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Comment

Conflict Free in the DRC

By Sabrina Reyes

Conflict Free in the DRC

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Abstract

Tin, tungsten, tantalum, and gold—3T+G—extracted from the eastern region of the Congo are known today as conflict minerals. These minerals play a significant role in fueling the world’s deadliest ongoing conflict, whereby rebel groups within the Democratic Republic of Congo attack the civilian population to exploit their labor and land for mining. The exploitation experienced by villagers is the paradigm of modern slavery, the foundation of which is brutality, extortion, sexual violence and enforced labor. This can be traced back to Dutch colonization and destabilization of the region. To curb these human rights abuses, more and more governments are looking to regulate business activities such that those activities do not fund violence in the Congo. International treaties, and guidelines speak to increasing business liability. In particular, the United States brought forth securities regulations in the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act that sought to place regulations on companies purchasing 3T+G minerals. This paper will discuss the history of the Democratic Republic of Congo, international responses to conflict minerals, and how the United States’ Dodd-Frank Act fails to adequately regulate business activities in relation to human rights violations.

Introduction

Minerals found in the Congo region, such as tin, tantalum, tungsten, and gold have been connected to funding human rights violations. These minerals are used in consumer products that are found in technology such as laptops, mobile phones and cars, and can enter into multinational supply chains.¹ Conflict minerals, especially gold, since they are less traceable than diamonds, have fueled the deadliest war in the Congo.² Armed conflict and mineral source looting by the Congolese National Army and other armed rebel groups have facilitated armed violence, extortion, forced labor upon the civilian population—including children—and many deaths occurred from the dangerous extraction of the minerals.³ This paper will discuss: (1) The history of the conflict; (2) International human rights violations and potential business liability; (3) The 2010 Dodd-Frank Act and; (4) International regulations in response to conflict minerals and corporate responsibility.

¹ BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, <https://business-humanrights.org/en/conflict-peace/conflict-minerals> (last visited Dec. 6, 2017).

² Nick Heath, *How Conflict Minerals Funded a War that Killed Millions, and Why Tech Giants are Finally Cleaning Up Their Act*, TechRepublic.com, <https://www.techrepublic.com/article/how-conflict-minerals-funded-a-war-that-killed-millions/> (last visited Dec. 06, 2017).

³ *Do No Harm: A Guide For Companies Sourcing From The DRC*, Globalwitness.Org, <https://www.globalwitness.org/en/archive/do-no-harm-guide-companies-sourcing-drc/> (Jul. 8, 2010). *See Democratic Republic of Congo*, GLOBALWITNESS.ORG, <https://www.globalwitness.org/en/campaigns/democratic-republic-congo/#more> (last visited Dec. 6, 2017); *See also Conflict Minerals in Eastern Congo*, GLOBALWITNESS.ORG, <https://www.globalwitness.org/en/campaigns/conflict-minerals/conflict-minerals-eastern-congo/> (Mar. 2, 2015).

I. The Congo: An Unstable History

A. Dutch Colonization

The continuous warfare, violence, and political instability occurring in the Democratic Republic of Congo (DRC) traces far back to Dutch colonization, with the Belgian King Leopold II claiming the Congo basin.⁴ Leopold enslaved the native Congolese population in his pursuit for natural resources such as rubber, and riches like ivory.⁵ An estimated 10 million indigenous peoples suffered, and perished due to disease, torture, and starvation from Leopold's brutal system of conquest from 1870 to the late 1890s.⁶ By 1908, after pressure from the Congo Reform Association, a human rights movement founded by Edward Dene Morel who exposed Leopold's atrocities and slavery in the Congo, Leopold sold most of the Congo to the Belgian government.⁷ Forced labor and severe exploitation continued under Belgian rule, with the requirement that the Congolese must complete 60 days of compulsory labor every year.⁸ The compulsory requirement increased to 120 days per year due to intensified industrial copper mining, and the discovery of diamonds.⁹ The Belgian colonial rule lasted until 1960, setting the foundation for the persistent exploitation of the Congolese population and Congo's raw materials, not only by other countries and foreign countries but also the elite within the Congo.

⁴ *Democratic Republic of Congo Profile*, BBC.COM, <http://www.bbc.com/news/world-africa-13286306> (last updated Aug. 1, 2018).

⁵ *DR Congo: Chronology*, HUMAN RIGHTS WATCH, (Aug. 21, 2009, 4:49 AM) https://www.hrw.org/news/2009/08/21/dr-congo-chronology#_Independence.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

Patrice Lumumba became the first prime minister when Congo gained independence, but through necessity, the Congolese government requested for assistance from the United Nations (UN) to help remove Belgian soldiers and foreign mercenaries from the country.¹⁰ Later, the Belgian and United States government supported a coup d'état led by Colonel Joseph Mobutu, which removed Lumumba from power.¹¹ Mobutu remained president of the Congo for 32 years, whereby the United States initially supported the rule until the end of the Cold War.¹² Within his presidency, he nationalized mining and redistributed management to the local elite, comprising of Mobutu's family and friends, which left the rest of the country without a clear or secure system of government because of the severe corruption.¹³ This would lead to internal tensions, and constant struggles for power to fill the void left by Belgian colonization.

