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Mining Gold in a Conflict Zone: The Context, Ramifications, and Lessons of AngloGold Ashanti's Activities in the Democratic Republic of the Congo

Brandon Prosansky*

> "We mine gold. We sell gold. That's what we do."[1] - Steve Lenahan, Executive Officer for Corporate Affairs, AngloGold Ashanti
>
> "We are cursed because of our gold. All we do is suffer. There is no benefit to us."[2] - Congolese gold miner

I. INTRODUCTION

¶1 In 2003, AngloGold Ashanti (AGA), a gold-mining company based in South Africa, started to lay the groundwork under which it would be able to commence gold-mining exploration activities in Mongbwalu, a city in the northeastern Ituri District of the Democratic Republic of the Congo (DRC). At the same time, the Nationalist and Integrationist Front (FNI), an armed faction vying for power in the Ituri area, was engaged in a campaign of grave human rights abuses against the local Congolese population. Inevitably, the paths of these two organizations crossed. AngloGold Ashanti claims that any contacts with the FNI were unavoidable. The FNI claims that AGA could not do business in Ituri without working with the FNI. To some extent, AGA may be involved in human rights abuses through its link with the FNI.

¶2 AngloGold Ashanti posted $2.629 billion of gold income in 2005.[3] The DRC's 2005 GDP was seven billion dollars.[4] To say that AGA is a powerful entity amid the African continent is an understatement, and AGA certainly influences the enjoyment of

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[1] Interview with Steve Lenahan, Executive Officer for Corporate Affairs, AngloGold Ashanti, in Johannesburg, South Africa (Mar. 15, 2006) [hereinafter Interview with Steve Lenahan] (discussing AngloGold Ashanti's activities in the Democratic Republic of the Congo).

[2] Hum. Rts. Watch, *The Curse of Gold: Democratic Republic of the Congo*, 1 (2005) (*written by* Anneke Van Woudenberg). All subsequent citations to this report refer to the text version of the report, with no pictures, *available at* http://hrw.org/reports/2005/drc0505/drc0505text.pdf.

[3] ANGLOGOLD ASHANTI, 2005 SUMMARY ANNUAL REPORT 16 (2006) *available at* http://www.anglogold.com/subwebs/InformationForInvestors/AnnualReport05/report/pdf/Summary_report_2005.pdf.

[4] David McKay, *DRC Miners in for "Peace Rerating"*, MININGMX.COM, Feb. 11, 2006, http://www.miningmx.com/events/zambia2006/893782.htm

internationally recognized human rights by many on the African continent through its gold mining and exploration activities, from providing employment to improving infrastructure.[5] AGA justifies its decision to operate in the DRC by claiming that its operations will provide economic growth to help transform the country.[6] The company claims it consulted extensively with the DRC government and the United Nations (UN) before deciding to operate in Ituri, but that conditions suddenly became non-conducive to normal business.[7] Companies should not be punished for lawfully investing in "bad" countries or with "bad" people, nor should they have to guess which countries are "so bad as to warrant complete disengagement."[8] Further, international law has historically failed to "articulate the human rights obligations of corporations and to provide mechanisms for regulating corporate conduct in the field of human rights."[9] At the same time, the field of corporate complicity law is emerging, and moral questions may be as important as legal questions.[10] The international community continues to debate whether businesses should operate in conflict zones.[11] Companies in the extractive industries may be in a particularly unique situation, since, at least in the preliminary analysis, geography, rather than strategic company decisions, dictate the location of their operating sites.[12] However, on a deeper level of analysis, companies may choose not to operate in conflict zones. AGA's activities in the DRC, which seek to profit in a conflict zone marked by grave human rights abuses, are thus suspect; whether those activities violate international law or international obligations is a more complex question.

¶3 AngloGold Ashanti's potential involvement in human rights abuses fits into the larger context of the link between natural resource exploitation and continuing conflict that results in human rights abuses, especially in Africa. Several interested parties, including the Congolese government,[13] the UN,[14] and non-governmental organizations (NGOs),[15] have attempted to address these issues and inform the public. The Berlin

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[5] *See* SARAH JOSEPH, CORPORATIONS AND TRANSNATIONAL HUM. RTS. LITIGATION 1 (2004).
[6] Brendan Ryan, *AngloGold Pays Price of First Mover Advantage*, MININGMX.COM, June 1, 2005, http://www.miningmx.com/commentary/445678.htm.
[7] *Id.*
[8] JOSEPH, *supra* note 5, at 52-53.
[9] Ronen Schamir, *Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility*, 38 L. & SOC'Y. REV. 635, 637 (2004) (quoting *Corporate Liability for Violations of International Human Rights Law*, 114 HARV. L. REV. 2025, 2030 (2001)).
[10] Irene Khan, Sec'y-Gen., Amnesty Int'l., Understanding Corporate Complicity: Extending the Notion Beyond Existing Laws, Address at the Business Human Rights Seminar, Dec. 8, 2005, AI Index POL/34/001/2006, Mar. 21, 2006.
[11] World Bank Inst. & U. Mich. Bus. Sch., *E-Conference on Business, Peace, and Democracy*, 7 (Oct. 7 - Nov. 1, 2002) (*edited by* Djordjija Petkoski and Timothy L. Fort), *available at* http://info.worldbank.org/etools/docs/library/57522/bdp_econference.pdf.
[12] *Id.*
[13] *See* REPUBLIQUE DEMOCRATIQUE DU CONGO ASSEMBLEE NATIONALE COMMISSION SPECIALE CHARGEE DE L'EXAMEN DE LA VALIDITE DES CONVENTIONS A CARACTERE ECONOMIQUE ET FINANCIER CONCLUES PENDANT LES GUERRES DE 1996-1997 ET DE 1998, RAPPORT DES TRAVEUX (2005), *available at* http://www.kongo-kinshasa.de/dokumente/regierung/rapport_lutundula.pdf [hereinafter RAPPORT DE L'ASSEMBLEE NATIONALE].
[14] *See* Reports of the U.N. Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, U.N. Doc. S/2001/357 (April 12, 2001), U.N. Doc. S/2002/565 (May 22, 2002), U.N. Doc. S/2002/1146 (October 16, 2002), U.N. Doc. S/2003/1027 (October 23, 2003).
[15] *See* Fatal Transactions, *DRC's Natural Treasures: Source of Conflict or Key to Development* (2005) (written by Saskia Van Hoyweghen), *available at* http://www.fataltransactions.org/DRC-

Declaration 2005, promulgated by civil society organizations from several countries, including Australia, Canada, Germany, and the United States (US), to stop irresponsible gold mining, calls on "governments and mining companies to respect human rights and to stop ongoing human rights violations" through various means, such as taking legal action under criminal law and ensuring adequate compensation of the victims of human rights violations.[16] Additionally, other concerned NGOs have staged campaigns against the use of "dirty gold," primarily since eighty percent of the world's mined gold is used in jewelry as a high end luxury item.[17] For example, Earthworks and Oxfam have jointly campaigned against dirty gold via the website, www.nodirtygold.org.[18] The No Dirty Gold Campaign supports the rights of local communities "to determine their own futures - not to have it [sic] decided for them by corporations."[19]

¶4 Whatever the status of the relationship between AngloGold Ashanti and the FNI, one unanswered question is whether the international community can hold AGA accountable if the company was involved in human rights violations related to gold mining in the Ituri District of the DRC. This paper will examine the various theories upon which liability might potentially rest to hold a company accountable for suspect acts within a conflict zone. Part I provides details concerning the link between political developments in the DRC, gold-mining in the northeast region, and human rights abuses. Part II documents the activities of AngloGold Ashanti in the Ituri District of the DRC and presents the company's record of corporate social responsibility. Part III explains relevant international and industry norms related to corporate responsibility and accountability for human rights violations, and analyzes whether AngloGold Ashanti's activities in the Ituri District comply with these norms. Part IV considers the availability of legal remedies, including criminal prosecution and civil approaches. Part V suggests alternative approaches to addressing the issue of corporate involvement in human rights abuses.

II. GOLD MINING, WAR, AND HUMAN RIGHTS VIOLATIONS IN THE ITURI DISTRICT OF THE DRC

A. Brief History of Gold Mining in the Ituri Area

¶5 Prospectors first discovered gold in the northeastern Congo in 1903.[20] At that time the area belonged to Belgian King Leopold II as his personal possession, and the country was known as the Congo Free State.[21] During the first half of the twentieth century,

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conference/DRC_Conference_report_FINAL_english.pdf.

[16] *Berlin Declaration 2005 – Stop Irresponsible Gold Mining*, http://www.globalpolicy.org/socecon/tncs/2005/0918berlin.pdf (last visited Apr. 13, 2007).

[17] Jane Perlez & Kirk Johnson, *Behind Gold's Glitter: Torn Lands and Pointed Questions*, N.Y. TIMES, Oct. 24, 2005.

[18] *See* No Dirty Gold Campaign Home Page, http://www.nodirtygold.org/about_us.cfm (last visited Apr. 13, 2007).

[19] *Id.*

[20] Hum. Rts. Watch, *supra* note 2, at 13.

[21] U.S. Dep't. of State, Bureau of Afr. Affairs, Background Note: Democratic Republic of the Congo, Jan. 2006, http://www.state.gov/r/pa/ei/bgn/2823.htm. However, the people of the Congo Free State were anything but free. "While [King] Leopold [II of Beligum] grandly issued edicts banning the slave trade, virtually no visitors . . . stated the obvious; not only the porters but even the soldiers of the Force Publique were, in effect, slaves." ADAM HOCHSCHILD, KING LEOPOLD'S GHOST, 129 (1998).

colonial entrepreneurs exploited gold through private companies that introduced large-scale or industrial mining.[22]

¶6 The Congo's independence in 1960 brought with it the nationalization of mining companies.[23] The new Congo leadership renamed the country the Democratic Republic of the Congo (DRC).[24] The new parliament elected Patrice Lumumba as prime minister in the first year of independence.[25] However, his leadership did not last long. In 1965, Lt. General Joseph Mobutu, commander in chief of the national army, seized and centralized power.[26] The next year, the state granted the gold mining concession in the Ituri District of the Orientale Province to the new state-owned Office of the Gold Mines of Kilo-Moto (OKIMO).[27] This concession is one of the largest unexplored gold reserves in Africa.[28]

¶7 Mobutu centralized power during the 1970s, and in a campaign of cultural awareness, changed the country's name to the Republic of Zaire.[29] Mobutu enforced a system of one-party rule during the 1980s. The early 1990s saw increased international criticism of the Mobutu regime's human rights practices.[30] During the early 1990s, OKIMO granted licenses to both multinational corporations (MNCs) using industrial methods and to local miners using artisanal methods.[31] Generally, artisanal mining in the DRC is characterized as very labor intensive mining in dangerous and unhealthy conditions.[32] Much of the small-scale mining is "done by hand, with broken shovels, plastic buckets and homemade hammers."[33]

B. Wars in the Congo

¶8 In October 1996, fighting broke out in what has become known as the First Congo War.[34] Laurent Kabila, head of the Alliance of Democratic Forces for the Liberation of the Congo (AFDL), in cooperation with Rwandan and Ugandan forces, invaded Zaire and ousted Mobutu.[35] In May 1997, Kabila declared himself president of the country that he renamed as the Democratic Republic of the Congo. He retained his support from Rwanda.[36] However, that relationship lasted only briefly.

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[22] Hum. Rts. Watch, *supra* note 2, at 13.
[23] *Id.*
[24] U.S. Dep't. of State, *supra* note 21.
[25] *Id.*
[26] *Id.*
[27] Hum. Rts. Watch, *supra* note 2, at 13.
[28] *Id.* at 14.
[29] U.S. Dep't. of State, *supra* note 21. The name "Zaire" derives from a Portuguese corruption of the word Nzere, the name for the Congo River in the languages spoken along its banks, translating as "the river that swallows all rivers." HOCHSCHILD, *supra* note 21, at 54 n.54.
[30] U.S. Dep't. of State, *supra* note 21.
[31] Hum. Rts. Watch, *supra* note 2, at 14.
[32] Fatal Transactions, *supra* note 15, at 5.
[33] Edmund Sanders, *Where Others Mined Wealth, Congo Villagers Scrape Living*, L.A. TIMES, Nov. 27, 2005 ("At the bottom of the deep pit are gray dolerite rocks containing tiny flecks of gold. Broken rocks are tossed up the same line of men and carried to a tent, where another row of workers pulverizes the stones by striking them with steel poles. To pass the time and make the work less monotonous, the laborers pound and sing in a rhythm that can be heard a mile away").
[34] Hum. Rts. Watch, *supra* note 2, at 12; U.S. Dep't. of State, *supra* note 21.
[35] Hum. Rts. Watch, *supra* note 2, at 12; U.S. Dep't. of State, *supra* note 21.
[36] U.S. Dep't. of State, *supra* note 21.

