserting that appointment of Sankoh as government officer destined peace agreement for failure); Schuler, *supra* note 12, at 7 (maintaining that Sankoh's position controlling diamonds for government is ironic); Coll, *supra* note 1, at W13 (asserting that granting Sankoh official control over Sierra Leone's diamonds is victory for RUF insurgents); Crossette, *supra* note 17, at 14 (alleging that although Sankoh assumed position in government, he continued to trade diamonds illegally); SMILLIE ET AL., *supra* note 19, at 50 (stating that Sankoh's RUF forces already controlled majority of diamond mines in Sierra Leone before Sankoh's appointment to government post).

116. See Lomé Peace Agreement, *supra* note 113, at art. 9(1)-(2) (stating, in part, that the "Government of Sierra Leone shall take appropriate legal steps to grant Corporal Foday Sankoh absolute and free pardon [and] shall also grant absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by

erra Leone<sup>117</sup> and the peace agreement has broken down.<sup>118</sup> The U.N. is establishing a war crimes tribunal for Sierra Leone since the failure of the Lomé agreement.<sup>119</sup>

#### b. Two Months Salary: Funding a Civil War

During the 1990s, RUF forces controlled the major diamond mines in Sierra Leone.<sup>120</sup> Commentators discuss that some RUF fighters were illicit diamond miners and traders before becoming combatants.<sup>121</sup> Some observers speculate that control of the diamond mines in Sierra Leone is an important

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them in pursuit of their objectives"); Harden, *supra* note 14, at A1 (stating that Lomé Peace Agreement grants RUF insurgents amnesty); Dickey, *supra* note 15, at 10 (claiming that agreement provided amnesty for all RUF insurgents); Vo, *supra* note 14, at 7 (reporting that human rights advocates denounced Lomé Peace Agreement's grant of amnesty for RUF insurgents); Chris McGreal, *Guerrilla Rivals Split Over Spoils of War: Rebels Two Leaders Fight for Control of Diamond Trade*, *GUARDIAN*, May 12, 2000, at 4 (explaining that RUF soldiers received blanket amnesty for their crimes).

117. See Dickey, *supra* note 15, at 9 (claiming that RUF insurgents violated peace agreement by attacking villages, burning homes, sexually assaulting women, and abducting children); HIRSCH, *supra* note 1, at 109 (claiming that RUF violations of peace agreement discredit their sincerity in seeking peace); Vo, *supra* note 14, at 7 (asserting that insurgents in Sierra Leone attacked strategic town of Masiaka on May 14, 2000); Press Release, Human Rights Watch, *Sierra Leone Rebels Violating Peace Accord* (Oct. 27, 1999), available at <http://www.hrw.org/hrw/press/1999/oct/sierra1027.htm> (expressing concern about recent violence in Sierra Leone).

118. See *War's Best Friend*, *supra* note 13 (stating that peace deal has disintegrated with return of violence); Farah, *supra* note 4, at A1 (reporting recent exchange of gunfire between British and RUF troops as sign of demise of peace accord). See generally HIRSCH, *supra* note 1, at 84-90 (explaining collapse of Lomé Peace Agreement).

119. See Press Release, United Nations, Press Briefing by Assistant Secretary-General for Legal Affairs (Oct. 5, 2000) (stating that U.N. and Sierra Leone government are in talks about measures necessary to establish court for prosecution of war crimes); Bruce Zagaris, *U.N. Security Council Votes to Establish War Crimes Tribunal for Sierra Leone*, 16 *INT'L ENFORCEMENT L. REP.* 978, 978 No. 10 (Oct. 2000) (claiming that Security Council voted unanimously to establish tribunal for war crimes committed by insurgent forces in Sierra Leone); Barbara Crossette, *U.N. To Establish a War Crimes Tribunal To Hear Sierra Leone Atrocity*, *N.Y. TIMES*, Aug. 15, 2000, at A6 (noting that Security Council resolution to establish Sierra Leone war crimes tribunal did not actually establish tribunal or decide composition or procedures of court).

120. See Vo, *supra* note 14, at 7 (claiming that RUF forces have controlled diamond mines for long time); MacAskill, *supra* note 96, at 4 (asserting that most of diamond mines in Sierra Leone are under RUF control); Zarate, *supra* note 19, at 95 (maintaining that RUF occupied valuable diamond territory in early 1990s); SMILLIE ET AL., *supra* note 19, at 50 (claiming that RUF controlled major diamond mining areas at time of Lomé Peace Agreement); see also HIRSCH, *supra* note 1, at 25 (claiming that RUF generated between US\$300,000,000 and US\$450,000,000 worth of diamonds annually in 1990s); *Hearing on Conflict Diamonds*, *supra* note 32, at 5 (estimating that Sierra Leone insurgents produced US\$70,000,000 worth of diamonds in 1999).

121. See Abdullah & Muana, *supra* note 13, at 179 (claiming that RUF recruited

underlying reason for the insurgency.<sup>122</sup> On July 6, 2000, the U.N. Security Council imposed an embargo on diamonds from Sierra Leone.<sup>123</sup> This resolution called on nations to take all necessary measures to prevent direct or indirect importation of diamonds from Sierra Leone that are not officially certified by the Sierra Leone government.<sup>124</sup>

### C. De Beers: *Diamonds Scar Forever*

Corporate actors facilitate the conflict diamond trade by buying illicit diamonds directly or indirectly from insurgent groups.<sup>125</sup> De Beers's control of the diamond trade makes its involvement with conflict diamonds particularly relevant.<sup>126</sup> For

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alienated youth who had become illicit diamond miners); SMILLIE ET AL., *supra* note 19, at 50 (noting that RUF is dominated by former illicit diamond miners).

122. See Crossette, *supra* note 8, at A1 (claiming that diamonds are problem behind war in Sierra Leone); O'Loughlin, *supra* note 13, at 25 (maintaining that RUF's main goal is control of diamond mines); Rupert, *supra* note 112, at A23 (noting that RUF forces have been fighting for control of Sierra Leone's diamond and gold mines); *60 Minutes*, *supra* note 12, at 20 (noting Bob Simon claiming RUF has no political objective and asserting that control of diamond mines motivates insurgent group); *HRW-Sierra Leone: Background*, *supra* note 1 (asserting that RUF's aim is access to diamond mines). One report indicates that the insurgents focused their efforts on controlling diamond producing areas at the start of the war. CONTEH-MORGAN & DIXON-FYLE, *supra* note 1, at 127. Some commentators allege that these wars continue because the profits increase as law and order disintegrate. See Abdullah & Muana, *supra* note 13, at 192 (noting that conflict continues because diamond trade provides financial security to insurgents); SMILLIE ET AL., *supra* note 19, at 10, 12 (claiming that war in Sierra Leone revolves around profit from diamond trade); see also Claudia McElroy, *Rich Pickings But Empty Coffers in Sierra Leone*, *GUARDIAN*, Sept. 11, 1996, at 10 (claiming that government officials in Sierra Leone also profit from illicit mining and trade in diamonds). See generally Collier, *supra* note 13 (asserting that fighting will continue when insurgents profit financially from conflict).

123. See S.C. Res. 1306, U.N. SCOR, 4168th mtg., at pmb., U.N. Doc. S/RES/1306 (2000) (expressing concern over role of illegal diamond sales in funding insurgent war effort in Sierra Leone).

124. See *id.* at para. 1 (mandating that countries should refuse to import diamonds from Sierra Leone).

125. See Crossette, *supra* note 17, at 14 (reporting that conflict diamond trade is linked to international traders and markets in Antwerp); SMILLIE ET AL., *supra* note 19, at 13, 15 (explaining role of private industry in sustaining civil wars by engaging in trade with insurgent forces with no enforceable regulations on trade).

126. See Collier, *supra* note 15, at A1 (stating that De Beers has responsibility as industry leader to ensure that diamonds do not come from conflict zones); Julie Flaherty, *A Diamond Stockpile That is Not Forever*, *N.Y. TIMES*, July 30, 2000, at 11 (claiming that De Beers's control of diamond trade has created considerable pressure on company to halt conflict diamond trade); *Rocks That Kill*, *supra* note 15, at 42 (claiming that De Beers bought diamonds from UNITA but then reluctantly complied with U.N. sanctions); *De Beers and Africa's Crisis*, *FIN. TIMES*, July 12, 2000, at 24 (maintaining that De

years, De Beers has set the price of diamonds for the entire diamond industry by acquiring the majority of diamonds before they reach the market.<sup>127</sup> De Beers is able to acquire these diamonds both through its own mining activities and by purchasing diamonds from sellers outside the organization.<sup>128</sup> Although De Beers no longer operates any buying activities in Angola or Sierra Leone,<sup>129</sup> commentators claim that the organization acquires diamonds from these areas by buying from outside dealers.<sup>130</sup> De Beers has recently guaranteed that their diamonds do not originate in conflict areas.<sup>131</sup>

### 1. Corporate Structure

De Beers is a corporation controlled by the Oppenheimer family.<sup>132</sup> Commentators note that De Beers's corporate struc-

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Beers should lead effort to ban conflict diamonds); SMILLIE ET AL., *supra* note 19, at 23-24, 28 (describing De Beers's domination of diamond industry and asserting that De Beers's consistent control makes their participation in conflict diamond trade likely).

127. See Montpelier, *supra* note 20, at 289 (noting that De Beers controls both supply and demand in effort to keep price of diamonds high); Romesh Ratnesar, *A Gem of a New Strategy*, TIME, Sept. 25, 2000, at B18, B18 (maintaining that De Beers tries to mine or buy all diamonds in world); Drogin, *supra* note 13, at A1 (quoting De Beers buyer who claimed that De Beers would buy from anyone in order to keep diamond prices stable).

128. See DE BEERS, 1999 ANNUAL REPORT, at 37 (2000) (stating that De Beers deals in diamonds from its own mines in South Africa, Namibia, and Botswana and also purchases diamonds from Russian and Canadian partners); SMILLIE ET AL., *supra* note 19, at 23 (claiming that De Beers obtains diamonds from its own mines through partnerships with government controlled mines in Botswana, Namibia, and Tanzania and through purchases from outside market).

129. See DE BEERS, *supra* note 128, at 14 (claiming that De Beers has shut down all of its outside buying offices in Africa).

130. See U.N. *Final Report*, *supra* note 15, at para. 163, 181 (asserting that several diamond dealers, who traded with De Beers, also traded with UNITA for diamonds); Duffield, *supra* note 17, at 28 (asserting that De Beers obtained diamonds from UNITA, making no inquiry about origin of diamonds); SMILLIE ET AL., *supra* note 19, at 28 (alleging that De Beers acquires diamonds that have been smuggled out of Sierra Leone).

131. See Economist Intelligence Unit, *Country Briefing, Africa: Gemocide*, June 20, 2000, at <http://www.eiu.com/latest/363867.asp> (reporting De Beers's announcement that it will require written contracts with buyers to guarantee that De Beers diamonds do not originate in conflict zones); Alan Cowell, *Controversy Over Diamonds Made Into Virtue by De Beers*, N.Y. TIMES, Aug. 22, 2000, at A1 (reporting that De Beers recast its position in diamond industry by guaranteeing that its diamonds would not originate in conflict areas).

132. See Montpelier, *supra* note 20, at 285 (stating that De Beers owes its corporate structure to its long time leader, Ernest Oppenheimer, and his son, Harry Oppenheimer); Cowell & Swarns, *supra* note 20, at W1 (reporting that Oppenheimer family has run De Beers since 1920s, with Nicky Oppenheimer, grandson of Ernest Oppen-

ture is complex.<sup>133</sup> For the past decade, two closely related public companies, De Beers Consolidated Mines Limited, incorporated in South Africa, and De Beers Centenary AG, incorporated in Switzerland, have controlled the De Beers syndicate.<sup>134</sup> In addition to these two large corporations, the De Beers syndicate controls many other subsidiary companies.<sup>135</sup> Prior to February 2001, De Beers maintained a thirty-five percent interest in the Anglo American Corporation, a large mining company.<sup>136</sup> Some observers have criticized De Beers's corporate structure as lacking transparency.<sup>137</sup>

De Beers recently announced its decision to change its organizational form and create a new private company with Anglo

heimer, as current chairman of De Beers). See generally KANFER, *supra* note 20, at 206-374 (examining Oppenheimer leadership of De Beers).

133. See KANFER, *supra* note 20, at 5 (claiming that De Beers's extensive organization presides over 1,300 businesses); Montpelier, *supra* note 20, at 285 (stating that De Beers is complex corporate group).

134. See Anglo American: Diamonds, *supra* note 20 (stating that De Beers was divided into two main companies in 1990 based in South Africa and Switzerland); see also DE BEERS, *supra* note 128, at 71-103, 105-34 (reporting on activities of De Beers Consolidated Mines Limited and De Beers Centenary AG in 1999); Montpelier, *supra* note 20, at 285-86 (reporting that despite split between South African and Swiss companies, they retain close relationship, sharing board of directors and annual reports).

135. See Montpelier, *supra* note 20, at 286 (reporting that De Beers controls or has substantial interests in many subsidiary companies); Press Release, Interim Results, De Beers (Aug. 16, 2000) (announcing De Beers recent move to acquire interest in other companies); Terry Macalister, *Storm Breaks over Pounds 12bn Bid for De Beers: Disgruntled Shareholders Accuse Anglo American and Oppenheimer Family of Conflicts of Interest and Lack of Information*, GUARDIAN, Feb. 16, 2001, at 29 (claiming that recent agreement between Anglo American and De Beers to become private organization is complicated by numerous cross holdings between two companies).

136. See Anglo American: Diamonds, *supra* note 20 (stating that De Beers owns 35% of Anglo American); DE BEERS, *supra* note 128, at 70 (claiming that De Beers owns 35.4% of Anglo American); see also Nicholas Stein, *A New Cut on an Old Monopoly*, FORTUNE, Feb. 19, 2001, at 186, 191 (asserting that cross-holdings between De Beers and Anglo American were originally designed to secure trading arrangements with countries that refused to trade with South Africa during apartheid era). Anglo American is a mining company based in London. See Gillian O'Connor, *There's Gold in Them There Streets*, FIN. TIMES, Apr. 22, 1999, at 28 (noting that Anglo American is mining company with significant ties to De Beers). Harry Oppenheimer controlled Anglo American Corporation before he became involved with De Beers. See KANFER, *supra* note 20, at 180-84 (examining establishment of Anglo American Corporation in 1917); EPSTEIN, *supra* note 20, at 81 (stating that Oppenheimer formed Anglo American in 1917).

137. See Cowell & Swarns, *supra* note 20, at W1 (asserting that critics have called relationship between De Beers and Anglo American secretive); Montpelier, *supra* note 20, at 287-88 (claiming that it is impossible to know how many companies De Beers controls and that De Beers's complex organizational structure presents serious problems for law enforcement).

American.<sup>138</sup> Under the new arrangement, a consortium called DB Investments, with most shares controlled by the Oppenheimer family and Anglo American, will buy out De Beers shareholders.<sup>139</sup> Although the new company will be private, representatives claim that De Beers will not retreat into secrecy.<sup>140</sup>

## 2. Buying Habits

De Beers controls about sixty percent of the world's uncut diamond sales.<sup>141</sup> De Beers has recognized its past position as "custodian of the market,"<sup>142</sup> and commentators note that this role has led to a policy of buying all of the diamonds on the market in an effort to control and stabilize the price of diamonds.<sup>143</sup> De Beers recently announced its intention to

138. See Cowell & Swarns, *supra* note 20, at W1 (reporting that De Beers and Anglo American plan to become one private organization); Macalister, *supra* note 135, at 29 (reporting announcement that Anglo American will buy out De Beers shareholders).

139. See Cowell & Swarns, *supra* note 20, at W1 (stating that Oppenheimer family and Anglo American will each have forty five percent stake in DB Investments and Debswana, controlled jointly by De Beers and Botswanan government, will have ten percent stake).

140. See Cowell & Swarns, *supra* note 20, at W1 (quoting assurances of representatives of Anglo American and De Beers and noting that critics claim De Beers will not be as open as when it was public); Macalister, *supra* note 135, at 29 (stating that critics fear new private status of De Beers will make company's activities even more difficult to monitor).

141. See DE BEERS, *supra* note 128, at 34 (stating that De Beers controlled about two thirds of world diamond supply in 1999); Anglo American: Diamonds, *supra* note 20 (asserting that De Beers sorts, values, and markets about 60% of all rough diamonds); *Hearing on Conflict Diamonds*, *supra* note 32, at 1 (claiming that De Beers controls 65% of world diamond production); see also SMILLIE ET AL., *supra* note 19, at 22 (noting that De Beers controls majority of world's diamonds and sets price of diamonds on global market). De Beers recently entered into a venture with France's LVMH luxury goods group. See Pretzlik, *supra* note 22, at 1 (stating that agreement will expand De Beers's involvement in diamond industry to retail jewelry sales).

142. See DE BEERS, *supra* note 128, at 12-13 (claiming that De Beers's role as custodian of market must adjust with changing times); Interview by Martin Rapaport with Nicky Oppenheimer, *supra* note 47 (explaining De Beers's recent decision to refrain from controlling supply and instead drive demand).

143. See Ratnesar, *supra* note 127, at B18 (claiming that De Beers attempted to mine or buy all diamonds in world); Drogin, *supra* note 13, at A1 (quoting De Beers buyer who claimed that De Beers would buy from anyone in order to maintain stable market); see also *60 Minutes*, *supra* note 12, at 21 (noting Bob Simon asserting that De Beers bought conflict diamonds in effort to keep diamond prices stable); DE BEERS, *supra* note 128, at 12 (explaining that De Beers's role in past has been to act as custodian of market, managing supply in order protect diamond prices from volatility of demand).

abandon its policy of acquiring all diamonds on the market.<sup>144</sup>

Before its change in policy, De Beers obtained diamonds both through production from its own mines and from outside markets, also known as the open market.<sup>145</sup> De Beers does not operate any mines in conflict areas,<sup>146</sup> thus, if De Beers obtains conflict diamonds, the company acquires them through the outside market buying process.<sup>147</sup> This system creates problems of accountability because there are a number of intermediaries involved.<sup>148</sup> In the past, when a government has been unable to

144. See Flaherty, *supra* note 126, at 11 (reporting that De Beers has plans to reduce its stockpile of diamonds and strengthen demand for diamonds through marketing strategies); A. Gary Shilling, *Diamonds Aren't Forever*, FORBES, Sept. 18, 2000, at 266, 266 (claiming that De Beers's announcement that they would no longer monopolize supply of diamonds was significant event); see also DE BEERS, *supra* note 128, at 13 (explaining De Beers's intention to begin selling off stockpile and redefine its role in diamond industry in accordance with changing times). Shortly before De Beers's announcement that it would reduce its stockpile in June 2000, De Beers declared that it would no longer trade in conflict diamonds. See Flaherty, *supra* note 126, at 11 (stating that De Beers also guaranteed that its diamonds would not originate in conflict zones); Economist Intelligence Unit, *supra* note 131 (stating that De Beers announced decision to refrain from buying conflict diamonds in June 2000).