B. The Rwandan Genocide

There is a direct correlation between the colonialism of Rwanda and the Congo, the Rwandan genocide, and the violence in the DRC today.¹⁴ The Rwandan genocide in 1994 claimed 800,000 lives.¹⁵ Rwanda is located just east of Congo, and at the time of Belgian colonial rule, was controlled by the ethnic group the Tutsis.¹⁶ Tutsis comprised

¹⁰ *DR Congo: Chronology*, *supra* note 5

¹¹ *Id.*

¹² Tony Gambino, *Democratic Republic of the Congo*, WORLD DEVELOPMENT REPORT 2011, http://web.worldbank.org/archive/website01306/web/pdf/wdr_2011_case_study_drc_1.pdf.

¹³ Howard W. French, *Anatomy of an Autocracy: Mobutu's 32-Year Reign*, NYTIMES.COM, (May 17, 1997), <https://archive.nytimes.com/www.nytimes.com/library/world/africa/051797zaire-mobutu.html>.

¹⁴ Nicholas Webb, Sonja Peterson, & Ellen J. Kennedy, *Conflict Minerals & the Law*, 72-JAN Bench & B. Minn. 26, 27 (2015).

¹⁵ Joan Abelardo, *Who Starved for that Smartphone?: Limitations of the SEC's Approach to the Congolese Conflict Minerals Trade Problem and the Need for the European Union to Better Address Its Associated Human Rights Abuses*, 40 Fordham Int'l L.J. 583, 591 (2017).

¹⁶ *Id.* at 586.

of 15% of the Rwandan population, while 85% identified as Hutus.¹⁷ The Belgian government instituted an identification system where identification cards distinguished the Tutsis and Hutus.¹⁸ Although the Hutus and Tutsis share the same language, religion, and to some degree culture, the divide created by the Dutch led to the animosity after decolonization in 1962.¹⁹

The Hutus took control of the government, and for decades intermittent violence occurred between the two ethnic groups leaving thousands of casualties on both sides. By 1994, the resentment felt by Tutsis, combined with the country's economic collapse and potential famine fueled the tension between the two groups.²⁰ The heightened tensions came to a climax when Tutsi militants allegedly assassinated the Hutu president of Rwanda. Hutu extremists attempted to eliminate all Tutsis and moderate Hutus by massacring thousands with machetes, and using rape as another tool of genocide, with the rationale of solidifying Hutu control over Rwanda.²¹

When Tutsi forces took back control, the Hutu genocide perpetrators fled into the Congo, bringing with them their desire for power, greed, and systematic use of rape to gain access to Congo's rich minerals.²² Tutsi militias formed in the Congo to combat the Hutus, and other states' armies joined in the conflict for the opportunity to take

¹⁷ United Nations Outreach Programme on the Rwanda Genocide and the United Nations, <http://www.un.org/en/preventgenocide/rwanda/education/rwandagenocide.shtml>. (last visited Dec. 7, 2017).

¹⁸ Jim Fussell, *Group Classification on National ID Cards as a Factor in Genocide and Ethnic Cleansing*, PREVENT GENOCIDE INTERNATIONAL, <http://www.preventgenocide.org/prevent/removing-facilitating-factors/IDcards/> (Last Visited Dec. 7, 2017).

¹⁹ *Id.*

²⁰ Nicholas Webb, Sonja Peterson, & Ellen J. Kennedy, *Conflict Minerals & the Law*, 72-JAN Bench & B. Minn. 26, 27 (2015).

²¹ *Id.*

²² *Id.*

minerals.²³ This fighting continues today, despite being the UN's longest peacekeeping mission and winded efforts to negotiate ceasefires and peace agreements.²⁴

C. Present Day Armed Conflict

Four armed groups control the heavy mineral laden Eastern region of the DRC: (1) Forces Democratiques de Liberation du Rwanda (FDLR), (2) Congress National por La Defense du Peuple (CND), (3) Forces Armees de la Republique Democratique du Congo (FARDC), and (4) Mai Mai militias.²⁵ The FARDC is the Congolese National Army, and seen as the official army, whereas the FDLR and the Mai Mai militias are considered rebel groups.²⁶ The FDLR is made of the Rwandan Hutu extremists that entered Congo after the genocide, and is one of the most feared militant groups.²⁷ Due to the political, and economic instability of the DRC, the groups are able to abuse entire communities.²⁸ These four armed groups are not only violent towards each other to gain access to resources, but also towards Congolese civilians, subjecting whole communities to enforced labor to extract minerals.²⁹ The profits from the minerals are then used to fund these militant groups.³⁰

D. The DRC and Conflict Minerals

²³ *Id.*

²⁴ *Crisis in the Democratic of Congo*, ICRTOP, <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-drc>(last visited Dec. 6, 2017).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Congo's Mining Slaves: Enslavement at South Kivu Mining Sites*, Freetheslaves.net (June 2013), <https://www.freetheslaves.net/wp-content/uploads/2015/03/Congos-Mining-Slaves-web-130622.pdf>.

²⁹ *Id.*

³⁰ *Id.*

Minerals that are being fought over enter into global supply chains, and the profits fund armed groups that enable human rights violations. These conflict minerals are known as the “3 Ts + Gold”: tin, tantalum, tungsten, and gold.³¹ Once processed, these minerals become valuable metals—Tantalum and tin are mined, smuggled, and illegally taxed to make electronic gadgets, pipes, and vehicles, while tungsten is utilized to make small tools, and gold is the most precious metal that has left one-fifth of the Central African Republic population displaced each year.³² Armed militant groups have engaged in gross human rights atrocities with wealth and power as the only objectives.