¶9 In July 1998, Kabila attempted to oust his Rwandan backers in what has become known as the Second Congo War.[37] On August 2, 1998, Rwandan and Ugandan forces entered the DRC. Kabila's government gained the support of neighboring Angolan, Zimbabwean, and Namibian forces, which fended off the Rwandan/Ugandan front. Eventually, the Rwandan forces retreated but gained de facto control over parts of the eastern DRC with the rebel group Congolese Rally for Democracy (RDC). In a similar move Ugandan forces backed the rebel group Congolese Liberation Movement (MLC) to gain control of the northern third of the DRC.[38] These wars resulted in the deaths of 3.5 million people, many from exposure, hunger, or lack of medical assistance.[39]

C. Attempts at Peace

¶10 In August 1999, all parties taking part in the conflict in the DRC signed the Lusaka Accord.[40] This first attempt at a peace settlement involved several components, including: a cease-fire; the deployment of a UN peacekeeping operation called the UN Organization Mission in the DRC (MONUC); the withdrawal of foreign troops; and an Inter-Congolese dialogue with the goal of forming a transitional government.[41] The parties failed to fully implement these provisions.

¶11 On January 16, 2001, Laurent Kabila was assassinated, and his son, Joseph Kabila, replaced him as president.[42] From 2002-03, the foreign troops were removed from the DRC. On December 17, 2002, the country negotiated an all-inclusive power-sharing agreement with the rebel forces and the central government. On June 30, 2003, President Kabila announced the formation of a new transitional government. However, ongoing violence and armed conflict continued to occur in the eastern part of the DRC.[43]

¶12 The new Congolese Parliament convened for the first time on August 22, 2003.[44] On December 18, 2005, eighty percent of Congolese voters accepted a draft Constitution in a country-wide referendum.[45] Reportedly, however, the East remained lawless; days after the referendum, UN and Congolese soldiers attacked militiamen in Ituri.[46]

¶13 Kabila faced opposition leader Jean-Pierre Bemba and thirty-one others in a presidential election on July 30, 2006.[47] Since no candidate obtained a majority of the popular vote,[48] a run-off election between Kabila, who had the most votes, and Bemba, the runner-up, was held October 29, 2006.[49] Kabila won the run-off election with fifty-eight percent of the vote. Bemba challenged the result, claiming election fraud and other

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[37] *Id.*
[38] *Id.*
[39] Hum. Rts. Watch, *supra* note 2, at 12.
[40] U.S. Dep't. of State, *supra* note 21.
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] Report of the U.N. Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, ¶ 44, U.N. Doc. S/2003/1027 (October 23, 2003) [hereinafter U.N. Panel of Experts 2003 Report].
[45] *A giant leap forward*, THE ECONOMIST, Jan. 7, 2006, at 49.
[46] *Id.*
[47] Edmund Sanders, *Congo Plans Runoff Vote for October*, LOS ANGELES TIMES, Aug. 21, 2006.
[48] *Id.*
[49] Eoin Young, *DRC Supreme Court Confirms J. Kabila as President*, MONUC.ORG, Nov. 27, 2006, http://www.monuc.org/News.aspx?newsID=13260.

irregularities. On November 27, 2006, the DRC Supreme Court confirmed Kabila as the winner of the election.[50]

D. The Fight for Gold in the Ituri District after the Congolese Wars

¶14 The withdrawal of foreign troops in 2002-03 led to a battle between local armed groups contending for control of the gold mining areas.[51] The armed groups drew the battle lines along ethnic lines; locals of the Hema tribe sided with the Union of Congolese Patriots (UPC), while those of the Lendu tribe sided with the Nationalist and Integrationist Front (FNI).[52] Rwanda and Uganda directly and indirectly supported these rebel groups, shifting their alliances depending on circumstances. The common uniting factor among all conflicting factions was to control the gold in the area.[53] Control of the gold ensured that the warring factions would have the means for buying guns and carrying on the conflict.[54]

¶15 In April 2003, dialogues chaired by the UN led to the formation of the Ituri Interim Administration (IIA), but this body proved ineffective.[55] In May 2003, the armed groups, under pressure from the national government and MONUC, made an empty pledge to support the peace process, and fighting continued.[56] Even as the new Congolese Parliament met on August 22, 2003, "that period also witnessed intensified fighting… notably in the Ituri District."[57] In June 2004, the IIA dissolved, and the national government restored local administrative structures.[58] The national government appointed administrators who had no connection to the armed groups and were unable to exercise control over the armed groups. In January 2005, six leaders of the Ituri armed groups became generals in the Congolese army after a presidential decree in late 2004.[59]

E. Account of Specific Atrocities Related to Gold Mining in Ituri Starting in Early 2003

¶16 In early 2003, AngloGold Ashanti started discussing its gold mining exploration plans for the Ituri District with the transitional government of the DRC. Around the same time, the FNI, the armed group associated with the Lendu tribe and supported by Uganda, sought to gain control of the gold-mining town of Mongbwalu in Ituri from the rival Hema-affiliated UPC.[60] From March to May 2003, the FNI committed a massacre at Kilo, en route to Mongbwalu, killing at least 100 civilians presumed to be of Nyali ethnicity whom the FNI accused of helping the rival Hema ethnic group.[61] Ugandan

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[50] *Id.*
[51] Hum. Rts. Watch, *supra* note 2, at 20.
[52] *Id.* at 10.
[53] *Id.* at 21.
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] U.N. Panel of Experts 2003 Report, *supra* note 44, at ¶ 44.
[58] Hum. Rts. Watch, *supra* note 2, at 22.
[59] *Id.*
[60] *Id.* at 35.
[61] *Id.* (The NGO Human Rights Watch conducted six research missions to Africa and Europe in 2004 and 2005 in preparing its report, entitled *The Curse of Gold*, regarding the human rights situation related to gold mining in the northeast Democratic Republic of the Congo (DRC). Researchers interviewed several victims and witnesses in the DRC. *Id.* at 9. The accounts of human rights abuses mentioned in this section

forces supported the FNI combatants,[62] and on March 13, 2003, the joint force reached Mongbwalu and set up a military camp under the command of the Ugandan army.[63]

¶17 On May 1, 2003, the Ugandan army withdrew and handed over control of Mongbwalu to the FNI.[64] On May 12, 2003, in Mongbwalu, FNI combatants shot and killed two MONUC observers who were attempting to evacuate the area.[65]

¶18 On June 10, 2003, the rival UPC retook Mongbwalu, commencing what has become known as the "48 Hour War," lasting until June 12, 2003.[66] The FNI then pushed back the UPC, using weapons left behind by the Ugandan soldiers who had departed in May. The warring factions killed an estimated 500 people, many of whom were civilians.

¶19 From July to September 2003, FNI combatants attacked several Hema villages to the east of Mongbwalu, killing scores of civilians and forcing thousands to flee.[67] From June 2003 to April 2004, FNI combatants conducted "witch hunts" for Hema women and for those accused of protecting the Hema.[68] They held "Godza ceremonies," in which they claimed the Lendu spirit Godza told them to kill the Hema women. The FNI killed seventy civilians, whom the combatants accused of witchcraft, from at least seven towns.[69]

¶20 The FNI's tactics for controlling the gold involved forced labor. The FNI organized forced community labor known as "salongo," initially requiring two full days a week, though eventually reducing the requirement to once a week for three hours.[70] The FNI enforced salongo by arbitrary beatings, arrests, fines, or even death.[71] The FNI took control of the gold mines in Mongbwalu, charged artisanal miners a fee, and took gold from miners.[72] The FNI used taxes from the mines to buy weapons and traded gold for weapons.[73]

III. ANGLOGOLD ASHANTI'S (AGA'S) ACTIVITIES IN THE ITURI DISTRICT

A. AngloGold Ashanti's (AGA's) Corporate Profile

¶21 AngloGold Ashanti formed from the merger of AngloGold Limited and Ashanti Goldfields Limited, completed April 26, 2004.[74] The company's headquarters are located

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are detailed more thoroughly in the Human Rights Watch report, and come directly from first-hand accounts of victims and witnesses.)

[62] *Id.* at 35. While the Ugandan forces attempted to limit FNI abuses, "they neither disarmed the combatants nor ended their military alliance with them." *Id.* at 37.

[63] *Id.*

[64] *Id.*

[65] *Id.* at 44.

[66] *Id.* at 38.

[67] *Id.* at 40.

[68] *Id.* at 41.

[69] *Id.* at 42.

[70] *Id.* at 46, 48.

[71] *Id.* at 48.

[72] *Id.* at 49.

[73] *Id.* at 52-53.

[74] AngloGold Ashanti Corporate Fact Sheet 2004, http://www.anglogoldashanti.com/NR/rdonlyres/CAF704E0-DB15-4DE5-833F-9C26ACA999BA/0/AGACorporate.pdf (last visited Apr. 13, 2007).

in Johannesburg, South Africa. With operations on four continents, including Africa, North America, South America, and Australia, the company employs more than 60,000 people, including permanent employees and contractors. Anglo American (AA), a British diversified mining company, effectively has a fifty-one percent interest in the independently managed AngloGold Ashanti, though Anglo American has appointed Goldman Sachs to sell AGA.[75] AngloGold Ashanti is a power player in the global gold mining industry; the company is Africa's foremost gold producer, and one of the world's leading resources companies.[76] AGA's corporate values state that the company "strive[s] to form partnerships with host communities, sharing their environments, traditions and values. [The company] want[s] the communities to be better off for AngloGold Ashanti's having been there."[77]

B. AGA's History in the Northeast DRC

¶22 In 1998, Ashanti Goldfields purchased a stake in a mining lease agreement with OKIMO, the DRC's state-run mining office.[78] The concession from OKIMO, known as Concession 40, covered over 8,000 square kilometers in the heart of Ituri with Mongbwalu at its center.[79] After the merger of Ashanti Goldfields with AngloGold, the company now operates in the DRC through a subsidiary called AngloGold Ashanti Kilo (AGK), a joint venture between AngloGold Ashanti and OKIMO, which owns a 13.8% non-contributory share.[80] The company currently considers its Ituri operation as a "Greenfields Explorations Area," meaning it plans "to discover new mines in new areas."[81] In 2004, AGA spent $2 million on exploration activities in the DRC.[82]

C. AGK's Mine Exploration Activities in the Ituri District

¶23 AGK started to lay the groundwork for its decision to start a mining exploration camp in Mongbwalu in 2003. Early that year, the company held discussions with the transitional government, OKIMO, MONUC, and other parties with a view to

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[75] John Waples and Mark Kleinman, *Anglo American Begins Huge Demerger*, THE AUSTRALIAN TIMES, January 16, 2006, *available at* http://theaustralian.news.com.au/common/story_page/0,5744,17832216%255E643,00.html. Anglo American's fifty-one percent interest consists of a 41.8 percent direct interest, with the remainder held by Anglo South Africa Capital (Proprietary) Limited, a wholly owned subsidiary of Anglo American. Press Release, Anglo American, Completion of Offering of AngloGold Ashanti Ordinary Shares (Apr. 20, 2006). Anglo American has not yet sold its complete interest in AngloGold Ashanti, and some analysts speculate that buyers may look to dismember AGA. Martin Creamer, *Analysts Foresee Possible AngloGold Break-up in $5bn Share Sale*, MINING WEEKLY, Mar. 30, 2007, *available at* http://www.miningweekly.co.za/article.php?a_id=106095.

[76] AngloGold Ashanti Corporate Fact Sheet 2004, *supra* note 74.

[77] AngloGold Ashanti: About Our Business Principles: Living Our Values, http://www.anglogoldashanti.com/Values (last visited Apr. 13, 2007).

[78] ANGLOGOLD ASHANTI, ANGLOGOLD ASHANTI'S ACTIVITIES IN THE DEMOCRATIC REPUBLIC OF THE CONGO 3, *available at* http://www.anglogoldashanti.com/NR/rdonlyres/A7AD9DFE-293B-4BF3-ADAF-A6A9B4658F83/0/AGA_and_the_DRC.pdf (last visited Apr. 13, 2007).

[79] Hum. Rts. Watch, *supra* note 2, at 57.

[80] ANGLOGOLD ASHANTI, *supra* note 78, at 2.

[81] Anglogold Ashanti: Exploration, http://www.anglogoldashanti.com/About/Exploration.htm (last visited Apr. 13, 2007).