145. See Collier, *supra* note 15, at A1 (stating that diamonds sold on open market are those that do not come from De Beers's own mines); DE BEERS, *supra* note 128, at 37 (stating that De Beers produced diamonds from its own mines in South Africa, Namibia, and Botswana and also bought diamonds from Russian and Canadian partners). *But see Hearing on Conflict Diamonds*, *supra* note 32, at 1 (claiming that outside market buying process constituted only five percent of De Beers's total intake in past decade). Diamonds from the outside market are diamonds that do not originate in mines owned or controlled by De Beers. See SMILLIE ET AL., *supra* note 19, at 22 (claiming that outside market buying consists of acquiring diamonds through non-De Beers sources); see also Smith, *supra* note 20, at 18 (asserting that outside market buying process includes buying from small Angolan dealers as well as dealers in London and Antwerp); Collier, *supra* note 15, at A1 (claiming that De Beers's announcement that it will not deal in conflict diamonds means that it will limit its outside market buying to places such as Russia and Australia where it does not have mines); Block, *supra* note 41, at 4 (maintaining that De Beers would buy diamonds from virtually anyone in order to preserve its control of diamond trade).

146. See *Hearing on Conflict Diamonds*, *supra* note 32, at 1 (stating that De Beers's mines are in South Africa, Namibia, Botswana, and Tanzania).

147. See *Hearing on Conflict Diamonds*, *supra* note 32, at 7 (acknowledging that De Beers bought Angolan diamonds on open market during war time in Angola); KOSKOFF, *supra* note 31, at 151 (claiming that while some legitimate transactions are conducted on open market, most deals on open market are for smuggled diamonds); SMILLIE ET AL., *supra* note 19, at 28 (maintaining that De Beers's connection to diamonds from Sierra Leone is indirect).

148. See U.N. *Final Report*, *supra* note 15, at para. 197 (asserting that open markets make laundering diamonds easier); Collier, *supra* note 15, at A1 (claiming that smugglers take diamonds from conflict areas to sell them in larger cities on open market with false registration information); *De Beers and the CSO*, *supra* note 22 (maintaining



effectively prevent smuggling, experts argue that De Beers knowingly bought diamonds from smugglers or other third parties in order to maintain its control over the supply of diamonds.<sup>149</sup>

### 3. Rules of Engagement

De Beers's involvement with diamonds from Angola and Sierra Leone reflects their old policy of acquiring the majority of diamonds produced in world in an effort to keep the diamond supply steady and diamond prices stable.<sup>150</sup> De Beers bought diamonds from Angola in the 1990s when UNITA occupied most diamond mines in the country.<sup>151</sup> Additionally, commentators assert that De Beers acquired diamonds from Sierra Leone through outside dealers.<sup>152</sup>

#### a. Angola

Commentators state that De Beers openly bought diamonds

that presence of multiple intermediaries makes tracing origin of diamonds very difficult).

149. See KOSKOFF, *supra* note 31, at 159 (claiming that De Beers's objective was simply to control flow of all diamonds, legal or illegal, by cooperating with government authorities when appropriate and working with smugglers when necessary); EPSTEIN, *supra* note 20, at 147-56 (asserting that De Beers deliberately engaged in illicit diamond trade with smugglers from Sierra Leone and Angola in 1960s and 1970s); see also U.N. *Final Report*, *supra* note 15, at para. 163 (stating that De Beers acquired diamonds from UNITA-held territories in Angola through De Decker brothers, who set up sales system for UNITA diamonds in 1993); *De Beers and the CSO*, *supra* note 22 (maintaining that De Beers has buyers in transit countries for smuggled diamonds). Furthermore, a U.N. report claims that De Beers often re-exports its diamonds through Switzerland in order to take advantage of Swiss tax laws. U.N. *Final Report*, *supra* note 15, at para. 198. This practice means that many of the diamonds imported into London by De Beers are said to originate in Switzerland rather than their true country of origin. U.N. *Final Report*, *supra*. The British government requested that De Beers cease this practice, but De Beers continues to engage in this process of re-exportation. *Id.*

150. See, e.g., Drogin, *supra* note 13, at A1 (quoting De Beers buyer who asserted that De Beers would buy from any seller in order to prevent non-De Beers diamonds from reaching market and to keep diamond prices stable).

151. See *Rocks That Kill*, *supra* note 15, at 42 (stating that De Beers bought UNITA diamonds during 1990s); Matloff, *supra* note 59, at 1 (asserting that De Beers spent between US\$500,000,000 and US\$800,000,000 on UNITA diamonds between 1992 and 1993); Honigsbaum & Gordon, *supra* note 47, at 23 (stating that De Beers acknowledged its involvement in buying UNITA diamonds off open market before imposition of U.N. sanctions on trade with UNITA).

152. See Dickey, *supra* note 15, at 9 (claiming that De Beers indirectly bought diamonds from Sierra Leone during time when RUF controlled diamond mines); SMILLIE ET AL., *supra* note 19, at 28 (asserting that it is incredible that De Beers has not bought Sierra Leone diamonds given its buying habits).

that originated in Angola in the 1990s, when the UNITA forces controlled the large majority of the diamond mines in the country.<sup>153</sup> Such individuals conclude that De Beers was engaged in trade with UNITA insurgents and thereby provided funds to combatants, who perpetuated strife in the region.<sup>154</sup> The United Nations also reports that De Beers was involved in the Angolan conflict diamond trade.<sup>155</sup> In the late 1990s, De Beers responded with a decision to refrain from buying Angolan diamonds.<sup>156</sup>

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153. See *Rocks That Kill*, *supra* note 15, at 42 (stating that De Beers spent US\$40,000,000 per month in effort to buy up UNITA diamonds); Matloff, *supra* note 59, at 1 (claiming that De Beers bought between US\$500,000,000 and US\$800,000,000 worth of diamonds from UNITA controlled mines between 1992 and 1993); Honigsbaum & Gordon, *supra* note 47, at 23 (stating that De Beers admitted to buying UNITA diamonds off open market before U.N. imposed sanctions on trade with UNITA); HRW-ANGOLA, *supra* note 13, at 58 (asserting that De Beers admitted to spending US\$500,000,000 to buy legal and illegal diamonds from Angola on open market); Ratnesar, *supra* note 127, at B18 (stating that De Beers bought US\$14,000,000 in diamonds from UNITA); Francesco Guerrera et al., *Special Report: De Beers: All that Glitters is Not Sold*, FIN. TIMES, July 11, 2000, at 16 (claiming that De Beers bought illegally mined diamonds from UNITA in 1992 while UNITA simultaneously engaged in peace talks with government). *But see Hearing on Conflict Diamonds*, *supra* note 32, at 7 (claiming that while De Beers admits to buying diamonds from Angola on open market during 1990s, it never bought diamonds directly from UNITA).

154. See CIMENT, *supra* note 50, at 72 (maintaining that UNITA had secret arrangement with Anglo American to sell diamonds); Duffield, *supra* note 17, at 28 (asserting that De Beers obtained diamonds from UNITA, asking no questions about origin of diamonds).

155. See U.N. *Final Report*, *supra* note 15, at para. 163, 181 (asserting that several major clients of De Beers traded with UNITA for diamonds); see also U.N. *Exposes Angola Diamond Trade*, *supra* note 17 (claiming that U.N. report called on De Beers to take responsibility for its role in conflict diamond trade).

156. See DE BEERS, *supra* note 128, at 14 (claiming that De Beers has been steadfast in observance of U.N. sanctions against Angola and has gone beyond legal requirements by guaranteeing that it will not buy any Angolan diamonds, even those with official government certificates, until Angola is stable); Press Release, Global Witness, *Cautious Welcome for De Beers Angolan Diamond Embargo* (Oct. 5, 1999), available at [http://www.oneworld.org/globalwitness/press/pr\\_991005.html](http://www.oneworld.org/globalwitness/press/pr_991005.html) [hereinafter *Cautious Welcome*] (reporting De Beers' announcement that it will no longer buy unofficial Angolan diamonds); see also Nicholas Shaxson, *De Beers Negotiates Rights with Angola: Talks Could Lead to the Re-establishment of the Company as Local Participant, Allowing It to Take on the Ascorp Joint Venture*, FIN. TIMES, Oct. 18, 2000, at 44 (claiming that De Beers's decision to stop buying unofficial Angolan diamonds was result of pressure to end trade in conflict diamonds); Economist Intelligence Unit, *supra* note 131 (noting that De Beers may actually benefit from public backlash because it is only company with ability to guarantee that diamonds are not from conflict zones).

## b. Sierra Leone

Experts discuss that De Beers's involvement in conflict diamonds from Sierra Leone is linked with smuggling into Liberia.<sup>157</sup> Liberia has few diamond mines within its own borders and is a transit country for Sierra Leone diamonds.<sup>158</sup> De Beers asserts that their offices in Sierra Leone and Liberia have been closed for fourteen years.<sup>159</sup> Commentators allege that it is conceivable that De Beers bought illicit Sierra Leone diamonds through intermediaries given De Beers's policy of buying from outside markets combined with its extensive use of intermediaries.<sup>160</sup>

## 4. "I Don't"

In June 2000, De Beers announced its intention to sign formal written contracts with its trading partners to ensure that

157. See Dickey, *supra* note 15, at 9-10 (noting that diamonds from Sierra Leone are usually smuggled into Liberia or other neighboring countries and that recent fighting in Liberia has disrupted this normal trade route); SMILLIE ET AL., *supra* note 19, at 6 (claiming that Liberian connection to conflict diamonds from Sierra Leone has existed since beginning of war). Commentators allege that throughout the civil war, Liberia has been an active supporter of the RUF, providing arms as well as funds, seemingly in exchange for stolen diamonds from the RUF. *Id.* at 49 (asserting that Liberia has exported large amounts of diamonds that are suspected to have originally come from Sierra Leone); Norimitsu Onishi, *Africa Diamond Hub Defies Smuggling Rules*, N.Y. TIMES, Jan. 2, 2001, at A1 (maintaining that Liberian President, Charles Taylor, backed Sierra Leone rebels, gaining diamonds in exchange for providing arms to forces); Harden, *supra* note 14, at A1 (claiming that most Sierra Leone diamonds are smuggled into Liberia for sale); McGreal, *supra* note 116, at 4 (asserting that Liberian President, Charles Taylor, has been RUF's chief sponsor); Buchan et al., *supra* note 14, at 6 (noting that RUF smugglers received assistance from Liberian President, Charles Taylor, in diamond trade).

158. See Dickey, *supra* note 15, at 9 (noting that Liberia is key route for Sierra Leone diamonds to reach consumer market); Kiley, *supra* note 8, at 6 (noting that Sierra Leone diamonds are smuggled into Liberia and that Liberia has virtually no diamonds); SMILLIE ET AL., *supra* note 19, at 49 (asserting that Liberia has negligible diamond production of its own and has become fencing nation). The U.N. Security Council recently voted to impose sanctions on Liberia for its participation in trading arms for diamonds from Sierra Leone. See Barbara Crossette, *Behave or Face a Diamond Ban, Security Council Tells Liberians*, N.Y. TIMES, Mar. 8, 2001, at A6 (noting that Security Council voted unanimously to ban imports of Liberian diamonds if Liberia continues to support RUF).

159. Press Release, De Beers, *Angolan Diamond* (Oct. 5, 1999).

160. See Dickey, *supra* note 15, at 9 (claiming that De Beers likely bought diamonds from Sierra Leone indirectly); SMILLIE ET AL., *supra* note 19, at 28 (asserting that it is inconceivable that De Beers has avoided buying Sierra Leone diamonds given its buying habits).

their diamonds do not originate in conflict zones.<sup>161</sup> The World Diamond Council, composed of the industry's two largest groups, also committed itself to ending the trade in conflict diamonds by setting up a global system of identification for all diamonds on the market.<sup>162</sup> These steps to reform the industry are in response to an increase in public awareness about this issue.<sup>163</sup>

## II. MULTI-FACETED APPROACHES TO CORPORATE LIABILITY

With the increased influence of MNCs in the twentieth and twenty-first centuries, international organizations, national poli-

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161. See Economist Intelligence Unit, *supra* note 131 (reporting De Beers's announcement that it will sign written contracts with buyers to guarantee that De Beers diamonds do not come from conflict areas); *De Beers and Africa's Crisis*, *supra* note 126 (reporting De Beers's decision to guarantee that its diamonds are not conflict diamonds and noting that any effort to reform industry must begin with De Beers because it controls majority of diamond trade); Cowell, *supra* note 131, at A1 (observing that De Beers redefined its position in diamond industry by guaranteeing that its diamonds would not originate in conflict zones). *But see U.N. Final Report*, *supra* note 15, at para. 199 (acknowledging that it is difficult to validate whether De Beers is complying with its pledge not to buy conflict diamonds because there is no external monitoring system). In the same announcement, De Beers called for a uniform standard for identifying diamonds according to their origin. Economist Intelligence Unit, *supra* note 131; see also *U.N. Final Report*, *supra* note 15, at para. 199 (expressing concern that although De Beers has closed many of its African buying offices, it is impossible to verify whether De Beers continues to buy conflict diamonds through its buying offices in Europe). Although De Beers has guaranteed that it will no longer trade in conflict diamonds, it does not account for the diamonds that are already in its stockpile. See *60 Minutes*, *supra* note 12, at 21 (noting Bob Simon stating that De Beers's guarantee that it will no longer trade in conflict diamonds does not ensure that diamonds already in its possession are not from conflict zones).

162. See *African Diamonds: Hearing Before Subcomm. on Trade of House Comm. on Ways and Means*, 106th Cong. 47-49 (2000) (text of Joint Resolution World Federation of Diamond Bourses and International Diamond Manufacturers Association) (proposing that every country that imports diamonds enact legislation requiring that every imported parcel of diamonds be "sealed and registered in a universally standardized manner by an accredited export authority from the exporting country"); *Diamond Traders Act*, *supra* note 17, at C21 (stating that World Diamond Council plans to establish computerized global registry for diamonds); *Diamond Leaders in Pact*, *supra* note 14 (reporting that decision by International Diamond Manufacturers Association and World Federation of Diamond Bourses was arrived at during World Diamond Congress in July 2000).

163. See *Diamond Traders Act*, *supra* note 17, at C21 (noting that since U.N. imposed sanctions on Sierra Leone diamonds, diamond industry has been developing strategies to assure consumers that diamonds do not come from conflict zones). *But see* Cowell, *supra* note 131, at A1 (observing that De Beers decision to refrain from buying conflict diamonds had economic as well as moral motives).

ticians, and private actors have developed various techniques for holding MNCs accountable.<sup>164</sup> In the past decade, private individuals have invoked the ATCA as a method for demanding corporate responsibility for human rights violations.<sup>165</sup> More traditionally, international organizations, the United States, and private industry initiatives have developed codes of conduct to guide MNCs in their activities abroad.<sup>166</sup> Although these efforts are meaningful for drawing attention to the need for corporate accountability, no court has found an MNC liable under the ATCA<sup>167</sup> and codes of conduct are generally voluntary and rarely

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164. See, e.g., *Declaration on International Investment and Multinational Enterprises*, Organisation for Economic Co-operation and Development, 15 I.L.M. 969-70, annex (1976) [hereinafter *OECD Declaration*] (creating guidelines for MNCs operating outside their home nation); *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, International Labour Organization, 17 I.L.M. 422, 425-28 (1978) [hereinafter *Tripartite Declaration*] (establishing labor standards for MNCs); *Development and International Economic Cooperation: Transnational Corporations*, U.N. ESCOR, 2d sess., Agenda Item 7(d), para. 14, U.N. Doc. E/1990/94 (1990) [hereinafter *Draft U.N. Code*] (claiming that MNCs should observe human rights standards); U.S. Department of Commerce, Model Business Principles, available at <http://www.itcilo.it/english/actrav/telearn/global/ilo/guide/usmodel.htm> [hereinafter Model Principles] (encouraging MNCs to adopt codes of conduct reflecting respect for fundamental human rights); *The Sullivan Statement of Principles* (4th Amplification), Nov. 8, 1984, 24 I.L.M. 1496 (1985) [hereinafter *Sullivan Principles*] (creating guidelines for MNCs operating in South Africa during apartheid); Irish National Caucus, The MacBride Principles, at <http://www.knight-hub.com/inc/MacBride.html> (establishing code of conduct for MNCs operating in Northern Ireland); *Wiwa v. Royal Dutch Petroleum*, 226 F.3d 88, 101 (2d Cir. 2000) (allowing suit against oil MNC operating in Nigeria to proceed under Alien Tort Claims Act ("ATCA") where allegations concerned human rights abuses related to its business activities there); *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 374 (E.D. La. 1997) (examining plaintiff's effort to apply ATCA to MNC operating in Indonesia); *Doe v. Unocal*, 963 F. Supp. 880, 891-92 (C.D. Cal. 1997) (recognizing that ATCA could apply to large oil MNC with respect to human rights abuses associated with project in Myanmar).

165. See, e.g., *Wiwa*, 226 F.3d at 101 (applying ATCA in case against MNC operating in Nigeria for human rights abuses related to its activities); *Beanal*, 969 F. Supp. at 374 (invoking ATCA to bring suit against MNC operating in Indonesia); *Unocal*, 963 F. Supp. at 891-92 (using ATCA to hold MNC accountable for human rights violations related to oil pipeline project in Myanmar).

166. See *OECD Declaration*, *supra* note 164, at 972-76 (establishing standards for MNC activity); *Tripartite Declaration*, *supra* note 164, at 425-28 (proposing standards for treatment of workers by MNCs operating outside their home country); *Draft U.N. Code*, *supra* note 164, at para. 14 (maintaining that MNCs should respect human rights); Model Principles, *supra* note 164 (urging MNCs to implement codes of conduct that require observance of human rights); *Sullivan Principles*, *supra* note 164, at 1496 (establishing standards for MNCs operating in South Africa during apartheid era); Irish National Caucus, *supra* note 164 (creating guidelines for MNCs conducting activities in Northern Ireland).

167. See, e.g., *Beanal*, 969 F. Supp. at 373 (refusing to find MNC liable under

enforced.<sup>168</sup>

### A. Alien Tort Claims Act

The ATCA acts as a tool for holding human rights violators liable to victims seeking redress when options in their own countries are limited.<sup>169</sup> Although the statute is over 200 years old, it

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ATCA); *Doe v. Unocal*, 110 F. Supp. 2d 1294, 1306-1307 (C.D. Cal. 2000) [hereinafter *Unocal II*] (granting summary judgment motion of MNC in ATCA case).

168. See Barbara A. Frey, *The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights*, 6 MINN. J. GLOBAL TRADE 153, 172-73 (1997) (noting that human rights commentators criticize U.S. Model Principles as being vague, duplicative, and unenforceable); Steven R. Salbu, *True Codes Versus Voluntary Codes of Ethics in International Markets: Towards the Preservation of Colloquy in Emerging Global Communities*, 15 U. PA. J. INT'L BUS. L. 327, 341-42 (1994) (commenting that Draft U.N. Code and Organisation for Economic Co-operation and Development's Declaration on International Investment and Multinational Enterprises ("OECD Declaration") lacks requisite specificity to be effectively enforced); Heidi S. Bloomfield, Note, *"Sweating" the International Garment Industry: A Critique of the Presidential Task Force's Workplace Codes of Conduct and Monitoring System*, 22 HASTINGS INT'L & COMP. L. REV. 567, 570 (1999) (asserting that lack of enforcement represents fundamental problem with codes of conduct).