II. International Human Rights Violations in the DRC and the Role of Businesses

International Human Rights Law (IHRL) generally have focused on protecting citizens from their states, however there is now a change that focuses on the company and its role in protecting human rights.³³ Historically and traditionally, IHRL imposes three obligations on only states: (1) Respect, (2) Protect, and (3) Guarantee.³⁴ Under the duty to respect, states must refrain from interfering with or limiting the enjoyment of human rights. The duty to protect binds states to take all measures necessary to prevent human rights violations against individuals or groups.³⁵ Lastly, the duty to guarantee or fulfill

³¹ *Conflict Minerals*, GLOBALWITNESS.ORG, <https://www.globalwitness.org/en/campaigns/conflict-minerals/#more>, (last visited Dec. 6, 2017).

³² *Id.*

³³ Francisco J. Rivera Juaristi, Lecture at Santa Clara Univ. Sch. of Law: Towards a Binding Treaty on Business and Human Rights (Nov. 1, 2017). *See Also* UN Convention on the Rights of the Child, *General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children’s rights**, U.N. Doc.

³⁴ *Id.*

³⁵ *Id.*

human rights requires the states to adopt positive measures to facilitate the enjoyment of basic human rights.³⁶

More recently, IHRL has recognized the duties to protect and to guarantee may extend to legal persons, which include businesses.³⁷ In the case of the DRC, even though the state has signed and ratified seven of the nine main human rights treaties, the DRC government continues to arbitrarily exercise state power over its people.³⁸ With a fragmented government, frail economy, and a vulnerable society, the obligation to ensure that gross human rights violations do not persist shifts to companies that are doing business within the DRC. The responsibility for businesses to ensure human rights in their business practices, and due diligence may be found in current human rights treaties, and the Protocol to the International Labour Organization's (ILO) Forced Labour Convention. The UN has also formulated the Guiding Principles on Business and Human Rights to implement the three IHRL obligations.

A. Convention on the Elimination of All Forms of Discrimination against Women

Gender-based violence, especially rape, is rampant in the DRC and is used as a weapon of war. There are entire villages where every female member in the community, from infants to the elderly, have been raped—whether by government soldiers or rebels, and often with extreme violence.³⁹ Sexual violence destroys community bonds, and

³⁶ *Id.*

³⁷ *Id.*

³⁸ United Nations Human Rights Office of the High Commissioner, *Ratification Status for Democratic Republic of the Congo*, OHCHR.ORG, http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=48&Lang=EN (last visited Dec. 06, 2017).

³⁹ Raquel Villaecija, *Mother Justice- waging a war on rape*, ALJAZEERA.COM, (Jun. 26, 2015), <http://www.aljazeera.com/indepth/features/2015/06/magazine-mother-justice-waging-war-rape-drc-150625100308995.html>.

results in communities living in constant fear.⁴⁰ Perpetrators would often gang-rape women and children while family members were forced to watch, or even participate in the rape, with the goal to dehumanize the family.⁴¹ The tactic of systematic rape serves as a way to not only alter a region's ethnic, or national identity, but also to drive families off their land so armed groups can take areas that may potentially be rich in minerals.⁴²

Under CEDAW, businesses may be responsible for the human rights violations against women in the DRC, if the violations are traced back to the business. The purpose of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is to emphasize that discrimination against women is still present, and such discrimination, “violates the principles of equality of rights and respect for human dignity”⁴³ and for State Parties to agree to “condemn discrimination against women in all its forms.”⁴⁴ Although CEDAW does not explicitly include language on violence against women, such as rape or domestic violence, the desire to abolish discrimination against women “in all forms”⁴⁵ was interpreted to encompass violence against women.⁴⁶ General Recommendation Number 19 explicitly includes gender-based violence as a form of discrimination covered by CEDAW whereby, “The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman...it includes acts

⁴⁰ Marcia Narine, *From Kansas to the Congo: Why Naming and Shaming Corporations Through the Dodd-Frank Act's Corporate Governance Disclosure Won't Solve a Human Rights Crisis*, 25 REGENT U. L. REV. 351, 377 (2013).

⁴¹ *Id.*

⁴² *Id.*

⁴³ Convention on the Elimination of All Forms of Discrimination Against Women introduction, Dec. 18, 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33 [hereinafter Convention on Discrimination against Women].

⁴⁴ *Id.* at art. 2.

⁴⁵ *Id.*

⁴⁶ Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 19: Violence against women, Eleventh Session, U.N. Doc A/47/38, at 1 (1993).

that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivation of liberty. Gender-based violence may breach specific provisions of [CEDAW] regardless of whether those provisions expressly mention violence.”⁴⁷ Most significantly, Article 2(e) proposes that, “all appropriate measures to eliminate discrimination against women by any person, organization, or enterprise” must be taken.⁴⁸ This was interpreted by the CEDAW Committee to include acts by corporations, including those operating outside of the country.⁴⁹ Therefore, transnational corporations can technically be found liable for actions where their companies are connected to fund violence against women.