[82] *Id.*

commencing an exploration program in Mongbwalu.[83] This timing is concurrent with the FNI massacre of civilians at Kilo. By July 2003, several reports about the grave human rights abuses in the northeast DRC were publicly available.[84] Steve Lenahan of AGA admits to knowing "that the FNI was one of many militia[s] that were accused of [human rights] atrocities."[85] Moreover, in July 2003, International Criminal Court Prosecutor Luis Moreno-Ocampo announced that he would follow the situation in Ituri as part of his investigation into alleged crimes in the DRC.[86]

¶24 In October 2003, AGK representatives met again with transitional government officials to discuss intentions to start gold exploration drilling in Mongbwalu.[87] In November 2003, the company sent two Congolese professional exploration employees to Mongbwalu to establish the infrastructure necessary for an exploration camp.[88] In December 2004, AGA deployed an exploration team at Mongbwalu after discussions with DRC government officials and other parties.[89] In January 2005, AGA commenced exploration drilling in Concession 40.[90]

D. AGA's Record of Corporate Social Responsibility

1. Important Contributions to Sustainable Development

¶25 AGA has made several important contributions to sustainable development in the northeast DRC.[91] In 2004, AGA provided a local hospital in Mongbwalu with supplies of drugs, other consumables, and equipment, and replaced the hospital's water pump and piping. The company has provided equipment and supplies to schools, and has helped repair roads and a drainage system. In May 2004, AGA helped maintain the Budana hydroelectric plant, serving towns in Ituri including Mongbwalu. AGA has also provided assistance for local community events.[92]

2. AGA's Potential Link to Human Rights Atrocities

¶26 Presumably, AngloGold Ashanti bears responsibility for the acts of its subsidiary, AngloGold Kilo. People seeking to hold AGA responsible for the acts of AGK may have to determine whether AGK is a proxy for AGA under corporate or agency law principles. The remainder of this paper assumes AGA is liable for the acts of AGK.

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[83] ANGLOGOLD ASHANTI, *supra* note 78, at 3.
[84] *See* Hum. Rts. Watch, *supra* note 2, at 58 & n.186, 110 & n.425 (sources include two detailed reports by Human Rights Watch; a report by International Crisis Group entitled *Congo Crisis: Military Intervention in Ituri*; a report by the U.N. Security Council entitled *Special Report on Events in Ituri*; and numerous press reports in Swiss newspapers).
[85] Interview with Steve Lenahan, *supra* note 1.
[86] Press Release, International Criminal Court [ICC], The Office of the Prosecutor of the International Criminal Court Opens Its First Investigation (Jun. 23, 2004).
[87] Hum. Rts. Watch, *supra* note 2, at 59.
[88] ANGLOGOLD ASHANTI, *supra* note 78, at 3-4.
[89] *Id.* at 4.
[90] *Id.*
[91] *Id.* at 6-7
[92] *Id.* at 7.

i) AGK's Interactions with the FNI

¶27 Human Rights Watch alleges that AGK had to set up a relationship with the FNI, since the FNI maintained de facto control over mines in Ituri, despite AGK's contract with and support from the transitional government.[93] In late 2003 in the national capital in Kinshasa, AGK representatives met with FNI leader Floribert Njabu, who indicated his support for AGK to commence work in Mongbwalu.[94] Later interactions included the visit of company representatives to Mongbwalu in November 2003, and February and March 2004, accompanied by FNI representatives who claim to have agreed to provide security to AGK.[95] These visits to Mongbwalu occurred in the face of warnings against visiting the area from the administrator of the IIA and the head of the MONUC office in Bunia.[96] AGA denies receiving a warning from MONUC.[97] By March 2004, a company representative documented internally that he acknowledged that the FNI would allow the company to operate in the area.[98] AGA knew about the FNI's human rights violations,[99] as press and other reports were publicly available.[100]

¶28 AGA claims that it did not establish a relationship with the FNI, and that any encounters with the FNI were unavoidable.[101] Interestingly, Steve Lenahan of AngloGold Ashanti admits that AGA "had contacts with the FNI," though in "the same way [the company] had contacts with MONUC and the [Congolese] government."[102] The FNI initiated "much of the contact," not AGA, since the FNI "had an interest in trying to understand" what AGA was doing in Ituri.[103]

ii) Specific Incidents with the FNI

a) Funding to the FNI

¶29 In January 2005, AGA paid the FNI $8000 to support a trip to Kinshasa.[104] AGA claims it made the payment "under protest and duress" after FNI had threatened the safety of its staff and company assets.[105] AGA admitted such payments were inconsistent with business principles.[106] AGA closed down its operation in Ituri for seven weeks after this incident,[107] and returned once MONUC had established its base in Mongbwalu.[108]

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[93] Hum. Rts. Watch, *supra* note 2, at 60-62, 71.
[94] *Id.* at 70.
[95] *Id.* at 64-65.
[96] *Id.* at 63-64.
[97] Letter from Bobby Godsell, CEO, AngloGold Ashanti, to Anneke Van Woudenberg, Hum. Rts. Watch (May 31, 2005) (available in Press Release, AngloGold Ashanti, Human Rights Watch Report on AngloGold Ashanti's Activities in the DRC (June 1, 2005)).
[98] Hum. Rts. Watch, *supra* note 2, at 65.
[99] Interview with Steve Lenahan, *supra* note 1.
[100] Hum. Rts. Watch, *supra* note 2, at 62-64.
[101] ANGLOGOLD ASHANTI, *supra* note 78, at 4-5.
[102] Interview with Steve Lenahan, *supra* note 1.
[103] Interview with Steve Lenahan, *supra* note 1.
[104] ANGLOGOLD ASHANTI, *supra* note 78, at 5.
[105] Hum. Rts. Watch, *supra* note 2, at 67.
[106] *Id.*
[107] Brendan Ryan, *AngloGold Ashanti Acts on DRC Allegations*, MININGMX.COM, June 1, 2005, http://www.miningmx.com/gold_silver/445618.htm
[108] Interview with Steve Lenahan, *supra* note 1.

¶30 Additionally, from February to October 2004, AGA paid $1100 in freight landing taxes to the FNI.[109] AGA claims it initially thought that the transitional government received these payments, based on the fact that the transitional government's stamp appeared on some receipts.[110] AGA stopped these payments when it became aware that the payments arguably contravened a UN arms embargo.[111]

b) Transportation to the FNI

¶31 AGA allegedly provided ground transport to FNI representatives, who often used AGA's four-by-four vehicle.[112] AGA claims the FNI's use of its vehicle occurred under duress of threats of abuse and assault.[113] Additionally, AGA allegedly provided the FNI with air transport, in that AGA permitted FNI representatives to travel on planes hired for flights leaving Mongbwalu.[114] However, AGA claims it had no formal arrangement with the FNI to provide transportation, and independent commercial charter airlines sold seats to anyone willing to pay, including FNI representatives.[115]

c) Housing to the FNI

¶32 FNI leader Njabu lived in a house on the AGK concession that was guarded by FNI combatants, some of them child soldiers, and was used as FNI headquarters.[116] AGA confirmed that the FNI occupied several houses on the company's property, but without AGA's permission or approval.[117] Further, AGA claims the FNI took occupation of some houses on the concession before AGK established its exploration camp.[118]

d) Political clout to the FNI

¶33 Few national politicians took interest in the FNI until AGA expressed its desire to start mining in Mongbwalu.[119] A Congolese senator feared that the relationship between the FNI and AGA would strengthen the FNI politically, and was "dangerous."[120] Further, a decree from President Kabila integrated one of the FNI senior commanders, Gode Sukpa, as a general in the new Congolese army in January 2005.

iii) Debate over the Timing of AGA's Decision to Begin Mine Exploration Activities in Ituri

¶34 Human Rights Watch has alleged that AGA should have waited until "a legitimate government authority" took charge before proceeding with its mine exploration activities, "rather than dealing with armed groups implicated in gross human rights violations."[121]

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[109] ANGLOGOLD ASHANTI, *supra* note 78, at 5.
[110] *Id.*
[111] *Id.*
[112] Hum. Rts. Watch, *supra* note 2, at 68.
[113] ANGLOGOLD ASHANTI, *supra* note 78, at 6.
[114] Hum. Rts. Watch, *supra* note 2, at 68.
[115] ANGLOGOLD ASHANTI, *supra* note 78, at 6.
[116] Hum. Rts. Watch, *supra* note 2, at 68.
[117] *Id.* at 69.
[118] ANGLOGOLD ASHANTI, *supra* note 78, at 6.
[119] Hum. Rts. Watch, *supra* note 2, at 69.
[120] *Id.* at 70.
[121] Anneke Van Woudenberg & Arvind Ganesan, *Letter to Mineweb from Human Rights Watch*, MINEWEB, June 14, 2005, http://www.mineweb.net/sections/sustainable_mining/450415.htm

AGA's Steve Lenahan gave some credence to this view when he acknowledged the possibility that his company "got [its] timing wrong," though he guardedly stated so since no guarantees existed that no other incidents with the FNI would have occurred if his company had waited for MONUC to actually establish a base.[122] However, CEO Bobby Godsell does not agree that companies should stay out of the DRC until the democratic processes are firmly entrenched, claiming that "[t]he DRC government sees economic growth as an integral part of transformation and the African Union encourages it."[123] Godsell notes that "[t]he crux of the matter is whether the development of a gold mine would be good or bad for the peace process in the DRC."[124] He answers that question in the affirmative, so long as his company does not "have to give succour to armed groups."[125]

¶35 Consistent with AGA's analysis, many NGOs also recognize the importance that the private sector plays in contributing to sustainable development.[126] MNCs influence government policy and practice, often with the aim of protecting their investments.[127] This influence may have the positive result of creating the stability necessary for sustainable development.

E. AGA's Current Plan for the DRC

> Following the deployment of the MONUC base in Mongbwalu, the signing of an agreement by the transitional government and armed militia groups in the regions, as well as its own detailed in loco investigations, AngloGold Ashanti has concluded that, under current circumstances, the company can continue to comply with its commercial and social responsibilities in the north eastern DRC with integrity.[128]

¶36 AGA will continue to fast-track exploration in 2007, and plans to conduct a feasibility study in 2008 that it hopes will allow it to commence construction of a mine in 2009.[129] In February 2006, OKIMO said that "AGA should accelerate its exploration plans in the DRC."[130]

¶37 Another mining company with interests in the Ituri region, Mvelaphanda Resources (Mvela) decided not to get involved in operations in Ituri after a strategic review of operations.[131] However, AGA believes that it can continue to operate in Ituri with integrity.[132] Steve Lenahan insisted that "if… we make the judgment that it's not possible

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[122] Interview with Steve Lenahan, *supra* note 1.
[123] Ryan, *supra* note 6.
[124] *Id.*.
[125] *Id.*
[126] Isabella D. Bunn, *Global Advocacy for Corporate Accountability: Transatlantic Perspectives from the NGO Community*, 19 AM. U. INT'L. L. REV. 1265, 1296 (2004).
[127] Ilias Bantekas, *Corporate Social Responsibility in International Law*, 22 B.U. INT'L. L.J. 309, 313-15 (2004).
[128] ANGLOGOLD ASHANTI, *supra* note 78, at 7.
[129] *Id.*
[130] David McKay, *OKIMO Calls Dispute with Moto*, MININGMX.COM, Apr. 4, 2006, http://www.miningmx.com/gold_silver/170320.htm
[131] Ryan, *supra* note 107.
[132] Interview with Steve Lenahan, *supra* note 1.

to do business there with integrity, we will leave the next day."[133] He also notes that even after the publication of the Human Rights Watch report, *The Curse of Gold*, in June 2005, "nobody, and this includes Human Rights Watch, told us to leave."[134]

¶38 The decision to operate in Ituri is one that the company will continuously monitor.[135] CEO Bobby Godsell has pledged that "AngloGold Ashanti does not and will not support militia,"[136] and has promised that "there should be no economic activity if we have to pay bribes."[137] Human Rights Watch has welcomed "AngloGold Ashanti's commitment to suspend their operations if it requires supporting [armed] groups [implicated in gross human rights violations] in the future."[138]

¶39 In October 2005, AngloGold Ashanti agreed to renegotiate its contract with OKIMO.[139] Okimo CEO Viktor Kasongo noted that he wanted to correct what the DRC government deemed an "imbalance of interests."[140] In March 2007, the DRC mines minister, Martin Kabwelulu, announced plans to review the AGA contract, which AGA supports.[141]

¶40 The Lutundula Parliamentary Commission Report, released in February 2006, calls for the renegotiation of the mining convention between OKIMO and AGA in order to readjust the shares of participation in the partnership.[142] Further, the report orders the suspension of mining activities in the OKIMO concessions because mining companies must cooperate with the militiamen to do business.[143] The report is the product of the Lutundula Commission, a special DRC National Assembly commission led by parliamentarian Christophe Lutundula, charged with investigating mining and other business contracts that rebels and government authorities signed between 1996 and 2003 during the Congo wars. The report, initially submitted to the National Assembly in June 2005, found that "dozens of contracts are either illegal or of limited value for the development of the country and it recommends their termination or renegotiation."[144] Further, the report calls for judicial action against several senior political and corporate actors involved in these operations,[145] though the report does not implicate any officials from AngloGold Ashanti.[146]

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[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] Ryan, *supra* note 107.
[137] Ryan, *supra* note 6.
[138] Van Woudenberg & Ganesan, *supra* note 121.
[139] *AngloGold to Reexamine Contract with Congo*, THE GEM AND JEWELLERY EXPORT PROMOTION COUNCIL NEWS, Oct. 26, 2005, http://www.gjepc.org/gjepc/gjepc.aspx?inclpage=News_NU_26102005C&section_id=5.
[140] *Id.*
[141] David McKay, *Half of Congo Licenses May Not Comply*, MININGMX.COM, Apr. 3. 2007, http://www.miningmx.com/mining_fin/745949.htm
[142] RAPPORT DE L'ASSEMBLEE NATIONALE, *supra* note 13, at 200.
[143] *Id.* at 201.
[144] Hum. Rts. Watch, DR Congo: End Illegal Exploitation of Natural Resources, Feb. 21, 2006, http://hrw.org/english/docs/2006/02/20/congo12692.htm.
[145] *Id.*
[146] RAPPORT DE L'ASSEMBLEE NATIONALE, *supra* note 13, at 196-201.