169. ATCA, 28 U.S.C. § 1350. See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876, 878, 889 (2d Cir. 1980) (noting that court in home country failed to respond to allegations of torture and holding that State official who tortures individual is liable under ATCA). A plaintiff from Sierra Leone or Angola seeking redress against De Beers for its involvement in the conflict diamond trade may rely on the Alien Tort Claims Act ("ATCA") because there is no Court of Human Rights in Africa. See Welch, *The African Commission on Human and Peoples' Rights: A Five-Year Report and Assessment*, 14 HUM. RTS. Q. 43 (1992), reprinted in INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY AND PRACTICE, at 828 (Richard B. Lillich & Hurst Hannum eds., 1995) (noting that regional African human rights system does not have court to complement African Commission on Human and People's Rights, unlike regional systems in Europe and in Americas). The U.N. has initiated an effort to set up a tribunal for addressing the war crimes committed in Sierra Leone, but it has not yet been established. See Zagaris, *supra* note 119, at 978 (reporting that Security Council voted unanimously to establish tribunal for prosecution of Sierra Leone war criminals); Crossette, *supra* note 119, at A6 (noting Security Council's decision to set up tribunal for Sierra Leone). The international community has established tribunals on several occasions to hear allegations of war crimes and other violations of international law. See generally Mary Margaret Penrose, *Lest We Fail: The Importance of Enforcement in International Criminal Law*, 15 AM. U. INT'L L. REV. 321 (2000) (reviewing international tribunals established to prosecute war crimes). Similarly, after the end of apartheid, the South African government set up the Truth and Reconciliation Commission. See Kadar Asmal, Second Annual Grotius Lecture, *International Law and Practice: Dealing with the Past in the South African Experience*, 15 AM. U. INT'L L. REV. 1211, 1214 (2000) (claiming that new democracy in South Africa chose to confront legacy of apartheid through Truth and Reconciliation Commission). These efforts to publicize and prosecute war crimes have encountered many obstacles in attempting to fulfill their mandates. See, e.g., Jelena Pejic, *Conceptualizing Violence: Present and Future Developments in International Law: Panel II: Adjudicating Violence: Problems Confronting International Law and Policy on War Crimes and Crimes Against Humanity: The Tri-*

existed in relative obscurity until the plaintiffs in *Filartiga v. Pena-Irala*<sup>170</sup> used it to hold a Paraguayan state official liable for torture.<sup>171</sup> Since then, plaintiffs have attempted to use the ATCA against private individuals and MNCs, alleging violations of the “law of nations.”<sup>172</sup> Nevertheless, plaintiffs utilizing this approach face many obstacles, making recovery unlikely.<sup>173</sup>

## 1. General Background

The ATCA, initially passed as part of the Judiciary Act of 1789,<sup>174</sup> grants jurisdiction to U.S. district courts over any civil action brought by an alien for a tort committed in violation of the “law of nations”<sup>175</sup> or a U.S. treaty.<sup>176</sup> Commentators specu-

*bunjal and the ICC: Do Precedents Matter?*, 60 ALB. L. REV. 841, 852-53 (1997) (claiming that international community has failed to support International Tribunal for Former Yugoslavia); Christina M. Carroll, *An Assessment of the Role and Effectiveness of the International Criminal Tribunal for Rwanda and the Rwandan National Justice System in Dealing with the Mass Atrocities of 1994*, 18 B.U. INT’L L.J. 163, 180-87 (2000) (examining obstacles to success of International Criminal Tribunal for Rwanda); Adam Roberts, *The Laws of War: Problems of Implementation in Contemporary Conflicts*, 6 DUKE J. COMP. & INT’L L. 11, 26 (1995) (asserting that Nuremberg Trials were selective and did not reach many war criminals); Theresa Klosterman, Note, *The Feasibility and Propriety of a Truth Commission in Cambodia: Too Little? Too Late?*, 15 ARIZ. J. INT’L & COMP. L. 833, 842-44 (noting that evidence gathered from truth commissions have yet to lead to prosecutions and observing that truth commissions may have effect of fostering old wounds).

170. See *Filartiga*, 630 F.2d at 887 (noting that courts seldom used ATCA in past).

171. See *id.* at 877-78 (explaining plaintiffs’ allegations that Pena-Irala tortured Filartiga to death).

172. See, e.g., *Kadic v. Karadzic*, 70 F.3d 232, 236-37 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996) (using ATCA to hold private individual liable for crimes of genocide and war crimes); *Beanal*, 969 F. Supp. at 374 (examining plaintiff’s claim that ATCA jurisdiction should extend to MNC operating in Indonesia); *Doe v. Unocal*, 963 F. Supp. 880, 891-92 (C.D. Cal. 1997) (acknowledging legitimacy of ATCA application in suit against MNC with respect to human rights violations resulting from business activities in Myanmar).

173. See Zia-Zarifi, *supra* note 25, at 121 (explaining that ATCA plaintiffs face stringent factual requirements); Kevin M. McDonald, *Corporate Civil Liability Under the U.S. Alien Tort Claims Act for Violations of Customary International Law During the Third Reich*, 1997 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 167, 191, 195-96 (1997) (commenting that forum non conveniens presents potential reason for U.S. courts not to hear ATCA suit and examining difficulties posed by personal jurisdiction requirements).

174. Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (1789). See generally Annemarie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT’L L. 461 (1989) (examining possible history behind passage of ATCA).

175. ATCA, 28 U.S.C. § 1350. See *Trial of Gideon Henfield* (C.C.D. Pa. 1773), *reprinted in* F. WHARTON, STATE TRIALS 49, 52-53 (1849) (quoting Chief Justice John Jay describing “law of nations” as laws that bind nations whether in peacetime or at war); see also Armin Rosencranz & Richard Campbell, *Foreign Environmental and Human Rights Suits Against U.S. Corporations in U.S. Courts*, 18 STAN. ENVTL. L.J. 145, 152-54 (1999)

late that the framers of the statute designed the legislation in order to avoid conflicts with other nations over mistreatment of non-U.S. citizens.<sup>177</sup> Although commentators hypothesize as to the possible purpose of this statute, little legislative history exists to indicate the framers' actual intent.<sup>178</sup> For almost 200 years, courts rarely used the ATCA.<sup>179</sup> This changed in 1980, when the Second Circuit court relied on the ATCA in the landmark case *Filartiga v. Pena-Irala*.<sup>180</sup>

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(analyzing requirements for qualification as violating "laws of nations"). See generally Charles F. Marshall, *Development in Immigration Law: Re-framing the Alien Tort Act After Kadic v. Karadzic*, 21 N.C. J. INT'L L. & COM. REG. 591, 605-06 (1996) (asserting that meaning of "law of nations" has changed over time and that modern day understanding generally only holds nations, and not individuals, obligated under "law of nations"). The "law of nations" also can be understood as customary international law or universally recognized principles of law. See INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE 93 (Richard B. Lillich & Hurst Hannum 3d ed., 1995) (commenting that customary international law is source of international law); Curtis A. Bradley, *Customary International Law and Private Rights of Action*, 1 CHI. J. INT'L L. 421, 422 (2000) (explaining that concept of international law is generally divided into customary international law and treaties).

176. See ATCA, 28 U.S.C. § 1350 (stating that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States").

177. See, e.g., Burley, *supra* note 174, at 465, 469, 475 (claiming that theories of intent of statute depict ATCA as effort to protect United States from conflict with other nations and asserting that framers of statute may have been concerned with denial of justice to alien in U.S. courts, protection of ambassadors, or nation's duty to enforce international law); Brad J. Kieserman, Comment, *Profits and Principles: Promoting Multinational Corporate Responsibility by Amending the Alien Tort Claims Act*, 48 CATH. U. L. REV. 881, 891-92 (1999) (examining theories of intent of ATCA and claiming that general purpose was protection of aliens from mistreatment in United States); David P. Kunstle, Note, *Kadic v. Karadzic: Do Private Individuals Have Enforceable Rights and Obligations Under the Alien Tort Claims Act?*, 6 DUKE J. COMP. & INT'L L. 319, 324 (1996) (claiming that legal scholars have examined intellectual climate at time ATCA was passed to determine rationale for law).

178. See Burley, *supra* note 174, at 463 (asserting impossibility of obtaining unambiguous proof of intended purpose of ATCA); Kunstle, *supra* note 177, at 324 (claiming little legislative history for ATCA exists); Kieserman, *supra* note 177, at 891-92 (noting lack of clarity in determining originally intended scope of ATCA).

179. See Ariadne K. Sacharoff, Note, *Multinationals in Host Countries: Can They be Held Liable Under the Alien Tort Claims Act for Human Rights Violations?*, 23 BROOK. J. INT'L L. 927, 938-39 (1998) (opining that courts did not rely on ATCA because they had only vague understanding of customary international law).

180. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980) (recognizing that courts had rarely relied on ATCA in past); see also Kunstle, *supra* note 177, at 326 (asserting that *Filartiga* increased knowledge of ATCA); Richard B. Lillich, *Invoking International Human Rights in Domestic Courts*, 54 U. CIN. L. REV. 367, 398-99 (1985) (asserting that *Filartiga* Court holding that State-sponsored torture violates international law is remarkable).



## 2. Case Law Development Under the ATCA

In 1980, the Court in *Filartiga v. Pena-Irala* found that State-sponsored torture constituted a part of the “law of nations” under the ATCA.<sup>181</sup> Over fifteen years later, a Second Circuit court in *Kadic v. Karadzic* found that private individuals can be liable under the ATCA where the allegations include war crimes and genocide.<sup>182</sup> Subsequently, plaintiffs began filing suits against MNCs under the ATCA alleging various human rights abuses related to MNC activity.<sup>183</sup> These suits have often targeted MNCs involved in extractive industries, such as oil and mining,<sup>184</sup> but recently, plaintiffs have also attempted to hold banking institutions liable for knowingly profiting off of human rights abuses.<sup>185</sup>

### a. *Filartiga*

*Filartiga* involved a wrongful death suit against a Paraguayan police officer, Americo Norboerto Pena-Irala.<sup>186</sup> The plaintiffs alleged that Pena-Irala kidnapped, tortured, and killed Joelito Filartiga on May 29, 1976.<sup>187</sup> The District Court dismissed the

181. See *Filartiga*, 630 F.2d at 880, 889 (finding that State-sponsored torture is included in “law of nations”).

182. See *Kadic v. Karadzic*, 70 F.3d 232, 241-43 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996) (holding that genocide and war crimes are violations of international law whether actor is State official or private individual).

183. See, e.g., *Wiwa v. Royal Dutch Petroleum*, 226 F.3d 88, 101 (2d Cir. 2000) (applying ATCA in case against MNC operating in Nigeria for human rights abuses related to its activities); *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 374 (E.D. La. 1997) (invoking ATCA to bring suit against MNC operating in Indonesia); *Doe v. Unocal*, 963 F. Supp. 880, 891-92 (C.D. Cal. 1997) (using ATCA to hold MNC accountable for human rights violations related to oil pipeline project in Myanmar); *Bodner v. Paribas*, 114 F. Supp. 2d 117, 121-23 (E.D.N.Y. 2000) (examining facts in ATCA suit by Holocaust victim’s heir against French banks to recover property looted by Nazis and held by banks).

184. See, e.g., *Wiwa*, 226 F.3d at 92 (stating that defendants, Royal Dutch Petroleum and Shell Transport, are oil and gas companies); *Beanal*, 969 F. Supp. at 163 (noting that Freeport-McMoRan is mining company); *Unocal*, 963 F. Supp. at 884-85 (claiming that defendants, Unocal and Total, negotiated with government in Myanmar with respect to oil and gas exploration there).

185. See, e.g., *Bodner*, 114 F. Supp. 2d at 121 (claiming that defendants are banking institutions).

186. See *Filartiga*, 630 F.2d at 878 (contending that Filartiga’s death resulted from his father’s political activities against government). Dolly Filartiga, the victim’s sister, who was living in the United States, learned of Pena-Irala’s presence in the United States in 1978 and served him with a summons alleging wrongful death. *Id.* at 879.

187. See *id.* at 878 (detailing factual allegations against defendant). Mr. Filartiga

case for lack of subject matter jurisdiction,<sup>188</sup> but the Second Circuit Court of Appeals reversed and allowed recovery under the ATCA.<sup>189</sup> The Court looked to international treaties and accords, as well as national laws, to determine whether torture formed a part of customary international law.<sup>190</sup> The Court

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attempted to press criminal charges against Pena-Irala in the Paraguayan courts but the police harassed and threatened his lawyer. *Id.*

188. *See id.* at 880 (stating that District Court recognized strength of plaintiffs' claims but refused to find liability because judge felt obligated to construe "law of nations" narrowly to exclude torture as violation). *See generally* Michelle M. Meloni, *The Alien Tort Claims Act: A Mechanism for Aliens to Hold Their Foreign Nations Liable for Tortious Conduct*, 5 DETROIT C.L.J. INT'L L. & PRAC. 349, 354-57 (1996) (explaining debate about subject matter jurisdiction under ATCA).

189. *See Filartiga*, 630 F.2d at 878, 889 (reversing District Court dismissal and holding that federal jurisdiction could be exercised over Filartiga's claim); *see also* Lillich, *supra* note 180, at 399-400 (examining Court of Appeals reasoning in *Filartiga*). The court found that State-sponsored torture of persons in detention is a violation of the "international law of human rights, and hence the law of nations." *Filartiga*, 630 F.2d at 880. In *Tel-Oren v. Libyan Arab Republic*, Judge Bork, in a concurring opinion, claimed that the ACTA does not grant a cause of action to plaintiffs and criticized the *Filartiga* decision as interpreting the ATCA too broadly. *See* 726 F.2d 774, 811-12 (D.C. Cir. 1984) (J. Bork concurring) (reasoning that if ATCA grants cause of action to plaintiffs for violations of international law, it also must grant cause of action for violations of U.S. treaties and this contradicts rule that treaties may not be sued upon unless direct federal authorization for cause of action under treaty exists); *see also* Monroe Leigh, *Jurisdiction—Private Right of Action Under the Law of Nations—Subject Matter Jurisdiction Under Alien Tort Claims Act—Separation of Powers*, 78 AM. J. INT'L L. 668, 669-71 (1984) (explaining varied approaches of three judges in *Tel-Oren*). In *Filartiga's* aftermath, many foreign plaintiffs filed suits against State actors for torture. *See, e.g.*, Abebe-Jiri v. Negewo, 72 F.3d 844, 845-47 (11th Cir. 1996), *cert. denied* 519 U.S. 830 (1996) (finding against defendant for torturing three Ethiopian women); Paul v. Avril, 812 F. Supp. 207, 213 (S.D. Fla. 1993), *aff'd*, 901 F. Supp. 330 (1994) (denying motion to dismiss in suit brought by Haitian torture victims against former head of military). *See generally* Mark Gibney, *Human Rights Litigation in U.S. Courts: A Hypocritical Approach*, 3 BUFF. J. INT'L L. 261, 273 (1996) (criticizing courts for holding foreign state actors liable while allowing U.S. state actors to remain immune).

190. *Filartiga*, 630 F.2d at 882-84; *see* Marshall, *supra* note 175, at 601-2 (claiming that *Filartiga* Court disregarded historical intent of ATCA and focused narrowly on whether allegation represented violations of international law). In *United States v. La Jeune Eugenie*, Justice Story looked to the practices and customs of states to find that slave trading violated the law of nations. 26 F. Cas. 832, 847 (C.C.D. Mass. 1822) (No. 15,551). Three years later, Justice Marshall disagreed with Justice Story's conclusion about the slave trade, finding that the customs and practices prohibiting the slave trade were not universal and, therefore, were not a part of the law of nations. *The Antelope*, 23 U.S. (10 Wheat.) 66, 120-21 (1825). In the *Paquete Habana*, the Court held that the practice of seizing fishing vessels as war prizes was a violation of customary international law, recognizing that once acceptable norms can ripen into violations of international law. 175 U.S. 677, 694, 708 (1900); *see also* Rosencranz & Campbell, *supra* note 175, 150-51 (examining facts and analysis of *Paquete Habana*). The Court further articulated that judges should consider generally accepted customs where no treaty or controlling

found that State-sponsored torture violates international customary law,<sup>191</sup> and therefore, if the allegations were proved, Pena-Irala could be liable under the ATCA.<sup>192</sup> The Court limited its holding to the issue of State-sponsored torture, recognizing that few other issues are as universally prohibited by the nations of the world.<sup>193</sup>

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law exists. *Paquete Habana*, 175 U.S. at 700. The *Filartiga* Court alluded to this case for the principle of "ripening." See *Filartiga*, 630 F.2d at 881 (stating that once lawful activities can ripen into violations of international law, and therefore, law should be interpreted at present time of application, not when created); see also Kieserman, *supra* note 177, at 895-96 (explaining concept of ripening).

191. See Statute of the International Court of Justice art. 38(1)(b) [hereinafter ICJ Statute], reprinted in DOCUMENTS ON THE INTERNATIONAL COURT OF JUSTICE (Shabtai Rosenne ed., 2d ed. 1979) (stating that customary international law stands as "evidence of a general practice accepted as law"). Violations of customary international law must be universal, defined, and obligatory. *Forti v. Saurez-Mason*, 672 F. Supp. 1531, 1541 (N.D. Cal. 1987); see also Leslie Wells, *A Wolf in Sheep's Clothing: Why Unocal Should Be Liable Under U.S. Law for Human Rights Abuses in Burma*, 32 COLUM. J.L. & SOC. PROBS. 35, 54 (1998) (asserting that few crimes rise to level of customary international law violation because these requirements are strict).

192. See *Filartiga*, 630 F.2d at 880, 889 (finding that international law prohibits State-sponsored torture and remanding case to District Court for determination on merits).

193. See *id.* at 881 (stating that few crimes are so universally condemned as torture). On remand, the District Court granted a default judgment to the plaintiffs. *Filartiga v. Pena-Irala*, 577 F. Supp. 860, 861 (E.D.N.Y. 1984). Judge Kaufman, who decided *Filartiga* for the Court of Appeals, recognized that ATCA claims must be limited to only the most universal offenses, and therefore, kept the *Filartiga* holding very narrow, only prohibiting torture. See Irving R. Kaufman, *A Legal Remedy for International Torture?*, N.Y. TIMES MAG., Nov. 9, 1980, at 44, 52. The *Filartiga* Court's reading of the ATCA does not focus on allegations of municipal torts but on whether the alleged conduct violates the "law of nations." See *Filartiga*, 630 F.2d at 880 (asserting that threshold question is whether alleged conduct violates "law of nations"). But see Kenneth C. Randall, *Federal Jurisdiction Over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 33 (1985) (claiming that another approach to applying ATCA requires that plaintiff establish both municipal tort and violation of international law, deconstructing ATCA into two parts). In *Adra v. Clift*, the court allowed separate allegations of a municipal tort and international law violation to grant jurisdiction over the claim in its reliance on the ATCA. 795 F. Supp. 857, 862-65 (D. Md. 1961). There, a Lebanese man sued his ex-wife and her husband for custody of his child, claiming that the wife took the child unlawfully from his custody and falsified the child's passport in order to conceal her identity and whereabouts. *Id.* at 860-61. The Court held that the unlawful taking of a child from the custody of a parent constitutes a municipal tort. *Id.* at 862. The Court then held that tampering with a passport constituted a violation of international law. *Id.* at 865. Thus, the Court had jurisdiction under the ATCA. *Id.* at 862-65; see also Kunstle, *supra* note 177, at 325-26 (explaining facts of *Adra*); Rosencranz & Campbell, *supra* note 175, at 163 (examining *Adra* as instance where private individual faced liability under international law). Judge Edwards claimed this approach as an alternative to *Filartiga* in his concurring opinion in *Tel-Oren*. See *Tel-Oren*, 726 F.2d at

## b. Kadic

In 1995, the Second Circuit expanded the ATCA with the ruling in *Kadic v. Karadzic*.<sup>194</sup> In *Kadic*, the Court found that acts committed by non-state actors also fell within the realm of the ATCA.<sup>195</sup> The plaintiffs in *Kadic*, Croat and Muslim citizens of Bosnia-Herzegovina, brought suit against the leader of the rebel military forces that engaged in systematic violations of international human rights law.<sup>196</sup>

The District Court held that the ATCA does not extend liability to private individuals and found that Karadzic was a private actor.<sup>197</sup> On appeal, the Court of Appeals held that certain violations of the "law of nations" do not require State action and, thus, private individuals may be held liable under the ATCA for these crimes.<sup>198</sup> The Court found that violations involving geno-

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787 (J. Edwards, concurring) (asserting that under this approach, violation of "law of nations" represents only one part of multidimensional jurisdictional test).