B. Convention on the Rights of the Child

Another element of the conflict in the DRC is the gruesome child labor in the region.⁵⁰ Although there have been UN-backed action plans prompting domestic legislation to improve child labor conditions, which is done by ceasing the recruitment of child soldiers, Congolese children are generally still exploited for labor to mine conflict minerals.⁵¹ In these mines, “[c]hildren dug minerals with very basic tools or their hands, without safety training or equipment”⁵², and most commonly the mines are under militia control.⁵³ Deaths and serious accidents occur daily, and in multiple operating mines⁵⁴ because individuals are working in conditions that are underground, transporting,

⁴⁷ *Id.* at art. 6

⁴⁸ Convention on Discrimination Against Women, *supra* note 43, at art. 2(e).

⁴⁹ *Democratic Republic of Congo Profile*, *supra* note 4, at 8.

⁵⁰ Heath, *supra* note 2.

⁵¹ Abelardo, *supra* note 15, at 595.

⁵² Heath, *supra* note 2.

⁵³ *Id.*

⁵⁴ *Id.*

carrying heavy loads or using explosives.⁵⁵ Mine owners, and armies will exploit children's hunger by offering one meal for mining, but without pay.⁵⁶ In addition to child labor, rebel groups frequently take children from their families to become soldiers. The UN estimates that 15-30% of all newly recruited soldiers in the DRC armed groups are under 18 years old.⁵⁷ Child soldiers are forced to commit the most egregious acts of murder; female child soldiers are used as sex slaves, and are utilized to oversee mining.⁵⁸

Although the Convention on the Rights of the Child (CRC) explicitly addresses child labor and child soldiers, provisions holding businesses or legal entities liable are not present. Article 32 of the CRC provides, "States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous...or to be harmful to the child's health or physical, mental, spiritual, moral or social development."⁵⁹ The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict addresses the use of child soldiers, and states, "armed groups that are distinct from the armed forces of a State should not...recruit or use in hostilities persons under the age of 18 years."⁶⁰ The CRC, and its Optional Protocol on children in armed conflict only holds the State liable for child labor and the use of child soldiers.

⁵⁵ Abelardo, *supra* note 15, at 595.

⁵⁶ *Id.*

⁵⁷ *Child Soldiers in the DRC*, SOS Children's Villages, <http://www.child-soldier.org/child-soldiers-in-drc> (last visited Dec. 07, 2017).

⁵⁸ *Id.*

⁵⁹ Convention on the Rights of the Child, art. 32, G.A. Res. 44/25, U.N. Doc. A/RES/44/25 (Nov. 20, 1989), http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/44/25..

⁶⁰ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, art. 4, G.A. 54/263, U.N. Doc. A/RES/54/263 (May 25, 2000), https://treaties.un.org/doc/source/docs/A_Res_54_263-E.pdf.

However, in the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, Article 3 establishes that state parties take measures to hold legal persons liable, whether it may be criminal, civil, or administrative.⁶¹ In General Comment 16 of the Optional Protocol, the Committee on the Rights of the Child specifically points to obligations to protect the rights of the child when conducting transnational business.⁶² All businesses, enterprises and transnational corporations are responsible that they do not adversely impact children, and that home states are also responsible for the activities of businesses and their operations within the states' jurisdiction.⁶³ Through this section, and the Committee's comment, there is a possibility that legal entities can be held liable for human rights violations due to business activities that negatively affect children in that particular state.⁶⁴ This is significant, because it pressures transnational businesses to ensure that their activities do not exploit the most vulnerable populations, and to hinder actions that facilitate such exploitation, like the use of child labor and child soldiers in the DRC.

C. Forced Labor Enforced by Armed Groups

Forced labor in the DRC runs on a spectrum, where at one extreme villagers are rounded at gunpoint by an armed group, brutalized and put to work in the mines for hours digging for minerals or processing mineral ores.⁶⁵ Those villagers that attempt to resist are killed; there is no pay, there is no escape.⁶⁶ On the other end of the spectrum, debt

⁶¹ *Id.*

⁶² Rivera, *supra* note 33. See Also UN Convention on the Rights of the Child, *General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights**, U.N. Doc.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Free The Slaves, *The Congo Report Slavery in Conflict Minerals*, 2011(Dec. 07, 2017).

⁶⁶ *Id.*

bondage indirectly locks villagers into dependency with the mining site owners.⁶⁷ Debt bondage is harder to detect, but is a form of forced labor.⁶⁸ In this context, workers are required to borrow money at high interest rates to purchase food and supplies, and the means necessary to keep them employed.⁶⁹ This system is created in a way to ensure that the debt will never be paid off.⁷⁰ Transnational corporations inadvertently end up funding this system of slavery in their purchase of minerals for consumer products, and it was only until recently that forced labor would be seen as a problem that would affect private enterprises.

While the ILO does not refer to hardline obligations and responsibilities to hold businesses liable for their business activities, Article 25 of the ILO's Forced Labour Convention posits penalties for those states that participate in forced labor.⁷¹ Article 2(1) of the Forced Labour Convention defines forced or compulsory labor as, "all work or service, which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."⁷² Forced labor is a criminal act under the Convention, "The illegal extraction of forced or compulsory labor shall be punished as a penal offense, and it shall be an obligation on any Member...to ensure that the penalties imposed by law are really adequate and are strictly enforced."⁷³ The ILO

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ The Congo Report Slavery in Conflict Minerals, *supra* note 65.