F. Summary of AGA's Potential Link to Human Rights Abuses

¶41 From early 2003 to the present, the FNI has killed civilians and used forced labor in its attempt to control the gold mining trade in Ituri. Concurrently, AngloGold Ashanti has engaged in mine exploration activities in the area. The two groups have interacted, meeting several times in 2003 and 2004. AGA claims that all contacts with the FNI were unavoidable; the FNI, on the other hand, claims that AGA sought its permission to operate in Ituri. AGA claims that any money or other support it gave to the FNI was either under duress or without AGA's permission, and the company made any such decisions, though contrary to AGA's policies, in the interest of protecting employees. However, AGA was aware of the FNI's deplorable record on human rights, and perhaps should have realized that any contact with the FNI would give the armed militia implicit support.

IV. ANALYSIS OF NORMS CONCERNING CORPORATE RESPONSIBILITY AND ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS

A. Explanation of Norms

1. Public International Norms and Provisions

¶42 Several organizations have developed international norms and provisions that apply in the context of business and human rights. These norms involve several different actors, including states, MNCs, and civil society organizations. Many of these initiatives are voluntary, which to some extent helps to induce participation.[147]

i) Voluntary Principles on Security and Human Rights

¶43 Participants to the Voluntary Principles on Security and Human Rights (Voluntary Principles) "have developed [a] set of voluntary principles to guide Companies in maintaining the safety and security of their operations within an operating framework that ensures respect for human rights and fundamental freedoms."[148] The Voluntary Principles operate in the areas of risk assessment, public security, and private security. Participants include the governments of the US, the UK, the Netherlands, and Norway, companies in the extractive and energy industries, and human rights NGOs.[149] Anglo American joined the Voluntary Principles in January 2005,[150] and AGA claims that the Voluntary Principles guide its actions in the "context of the DRC and on the particular issue of operating in politically sensitive regions or areas of potential conflict."[151] Since

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[147] *See* Barnali Choudhury, *Beyond the Alien Tort Claims Act: Alternative Approaches to Attributing Liability to Corporations for Extraterritorial Abuses*, 26 NW. J. INT'L. L. & BUS. 43, 64 (2005) ("Although the non-binding and voluntary nature of the [OECD] Guidelines facilitated their adoption by a multitude of states, these two factors also detract from the effectiveness of the Guidelines.")

[148] Voluntary Principles on Security and Human Rights: Introduction, http://www.voluntaryprinciples.org/principles/index.php (last visited Apr. 13, 2007).

[149] *Id.*

[150] Voluntary Principles on Security and Human Rights: Timeline, www.voluntaryprinciples.org/timeline/details/2005-01.htm (last visited Apr. 13, 2007).

[151] ANGLOGOLD ASHANTI, *supra* note 78, at 1-2. AngloGold Ashanti is "currently involved in the process of formally adopting [the Voluntary Principles]." *Id.* at 2.

AngloGold Ashanti's (AGA's) activities do not involve public or private security matters, only the Risk Assessment principles are relevant to this analysis.

¶44 The principles for Risk Assessment advise companies to consider several factors,[152] including:

- Potential for violence: "Risk assessments should examine patterns of violence in areas of Company operations," which can be "limited to particular regions;"
- Human rights records: "Risk assessments should consider the available human rights records of … paramilitaries," and "[a]wareness of past abuses and allegations can help Companies to avoid recurrences as well as to promote accountability;"
- Rule of law: "Risk assessments should consider the local prosecuting authority and judiciary's capacity to hold accountable those responsible for human rights abuses;" and
- Conflict analysis: Participating companies should "[i]dentif[y] and understand[ ] the root causes and nature of local conflicts, as well as the level of adherence to human rights and international humanitarian law standards by key actors" when developing strategies for managing relations with stakeholders.

ii) Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises

¶45 The Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises (OECD Guidelines) are recommendations of voluntary principles and standards for responsible business conduct addressed by governments to MNCs.[153] Observance by enterprises is voluntary and not legally enforceable.[154] The OECD Guidelines endorse policies that include respect for the human rights of those affected by company activities and abstention from any improper involvement in local political activities.[155] The OECD Guidelines call for member states, through state-appointed National Contact Points (NCPs), to investigate any allegations of violations of the Guidelines.[156] While neither South Africa nor the DRC are OECD members, the United Kingdom, where Anglo American is based, is an OECD member.[157] Further, the OECD Guidelines encourage NCPs to respond to specific instances from non-adhering countries.[158]

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[152] Voluntary Principles on Security and Human Rights: Risk Assessment, http://www.voluntaryprinciples.org/principles/assessment.php (last visited Apr. 13, 2007).
[153] ORG. FOR ECON. COOPERATION AND DEV. [OECD], THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 15 (2000).
[154] *Id.* at 17.
[155] *Id.* at 19.
[156] *Id.* at 36-37.
[157] OECD Member Countries, http://www.oecd.org/countrieslist/0,3025,en_33873108_33844430_1_1_1_1_1,00.html.
[158] OECD, *supra* note 153, at 37.

iii) UN Global Compact

¶46 The UN Global Compact calls for collective action among governments, companies, and international labor and civil society organizations to promote responsible corporate citizenship.[159] The Global Compact is a voluntary initiative.[160] Principles apply to the areas of human rights, labor, the environment, and anti-corruption.[161] The human rights principles are:[162]

- Businesses should support and respect the protection of internationally proclaimed human rights within their sphere of influence; and
- Businesses should make sure they are not complicit in human rights abuses.

AGA subscribes to the principles of the Global Compact.[163]

iv) Global Reporting Initiative (GRI) Guidelines

¶47 "The Global Reporting Initiative (GRI) is a multi-stakeholder process and independent institution whose mission is to develop and disseminate globally applicable Sustainability Reporting Guidelines."[164] Organizations subscribing to the GRI process voluntarily use the Guidelines to report on the economic, environmental, and social dimensions of their activities, products, and services.[165] The social performance indicator focuses on human rights,[166] and calls for qualitative data.[167] Participants include representatives from business, accountancy, investment, environmental, human rights, research and labor organizations.[168] GRI is an official collaborating center of the United Nations Environment Programme (UNEP) and works in cooperation with the UN Global Compact.[169] AGA joined the GRI as an Organizational Stakeholder in September 2004.[170]

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[159] The U.N. Global Compact Office, *The United Nations Global Compact: Advancing Corporate Citizenship*, 1-3 (June 2005).
[160] *Id*. at 4.
[161] *Id*. at 3.
[162] *Id*.
[163] Addendum to the U.N. Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, Response No. 15, U.N. Doc. S/2002/1146/Add.1 (June 20, 2003).
[164] Global Reporting Initiative [GRI], *GRI at a Glance*, http://www.globalreporting.org/about/brief.asp (last visited Apr. 29, 2006).
[165] *Id*.
[166] GRI, *Introducing the 2002 Sustainability Reporting Guidelines*, 7-8, *available at* http://www.globalreporting.org/guidelines/2002/gri_companion_lite.pdf
[167] *Id*. at 8.
[168] GRI, *supra* note 164.
[169] *Id*.
[170] GRI: Organisational Stakeholders, http://www.globalreporting.org/organisations/details.asp?Organisation_pk=10192

v) International Labour Organization (ILO) Declaration on Fundamental Principles and Rights at Work

¶48 The International Labour Organization (ILO) Declaration on Fundamental Principles and Rights at Work (Fundamental Principles) is a "commitment by governments, employers' and workers' organizations to uphold basic human values."[171] The Fundamental Principles state that ILO members have an obligation to respect, to promote, and to realize principles concerning fundamental rights including freedom of association, collective bargaining, elimination of forced labor, abolition of child labor, and elimination of discrimination in employment.[172] However, since the scope of the ILO's mandate is limited to conditions arising out of the employment relationship,[173] the Fundamental Principles are not relevant to AGA's activities in the DRC.

vi) UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (UN Norms)

¶49 The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (UN Norms) reaffirm that transnational corporations and other business enterprises have human rights obligations and responsibilities.[174] Transnational corporations have general obligations, within their sphere of activity and influence, "to promote, secure the fulfilment of, respect, ensure respect of and protect human rights."[175] The UN Norms derive their obligations from standards that apply to corporate activity, including international human rights instruments, binding conventions, and charters.[176]

¶50 The implementation mechanism calls for corporations to create and implement internal policies that comply with the UN Norms.[177] The UN and other appropriate organizations may independently review corporate activities,[178] while states should establish the legal and administrative framework to support implementation.[179] The UN Norms require companies found to be in violation to pay reparations to affected parties, as assessed by national courts or international tribunals.[180]

¶51 Steve Lenahan of AGA claims that the UN Norms are a set of principles that have no validity and have not been ratified by anybody.[181] He might not be alone in his

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[171] Welcome to International Labour Organization Declaration on Fundamental Principles and Rights at Work Web Page, http://www.ilo.org/dyn/declaris/DECLARATIONWEB.INDEXPAGE (last visited Apr. 13, 2007).
[172] Int'l. Labour. Org. [ILO], Declaration on Fundamental Principles and Rights at Work (June 18, 1998) *available at* http://www.ilo.org/dyn/declaris/DECLARATIONWEB.static_jump?var_language=EN&var_pagename=DECLARATIONTEXT.
[173] Bunn, *supra* note 126, at 1276.
[174] U.N. Econ. & Soc. Council [ECOSOC], U.N. Comm'n. on Hum. Rts., Sub-Comm'n. on the Promotion and Protection of Hum. Rts., *Economic, Social, and Cultural Rights: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, Preamble, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003).
[175] *Id*.
[176] Bunn, *supra* note 126, at 1285-86; Choudhury, *supra* note 147, at 65.
[177] ECOSOC, *supra* note 174, at ¶ 15.
[178] *Id*. at ¶ 16.
[179] *Id*, at ¶ 17.
[180] *Id*, at ¶ 18.
[181] Interview with Steve Lenahan, *supra* note 1.

analysis. Though the UN Commission on Human Rights passed a 2005 resolution that appointed a special representative to "identify and clarify standards of corporate responsibility and accountability," in accord with the Commission's implicit recognition of the UN Norms,[182] the United States, Australia, and South Africa, opposed it.[183] The United States feared that "an anti-business agenda would hold back economic and social advancement in developing nations and claimed that the resolution was formulated in a negative tone towards business."[184]

2. Extractive Industry Norms

¶52 In his Plenary Remarks at the World Mines Ministries Forum in Toronto, Canada, on March 3, 2006, the UN Secretary General's Special Representative for Business and Human Rights, John Ruggie, observed that "fragments of collaborative governance are emerging in a variety of areas, specifically tailored for their characteristic dilemma situations."[185] However, he also warned that "these arrangements have weaknesses," one of which is that "most choose their own definitions and standards of human rights," a choice informed as much by "what is politically acceptable within and among the participating entities than with objective human rights needs."[186] Ruggie was likely referring to the extractive industry, which has developed its own standards regarding human rights norms.

i) International Council on Mining and Metals (ICMM) Principles

¶53 Starting in May 2003, the International Council on Mining and Metals (ICMM) has encouraged corporate members to measure their performance against ten sustainable development principles.[187] The third principle is to "[u]phold fundamental human rights and respect cultures, customs and values in dealings with employees and others who are affected by [member] activities."[188] Under this principle the ICMM advises companies to "[r]espect the culture and heritage of local communities" and to avoid the use of forced labor.[189] ICMM members commit to report their human rights performance against the ICMM Principles in accord with the Global Reporting Initiative (GRI) Mining and Metals Sector Supplement and the 2002 Sustainability Reporting Guidelines.[190] The ICMM launched a pilot assurance procedure in May 2006 to provide independent

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[182] ECOSOC, U.N. Comm'n. on Hum. Rts., *Promotion and Protection of Human Rights: Human Rights and Transnational Corporations and Other Business Enterprises*, E/CN.4/2005/L.87 (Apr. 15, 2005).
[183] *UN Resolution Mixes Human Rights and Business*, FORBES, May 6, 2005, *available at* http://www.forbes.com/business/2005/05/06/cz_0506oxan_UNhumanrights.html.
[184] *Id.* However, South Africa based its opposition on the grounds that the resolution was too weak.
[185] John Ruggie, U.N. Sec'y Gen.'s Special Representative for Bus. and Hum. Rts., Plenary Remarks at World Mines Ministry Forum, Toronto, Canada (Mar. 3, 2006), *available at* http://www.reports-and-materials.org/Ruggie-World-Mines-Ministries-Forum-3-Mar-2006.doc.
[186] *Id.*
[187] Int'l. Council on Mining & Metals [ICMM] SD Framework: ICMM Principles, http://www.icmm.com/icmm_principles.php (last visited Apr. 13, 2007).
[188] *Id.*
[189] ICMM SD Framework: ICMM Principles: Human Rights, http://www.icmm.com/human_rights.php (last visited Apr. 13, 2007).
[190] ICMM SD Framework: Public Reporting, http://www.icmm.com/sd_reporting.php (last visited Apr. 13, 2007).

assurance that members are meeting their commitments.[191] AGA CEO Bobby Godsell serves on the ICMM Executive Committee.[192]

ii) International Federation of Chemical, Energy, Mine and General Workers' Unions (ICEM) Agreement with AngloGold Ltd.