194. *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996).

195. *See id.* at 239 (holding that certain conduct violates international law regardless of whether committed by State or private individual). The liability of non-State actors under international law deviates from the traditional notion of international law, which is only binding on sovereign States. *See, e.g.*, MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 238 (3d ed. 1999) (quoting Jeremy Bentham's *An Introduction to the Principles of Morals and Legislation*, which states that transactions between individuals are governed by internal laws while international law solely addresses transactions between sovereigns).

196. *See Kadic*, 70 F.3d at 237 (asserting claims against defendant for genocide, rape, forced prostitution and impregnation, and torture). The defendant headed the Bosnian-Serb military and also served as the President of "Srpska," a self-proclaimed state within Bosnia-Herzegovina with no recognition from the international community. *Id.*; *see also* Alan Frederick Enslin, Filartiga's *Offspring: The Second Circuit Significantly Expands the Scope of the Alien Tort Claim Act with its Decision in Kadic v. Karadzic*, 48 ALA. L. REV. 695, 698-701 (1997) (explaining facts of *Kadic*); Marshall, *supra* note 175, at 592-94 (analyzing background of *Kadic*); Kunstle, *supra* note 177, at 329-30 (examining allegations in *Kadic*).

197. *Doe v. Karadzic*, 866 F. Supp. 734, 740-41 (S.D.N.Y. 1994); *see also* Enslin, *supra* note 196, at 701-02 (examining District Court's reasoning in dismissing case under ATCA); Marshall, *supra* note 175, at 593-95 (explaining that Judge Leisure based decision in *Kadic* on prior ATCA cases that required State action). Although appellants, in their complaint, asserted that Karadzic was a state actor in his capacity as President of Srpska, in a Memorandum in Opposition to Defendant's Motion to Dismiss, they claimed that the defendant was not a government official. *Kadic*, 70 F.3d at 239. The District Court concluded that Karadzic was not a state actor because Srpska is not a state. *Doe v. Karadzic*, 866 F. Supp. at 739.

198. *See Kadic*, 70 F.3d at 239 (claiming that early determination of liability of private persons for engaging in piracy under international law supports conclusion that private actors can be liable under international law); *see also* Kunstle, *supra* note 177, at

cide or war crimes do not require State action and, since these violations were among the allegations, the defendant faced liability as a private actor under the ATCA.<sup>199</sup>

The *Kadic* court's extension of liability for certain crimes to non-State actors has significance.<sup>200</sup> Commentators argue that this expansion of the ATCA has left the application of the ATCA open to further enlargements.<sup>201</sup> Indeed, after *Kadic*, courts went on to recognize the possibility of extending ATCA liability to MNCs.<sup>202</sup>

### c. Beanal

In 1996, Tom Beanal, an Indonesian citizen and leader of an indigenous group there, brought suit under the ATCA against Freeport-McMoRan, a U.S. mining MNC operating in Beanal's town.<sup>203</sup> Beanal alleged human rights violations as well

331-37 (explaining Second Circuit's conclusion that non-State actors can be held liable for certain universal human rights violations).

199. See *Kadic*, 70 F.3d at 242-43 (recognizing that all participants in conflict are bound by laws of war and, thus, private individuals may be liable for war crimes under "law of nations"); see also Enslin, *supra* note 196, at 709-11 (analyzing Second Circuit's holding that genocide and war crimes do not require State action in order to violate international law); Marshall, *supra* note 175, at 608-12 (examining *Kadic* Court's reasoning in holding that certain crimes violate international law without State action). The court further held that claims of torture and summary execution, when not related to acts of genocide or war crimes, do require State action. *Kadic*, 70 F.3d at 243. The court opined that Karadzic might be a State actor because of his position as president of the self-proclaimed republic of Sprska. *Id.* at 245. Although the international community did not recognize Sprska as a State, the court asserted that a State might exist for the purposes of international human rights law without recognition from other nations. *Id.* According to Restatement Third, a State exists when it has (1) power over a defined territory with a permanent population, (2) government control, and (3) the ability to engage in formal relations with other States. RESTATEMENT THIRD OF FOREIGN RELATIONS § 201 (1983).

200. See *Kadic*, 70 F.3d at 241-43 (2d Cir. 1995) (holding that genocide and war crimes are violations of international law whether actor is State official or private individual); see also Enslin, *supra* note 196, at 704-09 (examining Court of Appeals explanation for holding non-State actors liable under ATCA).

201. See, e.g., Enslin, *supra* note 196, at 728 (claiming that *Kadic* will open up U.S. courts to future human rights plaintiffs); Justin Lu, *Jurisdiction over Non-State Activity Under the Alien Tort Claims Act*, 35 COLUM. J. TRANSNAT'L L. 531, 546 (criticizing *Kadic* court for its broad reading of ATCA).

202. See, e.g., *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 374 (E.D. La. 1997) (examining plaintiff's argument to extend ATCA liability to MNC operating in Indonesia); *Doe v. Unocal*, 963 F. Supp. 880, 891-92 (C.D. Cal. 1997) (applying ATCA liability to large oil MNC with respect to project in Myanmar where numerous human rights abuses occurred as result of project).

203. See *Beanal*, 969 F. Supp. at 366 (stating that Beanal, chief of Amungme Tribal

as environmental abuses committed by Freeport-McMoRan.<sup>204</sup> Although the Court recognized the potential for MNCs to be liable under the ATCA,<sup>205</sup> it dismissed the case for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure.<sup>206</sup>

Beanal alleged cultural genocide as a basis for finding a violation of international law.<sup>207</sup> Although private actors are liable for genocide without a showing of state action,<sup>208</sup> the Court found that Beanal's allegation did not amount to genocide.<sup>209</sup> Therefore, the Court would not find Freeport-McMoRan liable for acts committed in furtherance of genocide under the facts pled by Beanal.<sup>210</sup>

Beanal also alleged other human rights abuses, including torture, arbitrary detention, and destruction of property.<sup>211</sup>

Counsel of Lambaga Adat Suku Amungme, filed suit on behalf of himself and others similarly situated); *see also* Zia-Zarifi, *supra* note 25, at 98 (explaining history and facts of *Beanal*).

204. *See Beanal*, 969 F. Supp. at 365 (detailing Beanal's complaint); *see also* Hari M. Osofsky, *Environmental Human Rights Under the Alien Tort Statute: Redress for Indigenous Victims of Multinational Corporations*, 20 SUFFOLK TRANSNAT'L L. REV. 335, 338-39 (1997) (reporting allegations of *Beanal*); Anastasia Khokhryakova, *Beanal v. Freeport-McMoRan, Inc.: Liability of a Private Actor for an International Environmental Tort Under the Alien Tort Claims Act*, 9 COLO. J. INT'L ENVTL. L. & POL'Y 463, 472-9 (1998) (examining three amended complaints in *Beanal*).

205. *See Beanal*, 969 F. Supp. at 370 (recognizing that ATCA provides private rights of action and that private individuals can be liable for violations of "law of nations" under ATCA).

206. *See* FED. R. CIV. P. 12(b)(6) (stating that claim may be dismissed for "failure to state a claim upon which relief can be granted"); *Beanal*, 969 F. Supp. at 384 (dismissing Beanal's claims without prejudice); *see also* Khokhryakova, *supra* note 204, at 476 (explaining that *Beanal* Court dismissed plaintiff's claims because plaintiff did not allege sufficient facts to have standing in court).

207. *See Beanal*, 969 F. Supp. at 372 (maintaining that Beanal's claim of cultural genocide was unclear); *see also* Osofsky, *supra* note 204, at 354 (asserting that *Beanal* Court accepted plaintiff's allegation of cultural genocide as potential claim under ATCA but dismissed plaintiff's case for failure to connect claim and facts adequately); Khokhryakova, *supra* note 204, at 474-75 (examining Beanal's claim of cultural genocide); Zia-Zarifi, *supra* note 25, at 98-99 (explaining that Beanal's allegation of cultural genocide results from combination of human rights and environmental abuses).

208. *Beanal*, 969 F. Supp. at 372; *Kadic v. Karadzic*, 70 F.3d 232, 242-3 (2d Cir. 1995).

209. *See Beanal*, 969 F. Supp. at 373 (stating that genocide is intentional destruction of group of people rather than culture); *see also* Khokhryakova, *supra* note 204, at 475 (asserting that Beanal's genocide claim was essential to success of case).

210. *See Beanal*, 969 F. Supp. at 373 (finding Beanal's allegation of genocide to be insufficiently clear).

211. *See id.* at 369 (claiming that alleged acts of torture and arbitrary detention

Freeport-McMoRan's liability for these violations requires State action since these acts were not committed in furtherance of genocide.<sup>212</sup> After examining relevant tests for determining whether a private actor engaged in State action,<sup>213</sup> the Court found that Freeport-McMoRan did not have sufficient connections with the State to establish liability for these allegations.<sup>214</sup>

#### d. Unocal

In 1997, a district court in the Ninth Circuit heard another ATCA case against an MNC.<sup>215</sup> In *Doe v. Unocal*, farmers from Myanmar sued Unocal and Total S.A., two large oil companies

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occurred on premises of Freeport-McMoRan property); see also Khokhryakova, *supra* note 204, at 475 (claiming that Beanal alleged human rights violations separate from his genocide claim).

212. See *Beanal*, 969 F. Supp. at 373 (noting requirement of State action for non-genocide related claims); see also Khokhryakova, *supra* note 204, at 475-76 (reporting that *Beanal* court did not accept plaintiff's non-genocide related human rights claims because these claims require State action); Elizabeth Pinckard, *Indonesian Tribe Loses in Its Latest Battle Against Freeport-McMoRan, Inc., Operator of the World's Largest Gold and Copper Mine*, 1997 COLO. J. INT'L ENVTL. L. & POL'Y 141, 143 (claiming that *Beanal* Court rejected plaintiff's human rights claims because he failed to allege State action).

213. See *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1447 (10th Cir. 1995) (summarizing tests articulated by Supreme court). There are four ways of determining if state action exists: public function, symbiotic relationship, nexus, and joint action. See *id.* (examining four state action tests); see also Rosencranz & Campbell, *supra* note 175, at 160 (explaining state action tests as restated in *Gallagher*).

214. See *Beanal*, 969 F. Supp. at 380 (claiming that Beanal failed to allege requisite facts to convert Freeport's actions into State action). The Court also dismissed Beanal's environmental claims, holding that these allegations did not constitute violations of international law. *Id.* at 383-84. Beanal amended his complaint in an attempt to allege the necessary facts, but the same court also dismissed the amended complaint for failure to state a claim. *Beanal v. Freeport-McMoRan, Inc.*, 197 F.3d 161, 163 (5th Cir. 1999); see also Khokhryakova, *supra* note 204, at 476-77 (explaining dismissal of Beanal's subsequent amended complaints). The *Beanal* Court's formal application of the State action doctrine established a high factual threshold for ATCA plaintiffs at the pleading stage. See Kieserman, *supra* note 177, at 926 (explaining that despite allegations of significant investment in project, existing contractual arrangement between government and Freeport-McMoRan, and military presence at Freeport-McMoRan site in Indonesia, *Beanal* Court refused to find State action). This result places a substantial burden on plaintiffs alleging human rights abuses under the ATCA. See Zia-Zarifi, *supra* note 25, at 121-22 (maintaining that ATCA plaintiffs have high factual burden to proceed beyond pleading stage). Since most ATCA plaintiffs are unlikely to have the requisite information to submit a detailed pleading, courts following the *Beanal* Court's example are likely to dismiss ATCA suits at the pleading stage. See *id.* at 123 (asserting that U.S. courts will ultimately demand high factual threshold for ATCA plaintiffs at pleading stage).

215. *Doe v. Unocal*, 963 F. Supp. 880 (C.D. Cal. 1997).

operating in Myanmar.<sup>216</sup> The plaintiffs alleged a variety of human rights abuses, including forced labor, torture, and rape, committed by the repressive regime in Myanmar.<sup>217</sup> The claim revolves around Unocal's funding of, knowledge of, and benefit from human rights abuses committed by the State Law and Order Restoration Council<sup>218</sup> ("SLORC") in furtherance of a joint pipeline project between Unocal and SLORC.<sup>219</sup>

The Court held that private corporations could be held liable under the ATCA for joint action in complicity with the State.<sup>220</sup> The *Unocal* Court asserted that joint action is found

216. See *id.* at 883 (commenting that plaintiffs are from region in Myanmar where Unocal operates pipeline project); see also Zia-Zarifi, *supra* note 25, at 97 (examining facts of *Unocal*); Robert J. Peterson, Comment, *Political Realism and the Judicial Imposition of International Secondary Sanctions: Possibilities from John Doe v. Unocal and the Alien Tort Claims Act*, 5 U. CHI. L. SCH. ROUNDTABLE 277, 279-80 (1998) (explaining background to *Unocal* case); Lucien J. Dhooze, *A Close Shave in Burma: Unocal Corporation and Private Enterprise Liability for International Human Rights Violations*, 24 N.C. J. INT'L L. & COM. REG. 1, 1-11, 27-42 (1998) (examining facts and history behind allegations as well as procedural history in *Unocal*); Wells, *supra* note 191, at 38-39 (1998) (describing circumstances giving rise to *Unocal* suit); Eileen Rice, Note, *Doe v. Unocal Corporation: Corporate Liability for International Human Rights Violations*, 33 U.S.F. L. REV. 153, 159 (1998) (detailing facts alleged by plaintiffs in *Unocal*). The action was filed against Unocal, Total S.A., the Myanma Oil and Gas Enterprise ("MOGE"), the State Law and Order Restoration Council ("SLORC"), as well as some individual officers of Unocal. *Doe v. Unocal*, 963 F. Supp. at 883. However, the Court held that SLORC and MOGE were immune under the Foreign Sovereign Immunities Act ("FSIA"). *Id.* at 888; see also Rice, *supra*, at 160 (noting that Court rejected plaintiffs' argument that State Law and Order Restoration Council's ("SLORC's") activities fell within commercial exception to FSIA). Total, S.A. was later dismissed from the suit for lack of personal jurisdiction. *Doe v. Unocal*, 27 F. Supp. 2d 1174, 1179 (C.D. Cal. 1998).

217. See *Unocal*, 963 F. Supp. at 884-85 (detailing factual allegations of *Unocal*); see also Zia-Zarifi, *supra* note 25, at 97 (explaining that *Unocal* plaintiffs asserted human rights claims including rape, torture, and murder); Dhooze, *supra* note 216, at 19-27 (describing Myanmar government's history of human rights abuses).

218. See *Unocal*, 963 F. Supp. at 884-85 (explaining history behind SLORC's rise to power in Myanmar). SLORC took power in Burma in a military coup on September 18, 1988, and renamed the country "Myanmar." *Unocal*, 963 F. Supp. at 884. After the opposition democratic party gained the majority of parliamentary seats in elections in May 1990, SLORC arrested the leaders of the opposition and maintained repressive control of Myanmar. *Id.*; see also Dhooze, *supra* note 216, at 11-19 (describing political history and economic conditions of Myanmar).

219. See *Unocal*, 963 F. Supp. at 884-85 (explaining facts concerning Unocal's pipeline project with SLORC and plaintiff's human rights allegations); see also Zia Zarifi, *supra* note 25, at 97 (describing claims against Unocal as result of joint venture with SLORC); Wells, *supra* note 191, at 41 (stating that allegations against Unocal included knowledge of, and benefit from, human rights abuses committed by SLORC); Peterson, *supra* note 216, at 280 (examining joint venture between SLORC, Unocal, and Total, S.A., called Yadana pipeline project, and explaining complicity allegations).

220. See *Unocal*, 963 F. Supp. at 891 (holding that where claim alleges joint action



where there is a considerable amount of cooperation between the government and private entities in depriving people of their rights.<sup>221</sup> Furthermore, because the plaintiffs alleged forced labor, the Court found that Unocal might be liable without State action since forced labor can be considered within the ambit of slave trading.<sup>222</sup> The Court denied Unocal's motion to dismiss.<sup>223</sup>

At trial in *Doe v. Unocal*<sup>224</sup> ("Unocal II"), the Court held that Unocal was not liable for the violations because Unocal did not have the necessary degree of connection to the State to establish joint action.<sup>225</sup> The Court acknowledged that Unocal knew of the practice of using forced labor, but it did not take active steps to further such a practice, and, therefore, the Court dismissed the case against Unocal.<sup>226</sup> Although, the initial District Court opinion in *Unocal* provides a framework for holding corpora-

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between State and MNC violating international law, there is subject matter jurisdiction under ATCA); Rosencranz & Campbell, *supra* note 175, at 164 (explaining that *Unocal* Court held that private MNCs are potentially liable for human rights abuses even absent State action); Wells, *supra* note 191, at 51 (examining *Unocal* Court's analysis of Unocal as State actor); Rice, *supra* note 216, at 162 (asserting that *Unocal* Court's recognition that MNCs can be liable for international law violations will have broad impact on U.S. businesses operating abroad).

221. See *Unocal*, 963 F. Supp. at 891 (claiming that joint action requires substantial degree of cooperation); see also Dhooge, *supra* note 216, at 34 (describing *Unocal* Court's analysis of when joint action exists between State and private actors).

222. See *Unocal*, 963 F. Supp. at 892 (recognizing that private actors could be held liable for human rights abuses without State action where allegations include slave trading or piracy); see also Wells, *supra* note 191, at 47-52 (examining *Unocal* Court's jurisdiction with respect to allegations of forced labor and Unocal's liability without showing of State action); Dhooge, *supra* note 216, at 35 (explaining that Unocal could be liable without evidence of State action because plaintiffs alleged forced labor, which is related to slave trading). Combined with *Kadic*, the list of claims available against non-State actors for violating international law include, genocide, war crimes, slave trading, and piracy. *Unocal*, 963 F. Supp. at 892; *Kadic v. Karadzic*, 70 F.3d 232, 242-43 (2d Cir. 1995).

223. See *Unocal*, 963 F. Supp. at 898 (denying Unocal's motion to dismiss, finding that Court had subject matter jurisdiction under ATCA, and holding that SLORC and MOGE were not indispensable parties); see also Wells, *supra* note 191, at 40-41 (explaining *Unocal* Court's reasoning in denying motion to dismiss for lack of jurisdiction and failure to join indispensable party); Dhooge, *supra* note 216, at 29, 31, 33 (describing Unocal Court's analysis finding jurisdiction over Unocal and refusing to deem SLORC and MOGE as indispensable parties); Rice, *supra* note 216, at 160-62 (explaining Court's logic in refusing to dismiss case against Unocal).