⁷¹ International Labour Organization, *Forced Labor: Critical Issues for US Business Leaders*, ILO.ORG, http://www.ilo.org/global/topics/forced-labour/events/WCMS_092176/lang--en/index.htm (last visited Dec. 07, 2017).

⁷² International Labour Organization, Forced Labour Convention art. 2(1), C29 (June 28, 1930), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C029.

⁷³ *Id.* at art. 25.

interprets this article as a legal obligation towards the state to enforce the Convention whereby a company can be held liable to criminal prosecutions and sanctions by the state.⁷⁴ Complexities arise in the case of forced labor exploitation in the DRC, because the state authorities are either participating in the labor trafficking, or state authorities do not have the means to combat the militant groups.⁷⁵ This would shift the responsibilities of regulating supply chains to minimize forced labor to private entities.

D. Corporate Responsibility and The UN Guiding Principles on Business and Human Rights

The Guiding Principles on Business and Human Rights may be the gateway for corporate responsibility, and to prevent human rights abuses abroad.⁷⁶ The UN Global Compact in 1999 became the world's largest corporate initiative that focused on ten principles related to human rights, labor, the environment and anticorruption.⁷⁷ Despite the Global Compact's success in bringing forth thousands of signatories, the UN was unsuccessful in creating a legally binding document to hold corporations liable for human rights abuses in abroad.⁷⁸ Corporations and even States objected to the UN's attempt, arguing that the states, not corporations, are the traditional subjects of international law, therefore any drafts would be unenforceable.⁷⁹ In 2008, the Special Representative on the Issue of Human Rights, John Ruggie issued his "Protect, Respect and Remedy"

⁷⁴ International Labour Organization, *supra* note 71.

⁷⁵ The Congo Report Slavery in Conflict Minerals, *supra* note 65.

⁷⁶ United Nations Global Impact, *The Ten Principles of the UN Compact*, UNGlobalCompact.Org, <https://www.unglobalcompact.org/what-is-gc/mission/principles> (last visited Dec. 6, 2017).

⁷⁷ *Id.*

⁷⁸ UN Chronicle, *Silent Reform Through the Global Compact*, UNChronicle.un.org, <https://unchronicle.un.org/article/essay-silent-reform-through-global-compact>. (last visited Dec. 08, 2017).

⁷⁹ *Id.*

framework where: (1) the state has a “duty to protect against human rights abuses by third parties” including business entities; (2) the corporation has a “responsibility to respect human rights” by conducting due diligence, impact assessments, and auditing, and (3) there is “a need for more effective access to remedies” beyond flawed enforcement mechanisms.⁸⁰ By 2011, Ruggie issued the Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect, and Remedy” Framework.⁸¹

The Guiding Principles on Business and Human Rights is considered a soft law document whereby States and corporations are not legally bound, but the framework serves the purpose of (1) having the idea of business and human rights on the international agenda, such that it becomes customary international law, and (2) giving States goals that they may strive to achieve, without pressure. The Guiding Principles are significant, because they create a norm of corporate governance that would prevent business activities that contribute to human rights abuses due to business practices. If businesses acknowledge, or continue to adhere to the goals set forth in The Guiding Principles, conflicts such as those in the DRC would not be so heavily fueled.

⁸⁰ John Ruggie (Special Representative of the Secretary-General), *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, ¶ 9, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011).

⁸¹ United Nations Human Rights Office of the High Commissioner, *Implementing the United Nations “Protect, Respect and Remedy” Framework*, UNCHR.ORG, http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (last visited Dec. 08, 2017).

III. Dodd-Frank: The United States Response to Conflict Minerals and the DRC

The United States government has attempted to regulate the flow of conflict minerals in supply chains coming out of the DRC and adjoining countries. The U.S. government has regulated this through a series of reporting regulations under the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank).⁸² The regulations under Dodd-Frank are meant to urge corporations to remove conflict minerals from their supply chains by determining which minerals originated from the DRC.⁸³ Three issues arise with Dodd-Frank: (1) The current regulations are not strict, and have recently become even less effective in bringing public awareness to conflict minerals, because the reporting requirements have narrowed with the *National Ass'n of Manufacturers v. SEC* holding and; (2) The due diligence requirements are complex such that companies find ways to avoid the requirements.

A. Conflict Minerals and Legislative Intent of Dodd-Frank

Section 1502 of Dodd-Frank defines “conflict minerals” as “any other mineral or its derivatives determined by the Secretary of State to be financing the conflict in the [DRC] or an adjoining country.”⁸⁴ Although this broad definition may encompass many types of minerals, the section goes on to specifically address the 3T+G minerals.⁸⁵ As discussed above, the mineral derivatives in the DRC finance conflict and perpetuate gross

⁸² *Disclosing the Use of Conflict Minerals*, U.S. Securities and Exchange Commission: SEC.GOV, <https://www.sec.gov/opa/Article/2012-2012-163htm---related-materials.html> (last visited Dec. 08, 2017).

⁸³ *Id.*

⁸⁴ Conflict Minerals, 77 Fed. Reg. 56,274 (Sept. 12, 2012) (codified at 17 C.F.R. pts. 240.13p-1, 249b.400 (2017)).