¶54 On September 13, 2002, AngloGold CEO Bobby Godsell signed an agreement with the International Federation of Chemical, Energy, Mine and General Workers' Unions (ICEM), applicable to all AngloGold mines worldwide.[193] The parties agreed to promote both "universal respect for and observance of human rights and fundamental freedoms for all" and "good relationships with local communities."[194] The Agreement, effective once signed "unless otherwise agreed or amended,"[195] pledged to implement a sub-committee "to consider plans and proposals placed before it by either party following any alleged breach of accepted standards of conduct that could not be resolved at the level of local and national operation."[196]

iii) Extractive Industries Transparency Initiative (EITI)

¶55 The Extractive Industries Transparency Initiative (EITI) "supports improved governance in resource-rich countries through the full publication and verification of company payments and government revenues from oil, gas and mining."[197] "The EITI is a multi-stakeholder initiative, with partners from governments, international organizations, companies, NGOs, investors, and business and industrial organizations."[198] The EITI Principles call for greater transparency and accountability in payments and revenues through disclosure by companies and governments.[199] The EITI Criteria include regular publication of payments by companies to governments and revenues received by governments from companies, and independent audits reconciling the payments and revenues.[200]

¶56 On November 18, 2005, DRC President Kabila signed a decree that set up a committee to implement the EITI principles and criteria.[201] Anglo American endorsed the EITI at its launch in Johannesburg at the World Summit on Sustainable Development in 2002.[202] AngloGoldAshanti, as an independently managed subsidiary of Anglo

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[191] ICMM SD Framework: Independent Assurance, http://www.icmm.com/sd_verification.php (last visited Apr. 13, 2007). The ICMM expect its Council to approve the pilot program in October 2007.
[192] ICMM Council Members, http://www.icmm.com/about_council.php (last visited Apr. 13, 2007).
[193] News Release, Int'l. Fed'n. of Chem., Energy, Mine, & Gen. Workers' Unions [ICEM], AngloGold Signs Global Agreement: First in Mining Sector, Africa (Sep. 13, 2002), *available at* http://www.icem.org/?&id=25&doc=1000&fullpage=ok.
[194] Global Agreement between AngloGold Ltd. & ICEM on the Promotion and Implementation of Good Human and Industrial Relations in AngloGold Operations Worldwide, § 3, Sep. 13, 2002 [hereinafter AngloGold-ICEM Agreement].
[195] *Id.* at § 5.2.
[196] *Id.* at § 4.1.
[197] Extractive Industries Transparency Initiative [EITI], About EITI, http://www.eitransparency.org/section/abouteiti (last visited Apr. 13, 2007).
[198] EITI Home Page, Participants, http://www.eitransparency.org/ (last visited Apr. 13, 2007).
[199] EITI, *supra* note 197.
[200] *Id.*
[201] EITI, Countries: Democratic Republic of Congo, http://www.eitransparency.org/section/countries/_democraticrepublicofcongo (last visited Apr. 13, 2007).
[202] Anglo American: Corporate Responsibility: International Commitments: Extractive Industries Transparency Initiative, http://www.angloamerican.co.uk/article/?afw_source_key=F5C1CDD7-EA6E-

American, is involved in EITI processes in Ghana, Guinea, and the Democratic Republic of Congo.[203]

iv) The New DRC Mining Code

¶57 The DRC government drafted a new Mining Code in 2003 in conjunction with the World Bank.[204] The Code aims to facilitate privatization and international investment, while reserving artisanal mining for Congolese nationals only.[205]

B. Evaluation of AngloGold Ashanti's Activities in the DRC Compared to the Norms Concerning Corporate Responsibility and Accountability for Human Rights Violations

1. Public International Law Norms and Provisions

i) Voluntary Principles on Security and Human Rights (Voluntary Principles)

¶58 AngloGold Ashanti's actions appear to violate the Risk Assessment Principles of the Voluntary Principles. AGA appears to have failed to consider both the violence in the Ituri area and the deplorable human rights record of the FNI armed group, and neglected to determine the root causes of the local conflict. The initial participants of the Voluntary Principles met to discuss "concerns about whether companies should be operating at all in certain countries with deplorable human rights record [sic]."[206] Therefore, if AGA were truly adhering to the purpose of the Voluntary Principles, they might have made the decision not to begin exploration activities in Ituri. The Voluntary Principles, by incorporating UN instruments that codify international human rights norms, such as the Universal Declaration of Human Rights, subject companies to those norms and treaty obligations.[207] But, to the extent that a company's individual contracts do not reference the Voluntary Principles, which would render them legally binding, the Voluntary Principles may merely be hortatory for that company.[208] AGA has not updated its contract with OKIMO, which dates back to 1998, since it started following the Voluntary Principles in 2005. Further, no mechanism for third-party monitoring of implementation of the Voluntary Principles exists, so this approach is unlikely to be effective.[209]

ii) OECD Guidelines for Multinational Enterprises

¶59 The UN Panel of Experts Report on Illegal Resource Exploitation in the DRC concluded in October 2002 that the activities of Ashanti Goldfields (AG), AGA's predecessor, in the DRC may have violated the OECD Guidelines, and included AG in a list of eighty-five companies which the panel considered in breach of the OECD

48B6-AD03-A780616BD6EE&xsl_menu_parent=/corporateresponsibilty/internationalcommitments/eiti/ (last visited Apr. 13, 2007).

[203] *Id.*

[204] S. African Dev. Cmty. [SADC] Review: DRC Mining Industry, http://www.sadcreview.com/country_profiles/drc/drc_mining.htm (last visited Apr. 13, 2007).

[205] Helene La Roux, *Turning Congo's Mineral 'Curse' into a Rainbow of Hope*, MINING WEEKLY, Sep. 16, 2005.

[206] Cynthia Williams, *Civil Society Initiatives and "Soft Law" in the Oil and Gas Industry*, 36 N.Y.U. J. INT'L. L. & POL. 457, 477 (2004).

[207] *Id.* at 481.

[208] *Id.* at 482.

[209] *Id.* at 483.

Guidelines.[210] This report does not give any indication as to what AG's alleged violations of the Guidelines entail.[211] AG's response included a denial, stating that its record of activities was clean and that it should not have been named as a company in violation of the Guidelines.[212] The UN Panel of Experts later concluded in its October 2003 final report that the issues with Ashanti Goldfields had been resolved and that no further action was needed, though it provided no information as to the context of the resolution.[213] However, the 2003 report also maintained that a company's status as "resolved" should not be seen as invalidating the earlier findings with regard to the activities of the named companies.[214] The UN Security Council asked individual countries to follow up on Panel findings.[215]

¶60 Whether AG's activities directly violated the OECD Guidelines remains unclear. One can argue that dealing with the FNI was an improper foray into the local political situation, and that any dealing with the FNI indirectly and negatively impacted the human rights of local people. However, MNCs are not required to adhere to the OECD Guidelines, and no sanctions apply to a company's failure to adhere.[216] Victims would have to first file a complaint with the appropriate NCP, whose determination on the issue would be final and not subject to appeal.[217] This approach is unlikely to be effective based on the "resolved" status of the previous accusations of the UN Panel of Experts; however, AGA's continued activities in the DRC since the 2003 report raise concerns about violations of the OECD Guidelines.[218]

iii) UN Global Compact

¶61 AGA's activities appear to violate the spirit of the Global Compact, in that AGA's choice to operate in the region has caused it to become indirectly linked to human rights violations. The company has therefore failed to help protect human rights within its sphere of influence, and may even be complicit in abuses. However, since the Global Compact relies more on moral persuasion than on legal norms, as evidenced by the deliberate lack of enforcement mechanisms, this approach is unlikely to be effective.[219] Corporations generally understand that their decision to support the principles of the Global Compact is an "aspirational commitment" that neither legally binds the company nor creates a duty toward third parties.[220]

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[210] Report of the U.N. Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, Annex III, U.N. Doc. S/2002/1146 (Oct. 16, 2002); *see also* All Party Parliamentary Group on the Great Lakes Region [APPG], The OECD Guidelines for Multinational Enterprises and the DRC, 8 (2005).
[211] Hum. Rts. Watch, *supra* note 2, at 121.
[212] Addendum to the Report of the U.N. Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, Response No. 15, U.N. Doc. S/2002/1146/Add.1 (June 20, 2003).
[213] U.N. Panel of Experts Report, *supra* note 44, at Annex I.
[214] *Id.* at ¶ 23.
[215] APPG, *supra* note 210, at 8.
[216] Choudhury, *supra* note 147, at 64.
[217] *Id.*
[218] Hum. Rts. Watch, *supra* note 2, at 76.
[219] Bunn, *supra* note 126, at 1283.
[220] Halina Ward, *The Interface between Globalisation, Corporate Responsibility, and the Legal Profession*, 1 U. ST. THOMAS L.J. 813, 831 (2004).

iv) Global Reporting Initiative (GRI) Guidelines

¶62 The GRI Guidelines are a reporting mechanism, so AGA is unlikely to be in violation of them.

v) UN Norms

¶63 Again, AGA's activities appear to violate the spirit of the UN Norms, in that the company has not done everything in its power to promote human rights within its sphere of activity and influence. However, the implementation mechanism of the UN Norms is weak, lacking specificity as to which international and domestic actors will play a monitoring role.[221] Further, the UN Norms provide no guidance as to procedural and jurisdictional issues, such as which courts may assess damages, how they should do so, and which court's rules apply.[222] Additionally, the UN Norms have no legal standing.[223] While this approach may be ineffective, "the [UN] Norms' legalistic nature and proposed enforcement mechanism result in a vast improvement over other codes of conduct."[224]

2. Extractive Industry Norms

i) ICMM

¶64 While AGA has not used forced labor, which the ICMM principles denigrate, the company did not take action to prevent the use of forced labor by the FNI. Though the extent of the commitment to uphold fundamental human rights may be disputed, AGA arguably violated that commitment by failing to take action to prevent FNI abuses. However, since procedures for compliance with the ICMM Principles are in a pilot phase as of this writing, the ICMM may not be able to hold a member accountable for violating these principles.

ii) ICEM Agreement with AngloGold Limited

¶65 While some unions have put the ICEM Agreement with AngloGold "to the test,"[225] whether the parties have created the sub-committee they pledged to implement in the Agreement is unclear. Nothing in the Agreement explicitly prevents the local community in Ituri from attempting to hold AGA responsible for its activities in the DRC, despite the limitation that the Agreement "apply to operations, wherever situated, over which AngloGold has *direct* managerial control."[226] The local community members would likely have to file a complaint with both the ICEM and with high-ranking AngloGold Ashanti officials to achieve any result.

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[221] Choudhury, *supra* note 147, at 66.
[222] *Id.* at 66-67.
[223] Bunn, *supra* note 167, at 1285.
[224] Choudhury, *supra* note 147, at 67.
[225] GINO GOVENDER, ICEM, GLOBAL MINING, GLOBAL CHALLENGES, GLOBAL UNION ACTION: ICEM 2004 WORLD CONFERENCE FOR THE MINING INDUSTRIES 39 (2004) (describing successful lobbying efforts by two unions to convince the CEO to allow union officials to have access to workers in Tanzania).
[226] AngloGold-ICEM Agreement, *supra* note 194, at § 2 (emphasis added). Essentially, the local Ituri community would argue that AngloGold Ashanti has direct managerial control over its subsidiary, AngloGold Kilo.

iii) EITI

¶66 The EITI merely regulates disclosure by a company, not the company's behavior.[227] Moreover, the process is still being implemented in the DRC, and is thus an ineffective avenue for redress.

iv) The New DRC Mining Code

¶67 Viewed by some as a failure that is "little used and unknown in the country," the new DRC Mining Code "is not evenly applied to new mining partners."[228] Other critics complain that the drafters designed the Code to attract new foreign investors while neglecting to support local industry.[229] Moreover, the codes are hardly applied, especially in the absence of the rule of law.[230] Thus, the new DRC Mining Code does not provide an effective avenue for redress.

C. Analysis of Accountability

¶68 In the end, the true measure of AGA's accountability for its actions may lie in the realm of public opinion.[231] In light of the fact that AGA has decided to subscribe to several international norms, public opinion may be warranted in finding that AGA is disingenuous in its commitment to corporate social responsibility. Perhaps "paying lip-service to the idea of good corporate citizenship" is all AGA ever intended to achieve.[232] After all, AGA claims to commit to these international standards, yet gets involved in situations where it seeks to profit in a conflict zone like the northeast DRC marked by grave human rights abuses.