224. *Unocal II*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000).

225. See *id.* at 1306-1307 (holding for Unocal on summary judgment motion, claiming that Unocal did not engage in joint State action).

226. *Id.* at 1310; see also Peterson, *supra* note 216, at 282 (explaining complications

tions accountable for their complicity with repressive regimes,<sup>227</sup> the final decision of the *Unocal* Court reveals that establishing a case against an MNC under this framework will be extremely difficult.<sup>228</sup>

#### e. Swiss Bank Litigation

In late 1996 and early 1997, Holocaust survivors and their descendants filed three suits against Swiss banks alleging that the banks knowingly profited from slave labor and stolen property during the Nazi reign in Germany.<sup>229</sup> They alleged participation and complicity with the Nazi regime in perpetrating crimes against humanity, crimes against the peace, and war crimes, and claimed liability under the ATCA.<sup>230</sup> The Eizenstat Report,<sup>231</sup> of

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of *Unocal* since all previous ATCA cases held perpetrators directly liable for committing human rights abuses, not simply for knowledge of or benefit from such violations).

227. See *Unocal*, 963 F. Supp. at 891-92 (finding that allegations of joint action between MNC and State, as well as claims of forced labor, are sufficient for subject matter jurisdiction under ATCA).

228. See *Unocal II*, 110 F. Supp. 2d at 1295 (granting summary judgment to *Unocal*).

229. See generally Ramasastry, *supra* note 18, at 332 (examining Swiss banking secrecy laws and their negative effect on redress efforts by victims of human rights abuses); Derek Brown, *Litigating the Holocaust: A Consistent Theory in Tort for the Private Enforcement of Human Rights Violations*, 27 PEPP. L. REV. 553, 566-69 (2000) (describing cases against Swiss banks and subsequent settlement agreement). The cases filed were *Weisshaus v. Union Bank of Switzerland*, No. 96-CV-4849 (E.D.N.Y. Oct. 3, 1996); *Freidman v. Union Bank of Switzerland*, No. 96-CV-5161 (E.D.N.Y. Oct. 21, 1996); and *World Council of Orthodox Jewish Communities*, No. 97-CV-0461 (E.D.N.Y. Jan. 29, 1997) (Am. Compl. July 1997) [hereinafter *WCOJC* Complaints]. After being amended, the claims were separated into four groups: the *Weisshaus*, *Sonabend*, *Trilling-Gotch*, and *WCOJC* Complaints. See Ramasastry, *supra* note 18, at 377. The complaints also alleged that the Swiss banks were preventing Holocaust victims and their heirs from access to dormant accounts with the banks. *Id.* at 374-76. The *Sonabend* Complaint encompasses those plaintiffs who are aliens, making claims under international customary law. *Id.* at 377. Holocaust survivors and their heirs have also filed suits against German, French, and Austrian banks, alleging that these banks benefited from looted property and gold belonging to the plaintiffs. See generally Michael J. Bazylar, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 34 U. RICH. L. REV. 1, 237-48 (examining suits against non-Swiss banks for crimes committed during Holocaust).

230. See *Freidman* Complaint, No. 96-CV-5161 at 24 (claiming that Holocaust plaintiffs' international law claims revolve around allegation that Swiss banks acquired property as result of illegal activities of Nazis); Ramasastry, *supra* note 18, at 377, 387 (examining Holocaust plaintiffs' international law claims). Besides the international law claims, other theories of liability are the tort principles of conversion and unjust enrichment. *Freidman* Complaint, No. 96-CV-5161 at 92-4. These claims are not recoverable under the ATCA because they are not violations of the customary international law. See *ITT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (rejecting argument that stealing was in violation of "law of nations" for purposes of ATCA); see also *Unocal II*, 110 F.

ficially ordered by the U.S. government, speculates that Swiss banks prolonged the war by providing funds to the Nazis.<sup>232</sup>

The Holocaust plaintiffs invoked the Nuremberg Principles<sup>233</sup> to prove liability on the part of the banks.<sup>234</sup> The Nuremberg Principles are a restatement of the legal principles developed by the International Law Commission and recognized in the Nuremberg Charter, the decisions of the International Military Tribunal<sup>235</sup> ("IMT") that convicted Nazi war criminals ("Nuremberg Tribunals"), and customary international law.<sup>236</sup> Principle VI of the Nuremberg Principles defines crimes against the peace, war crimes, and crimes against humanity.<sup>237</sup> Principle VII provides that complicity in committing a crime against the

Supp. 2d at 1304 (asserting that violations of "law of nations" include genocide, war crimes, slavery, and torture). While the banks' actions may have been immoral, or focused solely on profit, it is arguable whether these actions amount to violations of international law. See Walter J. Rockler, *Bankers Not Collaborators*, WASH. POST, July 22, 1997, at A15 (arguing that litigation against Swiss banks for involvement in Holocaust is warped).

231. WILLIAM Z. SLANY, U.S. DEP'T OF STATE, U.S. AND ALLIED EFFORTS TO RECOVER AND RESTORE GOLD AND OTHER ASSETS STOLEN OR HIDDEN BY GERMANY DURING WORLD WAR II, PRELIMINARY STUDY (coordinated by Stuart E. Eizenstat) (May 1997), available at [http://www.state.gov/www/regions/eur/rpt\\_9705\\_ng\\_links.html](http://www.state.gov/www/regions/eur/rpt_9705_ng_links.html) [hereinafter EIZENSTAT REPORT]; see also Brown, *supra* note 229, at 579-80 (explaining mandate of Eizenstat report and subsequent investigation).

232. See EIZENSTAT REPORT, *supra* note 231, at xxvi (noting importance of relations with Switzerland in sustaining Germany's war effort).

233. Nuremberg Principles, *supra* note 18; see also Frank Lawrence, *The Nuremberg Principles: A Defense for Political Protesters*, 40 HASTINGS L.J. 397, 399-401 (1989) (examining historical events leading up to adoption of Nuremberg Principles by United Nations).

234. Ramasastry, *supra* note 18, at 397.

235. See *id.* at 394-95 (claiming that International Military Tribunal ("IMT") was established to try Nazi war criminals after World War II and examining origins of IMT); Lawrence, *supra* note 233, at 399-400 (noting that IMT was result of agreement between United States, Soviet Union, France, and Great Britain, called London Agreement, and that IMT was established to prosecute war criminals).

236. See Ramasastry, *supra* note 18, at 396-97 (stating that International Law Commission developed Nuremberg Principles and that Nuremberg Principles are recognized in Nuremberg Charter, Nazi war criminal court judgments, and customary international law); Steven Fogelson, Note, *The Nuremberg Legacy: An Unfulfilled Promise*, 63 S. CAL. L. REV. 833, 871-75 (1990) (claiming that Nuremberg Principles are incorporated into U.N. Charter and discussing qualification of Nuremberg Principles as part of customary international law); Lawrence, *supra* note 233, at 406-11 (analyzing argument that Nuremberg Principles are part of customary international law).

237. Nuremberg Principles, *supra* note 18. Principle VI asserts that:

The crimes hereinafter set out are punishable as crimes under international law:

I. a. Crimes against the peace:

peace, a war crime, or a crime against humanity violates international law.<sup>238</sup> These Principles are accepted as precedent in international law.<sup>239</sup>

At the Nuremberg Tribunals, Frederick Flick, a German industrialist, was convicted of spoliation and plunder for his takeover of a cement plant in France.<sup>240</sup> Although the IMT was hesitant to equate property crimes to crimes against humanity, the IMT found Flick guilty for accepting and retaining property that he knew the Nazi regime had obtained unlawfully.<sup>241</sup> Thus,

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A.(1) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances

B.(2) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned in (1)

...

II. b. War crimes

Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation of slave-labor, or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

...

III. c. Crimes against humanity

Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population or persecutions on political, racial or religious grounds, when such persecutions are carried on in execution of or in connection [sic] with any crime of peace or any war crime.

*Id.*

238. *See id.* (stating that “[c]omplicity in the commission on a crime against the peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law”).

239. *See* Fogelson, *supra* note 235, at 875 (commenting that Nuremberg Principles have become part of international law precedent); *see also* Lawrence, *supra* note 233, at 411 (arguing that Nuremberg Principles are part of customary international law, which is binding law for U.S. courts).

240. *See* Ramasastry, *supra* note 18, at 420 (examining Flick case and noting Flick’s involvement in management of French cement plant in Lorraine during World War II); Matthew Lippman, *Conundrums Of Armed Conflict: Criminal Defenses To Violations Of The Humanitarian Law of War*, 15 DICK. J. INT’L L. 1, 61-62 (1996) [hereinafter Lippman, *Conundrums*] (explaining background of Flick case); Matthew Lippman, *War Crimes Tribunals of German Industrialists: The “Other” Schindlers*, 9 TEMP. INT’L & COMP. L.J. 173, 193 (1995) [hereinafter Lippman, *War Crimes Tribunals*] (describing how Flick gained control over steel mills and smelting plants in France).

241. *See* Ramasastry, *supra* note 18, at 422, 425 (noting that IMT did not generally equate property crimes with crimes against humanity but found Flick guilty for his seizure and continued operation of civilian property in occupied territory during wartime); *see also* Lippman, *War Crimes Tribunals*, *supra* note 240, at 202 (asserting that Flick had potential defense of necessity but that IMT found that his intent was to plunder). The International Military Tribunal (“IMT”) also convicted Flick of contributing money

knowingly supporting and accepting looted property from war criminals is a violation of international law under the Nuremberg precedent.<sup>242</sup>

The Nuremberg trials in general, and the Flick conviction in particular, strengthen the Holocaust plaintiffs' claims.<sup>243</sup> The *Unocal II* summary judgment decision, however, required a high degree of cooperation between a State and private actor to find individual liability under the ATCA, presenting a potential problem for the Holocaust plaintiff's claims.<sup>244</sup> The parties to the Holocaust litigation eventually settled, and therefore, no judicial opinion was ever made regarding the legitimacy of the claims under international law.<sup>245</sup>

### 3. Criticisms of ATCA

Courts' willingness to entertain claims<sup>246</sup> against MNCs under the ATCA reveals a changing sentiment towards such suits.<sup>247</sup> Commentators generally agree, however, that the ATCA

to the Nazi police force, known as the SS, with full knowledge their criminal activities. Ramasastry, *supra* note 18, at 421; *see also* Lippman, *War Crimes Tribunals*, *supra* note 240, at 198-99 (explaining Flick's involvement with SS).

242. *See* Ramasastry, *supra* note 18, at 420-21 (noting that although Flick's actions did not constitute systemic plunder conceived of by Hitler, he was liable for seizure of private property). *But see Unocal II*, 110 F. Supp 2d 1294, 1310 (C.D. Cal. 2000) (finding that *Flick* case was predicated on active participation in illegal activities rather than simple knowledge of crimes).

243. *See* Ramasastry, *supra* note 18, at 425-26 (asserting that Holocaust victims will use Flick conviction to support theory that illegal seizure of property is basis for prosecution).

244. *See Unocal II*, 110 F. Supp. 2d at 1306-07 (noting that plaintiffs presented no evidence that Unocal influenced, controlled, or participated in unlawful activities of SLORC, while acknowledging that Unocal knew or should have known about these unlawful activities).

245. *See* Daniel Wise, *\$1.25 Billion Deal Set on Holocaust Claims; Settlement Approval Critical of Swiss Response*, N.Y.L.J., July 27, 2000, at 1 (reporting that Holocaust victims settled with Swiss banks for US\$1,250,000,000); *see also* Brown, *supra* note 229, at 567-68 (describing settlement agreement between Holocaust plaintiffs and Swiss banks).

246. *See, e.g.,* *Wiwa v. Royal Dutch Petroleum*, 226 F.3d 88, 101 (2nd Cir. 2000) (reversing lower Court's dismissal of ATCA case against MNC on grounds of forum non conveniens); Jason Hoppin, *Chevron Hit with Human Rights Claim*, NAT'L L.J., Apr. 24, 2000, at B1 (allowing case against oil MNC to proceed for alleged human rights violations in Nigeria); *see also* Anne-Marie Slaughter and David Bosco, *Plaintiff's Diplomacy*, FOREIGN AFF., Sept./Oct. 2000, at 102, 110 (asserting that courts' readiness to hear ATCA cases against MNCs may lead to large settlement agreements).

247. *See generally* Dhooze, *supra* note 216, at 67 (asserting that *Unocal* decision reflects new readiness of judiciary to address issues traditionally reserved for foreign affairs); Gregory G.A. Tzeuschler, *Corporate Violator: The Alien Tort Liability of Transna-*

is a weak method of holding corporations accountable for their activities in nations outside their home country.<sup>248</sup> ATCA plaintiffs face several obstacles in bringing suit against an MNC, including meeting the high factual threshold,<sup>249</sup> overcoming a forum non conveniens motion,<sup>250</sup> obtaining personal jurisdiction over the defendant,<sup>251</sup> and showing State action for most human rights allegations.<sup>252</sup>

### a. High Factual Threshold

The first potential problem with utilizing the ATCA to hold

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*tional Corporations for Human Rights Abuses Abroad*, 30 COLUM. HUM. RTS. L. REV. 359, 362 (1999) (maintaining that courts have demonstrated willingness to hear international human rights claims); Peterson, *supra* note 216, at 298 (speculating that using ATCA to hold MNCs liable is effective method for imposing secondary sanctions on "rogue" states); Wells, *supra* note 191, at 71 (claiming that MNCs should not be immune from liability for human rights abuses and that *Unocal* decision was proper). One scholar claims that the continuing expansion of the ATCA violates separation of powers. Donald J. Kochan, *Constitutional Structure as a Limitation on the Scope of the "Law of Nations" in the Alien Tort Claims Act*, 31 CORNELL INT'L L.J. 153, 171 (1998).

248. See generally Tzeutschler, *supra* note 247, 369-70 (1999) (noting that Act of State doctrine allows corporations to continue activities with relative impunity); Kieserman, *supra* note 177, at 925 (claiming that ATCA allows corporate defendants to commit human rights abuses through any means except using official foreign troops, which would constitute State action); Laura Bowersett, *Doe v. Unocal: Tortuous Decision for Multinationals Doing Business in Politically Unstable Environments*, 11 TRANSNAT'L LAW. 361, 375-79 (1998) (alleging that *Unocal* facts do not justify finding liability under ATCA). Commentators have proposed new legislation to address the ATCA's weaknesses, particularly with regard to holding MNCs liable. See Gregory J. Wallace, *Linked to Slavery*, LEGAL TIMES, Dec. 1, 1997, at 24 (commenting that *Unocal* case is problematic because it does not offer guidance to MNCs operating outside home countries and suggests that Congress should enact "Foreign Human Rights Abuse Act" to provide standards for MNCs with respect to human rights); John Christopher Anderson, *Respecting Human Rights: Multinational Corporations Strike Out*, 2 U. PA. J. LAB. & EMP. L. 463, 500-01 (2000) (suggesting that Congress adopt legislation called "Foreign Human Rights Abuse Act" that would provide cause of action for victims of human rights abuses against MNCs that assisted in, participated in, or knowingly benefited from such abuses).

249. See Zia-Zarifi, *supra* note 25, at 121 (commenting that high factual threshold is obstacle for ATCA plaintiffs).

250. See Kathryn Lee Boyd, *The Inconvenience of Victims: Abolishing Forum Non Conveniens in U.S. Human Rights Litigation*, 39 VA. J. INT'L L. 41, 46 (1998) (noting that forum non conveniens is difficult barrier for ATCA recovery).

251. See McDonald, *supra* note 173, at 191-93 (reviewing personal jurisdiction requirements and application in ATCA suits).

252. See, e.g., *Unocal II*, 110 F. Supp. 2d 1294, 1305 (C.D. Cal. 2000) (dismissing case against MNC because plaintiffs failed to prove State action); *Beanal v. Freeport-McMoRan*, 969 F. Supp. 362, 373-74 (E.D. La. 1997) (dismissing case because plaintiff did not show requisite level of State action).

MNCs accountable is that the plaintiff must meet a high threshold of factual evidence.<sup>253</sup> Often, a judge will grant a defendant's failure to state a claim motion in ATCA cases.<sup>254</sup> The plaintiff will struggle to satisfy this requirement because evidence of an MNC's participation in violations of international law is often difficult to obtain.<sup>255</sup> Although in some instances courts have allowed limited discovery for the plaintiff to establish the requisite facts,<sup>256</sup> generally courts demand a highly developed factual basis for the continuation of a case under the ATCA.<sup>257</sup>

### b. Forum Non Conveniens

Defendants also will likely object to an ATCA suit based on forum non conveniens.<sup>258</sup> Forum non conveniens is granted when a case can be pursued more effectively and fairly in another country.<sup>259</sup> The events giving rise to an ATCA claim often

253. See Zia-Zarifi, *supra* note 25, at 121 (explaining that factual requirements faced by ATCA plaintiffs are stringent).

254. See FED. R. CIV. P. 12(b)(6) (allowing dismissal of case at pleading stage for failure to state claim); see, e.g., *Beanal v. Freeport-McMoRan*, 197 F.3d 161, 163 (5th Cir. 1999) (dismissing Beanal's claim on grounds of failure to state claim); see also Zia-Zarifi, *supra* note 25, at 121 (comparing dismissal of plaintiff's claim in *Beanal* because he did not include enough facts in his claim with *Unocal* Court's initial willingness to let case continue because there were specific factual allegations).

255. See Zia-Zarifi, *supra* note 25, at 122 (stating that corporations may be uncooperative and unwilling to provide plaintiffs with necessary information to meet factual requirements).

256. See, e.g., *Bodner v. Paribas*, 114 F. Supp. 2d 117, 128 (E.D.N.Y. 2000) (assuming allegations to be true until further discovery proves otherwise); Khokhryakova, *supra* note 204, at 472-77 (explaining Beanal's three amended complaints).

257. See Zia-Zarifi, *supra* note 25, at 123 (noting that ATCA plaintiffs will encounter high factual threshold as barrier to recovery).

258. See, e.g., *Wiwa v. Royal Dutch Petroleum*, 226 F.3d 88, 101 (2d Cir. 2000) (reversing District Court's decision to dismiss on grounds of forum non conveniens); *Bodner*, 114 F. Supp. 2d at 134 (rejecting defendant's motion to dismiss on grounds of forum non conveniens). See generally Boyd, *supra* note 250, at 58-85 (asserting that forum non conveniens should be abolished with respect to human rights litigation). Forum non conveniens is a common law doctrine grounded in concerns about the convenience of the forum for the parties and the court. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249 (1981) (recognizing that forum non conveniens analysis only revolves around determination of convenience).