⁸⁵ *Id.*

violations of human rights. Under Dodd-Frank, the SEC can require public corporations to disclose the use of conflict minerals, and in turn, the corporation must audit where their minerals come from.⁸⁶ Disclosing the use of conflict minerals in the corporate supply chain is meant to discontinue involvement, and benefit to, armed groups that perpetrate human rights atrocities and violence in the DRC and surrounding areas.⁸⁷

The Congressional purpose is to reduce the use of conflict minerals thereby reducing the funding of armed groups contributing to the conflict, and pressuring those militant groups to end the conflict.⁸⁸ Congress chose to use the securities laws disclosure requirements to, “bring greater public awareness of the source of issuers’ conflict minerals and to promote the exercise of due diligence on conflict mineral supply chains”⁸⁹ with the goal of helping end human rights abuses in the DRC.⁹⁰ In having supply chain regulations, Congress additionally intended to “enhance transparency” and “also help American consumers and investors make more informed decisions.”⁹¹ Congress hopes that these regulations will push corporations to look at conflict-free supply chains, overall reducing the sales of conflict-ridden chains, and therefore dismantling armed groups’ entire funding.⁹² At a minimum, for the Dodd-Frank regulations to be effective, there must be both public awareness and due diligence.⁹³

⁸⁶ *Understanding Conflict Minerals Provisions*, ENOUGH PROJECT, <https://enoughproject.org/one-pager/understanding-conflict-minerals-provisions> (last visited Dec. 7, 2017).

⁸⁷ *Id.*

⁸⁸ *Conflict Minerals*, Securities and Exchange Commission, 17 CFR pts. 240-249b, p.8, <https://www.sec.gov/rules/final/2012/34-67716.pdf> (last visited Dec. 08, 2017).

⁸⁹ *Id.*

⁹⁰ *Id.* at 9.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Understanding Conflict Minerals Provisions*, *supra* note 86.

With the current holding in *National Ass'n of Manufacturers v. SEC*, discussed below, the public awareness purpose of Dodd-Frank is weakened.

B. National Association of Manufacturers v. SEC

The National Association of Manufacturers (NAM) challenged the SEC regulations found in Dodd-Frank that require companies to disclose on their website and in reports to the SEC whether the minerals that they use for consumer products are from the DRC.⁹⁴ NAM argued that that the requirement to place the phrase “conflict free” on websites and in SEC filings was compelled speech in violation of the First Amendment.⁹⁵ Under the *Zauderer* review for commercial speech in regards to the First Amendment, a deferential standard of review applies to disclosures that are “factual and uncontroversial information.”⁹⁶ The SEC recognized that the regulations were “directed at achieving overall social benefits,” and that the law “was quite different from economic or investor protection benefits...” thus the court evaluated the conflict mineral disclosures on a stricter standard.⁹⁷ The court concluded that the labels “conflict free” or “not conflict free” were far from “purely factual and uncontroversial information” because the labels conveyed a moral responsibility on companies where their business only indirectly finance armed groups in the DRC, and violated the companies’ free speech rights.⁹⁸

Under this holding, corporations must still audit their supply chains and report to the SEC in regards to where their minerals are sourced, however, they are not required to

⁹⁴ *National Ass'n of Manufacturers v. S.E.C.*, 800 F.3d 518, 520 (2015).

⁹⁵ *Id.* at 554.

⁹⁶ *Id.* at 523.

⁹⁷ *Id.* at 522.

⁹⁸ *Id.* at 555.

publish or report that their sourced minerals are “conflict free” or “not conflict free”.⁹⁹

With this holding, the public awareness strategy behind Dodd-Frank’s conflict mineral regulations are substantially weakened—the rationale behind Dodd-Frank to require corporations to disclose whether their minerals are sourced from the DRC was to shed light on the human rights atrocities occurring in the region due to conflict minerals.¹⁰⁰

C. Organization for Economic Cooperation and Development Due Diligence Guidance on Supply Chains

Dodd-Frank requires issuers filing a Conflict Mineral Report to use the Organization for Economic Cooperation and Development (OECD) Due Diligence Guidance for Responsible Supply Chains guidance on 3T+G minerals. The OECD demonstrates the first attempt at a collaborative response between governments and corporations for responsible supply chains of minerals in vulnerable regions.¹⁰¹ provides a five-step framework for companies to follow: (1) establish strong company management systems; (2) identify and assess risks in the supply chain; (3) design and implement a strategy to respond to identified risks; (4) carry out independent third-party audit of supply chain due diligence at identified points in the supply chain; and (5) report on supply chain due diligence.¹⁰² The framework was created with the intent to, “cultivate transparent mineral supply chains and sustainable corporate engagement in the mineral sector.”¹⁰³

⁹⁹ Victoria Stork, *Conflict Minerals, Ineffective Regulations: Comparing International Guidelines to Remedy Dodd-Frank Inefficiencies*, 61 N.Y.L SCH. L. REV. 429, 436 (2016).

¹⁰⁰ *Id.*

¹⁰¹ OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, p. 3
<https://www.oecd.org/corporate/mne/GuidanceEdition2.pdf> (last visited Dec. 08, 2017).

¹⁰² *Id.* at 17.