¶69 However, AGA has made significant improvements to the infrastructure of Mongbwalu. Further, Steve Lenahan fears that if AGA were to pull out of the DRC, his company would be replaced by less reputable gold mining companies who would not care about human rights.[233] Sam Jonah, AngloGold Ashanti's president at the time of the Human Rights Watch report, echoed Mr. Lenahan's fears, warning that those wishing to keep their hands clean by advocating economic removal "may end up with far dirtier hands than [AngloGold Ashanti's]."[234] At the very least, public opinion must determine whether having a reputable gold mining company operate in the northeast DRC is the lesser of two evils.

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[227] Williams, *supra* note 206, at 498.
[228] William Church, *DRC Mining Sector a Disaster*, RWANDA NEW TIMES, Nov. 29, 2005, *available at* http://www.newtimes.co.rw/index.php?option=com_content&task=view&id=2429&Itemid=35.
[229] Fatal Transactions, *supra* note 15, at 9.
[230] *Id.*
[231] Ward, *supra* note 220, at 831.
[232] Clive Crook, A Survey of Corporate Social Responsibility: The Good Company, THE ECONOMIST , at 4 (Jan. 22, 2005).
[233] Interview with Steve Lenahan, *supra* note 1.
[234] Sam Jonah, We'll Stay in the DRC – AngloGold, MININGMX.COM, June 15, 2005, http://www.miningmx.com/commentary/450939.htm.

V. LEGAL APPROACHES TO HOLDING ANGLOGOLD ASHANTI ACCOUNTABLE FOR ITS ALLEGED INVOLVEMENT IN HUMAN RIGHTS ABUSES IN THE DRC

A. Criminal Law Approaches

1. International Criminal Court (ICC)

¶70 The International Criminal Court (ICC) has jurisdiction over the crimes of genocide, crimes against humanity, and war crimes.[235] The ICC can only exercise its jurisdiction if: the state on whose territory the alleged violation took place is a party to the Rome statute; if the person the Court is investigating is a national of a state party to the Rome statute; or if a state that is a non-state party to the Rome statute has accepted the Court's jurisdiction.[236] Since the Court's jurisdiction extends only to natural and not to legal persons,[237] the ICC has no jurisdiction over corporations.[238] The ICC might hold liable corporate officials in leadership positions,[239] whom the corporation might then indemnify.[240]

¶71 The Rome Statute entered into force on July 1, 2002,[241] and the Court only has jurisdiction over crimes committed after the statute's entry into force.[242] The DRC is a state party to the Rome Statute.[243] In July 2003, the Prosecutor of the ICC announced that he would closely follow the situation in the DRC.[244] The Office of the Prosecutor then analyzed the situation in the DRC, with a focus on crimes committed in the Ituri region.[245] On April 19, 2004, the President of the DRC referred to the Prosecutor of the ICC "the situation of crimes within the jurisdiction of the Court allegedly committed anywhere in the territory of the DRC since the entry into force of the Rome statute."[246] The ICC opened an investigation of the DRC on June 23, 2004.[247] The Prosecutor has not brought charges against corporate officials in this case.

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[235] Rome Statute of the International Criminal Court [hereinafter Rome Statute], art. 5, § 1 (1998). The Court will eventually have jurisdiction over the crime of aggression once the ICC defines the crime.
[236] Rome Statute, art. 12, § 2.
[237] Rome Statute, art. 25, § 1.
[238] Choudhury, *supra* note 147, at 58-59.
[239] Rome Statute, art. 25; *see also* Michael Chertoff, *The International Criminal Court Is Even Worse than Its Critics Have Said*, WEEKLY STANDARD, Apr. 12/Apr. 19, 2004, *available at* http://www.weeklystandard.com/Content/Public/Articles/000/000/003/956xhybq.asp (arguing against bringing corporate officials before the ICC).
[240] *See* Stephen Kabel, Comment, *Our Business Is People (Even If It Kills Them): The Contribution of Multinational Enterprises to the Conflict in the Democratic Republic of the Congo*, 12 TUL. J. INT'L. & COMP. L. 461, 483-84 (presenting arguments against prosecuting corporate officials based on shareholders' rights issues).
[241] Rome Statute of the International Criminal Court, http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf (last visited Apr. 13, 2007).
[242] Rome Statute, art. 11, § 1.
[243] Participants to the Rome Statute of the International Criminal Court, http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty11.asp (last visited Apr. 13, 2007). The DRC signed the Rome Statute on September 8, 2000, and ratified it on April 11, 2002.
[244] Press Release, ICC, Prosecutor Receives Referral of the Situation in the Democratic Republic of Congo (Apr. 19, 2004).
[245] Press Release, ICC, *supra* note 86.
[246] Press Release, ICC, *supra* note 244.
[247] Press Release, ICC, *supra* note 86.

¶72 With regard to AngloGold Ashanti, the Prosecutor must determine whether he can bring charges within the jurisdiction of the Court against high level figures within AGA for acts committed in the DRC. The Prosecutor could establish the Court's jurisdiction on a territorial basis since the acts occurred in the DRC, a state party to the Rome Statute. However, the Prosecutor would have a more difficult time deciding that AGA's actions meet the definition of one of the crimes over which the ICC has jurisdiction. First, the Prosecutor would have to allege that the FNI's actions met the definition of one of the crimes under the statute. The Prosecutor could conceivably argue that the FNI's actions meet the definition of genocide, war crimes, and crimes against humanity, though the most likely argument is that the FNI's actions constituted a crime against humanity because the FNI committed murder as part of a widespread attack against a civilian population.[248] Next, the Prosecutor would have to prove that AGA's actions "aid[ed], abet[ted] or otherwise assist[ed]" the FNI in the commission of a crime contemplated by the statute.[249] Alternatively, the Prosecutor would have to show that the high level officials of AGA had sufficient knowledge of both the FNI's intention of committing crimes and of AGA's actions in the DRC.[250] Based on the facts known at this time, the Prosecutor would have difficulty in claiming a sufficient basis to bring charges against high level officials of AGA. The connection between AGA and the FNI is likely too attenuated to meet the standard of aiding and abetting, and the high level officials would likely claim that they neither sanctioned nor had knowledge of AGK's interaction with the FNI.

2. Domestic DRC Criminal Law

¶73 Though the DRC has passed its own anti-corruption law, an "ingrained culture" of corruption that permeated the country under the Mobutu regime persists.[251] "Bribery is still routine," despite its illegal status.[252] Under these domestic conditions, pursuing AngloGold Ashanti in the DRC is unlikely to bear positive results, especially since the DRC state owns a share in the AGK joint venture. However, whether the courts in the DRC would be willing and able to provide a forum for a meaningful prosecution is beyond the scope of this analysis. That conclusion might impact the jurisdiction of the ICC, which, under the complementarity principle, can only exercise jurisdiction if territorial courts are not willing and able to provide a forum for a meaningful prosecution.[253]

3. South African Criminal Law

¶74 The Prevention and Combating of Corrupt Activities Act, signed April 28, 2004, defines the general offence of corruption in South Africa, and includes an act in which any person gives money to any other person in order to act in a manner that amounts to

[248] Rome Statute, arts. 6-8 (explaining the definitions of each crime over which the ICC has jurisdiction).
[249] Rome Statute, art. 25, § 3(c).
[250] Rome Statute, art. 25, § 3(d)(ii).
[251] U.S. Dep't. of State, 2006 Investment Climate Statement, Democratic Republic of Congo, Corruption, http://www.state.gov/e/eb/ifd/2006/64000.htm(last visited Apr. 27, 2006).
[252] *Id.*
[253] Rome Statute, art. 17.

either the abuse of a position of authority or a breach of trust, or the violation of a legal duty or a set of rules.[254] The Act provides extraterritorial jurisdiction over acts of a corporation which allegedly meet the definition of corruption but that occurred outside South Africa, "regardless of whether or not the act constitutes an offence at the place of its commission."[255]

¶75 AGA's actions in relation to the payments to the FNI appear to violate the letter of this law, though the countervailing terms of extortion and AGA's public acknowledgement and explanation of these actions militate against pursuing accountability under this Act. However, other criminal approaches in South Africa may exist.[256]

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[254] The Prevention and Combating of Corrupt Activities Act of 2004 s. 3, *available at* http://www.info.gov.za/gazette/acts/2004/a12-04.pdf [hereinafter Corrupt Activities Act]. This section of the Act reads:

> General offence of corruption
>
> 3. Any person who, directly or indirectly—
>
> (a) accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself of herself or for the benefit of another person; or
>
> (b) gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person,
>
> in order to act, personally or by influencing another person so to act, in a manner—
>
> (ii) that amounts to—
>
> (aa) the abuse of a position of authority;
>
> (bb) a breach of trust; or
>
> (cc) the violation of a legal duty or a set of rules
>
> is guilty of the offence of corruption.

[255] Corrupt Activities Act, s. 35. This section of the Act reads:

> Extraterritorial jurisdiction
>
> 35. (1) Even if the act alleged to constitute an offence under this Act occurred outside the Republic, a court of the Republic shall, regardless of whether or not the act constitutes an offence at the place of its commission, have jurisdiction in respect of that offence if the person to be charged—
>
> (a) is a citizen of the Republic;
>
> (b) is ordinarily arrested in the Republic;
>
> (c) was arrested in the territory of the Republic, or in its territorial waters or on board a ship or aircraft registered or required to be registered in the Republic at the tim the offence was committed;
>
> (d) is a company, incorporated or registered as such under any law, in the Republic; or
>
> (e) any body of persons, corporate or unincorporated, in the Republic.

[256] At the Inaugural Imbizo of the Department of Foreign Affairs on August 23, 2005, when asked what the South African government has done to act on the link between South African mining houses and fighting for power over resources in the DRC, Minister of Foreign Affairs Dr. Nkosazana Dlamini Zuma said the government had taken steps to "consider prosecuting [the] alleged violators." S. Afr. Dep't of Foreign Affairs, Notes on the Address of the Minister of Foreign Affairs, Dr. Nkosazana Dlamini Zuma, at the Inaugural Imbizo of the Department of Foreign Affairs, Jameson Hall, University of Cape Town, Aug. 23, 2005, *available at* http://www.info.gov.za/speeches/2005/05083109151002.htm Perhaps South African government action is forthcoming.

4. United Kingdom Criminal Law

¶76 In 2001, the UK Parliament amended its anti-corruption statutes to include acts of corruption or bribery carried out or conducted "in a country or territory outside the United Kingdom."[257] For acts of bribery and corruption committed outside the UK, the law applies to a UK national or a body incorporated under the law of the UK.[258] Proceedings for the offence may be taken in the UK.[259] The Act defines the offence of corruption as "any common law offence of bribery,"[260] or "the first two offences under section 1 of the Prevention of Corruption Act 1906," which refer to bribes obtained by or given to agents.[261]

¶77 The UK would not be able to prosecute AngloGold Ashanti directly, since the company is not incorporated under the laws of the UK. However, the UK could conceivably prosecute Anglo American, a UK corporation and a significant stakeholder of AGA. The UK would have to prove that Anglo American is responsible for the acts of AGA as Anglo American's subsidiary.[262] Further, the UK would have to prove that the FNI served as AGA's agent, and that AGA's payments to the FNI constituted bribes as defined by the first two offences under section 1 of the Prevention of Corruption Act 1906. A court is unlikely to find that the FNI was AGA's agent, since AGA had no formal contractual relationship and only limited interaction with the FNI.

B. Civil Law Approaches

1. Domestic DRC Civil Law

¶78 A civil lawsuit against AGA in the DRC would encounter many of the same issues as a criminal lawsuit. Again, whether domestic courts in the DRC are willing and able to hear a case against AGA is beyond the scope of this analysis.

2. United Kingdom Civil Law

¶79 The United Kingdom might be an especially valid choice of forum because Anglo American, which has a significant interest in AngloGold Ashanti, is incorporated and based there. Principles of extraterritorial jurisdiction require the defendant corporation to be an English company, or a foreign company that carries on business to a definite extent

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[257] Anti-terrorism, Crime and Security Act, 2001, c. 24, pt. 12, § 108.
[258] *Id.* § 109(1)(a).
[259] *Id.* § 109(2)(b).
[260] *Id.* § 109(3)(a).
[261] *Id.* § 109(3)(c). The first two offences listed under Section 1 of the Prevention of Corruption Act 1906 are: "(1) If any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gift or consideration as an inducement or reward for doing or for bearing to do, or for having after the passing of this Act done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business; or
If any person corruptly gives or agrees to give or offers any gift or consideration to any agent as an inducement or reward for doing or forbearing to do, or for having after the passing of this Act done or forborne to do, any act in relation to this principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business;" Prevention of Corruption Act, 1906, c. 34, § 1.
[262] See discussion *infra* at notes 258-61.

from premises based in England.[263] Therefore, plaintiffs seeking to hold AGA accountable for human rights violations would have to bring a suit against Anglo American, as opposed to AGA, since AGA has no presence in the UK.