259. See *In re Union Carbide*, 809 F.2d 195, 198-99 (reviewing District Court examination of whether claim arising out of industrial gas plant accident in India is more properly pursued in Indian courts); Rosencranz & Campbell, *supra* note 175, at 179-80 (explaining court's two part analysis to first determine if there is adequate, alternative forum, and then consider variety of private and public interests).

occur in another nation, and because of this, defendants argue that the United States is not the proper place for a trial.<sup>260</sup>

For example, in *Wiwa v. Royal Dutch Petroleum*, Nigerian plaintiffs brought suit against Shell and Royal Dutch Petroleum, two oil companies, for their direct and indirect involvement in human rights abuses perpetrated by the Nigerian State.<sup>261</sup> The defendants moved to dismiss the case on forum non conveniens grounds.<sup>262</sup> The Second Circuit held that the defendants failed to establish that the claims would be more appropriately addressed in a court outside the United States.<sup>263</sup> The Court also set out additional factors for a forum non conveniens analysis,<sup>264</sup> such as the principle that there should be increased deference to the plaintiff's choice of forum when the plaintiff has substantial ties to that forum.<sup>265</sup> The Court found that since the plaintiffs lived in the United States, changing the forum of the suit would impose a significant hardship on them.<sup>266</sup>

Additionally, where the United States has an interest in litigating the claim, courts should strive to maintain the suit in U.S. court.<sup>267</sup> The plaintiff in *Wiwa* argued against a forum non conveniens dismissal by appealing to the U.S. policy interest in liti-

260. See Zia-Zarifi, *supra* note 25, at 141 (noting that forum non conveniens analysis will often depend upon availability of alternative, adequate forum); McDonald, *supra* note 173, at 195-96 (1997) (commenting on suit by former forced laborers under Nazi regime and noting forum non conveniens as potential reason for U.S. courts not to hear suit).

261. See *Wiwa*, 226 F.3d at 92 (stating that plaintiff's claim alleges that oil companies acted with Nigerian police to imprison, torture, and kill Nigerian citizens); see also Rosencranz & Campbell, *supra* note 175, at 183-85 (discussing allegations in *Wiwa*); Zia-Zarifi, *supra* note 25, at 94 (explaining facts of *Wiwa*).

262. See *Wiwa*, 226 F.3d at 94 (stating that lower Court dismissed on grounds of forum non conveniens); Rosencranz & Campbell, *supra* note 175, at 185 (discussing lower Court dismissal of plaintiffs' claims on forum non conveniens).

263. See *Wiwa*, 226 F.3d at 101 (refusing to dismiss on grounds of forum non conveniens).

264. See *id.* at 100 (claiming that District Court did not give sufficient weight to all relevant factors in forum non conveniens finding); see also Rosencranz & Campbell, *supra* note 175, at 179-88 (examining various factors to be considered in deciding whether case should be dismissed on forum non conveniens grounds).

265. See *Wiwa*, 226 F.3d at 101-02 (asserting that courts should accord deference to plaintiff's chosen forum, especially where plaintiff has significant ties to that forum).

266. See *id.*, 226 F.3d at 103 (noting that although plaintiffs were not residents of district in which they filed, they were U.S. residents and it is appropriate to be deferential to their choice of forum).

267. See *id.* at 101 (noting that District Court did not give sufficient weight to U.S. interest in litigating claim).



gating human rights claims.<sup>268</sup> The Court recognized that forum non conveniens represents a major setback for victims of human rights abuses seeking redress.<sup>269</sup> The Court claimed that the passage of the Torture Victims Protection Act<sup>270</sup> ("TPVA") in 1991 is acknowledgement by Congress that victims of gross human rights violations need an accessible forum.<sup>271</sup> Allowing defendants to avoid law suits by claiming forum non conveniens would run contrary to Congress's policy reflected in the TPVA.<sup>272</sup>

### c. Personal Jurisdiction

Another obstacle to an ATCA suit against an MNC is personal jurisdiction, particularly when the MNC is not based in the United States.<sup>273</sup> Courts apply the minimum contacts test to determine whether exercising jurisdiction over the defendant is in accordance with principles of "fair play and substantial justice."<sup>274</sup> The minimum contacts test requires that the court as-

268. *See id.* at 103 (claiming that Torture Victims Protection Act ("TPVA") reflects U.S. policy towards torture victims litigating in U.S. courts).

269. *See id.* at 106 (noting that forum non conveniens presents particular difficulties for torture victims because, where state is accused, it is unlikely that that state will provide adequate forum).

270. *See* 28 U.S.C. § 1350 (stating that any individual who "subjects [another] individual to torture shall, in a civil action, be liable for damages to that individual"). The Torture Victims Protection Act ("TPVA") was enacted in response to the *Filartiga* litigation. *See id.* at 104 (claiming that passage of TPVA reflected approval of *Filartiga* decision); *see also* Kunstle, *supra* note 177, at 344 (asserting that Congress passed TPVA in order to grant individuals private right of action against their torturers). *See generally* Jennifer Correale, *The Torture Victim Protection Act: A Vital Contribution to International Human Rights Enforcement or Just a Nice Gesture?*, 6 *PACE INT'L L. REV.* 197, 208-21 (1994) (examining provisions of TPVA and its implications for international human rights litigation).

271. *Wiwa*, 226 F.3d at 106.

272. *Id.*

273. *See* McDonald, *supra* note 173, at 191 (examining difficulties presented by personal jurisdiction and minimum contacts requirements); *see also* *Doe v. Unocal*, 27 F. Supp. 2d 1174, 1179 (C.D. Cal. 1998) (dismissing Total SA from *Unocal* suit for lack of minimum contacts with United States).

274. *See Int'l Shoe v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)) (stating that defendant must have sufficient minimum contacts so that maintenance of suit is not contrary to traditional conceptions of fairness and justice); *see also* *Asahi Metal Indus. Co. v. Superior Ct.*, 480 U.S. 102, 112 (1987) (noting that to satisfy minimum contacts test, defendant must purposefully avail himself of privileges associated with acting in relevant forum); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) (stating that once minimum contacts have been established, Court should examine reasonableness of jurisdiction); *World Wide Volk-*

sess the degree of contact of the party with the forum state as well as the relatedness of the contacts to the claim at issue.<sup>275</sup>

In *Asahi Metal Industry Co. v. Superior Ct.*, the Supreme Court held that where a non-U.S. company simply places a product in the stream of commerce in the United States, minimum contacts have not been met and jurisdiction is improper.<sup>276</sup> The *Asahi* Court provided examples of activities that may subject a non-U.S. defendant to personal jurisdiction, including advertising in the particular jurisdiction.<sup>277</sup> Jurisdiction over a corporation also is available where the level of activity in the forum state is "continuous and systematic."<sup>278</sup> Notably, in a suit against a defendant that is not a U.S. entity, the court may find that the corporation has sufficient minimum contacts with the United States, rather than any particular state.<sup>279</sup>

A possible exception to the minimum contacts test arises if the alleged violation is a "universal offense,"<sup>280</sup> such as slave trad-

swagen v. Woodson, 444 U.S. 286, 292 (1980) (claiming that potential burden on defendant should be considered in determining personal jurisdiction).

275. See *Int'l Shoe*, 326 U.S. at 319 (noting that test for determining personal jurisdiction is not only amount of contacts, but also quality and nature of contacts).

276. *Asahi*, 480 U.S. at 112.

277. *Id.*

278. *Int'l Shoe*, 326 U.S. at 317 (noting that presence in state gives rise to "continuous and systematic" contacts). "Continuous and systematic" contacts means that the defendant corporation took advantage of the privilege of carrying out business in the forum State, giving the company notice that it could be haled into court there. See *id.* at 319; see also *World Wide Volkswagen*, 444 U.S. at 297 (claiming that defendant's conduct and connection to forum State should be enough to create anticipation of being haled into court in forum State).

279. See *Chew v. Dietrich*, 143 F.3d 24, 28 (2d Cir. 1998) (citing Rule 4 of Federal Rules of Civil Procedure and asserting that jurisdiction could be exercised over defendant if he had requisite level of contacts with United States rather than only forum state). Since the 1993 amendment of Rule 4, it is unclear whether jurisdiction may be obtained by assessing the aggregate national contacts of an alien defendant when the case involves a federal question. *Id.* A "national contacts" test is provided for in the Federal Rules of Civil Procedure. FED. R. CIV. P. 4(k)(2). Rule (4)(k)(2) in part states that:

[i]f the exercise of jurisdiction is consistent with the Constitution and the laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

*Id.* Using *Tel-Oren* as an example, one commentator argues that the Palestinian Liberation Organization has sufficient contacts with the United States to reasonably expect to be haled into court and to give the United States a legitimate interest in adjudicating a claim against it. Randall, *supra* note 193, at 67.

280. See RESTATEMENT THIRD OF FOREIGN RELATIONS LAW § 404 (stating that certain

ing, hijacking planes, genocide, and war crimes.<sup>281</sup> Any state has jurisdiction over these claims, regardless of the nationality of the parties or the place where the event giving rise to the suit occurred.<sup>282</sup> In an ATCA claim, it is often possible that the allegations will include universal offenses.<sup>283</sup>

#### d. State Action

Traditionally, international law binds States rather than individuals or corporations.<sup>284</sup> To hold a private individual liable under principles of international law, a showing of State action is often necessary.<sup>285</sup> Although courts have held that genocide, war crimes, slavery, and piracy do not require State action,<sup>286</sup> the vast majority of human rights violations will require State action for the ATCA to apply.<sup>287</sup>

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offenses may be prosecuted in any state because they are so universally prohibited); *see also* Marshall, *supra* note 175, at 606-07 (explaining concept of universal jurisdiction); Rosencranz & Campbell, *supra* note 175, at 158-59 (positing that although universal jurisdiction is established legal principle, it may not apply in United States because of federal system).

281. RESTATEMENT THIRD OF FOREIGN RELATIONS LAW § 404. Complicity in war crimes is not included as a universal offense by the Restatement. *See id.* (failing to include complicity in war crimes in list of universal offenses).

282. *See* Willard B. Cowles, *Universality of Jurisdiction over War Crimes*, 33 CAL. L. REV. 178, 177, 180-81 (1945) (stating that States have power to hear any criminal matter so long as jurisdiction is not prohibited by international law and commenting that jurisdiction over punishment of war crimes is universal); Marshall, *supra* note 175, at 606-07 (maintaining that universal jurisdiction attaches to most heinous crimes and any state may prosecute perpetrators for these crimes).

283. *See, e.g.*, *Kadic v. Karadzic*, 70 F.3d 232, 237 (2d Cir. 1995) (alleging acts of genocide), *Beanal v. Freeport-McMoRan*, 969 F. Supp. 362, 365 (E.D. La. 1997) (alleging cultural genocide); *Doe v. Unocal*, 963 F. Supp. 880, 892 (C.D. Cal. 1997) (asserting that claims of forced labor can be considered slave trading).

284. *See* 1 OPPENHEIM'S INTERNATIONAL LAW § 6 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992) (commenting that States are primary subjects of international law).

285. *See, e.g.*, *Unocal II*, 110 F. Supp. 2d 1294, 1305 (C.D. Cal. 2000) (dismissing case for failure to prove State action); *Beanal*, 969 F. Supp. at 373-74 (dismissing case because plaintiff did not show role of State in allegations).

286. *Kadic*, 70 F.3d at 242-43; *Unocal*, 963 F. Supp. at 892. The crimes that do not require State action overlap with "universal offenses." RESTATEMENT THIRD OF FOREIGN RELATIONS LAW § 404. Courts have analogized the State action requirement in international law with the State action requirement in domestic anti-discrimination law under 42 U.S.C. § 1983. *See, e.g.*, *Kadic*, 70 F.3d at 245 (stating that "color of law" jurisprudence of §1983 is instructive for determining if there has been State action in international context); *Beanal*, 969 F. Supp. at 374 (using § 1983 as guide in determining whether State action exists).

287. *See* RESTATEMENT THIRD OF FOREIGN RELATIONS LAW § 702 (stating that viola-

The *Unocal II* decision applied a joint action test<sup>288</sup> to ascertain whether the corporation had sufficient connections with the State to be liable.<sup>289</sup> The joint action test requires that the State and the MNC work together for the specific purpose of depriving people of their rights.<sup>290</sup> The standard established by *Unocal II* requires that the private entity actually commit the alleged acts in cooperation with the State or exercise control over the State's action.<sup>291</sup>

This standard presents difficulties in holding MNCs liable under the ATCA because often MNCs and States develop a relationship for mutually beneficial business purposes.<sup>292</sup> MNCs that partner with governments, who commit human rights abuses, do so for financial reasons.<sup>293</sup> Similarly, governments enjoy the prominence associated with large MNCs and the money generated by MNC operations in their country.<sup>294</sup> The MNC need not directly commit human rights abuses nor unduly influence an already corrupt government to realize its profits because the government is willing to engage in these practices to maintain the business relationship.<sup>295</sup> The MNC's main goal is profit,

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tions that require State action include torture, arbitrary detention, disappearances, and racial discrimination).

288. See *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1453 (10th Cir. 1995) (explaining that this test examines whether State and private entity have acted in concert in deprivation of rights of others).

289. See *Unocal II*, 110 F. Supp. 2d at 1306-1307 (noting that allegations failed to establish State action under joint action test or proximate cause test for determining State action).

290. See *Gallagher*, 49 F.3d at 1454 (examining joint action test).

291. See *Unocal II*, 110 F. Supp. 2d at 1306-07 (commenting that plaintiffs did not prove that Unocal participated in violations, or influenced or controlled SLORC's actions).

292. See Kieserman, *supra* note 177, at 916 (noting that despite extensive commercial relationship between Freeport-McMoRan and Indonesian government evidenced in facts of *Beanal*, contacts still were not close enough to establish State action).

293. See PETER MARBER, FROM THIRD WORLD TO WORLD CLASS: THE FUTURE OF EMERGING MARKETS IN THE GLOBAL ECONOMY 87-104 (1998) (discussing benefits for MNCs operating in countries where human rights have not been prioritized); see also Kieserman, *supra* note 177, at 910-11 (explaining mutually beneficial relationship between MNCs and governments of nations with bad human rights records).

294. See Kieserman, *supra* note 177, at 911 (noting that in countries that do not respect human rights, revenue from collaborating with MNC often is used to finance military).

295. See generally *id.* at 911, 916-17 (criticizing *Beanal* Court for its unwillingness to classify Freeport-McMoRan's activities as State action despite close working relationship between government and MNC).

not violating human rights.<sup>296</sup>

Furthermore, State actors are often shielded from liability under the Foreign Sovereign Immunities Act<sup>297</sup> (“FSIA”).<sup>298</sup> One strategy utilized by corporate defendants in ATCA litigation is to win a dismissal for State actors in the suit under the FSIA and then plead indispensable parties under Rule 19 of the Federal Rule of Civil Procedure.<sup>299</sup> If a court finds that a party is essential to the litigation but cannot be joined to the suit, the court then must analyze whether the case should proceed with the remaining parties considering the potential prejudice to any party, the possible relief available without the absent party, and alternative locations for trial.<sup>300</sup> When a government is dismissed under the FSIA and an MNC successfully claims that the

296. See generally Tzeustcher, *supra* note 246, at 414 (noting that corporations often lack requisite intent to commit violations of international law such as genocide).

297. See Foreign Sovereign Immunities Act, 28 U.S.C. § 1604 (2000) [hereinafter FSIA] (stating that “a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States”).

298. See *id.* (allowing foreign sovereign defendants to escape liability). There are exceptions to this law, most notably, an exception to immunity where the activity is commercial in nature. See FSIA, 28 U.S.C. § 1605 (2000). The exceptions clause to the Foreign Sovereign Immunities Act (“FSIA”) states, in part, that:

[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

See generally David J. Bederman, *Problems of Proving International Human Rights Law in U.S. Courts: Dead Man’s Hand: Reshuffling Foreign Sovereign Immunities in U.S. Human Rights Litigation*, 25 GA. J. INT’L & COMP. L. 255 (1996) (analyzing problems of FSIA in human rights litigation).

299. FED. R. CIV. P. 19. Rule 19 states, in part, that:

[a] person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person’s absence complete relief cannot be accorded among those already present [and i]f [such] a person . . . cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable.

*Id.* The defendants in Unocal attempted this strategy but were unsuccessful. Doe v. Unocal, 963 F. Supp. 880, 885-889 (C.D. Cal. 1997) (noting that defendants moved to dismiss state actors under FSIA and then pleaded indispensable parties to have entire case dismissed); see also Rosencranz & Campbell, *supra* note 175, at 203 (discussing interplay between FSIA and Rule 19).

300. See *Unocal*, 963 F. Supp. at 889 (examining considerations for determination of whether parties are indispensable).

government actor is an indispensable party, the MNC avoids liability through the benefit of the State partner's sovereign immunity.<sup>301</sup>

### B. *Methods of Regulating MNCs*

Little uniform binding law exists to regulate MNC activity when they operate outside their country of incorporation.<sup>302</sup> International organizations, governments, and private industry actors have recognized the need for corporate accountability in MNC activities outside their home country and have responded to this need with corporate codes of conduct.<sup>303</sup> Codes of conduct are helpful to MNCs operating in countries other than their home nation because they provide standards and guidelines for respecting human rights.<sup>304</sup> Codes of conduct, however, are often criticized for being unenforceable due to their voluntary nature.<sup>305</sup>

301. See, e.g., *Aguinda v. Texaco, Inc.*, 945 F. Supp. 625, 627-28 (S.D.N.Y. 1996) (dismissing ATCA suit on grounds of indispensable parties). Where this strategy does not work, the courts may face a remarkable paradox. Kieserman, *supra* note 177, at 909-10. The government actor will be immune under the FSIA. *Id.* at 909. The MNC will be charged with violating human rights, which require a showing of State action. *Id.* at 910. Thus, the MNC can be held liable the joint activities of the State and the MNC while the State escapes liability entirely. *Id.* Furthermore, the court must find that the violation is of such magnitude that all States condemn such action and simultaneously acknowledge that a government, which condones such activity, is not liable for the violation. *Id.*

302. See Zia-Zarifi, *supra* note 25, at 84 (asserting that public international law does not obligate MNCs to observe any minimum human rights standards); Wells, *supra* note 191, at 65 (claiming no controlling law regulates MNCs at present); Sacharoff, *supra* note 179, at 931 (maintaining that MNCs are only required to follow laws of country in which they operate); Kieserman, *supra* note 177, at 881-83 (alleging that MNCs have ability to operate in many countries with no accountability).

303. See *OECD Declaration*, *supra* note 164, at 972-76 (establishing guidelines for MNC activity); *Tripartite Declaration*, *supra* note 164, at 425-28 (proposing standards for treatment of workers by MNCs); *Draft U.N. Code*, *supra* note 164, at para. 14 (claiming that MNCs should respect human rights); Model Principles, *supra* note 164 (urging MNCs to adopt codes of conduct reflecting respect for fundamental rights); *Sullivan Principles*, *supra* note 164, at 1496 (providing standards for MNCs operating in South Africa during apartheid); Irish National Caucus, *supra* note 164 (establishing code of conduct for MNCs operating in Northern Ireland).

304. See, e.g., Model Principles, *supra* note 164 (encouraging MNCs to recognize codes of conduct that respect fundamental rights).

305. See, e.g., Bloomfield, *supra* note 168, at 570 (maintaining that lack of enforcement is significant problem with codes of conduct); Bob Hepple, *A Race to the Top? International Investment Guidelines and Corporate Codes of Conduct*, 20 COMP. LAB. L. & POL'Y J. 347, 354 (1999) (claiming that International Labour Organisation ("ILO") Tri-

## 1. General Background

While some scholars have claimed that the only responsibility of a business is to use its resources to the fullest extent to raise profits while staying within the bounds of the law,<sup>306</sup> others argue that MNCs have increasing social obligations.<sup>307</sup> Presently, MNCs do not have many legal obligations with respect to the countries in which they are operating.<sup>308</sup> Corporate regulations are particularly necessary for MNCs operating in countries engaged in civil war, since absence of rule of law often creates an economic opportunity for MNCs that can be detrimental to the

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partite Declaration is ineffective because it has no ability to sanction MNCs for non-compliance).