¹⁰³ *Id.*

The due diligence procedures in place determine whether or not their minerals originated in the DRC or a neighboring country and if the business may be supporting the armed conflict there.¹⁰⁴ Until now, many companies have relied upon assurances by suppliers that their purchase of minerals is free from conflict, but with Dodd-Frank, the companies must find out which countries supply their sources.¹⁰⁵ More reporting is required if the source is found to originate from the Congo or neighboring countries.¹⁰⁶ The Dodd-Frank provisions seek increased corporate due diligence in regulating supply chains, but have been found to be increasingly expensive and difficult to comply with.¹⁰⁷ In 2014, about 80% of public companies analyzed by human rights groups did not sufficiently comply with Dodd-Frank requirements.¹⁰⁸ This would suggest that genuine due diligence to comply with Dodd-Frank will not occur without a third-party certification requirement, and in practice, Dodd-Frank's due diligence requirements will not be as effective without that third-party certification.

Although Dodd-Frank is a significant step in the direction of corporate responsibility in regards to conflict minerals and the DRC, regulations need to be improved such that there are new methods for the public to become aware of companies that have conflicted supply chains in light of the holding in *National Ass'n of Manufacturers*, and third-party certification for Dodd-Frank to truly become effective.

¹⁰⁴ *Understanding Conflict Minerals Provisions*, *supra* note 86.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Digging for Transparency*, GLOBALWITNESS.ORG, <https://www.globalwitness.org/en/campaigns/conflict-minerals/digging-transparency/> (last visited Dec. 08, 2017).

IV. International Responses and Regulations to Conflict Minerals

The United States should look to, and try to incorporate regulations found in other governments and international organizations, to find ways to hold corporations liable for conflict minerals that are present in their supply chains. The Dodd-Frank regulations as they are do not have independent third-party auditors to adequately fulfill due diligence requirements, and do not regulate third parties.

A. The European Union

The European Parliament passed a resolution in October 2010 calling on the European Union (EU) to draft similar legislation to Dodd-Frank's Section 1502.¹⁰⁹ By April 2017, the EU Council adopted regulations aimed at stopping the financing of armed groups via conflict mineral trade.¹¹⁰ The EU had been actively involved in the OECD Due Diligence Guidelines, and like the United States, the EU recognizes the OECD Due Diligence Guidelines as an international framework for disclosure of the use of Conflict Minerals.¹¹¹ Like Dodd-Frank, the bill focuses on the DRC but also recognizes conflicts fueled by mining in other parts of Africa, and the bill also uses the OECD due diligence guidelines for conflict sourcing to prevent European businesses from fueling conflict and human rights abuses with the purchase of 3T+G minerals.¹¹²

¹⁰⁹ Abelardo, *supra* note 15, at 613.

¹¹⁰ *Conflict Minerals: Council adopts new rules to reduce financing of armed groups*, EUROPEAN COUNCIL, <http://www.consilium.europa.eu/en/press/press-releases/2017/04/03/conflict-minerals/#> (last visited Dec. 09, 2017).

¹¹¹ European Union Regulation 2017/821, 2017 J.O. (L 130).

¹¹² Covington, *EU Adopts Final Regulation on Importation of Conflict Minerals*, COV.COM, https://www.cov.com/-/media/files/corporate/publications/2017/03/eu-adopts_final_regulation_on_importation_of_conflict_minerals.pdf (last visited Dec. 09, 2017).

However, under the EU regulations, not only are mineral importers, smelters, and other refiners required to report that their revenues are not funding conflicts, but also manufacturers of consumer products are subject to similar requirements.¹¹³ There is also compulsory reporting with independent third-party audits and certification to the government documenting that the minerals from businesses are not contributing to the violence in the DRC.¹¹⁴ In addition to the third-party certification requirements, businesses are also required to develop plans to remove conflict minerals from their own supply chains.¹¹⁵ Not only are the regulations more robust than Dodd-Frank, the regulations are stronger and unambiguous. Most significantly, the EU regulations review what occurs after entities complete their due diligence and report on their supply chains to pressure those companies to remove conflict minerals from their supply chains entirely.¹¹⁶ The third-party certification, and mandatory reports would make Dodd-Frank more robust.

B. The International Conference on the Great Lakes Region

The International Conference on the Great Lakes Region (ICGLR) Mineral Tracking and Certification Scheme acknowledges the 3T+G illicit mineral trade in the Great Lakes region is both a regional and international concern.¹¹⁷ The framework

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *The EU's new Conflict Minerals Regulation: A quick guide if you're involved in the trade in tin, tungsten, tantalum, or gold*, EUROPEAN COMMISSION, March 2017, http://trade.ec.europa.eu/doclib/docs/2017/march/tradoc_155423.pdf (last visited Dec. 09, 2017).

¹¹⁶ European Parliament, *Conflict Minerals: MEPs secure due diligence obligations for importers*, EUROPPARL.EUROPA.EU, <http://www.europarl.europa.eu/news/en/press-room/20170308IPR65672/conflict-minerals-meps-secure-due-diligence-obligations-for-importers>.

¹¹⁷ ICGLR Regional Certification Mechanism, OECD.ORG, <http://www.oecd.org/investment/mne/49111368.pdf>.

consists of four main components: (1) Mine inspections and traceability; (2) Information database; (3) Audits and; (4) Independent Monitoring.¹¹⁸ Like the EU, the ICGLR’s scheme utilizes regional accredited independent auditors that track and certify designated minerals.¹¹⁹ As of June 2015, 141 mines in the DRC were validated as conflict-free by teams comprised of UN officials, Congolese civil society, and government representatives.¹²⁰ This demonstrates that independent third-party auditors are a significant aspect to fulfilling the goal of diminishing the use of illegal mining, and the illegal trade of conflict minerals.