¶80 Few cases in the international human rights context have addressed the extent of liability of a parent corporation for the acts of its subsidiary.[264] A plaintiff must convince the court to pierce the corporate veil that shields the parent company as a corporate shareholder from liability for the acts of its subsidiary.[265] While no set standard exists to guide the decision, courts will look to factors including undercapitalization of the subsidiary, failure to observe corporate formalities, or a high level of control over the subsidiary so that the subsidiary is essentially the parent company's alter ego.[266] Plaintiffs bringing transnational human rights tort claims face a significant challenge in convincing a court to pierce the corporate veil.[267] Plaintiffs bringing a suit to hold Anglo American liable for AGA's acts in the DRC must convince the court that Anglo American's interest in AGA amounted to sufficient control over AGA's activities. Alternatively, plaintiffs may seek to hold Anglo American liable for the acts of AGA under agency principles, though the court would have to find that Anglo American exercised a significant amount of control over AGA.[268]

¶81 Plaintiffs in the UK can bring a civil claim under customary international law, which is part of English common law.[269] That claim must show state action unless it involves a violation of a *jus cogens* norm.[270]

¶82 However, plaintiffs face several concerns when bringing a suit in the UK. In the UK, the losing party pays for the costs of litigation, which may pose a strategic limit to the type of case that a plaintiff may bring.[271] Additionally, the UK grants extensive sovereign immunity that may attach to state agents.[272]

¶83 Most of these considerations militate against bringing a suit in the UK against AA seeking to hold that company accountable for the acts of AGA in the DRC.

3. United States Civil Law

i) Jurisdictional Hurdles

¶84 The United States has played host to the large majority of transnational human rights cases against corporations.[273] Plaintiffs bringing civil suits against corporations under any statute in the United States face several preliminary hurdles on jurisdictional

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[263] JOSEPH, *supra* note 5, at 113.
[264] *Id.* at 129.
[265] *Id.* at 130.
[266] *Id.*
[267] *See id.* at 131-32 ("Empirical studies have found that courts in the US, England, and Australia were *less* likely to pierce the veil to expose corporate shareholders in a corporate group, as opposed to individual shareholders. … [C]ourts are less willing to pierce the veil in tort cases than in non-tort cases") (emphasis in original).
[268] *Id.* at 132-33.
[269] *Id.* at 115.
[270] *Id.*
[271] *Id.* at 120.
[272] *Id.* at 121.
[273] *Id.* at 113.

and procedural grounds which courts may use to dismiss suits.[274] First, courts must establish personal jurisdiction over the defendant corporation. A court can establish personal jurisdiction when the defendant has "certain minimum contacts with [a forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[275]

¶85 A US court should have little difficulty exercising personal jurisdiction over AngloGold Ashanti. First, AGA has operations in the US, for which it can reasonably expect to be haled into US courts. A court will likely find that such a presence in the US constitutes at least "minimum contacts." Second, AGA is listed on the New York Stock Exchange,[276] and its investor relations office in New York subjects AGA to New York jurisdiction.[277]

¶86 Another jurisdictional hurdle plaintiffs bringing a suit in the US face is the doctrine of forum non conveniens, which allows US courts to dismiss a case if the court decides that an alternative forum in another jurisdiction or country would best serve the public and private interests at stake.[278] Courts give deference to the plaintiff's choice of forum, though resident plaintiffs receive greater deference than non-resident plaintiffs.[279] Courts then apply a two-step test.[280] First, the court will determine whether an adequate alternative forum is available.[281] Alternative fora often include the state where the alleged abuses occurred or the state of the alien defendant's place of incorporation.[282] However, the issue of adequacy becomes paramount in transnational human rights cases, since governments of foreign fora are often implicated in such suits, raising concerns about corruption in the administration of justice.[283] Second, the court weighs the public and private interests to determine the most convenient forum.[284]

¶87 Plaintiffs bringing a suit against AGA should argue that adjudication in the DRC is subject to corruption. As for the alternative forum of South Africa, plaintiffs should argue that the court should defer to the plaintiff's desire to litigate in the US; that traveling to either the US or South Africa is equally inconvenient to the plaintiffs; that the costs to AGA of litigating in the US as opposed to South Africa are not "excessively burdensome" in light of AGA's vast resources;[285] and that AGA should not be surprised by being haled into US courts based on the existence of company operations in the US. Plaintiffs should argue that the US interest in providing a forum for the enforcement of international human rights norms,[286] especially in the DRC,[287] outweighs any other public interest, such as flooding the courts.[288]

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[274] *Id.* at 83.
[275] International Shoe Co. v. Wash., 326 U.S. 310, 316 (1945).
[276] ANGLOGOLD ASHANTI, *supra* note 3, at Scope of the Report.
[277] JOSEPH, *supra* note 5, at 87.
[278] Sandra Coliver, Jennie Green, & Paul Hoffman, *Holding Human Rights Violators Accountable by Using International Law in U.S. Courts: Advocacy Efforts and Complementary Strategies*, 19 EMORY INT'L. L. REV. 169, 218 (2005).
[279] JOSEPH, *supra* note 5, at 88.
[280] *Id.*
[281] *Id.*
[282] *Id.* at 89.
[283] *Id.* at 90.
[284] *Id.* at 88.
[285] Wiwa v. Royal Dutch Petroleum, 226 F.3d 88, 107 (2d Cir. 2000).
[286] *Id.* at 103.

¶88 When plaintiffs bring a suit in the US alleging some form of state action, they face additional jurisdictional hurdles related to foreign policy. Some of these hurdles include: the act of state doctrine, in which a US court may dismiss a suit when it must adjudicate claims related to the official acts of a foreign state;[289] the political question doctrine, in which a US court may dismiss a suit involving a non-justiciable political question;[290] and the international comity doctrine, in which a US court may dismiss a suit if it determines that exercising jurisdiction would be unreasonable based on the interests of a foreign state affected by the litigation.[291] These hurdles will likely play a diminished role in a suit against AngloGold Ashanti, especially since the US State Department has found that "serious human rights problems remain in the security services and justice system" in the DRC.[292]

ii) Alien Tort Claims Act

a) Current Status

¶89 An increasing number of plaintiffs have attempted to use the Alien Tort Claims Act (ATCA) to hold multinational corporations liable for human rights abuses committed outside the United States.[293] Though no plaintiffs have been successful against corporations in court,[294] the specter of continuing litigation may cause some suits to settle out of court.[295] The ATCA grants "[t]he district courts … 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."[296] The majority of claims against corporations seek indirect liability based on the corporation's link to a third party that committed the abuses.[297]

¶90 Jurisdictional Requirements: Courts have interpreted the ATCA to impose certain jurisdictional requirements that a plaintiff must meet in bringing a suit. One such requirement, stated directly in the statute, is that the plaintiff be an alien of the US.[298] Another requirement is that the tort complained of be in violation of customary international law norms, which is the modern term for "the law of nations."[299] Customary international laws arise from the "general and consistent practice of states [state practice] followed by them from a sense of legal obligation [*opinio juris*]."[300] They are binding on

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[287] Democratic Republic of Congo Relief, Security and Democracy Promotion Act of 2005, S. 2125, 109th Cong. (2005) ("It is the policy of the United States . . . [to] hold accountable individuals, entities, and countries working to destabilize the country").
[288] JOSEPH, *supra* note 5, at 92.
[289] *Id.* at 40.
[290] *Id.* at 44.
[291] *Id.* at 46-47.
[292] U.S. Dep't of State, *supra* note 21.
[293] David D. Christensen, Comment, *Corporate Liability for Overseas Human Rights Abuses: The Alien Tort Statute after* Sosa v. Alvarez-Machain, 62 WASH. & LEE L. REV. 1219, 1221 (2005).
[294] *Id.*
[295] *Id.* at 1258 (noting that the *Unocal* case [Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002)] settled out of court awaiting en banc rehearing by the Ninth Circuit Court of Appeals.)
[296] 28 U.S.C. § 1350 (2000).
[297] Coliver, et al., *supra* note 278, at 212 (2005).
[298] 28 U.S.C. § 1350 ("[t]he district courts shall have original jurisdiction of any civil action by an *alien*") (emphasis added).
[299] Christensen, *supra* note 293, at 1224.
[300] JOSEPH, *supra* note 5, at 23.

all states except for those which have persistently objected to their application.[301] Included within customary international law are *jus cogens* norms, which are binding on all states and are non-derogable in all circumstances.[302]

¶91 Challenges to Plaintiffs: Plaintiffs seeking to hold corporations liable under the ATCA face several challenges. First, they must convince the court that the norms that the defendant corporation violated are actionable. The Supreme Court addressed the limitations of actionable norms under the ATCA in its decision in *Sosa v. Alvarez-Machain*.[303] Though the ATCA is "only jurisdictional,"[304] federal courts may recognize causes of action based on violations of a "narrow class of international norms"[305] with at least the same level of "definite content and acceptance among civilized nations" as those recognized when Congress first enacted the ATCA in 1789.[306] This decision may influence courts to curtail their willingness to classify alleged violations as breaches of the law of nations.[307]

¶92 Plaintiffs must also determine whether they need to show state action. The requirement of state action reflects the reality that "[m]ost customary human rights norms apply only in the context of governmental action."[308] Only some human rights violations, namely genocide, certain war crimes, piracy, slavery, forced labor, and aircraft hijacking, are prohibited by the law of nations without state action.[309] To meet the state action requirement, plaintiffs in ATCA suits against corporations have attempted to show joint responsibility of the corporation and the state.[310] Many US courts make this state action determination in a manner similar to that used in domestic civil rights cases brought under 42 U.S.C. §1983 that seek to establish private liability under the color of law.[311]

¶93 Finally, plaintiffs must define the standard of liability. After *Sosa*, the source of this standard, whether international or domestic, remains unclear.

¶94 International Standard – Aiding and Abetting: One commentator has noted that while the *Sosa* Court did not decide the issue of standard of liability,[312] its requirement of narrowly defining actionable international norms suggests that the standard of liability should also come from the federal common law, while leaving open the possibility that this standard may derive from the law of nations.[313] However, the defendant in *Sosa* was not a corporation. Since *Sosa* does not foreclose the idea that corporations are indeed legitimate defendants in ATCA cases,[314] other ATCA cases involving corporations may yet provide guidance.

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[301] *Id.*
[302] *Id.*
[303] Christensen, *supra* note 293, at 1222.
[304] *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004).
[305] *Id.*
[306] *Id.* at 732.
[307] JOSEPH, *supra* note 5, add. (2004) (Conclusion), *available at* http://www.hartpub.co.uk/Updates/sjupdates.html.
[308] JOSEPH, *supra* note 5, at 33.
[309] *Id.* at 48.
[310] *Id.* at 33.
[311] *Id.* at 33, 37; Christensen, *supra* note 293, at 1242.
[312] Christensen, *supra* note 293, at 1257.
[313] *Id.* at 1259-60.
[314] *Id.* at 1240.

¶95 One of the leading ATCA cases involving a corporation is *Doe I v. Unocal Corp.*, in which a federal court applied an international criminal aiding and abetting standard to determine Unocal's liability for its role in human rights abuses committed by the Myanmar military, which Unocal knew provided security for its natural gas pipeline project.[315] The court derived this aiding and abetting standard from international criminal tribunals, rather than from domestic § 1983 standards to determine private actor liability.[316] The court announced that a corporation could be held liable for providing "knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime."[317] One commentator counsels against applying the aiding and abetting standard since it is not well-established in federal common law, and would be an expansive interpretation of the ATCA in the face of *Sosa*'s requirement of a narrow one.[318] Post-*Sosa* courts must decide whether the international aiding and abetting standard applies in ATCA litigation.[319]

¶96 Domestic Standards – Common Law Tort Principles: Courts may, and perhaps should, apply common law tort principles in determining the standard of liability of corporations in ATCA suits.[320] Examples of these principles include agency, joint venture liability, reckless disregard, action in concert, and directing the conduct of another.[321]

b) Applying ATCA to AngloGold Ashanti

¶97 In this case, Congolese victims of human rights abuses in the Ituri District would have to initiate the ATCA suit in the US against AngloGold Ashanti. They would also have to claim that AGA violated an actionable norm of international law. Even limiting actionable norms to *jus cogens* violations,[322] plaintiffs pleading forced labor should be successful on this front, especially since the Ninth Circuit Court of Appeals in *Unocal* classified forced labor as a *jus cogens* violation.[323] Plaintiffs need not show state action for *jus cogens* violations. However, for violations not included within *jus cogens*, plaintiffs would have to show state action. One test used in domestic cases is the nexus test, which requires such a connection between the private actor and the state that one may treat the action of one as the action of the other.[324] In this case, the relationship between AngloGold Ashanti and the DRC government appears to meet the nexus test based on the joint venture status of AngloGold Kilo.