306. See, e.g., Milton Friedman, *Social Purpose of Business is to Increase its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 32, 33 (stating that businesses need only concern themselves with making legal profit). Milton Friedman is a Nobel Prize winning economist. See *How Indexation Builds in Inflation*, BUS. WEEK, Nov. 12, 1979, at 114, 114 (noting that Milton Friedman won Nobel Prize).

307. See Stuart Rees & Shelley Wright, *Human Rights and Business Controversies*, in HUMAN RIGHTS, CORPORATE RESPONSIBILITY: A DIALOGUE 3, 5-8 (2000) (explaining necessity of corporate observance of human rights standards); Wells, *supra* note 191, at 70 (claiming that proliferation of private and international codes of conduct reflect growing awareness that MNCs should not participate in business that implicates human rights abuses); Douglass Cassel, *International Security in the Post-Cold War Era: Can International Law Truly Effect Global Political and Economic Stability? Corporate Initiatives: A Second Human Rights Revolution?*, 19 *FORDHAM INT'L L.J.* 1963, 1981-84 (1996) (suggesting levels of corporate responsibility depending upon proximity of human rights violations to corporate activity). See generally Anderson, *supra* note 248, at 468 (asserting that MNCs should have legal duty to observe human rights). Commentators note that MNCs have become increasingly influential as globalization continues into the twenty-first century. See Clare Duffield, *Multinational Corporations and Workers' Rights* in HUMAN RIGHTS, CORPORATE RESPONSIBILITY: A DIALOGUE 191, 193-94 (Stuart Rees & Shelley Wright eds., 2000) (examining power that MNCs have over developing nations); Duffield, *supra* note 17, at 22 (asserting that MNCs play increasing role in social policy); Cassel, *supra*, at 1979-80 (claiming that annual revenues of MNCs often exceed that of most nations); Kieserman, *supra* note 177, at 882-83 (stating that MNCs often exercise more control over resources than governments); Kathryn L. Boyd, *Collective Rights Adjudication in U.S. Courts: Enforcing Human Rights at the Corporate Level*, 1999 *BYU L. REV.* 1139, 1142-43 (1999) (noting dual impact MNCs can have on host countries by improving economy and simultaneously exploiting human rights).

308. See Zia-Zarifi, *supra* note 25, at 84 (claiming that public international law imposes virtually no obligations on MNCs); Wells, *supra* note 191, at 65 (maintaining that MNCs are not obliged under any controlling law at present); Sacharoff, *supra* note 179, at 931 (asserting that MNCs are obliged to abide by laws of country in which they operate); Kieserman, *supra* note 177, at 881-83 (asserting that MNCs can operate with no accountability in many countries); see also Su-Ping Lu, Note, *Corporate Codes of Conduct and the FTC: Advancing Human Rights Through Deceptive Advertising Law*, 38 *COLUM. J. TRANSNAT'L L.* 603, 608 (2000) (stating that traditionally MNCs suffer no consequences when MNC fails to take action to prevent human rights abuses by government).

local citizens who live in the instability.<sup>309</sup> In response to the lack of regulation, there have been several attempts to design codes for the protection of both foreign investment and host countries.<sup>310</sup>

## 2. Approaches

The Organisation for Economic Co-operation and Development ("OECD"), International Labour Organisation ("ILO"), and the United Nations all have developed guidelines for MNCs operating in countries other than their home country.<sup>311</sup> The U.S. government also has encouraged MNCs to observe certain minimum standards in their operations abroad with respect to fundamental rights.<sup>312</sup> Additionally, turbulent political situations in certain regions, such as South Africa and Northern Ireland, have given rise to private efforts to develop standards for MNC activities in those areas.<sup>313</sup>

### a. International Efforts

Recognizing the growing importance of international investment, the OECD developed their Declaration on Interna-

309. See Duffield, *supra* note 17, at 28 (examining opportunities for profit in circumstances of conflict); SMILLIE ET AL., *supra* note 19, at 12-13 (suggesting that certain private companies may benefit from increased destabilization in conflict areas); see also Collier, *supra* note 13 (theorizing that certain conditions make civil war profitable for insurgents).

310. See *OECD Declaration*, *supra* note 164, at 972-76 (establishing guidelines for MNCs operating outside home country); *Tripartite Declaration*, *supra* note 164, at 425-28 (proposing labor standards for MNCs running facilities in nations other than country of incorporation); *Draft U.N. Code*, *supra* note 164 (suggesting standards for corporations with international operations); *Model Principles*, *supra* note 164 (urging MNCs to adhere to voluntary code of conduct respecting human rights); *Sullivan Principles*, *supra* note 164, at 1496 (establishing principles for corporations operating in South Africa); Irish National Caucus, *supra* note 164 (creating guidelines for MNCs with operations in Northern Ireland). See generally Frey, *supra* note 168, at 154-60 (reviewing past efforts to regulate MNCs by United Nations, governments, and NGOs).

311. See *OECD Declaration*, *supra* note 164, at 972-76 (proposing guidelines for MNC activity outside home country); *Tripartite Declaration*, *supra* note 164, at 425-28 (suggesting standards for MNC treatment of workers in facilities in nations other than country of incorporation); *Draft U.N. Code*, *supra* note 164 (suggesting guidelines for MNCs).

312. See *Model Principles*, *supra* note 164 (suggesting standards for MNCs with respect to fundamental rights).

313. See *Sullivan Principles*, *supra* note 164, at 1496 (creating standards for MNCs with operations in South Africa during apartheid); Irish National Caucus, *supra* note 164 (suggesting guidelines for MNCs with activities in Northern Ireland).



tional Investment and Multinational Enterprises (“Declaration”).<sup>314</sup> The ILO developed standards for MNC activities with respect to treatment of workers in 1978.<sup>315</sup> The United Nations similarly has attempted to develop a code of conduct for MNCs, but the General Assembly never adopted the proposed draft.<sup>316</sup>

#### i. Organisation for Economic Co-operation and Development

In 1976, the OECD introduced their Declaration.<sup>317</sup> This Declaration calls on MNCs to respect the policy choices of the nation in which they are operating, to provide any information requested by national authorities while taking account of business confidentiality, to work closely with local businesses and communities, to refuse bribes in all circumstances, and to refrain from participation in political activities.<sup>318</sup> These standards are voluntary and unenforceable.<sup>319</sup>

#### ii. International Labour Organisation

The ILO developed international standards for MNCs with the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (“Tripartite Declaration”).<sup>320</sup> The Tripartite Declaration urges MNCs to create employment opportunities in the countries where they operate, promote

314. See *OECD Declaration*, *supra* note 164, at 967 (stating that OECD member countries considered that “international investment has assumed increased importance in the world economy”).

315. See *Tripartite Declaration*, *supra* note 164, at 425-28 (proposing labor standards for MNCs outside of home country).

316. See *Draft U.N. Code*, *supra* note 164 (suggesting standards for MNC activity in countries other than country of incorporation); Anderson, *supra* note 248, at 475 (commenting that General Assembly never adopted Draft U.N. Code); Rice, *supra* note 216, at 170 (observing that Draft U.N. Code has not gone into effect).

317. *OECD Declaration*, *supra* note 164, at 969-70; see also Lance Compa & Tashia Hinchliffe-Darricarrere, *Doing Business in China and Latin America: Developments in Comparative and International Labor Law: Enforcing International Labor Rights Through Corporate Codes of Conduct*, 33 COLUM. J. TRANSNAT’L L. 663, 670 (1995) (examining history of OECD Declaration).

318. *OECD Declaration*, *supra* note 164, at 972 annex (1976).

319. *Id.* at 970; see also Zia-Zarifi, *supra* note 25, at 85 (noting that OECD Declaration is voluntary and unenforceable, and has not been invoked often); Compa & Hinchliffe-Darricarrere, *supra* note 317, at 671 (noting that OECD Declaration lacks coercive enforcement); Hepple, *supra* note 305, at 354 (asserting that OECD Declaration was developed by industrialized nations to avoid stricter codes and therefore, it is voluntary).

320. *Tripartite Declaration*, *supra* note 164.

equality of opportunity, ensure stable employment, provide vocation training in cooperation with national government, guarantee favorable work conditions and workplace safety, and protect freedom of association and the right to collective bargaining.<sup>321</sup> These standards, like the OECD Guidelines, are also voluntary and they lack an enforcement mechanism.<sup>322</sup> Acknowledging the deficiencies of the principles, the ILO initiated a new Declaration on Fundamental Principles and Rights at Work ("Fundamental Principles").<sup>323</sup> At least one commentator claims that since the Fundamental Principles are relatively new, their potential to ensure observance of human rights is still unclear.<sup>324</sup>

### iii. United Nations

More recently, the United Nations developed the United Nations Code of Conduct on Transnational Corporations ("Draft U.N. Code").<sup>325</sup> The Draft U.N. Code makes explicit ref-

321. *Id.* at 425-28.

322. See Zia-Zarifi, *supra* note 25, at 85 (noting failure of ILO to establish binding code of conduct for MNCs); Hepple, *supra* note 305, at 354 (maintaining that Tripartite Declaration is ineffective because of absence of sanctions); Anderson, *supra* note 248, at 476 (observing that Tripartite Declaration is ineffective because it relies on public persuasion to ensure compliance); Compa & Hinchliffe-Darricarrere, *supra* note 317, at 671 (noting that enforcement of Tripartite Declaration is through discreet persuasion and public embarrassment). The International Labour Organisation ("ILO") has failed to implement its own principles with regard to MNCs. See, e.g., Press Release, International Labor Organization, Report of ILO Commission Reveals Widespread and Systematic Use of Forced Labor in Myanmar (Burma), available at <http://www.ilo.org/public/english/bureau/inf/pr/1998/32.htm> (examining practice of forced labor in Myanmar imposed by military authorities with no inquiry into involvement of relevant oil companies in region, particularly Unocal and Total SA).

323. See International Labor Organization, Declaration on Fundamental Principles and Rights at Work, available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc86/com-dtxt.htm> [hereinafter Fundamental Principles] (stating that all Member States have obligation to respect fundamental rights, including freedom of association, right against forced labor, right against child labor, and right against discrimination in employment). The Declaration only imposes an obligation on Member States and not on MNCs. See *id.*

324. See Fundamental Principles, *supra* note 323 (stating that Fundamental Principles were adopted in June 1998); Anderson, *supra* note 248, at 476 (observing that it is too early to assess effectiveness of Fundamental Principles).

325. *Draft U.N. Code*, *supra* note 164; see also Sacharoff, *supra* note 179, at 933 (noting that Draft U.N. Code proposed standards for treatment of MNCs by governments and MNC conduct); Frey, *supra* note 168, at 166 (claiming that U.N. Economic and Social Council established U.N. Commission on Transnational Corporations in 1974 and that Commission's purpose was to develop code for MNC activity); Rice, *supra* note 216, at 169-70 (asserting that Draft U.N. Code is recognition that MNCs have certain responsibilities when investing abroad). The United Nations also attempted to formu-

erence to human rights and encourages MNCs to respect the sovereignty of the nations in which they operate.<sup>326</sup> The U.N. General Assembly never officially adopted the Draft U.N. Code and, therefore, the code remains a hortatory document, with no means of enforcement.<sup>327</sup>

#### b. United States Efforts

In May 1995, President Clinton revealed the Model Business Principles<sup>328</sup> ("Model Principles").<sup>329</sup> The Model Principles set

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late a code of conduct for MNCs in the 1970s, but this effort was unsuccessful. See Compa & Hinchliffe-Darricarrere, *supra* note 317, at 669 (observing that U.N. Code developed in 1970s is not useful with advent of modern day globalization); Cassel, *supra* note 307, at 1969 (stating that U.N. has attempted and failed to develop international code of conduct for MNCs since 1970s). See generally Seymour Rubin, *Transnational Corporations and International Codes of Conduct: A Study of the Relationship Between International Legal Cooperation and Economic Development*, 10 AM. U. J. INT'L L. & POL'Y 1275 (1995) (examining history of U.N. effort to develop Code of Conduct for Transnational Corporations); Anderson, *supra* note 248, at 474-76 (reviewing international attempts to create codes of conduct for businesses operating in nations other than home country).

326. See *Draft U.N. Code*, *supra* note 164, at para. 13 (stating that "transnational corporations should/shall respect human rights and fundamental freedoms in the countries in which they operate").

327. See Anderson, *supra* note 248, at 475 (noting that Draft U.N. Code was never adopted by General Assembly); Rice, *supra* note 216, at 170 (observing that Draft U.N. Code has not gone into effect). See generally Salbu, *supra* note 168, at 335-53 (analyzing difficulties posed by international codes of conduct).

328. See Model Principles, *supra* note 164 (encouraging MNCs to adopt voluntary codes of conduct in recognition of importance of upholding universal standards of human rights).

329. See Paul Lewis, *U.S. Provides First Details Of Its Business Ethics Code*, N.Y. TIMES, May 27, 1995, at 36 (reporting that Clinton administration disclosed plans in May 1995 to encourage MNCs to adopt voluntary code of conduct); Frey, *supra* note 168, at 172 (stating that President Clinton revealed Model Business Principles ("Model Principles") in May 1995); Wells, *supra* note 191, at 66 (claiming that U.S. government released Model Principles in May 1995). The Model Business Principles ("Model Principles") responded to public pressure to link human rights and most favored nation status with respect to China. See Cassel, *supra* note 307, at 1974-75 (asserting that when President Clinton de-linked human rights from U.S. trade policy towards China, he promised to emphasize corporate codes of conduct); Frey, *supra* note 168, at 171-72 (maintaining that President Clinton vowed to establish human rights code for MNCs operating in China); Robert J. Liubicic, *Corporate Codes of Conduct and Product Labeling Schemes: The Limits and Possibilities of Promoting International Labor Rights Through Private Initiatives*, 30 LAW & POL'Y INT'L BUS. 111, 125 (1998) (claiming that President Clinton proposed Model Principles on account of promise made to establish code while reviewing China's most favored nation status). The Foreign Corrupt Practices Act of 1977, which holds American MNCs liable for bribing foreign officials, is evidence of U.S. concern with regulation of MNC activity. See 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3 (1994). The Foreign Corrupt Practices Act states, in part, that:

[i]t shall be unlawful for any person other than an issuer that is subject to

standards for the treatment of workers and encourage a corporate atmosphere that values freedom of expression, condemns political oppression, contributes to the local community, and

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section 30A of the Securities Exchange Act of 1934 [15 USCS § 78dd-1] or a domestic concern (as defined in section 104 of this Act [15 USCS § 78dd-2]) . . . while in the territory of the United States, corruptly to make use of the mails or any means or instrumentality of interstate commerce or to do any other act in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to—

(1) any foreign official for purposes of—

(A) (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such person in obtaining or retaining business for or with, or directing business to, any person; or

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of—

I.(A) (i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing any improper advantage; or

II.(B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such person in obtaining or retaining business for or with, or directing business to, any person; or

(3) any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of—

(A) (i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or

III.(C) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such person in obtaining or retaining business for or with, or directing business to, any person.

Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-3 (2000). See generally A. Timothy Martin, *Corruption and Improper Payments: Global Trends and Applicable Laws*, 36 ALBERTA L. REV. 416, 420-26 (1998) (explaining Foreign Corrupt Practices Act); Gary Eisenberg, *Foreign Corrupt Practices Act*, 37 AM. CRIM. L. REV. 595 (2000) (examining Foreign Corrupt Practices Act and subsequent amendments).

promotes ethical conduct.<sup>330</sup> The Model Principles are voluntary and non-binding.<sup>331</sup>

### c. Private Efforts

Another method of regulating MNCs is through self-imposed codes of conduct.<sup>332</sup> In response to public pressure, some MNCs have individually adopted their own codes of conduct.<sup>333</sup> These efforts vary in specificity and degree.<sup>334</sup> Corporations that have recognized the value of corporate codes of conduct include Levi Strauss, Nike, Gap, and Sears.<sup>335</sup> Occasionally, where a particular nation has consistent human rights problems, companies will adhere to industry-wide codes of conduct, such as the Sullivan Principles in South Africa and the MacBride Principles in Northern Ireland.<sup>336</sup>

#### i. Sullivan Principles

Reverend Leon Sullivan, a General Motors board member, first initiated the concept of an industry-wide code of conduct in

330. Model Principles, *supra* note 164; *see also* Cassel, *supra* note 307, at 1974 (examining terms of Model Principles); Anderson, *supra* note 248, at 482-83 (detailing provisions of Model Principles).

331. Model Principles, *supra* note 164.

332. *See* Cassel, *supra* note 307, at 1972 (asserting that many MNCs have responded to human rights abuses by adopting private codes of conduct); Bloomfield, *supra* note 168, at 570-72 (examining various corporate motivations for voluntarily adopting codes of conduct).

333. *See* Cassel, *supra* note 307, at 1972 (stating that corporations have responded to human rights violations with codes of conduct for their operations); Frey, *supra* note 168, at 177-80 (explaining various types of codes of conduct adopted by MNCs to state commitment to human rights). *See generally* Liubicic, *supra* note 328, at 128-31 (examining private initiatives to develop internal codes of conduct).

334. *See* Frey, *supra* note 168, at 177 (asserting that corporate codes of conduct can be divided into three general types: vendor standards regarding forced or child labor, standards supporting civil and political rights, and criteria for investment).

335. Cassel, *supra* note 307, at 1973; *see also* Frey, *supra* note 168, at 177 (claiming that Sears, K-Mart, Reebok International Ltd., Walmart, and Timberland have all adopted self-imposed standards for their overseas operations). *See generally* Compa & Hinchliffe-Darricarrere, *supra* note 317, at 675-86 (examining corporate codes of conduct adopted by Levi-Strauss, Reebok, and Starbucks). One commentator argues that the Federal Trade Commission should hold MNCs accountable for violations of these self-imposed codes through regulations controlling deceptive advertising. Lu, *supra* note 308, at 617-24.

336. *See Sullivan Principles*, *supra* note 164, at 1496 (creating standards for MNCs operating in South Africa during apartheid era); Irish National Caucus, *supra* note 164 (developing guidelines for MNCs with operations in Northern Ireland to fight religious discrimination).

response to the public outcry against apartheid in South Africa in the 1970s and 1980s.<sup>337</sup> Reverend Sullivan created the Sullivan Principles, establishing standards of corporate responsibility for MNCs operating in South Africa.<sup>338</sup> The Sullivan Principles not only called for the eradication of discrimination in the workplace, but also required MNCs to use their influence to work for the end of apartheid.<sup>339</sup> The MNCs that signed on to the Sullivan Principles also agreed to external audits and public reports to guarantee compliance.<sup>340</sup> Although the Sullivan Principles cannot claim to have caused the demise of apartheid, they served as a basic model for other codes of conduct aimed at corporate responsibility.<sup>341</sup>

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337. See Bloomfield, *supra* note 168, at 587 (asserting that General Motors' refusal to withdraw from South Africa led Sullivan to develop Sullivan Principles and explaining history of Sullivan Principles); Sacharoff, *supra* note 179, at 935 (claiming that Sullivan was first to develop framework for corporate code of conduct); Cassel, *supra* note 307, at 1969 (noting that Sullivan Principles were experimental in 1970s and 1980s).