C. The London Bullion Market

The London Bullion Market Association (LBMA) is an international trade association of gold and silver bullion on the London market, which has “set up Responsible Gold Guidance for Good Delivery Refiners in order to combat systematic or widespread human rights abuses.”¹²¹ The LBMA follows a five-step framework in conjunction with the due diligence of the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas.¹²² Refiners must comply with the Guidance in order to remain on the London market list.¹²³ The LBMA’s Guidance provides transparency and consistency throughout the audit

¹¹⁸ Aaron Hall & Sasha Lezhnev, *Coming Clean: A Proposal for Getting Conflict Minerals Certification on Track*, Enoughproject.org, <https://enoughproject.org/files/ComingClean-Getting-Conflict-Minerals-Certification-on-Track.pdf> (last visited Dec. 09, 2017).

¹¹⁹ *Id.*

¹²⁰ *Dodd-Frank 1502 Law: Impact on Conflict Minerals Trade in Congo*, ENOUGHPROJECT.ORG, <https://enoughproject.org/press-releases/dodd-frank-1502-law-impact-conflict-minerals-trade-congo> (last visited Dec. 09, 2017).

¹²¹ *LBMA Responsible Gold Guidance*, LBMA.ORG, http://www.lbma.org.uk/assets/downloads/responsible%20sourcing/Responsible_Gold_Guidance.pdf (last visited Dec. 08, 2017).

¹²² *Id.*

¹²³ *Id.*

process, and all auditors must be LBMA-approved. These auditors must self-certify every year that they are complying under the LBMA guidance audit.¹²⁴ Parties that wish to sell gold, and silver in the market, must now comply with the LBMA, and must be assessed by a third-party auditor.¹²⁵ The LBMA demonstrates a global marketplace for certain minerals can address human rights issues adequately and efficiently through strict due diligence processes.

D. The Kimberley Process

In December 2000, the UN General Assembly adopted a key resolution that supported “the creation of an international certification scheme for rough diamonds” and to “enforce a ban on conflict diamonds entering into the global economy.”¹²⁶ Currently, diamonds are regulated by the World Diamond Council, which aided in the creation of the Kimberley Process.¹²⁷ The Kimberley Process Certification Scheme (KPCS) tries to stop the flow of conflict diamonds, stabilize countries and support those countries in development.¹²⁸ Like conflict minerals, armed rebel groups use conflict diamonds to finance wars against legitimate governments and to perpetuate human rights violations.¹²⁹ The KPCS has deterred crime in the diamond trade, because the scheme requires member

¹²⁴ *Id.*

¹²⁵ LBMA, LBMA.ORG.UK, <http://www.lbma.org.uk/responsible-sourcing> (last visited Dec. 09, 2017).

¹²⁶ Otto Faludi, *Conflict Minerals and the Kimberley Process: 15 Years of Questionable Progress*, IAFFAIRSCANADA.COM, <http://www.iaffairscanada.com/2016/conflict-minerals-and-the-kimberley-process-15-years-of-questionable-progress> (last visited Dec. 09, 2017).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *The Kimberley Process*, GLOBALWITNESS.ORG, <https://www.globalwitness.org/en/campaigns/conflict-diamonds/kimberley-process/> (last visited Dec. 09, 2017).

states to set up an import and export control system for rough diamonds.¹³⁰ KPCS also requires transparency between states, and the exchange of statistical data.¹³¹ This led to over many of the world's diamond manufacturing, producing and trading countries to participate in the scheme.¹³² Dodd-Frank was loosely modeled on the Kimberley Process, and many argue for the need to follow the KPCS more closely to increase the effectiveness of the regulations.¹³³

¹³⁰ *KP Basics*, KIMBERLYPROCESS.COM Kimberleyprocess.com, <https://www.kimberlyprocess.com/en/about> (last visited Dec. 09, 2017).

¹³¹ *Id.*

¹³² *Id.*

¹³³ *The Kimberley Process*, *supra* note 129.

Conclusion

Conflict minerals, and supply chain regulation in the DRC is complex. Although Dodd-Frank is a respectable stepping stone to compel businesses to recognize where they source their minerals, and the effect their business activities have on funding human rights violations abroad, the current Dodd-Frank regulations can still be heavily improved. Dodd-Frank should investigate other ways to enhance public awareness, especially after the holding in *National Ass'n* that disabled the requirement of “Conflict Free” labels, and bolster the due diligence reporting requirements. The United States should look to emulate other governments, and international organizations in regards to due diligence regulations. Following the OECD guidelines is not enough to truly push companies to look at their supply chains and comply with Dodd-Frank. To fulfill the purpose of Dodd-Frank, the United States should imitate LBMA procedures where auditors and third-party requirements play a significant role in reporting. At a minimum Dodd-Frank should follow EU guidelines that require third-party certifications. Strengthening the due diligence process ensures that filings and reports are completed to a specific standard, and that businesses cannot avoid their obligations. For Dodd-Frank to truly become effective, the public awareness and due diligence factors must be focused on more rigorously.