338. *Sullivan Principles*, *supra* note 164, at 1496; see also Cassel, *supra* note 307, at 1969 (noting that signatories to Sullivan Principles, through their commitment to Sullivan Principles, took unprecedented step towards corporate social responsibility for human rights abuses); Bloomfield, *supra* note 168, at 587 (maintaining that goal of Sullivan Principles was to end apartheid and have significant impact on lives of blacks in South Africa); Anderson, *supra* note 248, at 476-77 (asserting that Sullivan hoped that companies refusing to withdraw from South Africa would at least contribute to demise of apartheid).

339. See *Sullivan Principles*, *supra* note 164, at 1496 (stating that "[e]ach signator of the Statement of Principles will proceed immediately to: [e]valuate existing and/or develop programs, as appropriate, to address the specific needs of Black and other non-white employees in the areas of housing, health care, transportation and recreation"); see also Liubicic, *supra* note 328, at 122-23 (explaining that Sullivan Principles required non-discrimination in workplace as well as efforts to improve housing, education, and health facilities).

340. See *Sullivan Principles*, *supra* note 164, at 1496 (stating that signatories will "[r]eport progress on an annual basis to Reverend Sullivan through the independent administrative unit he has established [and] [h]ave all areas specified by Reverend Sullivan audited by a certified public accounting firm"); see also Frey, *supra* note 168, at 175 (reporting that D. Reid Weedon, of Arthur D. Little consulting firm, conducted audits and graded companies that signed on to Sullivan Principles). Initially, only 12 corporations chose to sign on to the Sullivan Principles, but by 1982, the Sullivan Principles claimed about 150 signatories. Anderson, *supra* note 248, at 478; Liubicic, *supra* note 328, at 123; see also Frey, *supra* note 168, at 175 (claiming that Sullivan Principles, at their height, had 125 signatories).

341. See Sacharoff, *supra* note 179, at 936 (asserting that Sullivan Principles did not end apartheid but basic principles endured and many attempts have been made to replicate Sullivan Principles); Frey, *supra* note 168, at 175 (noting that Sullivan Principles were not enough to eradicate apartheid); Liubicic, *supra* note 328, at 123-24 (claiming that despite failure to end apartheid, Sullivan Principles had significant positive effect South African blacks). Sullivan considered the Sullivan Principles a failure

## ii. MacBride Principles

The MacBride Principles address the corporate responsibilities of U.S. MNCs in Northern Ireland.<sup>342</sup> Named after Dr. Sean MacBride, an Irish nationalist and the founder of Amnesty International,<sup>343</sup> these principles attempt to ensure non-discrimination in employment and oblige MNCs to protect the safety of their workers not only at work, but also during their commute to and from work.<sup>344</sup> In February 1995, the MacBride Principles had thirty-two MNC signatories out of the eighty U.S. MNCs operating in Northern Ireland.<sup>345</sup>

## 3. Lack of Legal Enforcement as Criticism to Corporate Codes of Conduct

Codes of conduct often fail to be effective because they are not enforced.<sup>346</sup> Past international efforts have proven ineffective because they lack power to punish those who do not comply.<sup>347</sup> Commentators also criticize Clinton's Model Principles as

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because they did not succeed in the destruction of apartheid. See Patricia Arnold & Theresa Hammond, *The Role of Accounting in Ideological Conflict: Lessons from the South African Divestment Movement*, 19 *ACCT., ORG., & SOC.* 111, 117-18 (1994) (reporting that Sullivan withdrew his support for Sullivan Principles after it was clear that apartheid had not been dismantled).

342. See Irish National Caucus, *supra* note 164 (encouraging non-discriminatory U.S. MNC investment in Northern Ireland); Bloomfield, *supra* note 168, at 688 (describing nine MacBride Principles); Liubicic, *supra* note 328, at 124 (claiming general goal of MacBride Principles was to eliminate discrimination against Catholic workers). See generally Conor O'Clery, *MacBride Principles Report Claims Some Success*, *IRISH TIMES*, July 2, 1993, at 6 (describing MacBride Principles).

343. See Frey, *supra* note 168, at 175 (stating that MacBride Principles were named after Dr. Sean MacBride, who founded Amnesty International and was Irish nationalist).

344. See Irish National Caucus, *supra* note 164 (urging MNCs to increase representation of religious minorities in workforce, to prohibit religious symbols in workplace, and to ban discriminatory hiring and firing practices). The MacBride Principles also require MNCs to guarantee the safety of workers at work and during their commute. *Id.*

345. Cassel, *supra* note 307, at 1972. Commentators claim that forty percent of U.S. MNCs operating in Northern Ireland have subscribed to MacBride Principles. Liubicic, *supra* note 328, at 124; Bloomfield, *supra* note 168, at 588.

346. See Bloomfield, *supra* note 168, at 570 (asserting that most pressing problem with codes of conduct is lack of enforcement); Hepple, *supra* note 305, at 354 (criticizing ILO Tripartite Declaration as ineffective because it has no mechanism for imposing sanctions for non-compliance); Liubicic, *supra* note 328, at 136-37 (claiming that internal corporate monitors of private codes of conduct have minimal incentive to report violations of code).

347. See Salbu, *supra* note 168, at 341-42 (criticizing Draft U.N. Code and OECD's

being vague and inadequate because they are voluntary and unenforceable.<sup>348</sup> Additionally, private initiatives are often self-imposed, making it difficult to assess whether a corporation is actually complying with its own code.<sup>349</sup>

### III. DE BEERS'S LIABILITY UNDER THE ATCA

As governments and the United Nations seek permanent solutions to end these civil wars,<sup>350</sup> attempts will be made to rebuild these societies. In this century, countries have addressed war crimes by setting up tribunals to hold the perpetrators accountable.<sup>351</sup> Still, these tribunals suffer from multiple problems, inhibiting their overall effectiveness.<sup>352</sup>

There is no court of human rights in Africa and national courts are not likely to provide a fair forum for the victim.<sup>353</sup>

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Declaration as lacking enough specificity to be effectively enforced); Hepple, *supra* note 305, at 354 (claiming that lack of enforcement ability caused ILO Tripartite Declaration to fail).

348. See, e.g., Human Rights Watch, Corporations and Human Rights, available at <http://www.hrw.org/hrw/about/initiatives/corp.html> (claiming that U.S. government failed to implement Model Principles); see also Anderson, *supra* note 248, at 483 (noting that both human rights advocates and business leaders have criticized Model Principles); Sacharoff, *supra* note 179, at 935 (reporting that human rights groups disapprove of Model Principles because they are vague and unable to effectively target human rights abuses); Frey, *supra* note 168, at 172-73 (observing that human rights community criticized Model Principles as being vague, duplicative, and unenforceable). U.S. business leaders also criticized the Model Principles for putting U.S. MNCs at a comparable disadvantage with competitors. See Frey, *supra* note 168, at 173 (claiming that business community did not welcome Model Principles because they would have effect of placing U.S. MNCs at disadvantage compared to competitors); Sacharoff, *supra* note 179, at 935 (maintaining that business leaders advocated for multilateral approach that would provide more protection to MNCs from competitive disadvantage that Model Principles may create for U.S. MNCs).

349. See Lu, *supra* note 308, at 616 (noting that self imposed codes of conduct present problems of disclosure); Hepple, *supra* note 305, at 359 (asserting that many companies do not adequately monitor compliance with their own private codes of conduct); Liubicic, *supra* note 328, at 136-37 (criticizing internal corporate monitoring because corporate monitors may be hesitant to publicize violations); see also U.N. *Final Report*, *supra* note 15, at para. 199 (acknowledging that it is difficult to validate whether De Beers is complying with its pledge not to buy conflict diamonds).

350. See *supra* notes 88-90, 119, and 123-124 and accompanying text (explaining U.N. Security Council sanctions on trade in diamonds and arms with Angola and Sierra Leone and noting that U.N. is in process of establishing war tribunal for Sierra Leone).

351. See *supra* notes 169 and 235 and accompanying text (following establishment of various war crimes tribunals).

352. See *supra* note 169 and accompanying text (noting that commentators observe many obstacles in effectiveness of tribunals).

353. See *id.* (observing that no court of human rights exists in Africa).



The ATCA provides an alternative method for victims of human rights abuses to hold their violators accountable.<sup>354</sup> Therefore, plaintiffs may seek redress in American courts under the ATCA.<sup>355</sup>

Although a cause of action against the insurgent groups may seem logical, these groups may be unavailable for suit.<sup>356</sup> Thus, plaintiffs may institute a suit against De Beers for its involvement in the trade in conflict diamonds. The plaintiffs will assert that De Beers knowingly funded war crimes and crimes against humanity.<sup>357</sup> Since complicity in war crimes and crimes against humanity are possible violations of the "law of nations,"<sup>358</sup> and the plaintiffs are likely to be aliens, the ATCA provides a cause of action for these plaintiffs in U.S. court.

De Beers will likely object to a suit in U.S. court, claiming *forum non conveniens* and that the court does not have personal jurisdiction over the company. Given the recent trend of *forum non conveniens* motions in ATCA cases,<sup>359</sup> the court will probably not accept this objection. Angola and Sierra Leone do not provide adequate forums for these claims.<sup>360</sup> Furthermore, South Africa, De Beers's headquarters, does not present an appropriate forum because of the burden it imposes on plaintiffs, who probably do not reside in South Africa.<sup>361</sup> Courts also have recognized that the United States has an interest in adjudicating

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354. See *supra* notes 169-245 and accompanying text (examining history of ATCA and ATCA cases that have attempted to hold perpetrators liable for human rights abuses).

355. See *supra* note 169 and accompanying text (explaining that lack of options for alien plaintiffs may lead to utilization of ATCA as possible means of recovery).

356. See, e.g., *supra* note 116 and accompanying text (noting that Lomé Peace Agreement granted amnesty to RUF insurgent fighters).

357. See *supra* notes 153-55 and 160 and accompanying text (observing that commentators claim that De Beers bought diamonds from UNITA forces and speculate that De Beers also acquired diamonds from conflict areas in Sierra Leone).

358. See *supra* notes 237-39 and 242 and accompanying text (quoting Nuremberg Principles and asserting that complicity in war crimes violates international law).

359. See *supra* note 258 and accompanying text (noting that *forum non conveniens* is common objection to ATCA suits).

360. See *supra* notes 84 and 117 and accompanying text (discussing that violence continues in both Angola and Sierra Leone).

361. See *supra* notes 259 and 266 and accompanying text (stating that *forum non conveniens* is appropriate where claim can be pursued more fairly and effectively in another nation).

human rights claims.<sup>362</sup> Thus, De Beers will probably not succeed on a forum non conveniens motion.

Although De Beers is not a U.S. corporation, a court may be able to exercise jurisdiction over the company. Applying the minimum contacts test to De Beers, the plaintiff must establish that De Beers has a high degree of contact with the United States and that the claim is sufficiently related to those contacts.<sup>363</sup> De Beers is not subject to U.S. jurisdiction simply because its diamonds reach the U.S. market.<sup>364</sup> Nevertheless, De Beers's contacts may be established by examining whether De Beers's advertising campaign in the U.S. shows that the company can reasonably expect to be hailed into U.S. court and whether these contacts rise to the level of "continuous and systematic."<sup>365</sup>

The second part of the test requires that the claim be related to the contacts.<sup>366</sup> In this situation, the claim revolves around illicit diamonds that De Beers bought from insurgent groups and then marketed to U.S. customers, amongst others. De Beers's advertising campaign in the United States is inherently related to the diamonds that De Beers buys and sells.

To recover under the ATCA against De Beers, the potential plaintiffs must establish that the MNC committed a violation of the "law of nations."<sup>367</sup> First, the Nuremberg Principles establish that complicity in war crimes violates international law.<sup>368</sup> The case against Frederick Flick confirms that knowingly profiting off of war crimes and accepting looted property from known war criminals violates international law.<sup>369</sup> The Holocaust plaintiffs

362. See *supra* notes 268-72 and accompanying text (claiming that TPVA reflects U.S. policy interest in adjudicating human rights claims).

363. See *supra* note 275 and accompanying text (discussing personal jurisdiction and minimum contacts test).

364. See *supra* note 276 and accompanying text (observing that *Asahi* court claimed that personal jurisdiction was inappropriate when company simply placed product in stream of commerce).

365. See *supra* notes 277-78 and accompanying text (noting that advertising in forum state may give rise to jurisdiction and explaining that continuous and systematic contacts also justify jurisdiction).

366. See *supra* note 275 and accompanying text (commenting that jurisdiction depends on extent of contacts as well as relatedness of contacts).

367. See *supra* note 175 and accompanying text (examining "law of nations").

368. See *supra* note 238 and accompanying text (quoting Nuremberg Principle VII and noting that complicity in war crimes violates international law).

369. See *supra* notes 240-42 and accompanying text (describing conviction of Frederick Flick at Nuremberg Tribunal).

also rely on this theory of liability, amongst other theories, in their suit against the Swiss banks.<sup>370</sup>

De Beers's policy of buying and controlling all of the diamonds on the market means that they buy both official, legal diamonds and illicit diamonds from the black market.<sup>371</sup> Given De Beers's history of trading with smugglers, it seems likely that De Beers bought diamonds smuggled out of Angola and Sierra Leone by insurgent groups.<sup>372</sup> This trade provided the insurgent groups with the money to continue their wars, subjecting the civilian populations to human rights violations.<sup>373</sup> De Beers's policy of valuing profits and control of the diamond market above all else allowed these terrible crimes to happen in a systematic fashion.

War crimes are included amongst universal offenses, which are punishable anywhere.<sup>374</sup> Although complicity in committing war crimes violates international law,<sup>375</sup> this offense is not a universal offense according to the Restatement.<sup>376</sup> Additionally, complicity to commit war crimes suggests that the plaintiff must show a connection between the war criminals and the entity acting in complicity. The test for complicity may be similar in construction to the joint action test for State action.<sup>377</sup>

Plaintiffs will encounter difficulties in showing a substantial connection between De Beers and the insurgent groups because

370. *See supra* notes 229, 234, and 243 and accompanying text (noting that Holocaust plaintiffs use Nuremberg Principles and Flick conviction to claim that Swiss banks should be liable for knowingly profiting off of slave labor and looted property).

371. *See supra* notes 145-49 and accompanying text (discussing De Beers's former policy of controlling both supply and demand acquiring majority of diamonds before diamonds reach consumer market).

372. *See supra* notes 149-60 and accompanying text (remarking that De Beers has traded with smugglers from Angola and Sierra Leone in past in effort to maintain control of diamond market).

373. *See supra* notes 15-7 and accompanying text (discussing trade of diamonds for weapons and describing human rights violations by insurgent groups).

374. *See supra* notes 280-82 and accompanying text (noting that war crimes are universal offense and explaining that all states have jurisdiction over universal offenses).

375. *See supra* note 238-39 and accompanying text (quoting Nuremberg Principle VII, defining complicity in war crimes as violating international law and commenting that Nuremberg Principles are accepted as part of international law).

376. *See supra* note 281 and accompanying text (observing that complicity in war crimes is not among crimes included as universal offenses).

377. *See supra* note 221 and accompanying text (claiming that State action requires significant cooperation between State and private entity).

of De Beers's use of multiple middlemen in the acquisition of its diamonds.<sup>378</sup> De Beers has dealt with smugglers in the past, particularly where the black market proved more profitable than official trade routes.<sup>379</sup> Due to the lack of transparency in De Beers's operations and the diamond industry as a whole,<sup>380</sup> it is difficult to ascertain exactly how much the company knew about the diamonds it acquired. Although many inferences can be drawn about De Beers's participation in the conflict diamond trade, it is doubtful that a plaintiff will establish the requisite degree of proof necessary to show complicity between De Beers and the insurgent groups. Additionally, since plaintiffs will likely fail to allege the necessary facts to show complicity, a court may dismiss a claim against De Beers on a 12(b)(6) motion for failure to state a claim upon which relief can be granted.<sup>381</sup>

Given the increasing influence of MNCs, many commentators claim that MNCs should observe international human rights standards.<sup>382</sup> Efforts by international organizations to regulate MNCs have been ineffective, as have government initiatives.<sup>383</sup> The voluntary nature of these principles and codes is their fatal flaw.<sup>384</sup> Therefore, these initiatives need legally binding force.

The ATCA is a potentially useful tool for preventing human rights abuses by MNCs, but in its present form, the ATCA presents many obstacles for plaintiffs to overcome.<sup>385</sup> As of yet,

378. See *supra* notes 148 and accompanying text (describing De Beers's outside market buying process and remarking that multiple intermediaries create problems in tracing origin of diamonds).

379. See *supra* note 149 and accompanying text (asserting that De Beers traded with smugglers in past to maintain control of diamond supply).

380. See *supra* notes 47 and 137 and accompanying text (discussing that diamond industry and De Beers lack transparency).

381. See *supra* notes 253-55 and 257 and accompanying text (explaining that courts generally set high factual threshold for ATCA plaintiffs and are likely to dismiss on 12(b)(6) grounds for failure to meet this threshold requirement).

382. See *supra* note 307 and accompanying text (citing commentators who claim that MNCs should be required to observe human rights standards).

383. See *supra* notes 253-01 and accompanying text (discussing issues that prevent recovery under ATCA such as high factual threshold, forum non conveniens, lack of personal jurisdiction, and requirement of State action).

384. See *supra* notes 203-28 and accompanying text (explaining facts and unsuccessful outcomes for plaintiffs in *Beanal* and *Unocal*).

385. See *supra* notes 319, 322, 327, and 331 and accompanying text (observing that codes of conduct developed by international organizations, United Nations, and U.S. government are non-binding and ineffective).

no ATCA case against an MNC has been successful.<sup>386</sup> The ATCA should be re-examined and amended to reach the conduct of MNCs.

Commentators have recognized the limitations of the ATCA and have suggested that new federal legislation called the Foreign Human Rights Abuse Act should be adopted.<sup>387</sup> This proposed legislation should prohibit MNCs from engaging in practices that cause or facilitate human rights abuses, including complicity in war crimes by funding war criminals. The legislation should call on the U.S. government to develop standards that MNCs can use as guidelines in achieving compliance with the new legislation. Violation of the proposed law should give rise to civil and criminal liability. Amending the ATCA in this way to target MNCs will assist aggrieved individuals bringing suit in U.S. court and hold MNCs to higher standards of accountability.

### CONCLUSION

Imposing liability on MNCs for knowingly profiting off of human rights abuses will deter MNCs from these unethical practices and encourage states to be more observant of human rights. If states know that they will not attract foreign investment with a bad human rights record, perhaps they will make concerted efforts to improve their practices. Furthermore, MNCs will be forced to take account of human rights when considering its business choices.

The trade in conflict diamonds can be stopped, and could have been stopped years ago if De Beers had decided that human life was more important than profits. The threat of litigation would have made De Beers contemplate the results before engaging in this trade. Amending the ATCA and adopting more comprehensive legislation will make this threat a real possibility, thereby forcing MNCs to carefully consider the lives at stake in their business choices.

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386. *See id.* (noting that codes of conduct are often voluntary); *see also supra* note 346 and accompanying text (claiming that unenforceable nature of codes of conduct is large problem).

387. *See supra* note 248 and accompanying text (discussing proposed legislation for holding MNCs liable for human rights abuses).