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[315] Doe I v. Unocal Corp., 395 F.3d 932, 947 (9th Cir. 2002), *reh'g granted* Doe I v. Unocal Corp., 395 F.3d 978 (9th Cir. 2003); *Id.* at 1260.
[316] JOSEPH, *supra* note 5, at 48-49.
[317] *Unocal Corp.*, 395 F.3d at 947; Coliver, et al., *supra* note 278, at 215; JOSEPH, *supra* note 5, at 49.
[318] Christensen, *supra* note 293, at 1264-65.
[319] *See* Presbyterian Church of Sudan v. Talisman Energy, Inc., 374 F. Supp. 2d 331, 340-41 (S.D.N.Y 2005) (accepting the aiding and abetting standard of "secondary liability" for a cause of action under the ATCA); *contra* In re South African Apartheid Litigation, 346 F. Supp. 2d 538, 550 (S.D.N.Y. 2004) (finding that "the ATCA presently does not provide for aider and abettor liability," and refusing to "write it into the statute").
[320] Christensen, *supra* note 293, at 1265.
[321] *Id.* at 1266-68.
[322] *Id.* at 1249 ("the jus cogens test narrows the debate [over actionable norms] to the most universal norms").
[323] Doe I v. Unocal Corp., 395 F.3d 932, 948 (9th Cir. 2002) *reh'g granted* Doe I v. Unocal Corp., 395 F.3d 978 (9th Cir. 2003).
[324] JOSEPH, *supra* note 5, at 34.

¶98 However, one problem is that the FNI, not AngloGold Ashanti or the DRC state, committed the alleged human rights abuses. Plaintiffs can make several arguments to attempt to overcome this hurdle. First, they can claim that the DRC state and the FNI are essentially the same, in that the state's failure to protect citizens against FNI abuses implicates the state in those abuses. However, AGA may yet escape liability because joint venture partners are only liable for acts within the scope of the joint venture,[325] and human rights abuses are outside that scope. Additionally, plaintiffs may claim that AGA is linked to the FNI based on the specific incidents of interaction between the two organizations. However, this link is likely too attenuated to withstand a motion to dismiss.

iii) Torture Victims Protection Act

a) Current Status

¶99 The Torture Victims Protection Act of 1991 (TVPA) provides a cause of action to US citizens or aliens for acts of torture or extra-judicial killings committed by individuals "under actual or apparent authority, or color of law, of any foreign nation."[326] Case law appears to support the notion that corporations as legal individuals are legitimate defendants in TVPA suits,[327] and the legislative history does not mention an exemption for corporations from suits.[328] The statute imposes a ten year statute of limitations,[329] and requires plaintiffs to "exhaust adequate and available remedies in the place in which the conduct giving rise to the claim occurred."[330] Case law suggests that plaintiffs can plead that exhausting local remedies would be futile or dangerous, and some courts have placed the burden of proof on the defendant corporation to show that plaintiffs have failed to exhaust remedies.[331]

b) Applying TVPA to AngloGold Ashanti

¶100 While plaintiffs may be Congolese or American when bringing a suit under the TVPA against AngloGold Ashanti for torture or extra-judicial killing in the DRC, they must show state action. Plaintiffs would have to bring the suit by 2014, and they should have little difficulty showing that exhausting local remedies would be futile or even dangerous. However, as with the ATCA claim, the plaintiffs face a challenge in proving state action.

iv) Racketeer Influenced and Corrupt Organizations Act ("RICO")

a) Current Status

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[325] Christensen, *supra* note 293, at 1267.
[326] Torture Victims Protection Act of 1991, 28 U.S.C. § 1350 historical and statutory notes § 2(a) (2000) [hereinafter TVPA]; JOSEPH, *supra* note 5, at 61.
[327] JOSEPH, *supra* note 5, at 61.
[328] Christensen, *supra* note 293, at 1238.
[329] JOSEPH, *supra* note 5, at 62.
[330] TVPA, *supra* note 326; JOSEPH, *supra* note 5, at 62.
[331] JOSEPH, *supra* note 5, at 62-63.

¶101 Plaintiffs have claimed relief in several transnational human rights cases under the Racketeer Influenced and Corrupt Organizations (RICO) statute.[332] The RICO statute provides a civil remedy to a person injured by an organization that commits or threatens racketeering activity, including murder, kidnapping, robbery, and extortion, more than once and in a way that affects interstate commerce.[333] A defendant found liable under RICO may have to pay triple damages and the plaintiff's legal costs.[334] Courts will only exercise RICO jurisdiction over acts outside the US if the claim passes either an effects test, in which the acts have substantial effects within the US, or a conduct test, in which conduct within the US caused damages outside the US.[335]

b) Applying RICO to AngloGold Ashanti

¶102 A claim against AGA would fail both the effects test and the conduct test. Plaintiffs would have difficulty showing that AGA's acts in the DRC had sufficient effects in the US, especially since AGA's activities in the DRC were relegated to exploration and not commercial production.[336] Plaintiffs would similarly be unable to show that AGA's conduct in the US was related to damages in the DRC.[337]

v) Transitory Tort Litigation

¶103 US state courts may extend jurisdiction over transitory torts, defined as torts for which "the tortfeasor's wrongful acts create an obligation which follows him across national boundaries."[338] Additionally, US federal courts have jurisdiction to hear diversity suits between aliens and US citizens, including corporations, if the claim exceeds $75,000.[339] Pursuing litigation based on a transitory tort theory may be especially helpful when customary international law will not recognize corporate liability without state action.[340] Plaintiffs bringing a transitory tort suit against AngloGold Ashanti face an uphill battle, since AGA is not directly responsible for human rights abuses in the DRC. Plaintiffs would first have to show that AGA was vicariously liable for the acts of the FNI, or that AGA acted in concert with the FNI.[341] Then, plaintiffs would have to show that AGA's conduct either recklessly caused them harm or negligently caused them foreseeable harm.[342]

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[332] *Id*. at 78.
[333] *See* 18 U.S.C. § 1961-62, 1964 (2002); JOSEPH, *supra* note 5, at 78-79; Coliver, et al., *supra* note 278, at 219.
[334] *Id.* § 1964(c).
[335] JOSEPH, *supra* note 5, at 79.
[336] *See* Wiwa v. Royal Dutch Petroleum Co., 2002 U.S. Dist. LEXIS 3293, at *70-71 (S.D.N.Y. Feb. 22, 2002) (a relevant effect for purposes of the RICO effects test is that defendant corporation exported to the US forty percent of oil extracted from the location of the human rights abuses).
[337] *See* Doe I v. Unocal Corp., 395 F.3d 932, 961 (9th Cir. 2002), *reh'g granted* Doe I v. Unocal Corp., 395 F.3d 978 (9th Cir. 2003) (defendant's transfer of money from US to location of alleged human rights abuses not sufficient to satisfy RICO conduct test).
[338] Choudhury, *supra* note 147, at 50 (quoting Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction Over International Human Rights Claims: The Alien Tort Claims Act after* Filartiga v. Pena-Irala, 22 HARV. INT'L. L.J. 53, 63 (1981)).
[339] JOSEPH, *supra* note 5, at 65-66.
[340] *Id*. at 66.
[341] *Id.* at 67.
[342] *Id*.

4. Remedies: Precedents for Reparations

i) Corporate Precedents

¶104 Though most cases seeking to hold corporate actors accountable for transnational human rights abuses have not been successful, several cases suggest precedents for reparations. In *Aguinda v. Texaco*, Ecuadorian and Peruvian citizens brought an ATCA claim seeking recovery for damages caused by Texaco's alleged pollution of rainforests and rivers in Ecuador and Peru.[343] Though the Second Circuit Court of Appeals affirmed the district court's dismissal of the suit on forum non conveniens grounds since Ecuador provided an adequate alternative forum,[344] reports about the decision claim that the judge "promised to oversee enforcement of the Ecuadorian court's ruling."[345] Additionally, as part of the March 21, 2005, *Unocal* settlement, Unocal agreed to direct compensation of victims and the provision of funds to develop programs to improve living conditions, health care, and education.[346]

ii) State Precedents

¶105 The victims of human rights abuses might choose an alternative strategy of implicating the DRC state for its failure to protect them from such abuses. This approach might be a substitute for seeking to hold AngloGold Ashanti directly accountable.

¶106 In 1988, the Inter-American Court of Human Rights (IACHR), in the Velásquez Rodríguez Case, in which the complainants sought to hold the state of Honduras accountable for the disappearance of Angel Manfredo Velásquez Rodríguez, declared that "[t]he State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, impose the appropriate punishment and ensure the victim adequate compensation."[347] More recently, the IACHR ordered the state of Guatemala to pay reparations in the form of compensation for pecuniary and non-pecuniary damages for its responsibility in connection with the extra-legal execution of Myrna Mack Chang and the subsequent cover-up of the execution.[348] In a case that may have repercussions for mining companies seeking to operate in indigenous communities, the IACHR required the state of Nicaragua to pay reparations for immaterial damages for its role in granting a logging concession on the land of an indigenous community without the community's assent.[349] Referenda in Peru and Argentina subsequent to the Nicaragua decision rejected the proposal of Canadian companies to operate commercial mines based on environmental

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[343] 303 F.3d 470, 473 (2d Cir. 2002).
[344] *Id.* at 480.
[345] Mike Ceasar, *Indigenous Lawsuit Targets Texaco*, MIAMI HERALD (Apr. 19, 2006). However, a thorough reading of the case provides no evidence of the judge's promise to enforce an Ecuadorian ruling. *See Aguinda*, 303 F.3d 470.
[346] News Release, Unocal News Release Archive, Settlement Reached in Yadana Pipeline Lawsuit, Mar. 21, 2005, http://www.unocal.com/uclnews/2005news/032105.htm; Rachel Chambers, *The* Unocal *Settlement: Implications for the Developing Law on Corporate Complicity in Human Rights Abuses*, 13 HUM. RTS. BRIEF 14, 14 (2005).
[347] Case of Velásquez Rodríguez v. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 4, at ¶ 174 (Jul. 29, 1988).
[348] Case of Myrna Mack-Chang v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 101, at ¶ 301, sub-¶¶ 5, 8, 13, 14 (Nov. 25, 2003).
[349] Case of the Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Inter-Am. Ct.H.R. (ser. C) No. 79, at ¶ 173, sub-¶ 6 (Aug. 31, 2001).

concerns.[350] These precedents suggest that Congolese victims of human rights abuses may be able to obtain reparations from the DRC state if they prove the DRC state failed to protect them.

¶107 In 2005, the UN Commission on Human Rights approved The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles and Guidelines), which "describe [UN member states'] obligations in cases of gross violations of international human rights law."[351] The Principles and Guidelines obligate states to provide victims with "[e]qual and effective access to justice," and to make available to the victims "[a]dequate, effective and prompt reparation."[352]

¶108 Plaintiffs should argue that they are entitled to reparations for any judgment against AGA, based on the precedents in corporate suits. Additionally, if plaintiffs seek to hold the DRC state accountable for failing to protect them from human rights abuses, they should rely on the IACHR precedents and the Basic Principles and Guidelines. Plaintiffs may have to determine how to trace AngloGold Ashanti's illicit gains for disgorgement, which is beyond the scope of this analysis.

VI. ALTERNATIVE MANNERS OF HOLDING CORPORATIONS ACCOUNTABLE FOR THEIR INVOLVEMENT IN HUMAN RIGHTS ABUSES

¶109 This section presents alternative approaches that the international community may take to ensure corporate actors like AngloGold Ashanti do not become involved in human rights abuses in conflict areas like the northeast DRC. These approaches require additional research.

A. UN Security Council Involvement

¶110 The UN Security Council arguably has power to effect change by banning the mining of gold in conflict zones such as the Ituri District of the DRC since it has "the authority to intervene, even in internal armed conflicts, to prevent further humanitarian crises."[353] Such an action would be similar to the Security Council's call for a ban on the import of rough diamonds from Sierra Leone.[354]

¶111 Yet this solution, which will effectively mean that corporations from developed countries could not do business in the conflict zone, has the unintended effect of eliminating the benevolent, community-building acts that some corporations perform, and

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[350] Christine R. Thompson, *A Multifaceted Approach to the Regulation of Cyanide in Gold Mining Operations*, 29 SUFFOLK TRANSNAT'L. L. REV. 79, 99 (2005).
[351] International Law in Brief, Declarations, Resolutions and Other Documents, http://www.asil.org/ilib/2005/05/ilib050525.htm#r1 (last visited Apr. 13, 2007).
[352] U.N. Office of the High Comm'r for Hum. Rts., *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, Human Rights Resolution 2005/35.
[353] Kyle Rex Jacobson, Comment, *Doing Business with the Devil: The Challenges of Prosecuting Corporate Officials Whose Business Transactions Facilitate War Crimes and Crimes against Humanity*, 56 A.F. L. REV. 167, 222.
[354] *Id*. at 224.

of allowing less reputable companies which aren't concerned with human rights to enter the area.

B. Permanent UN Body to Monitor the Role of Business in Conflict Areas

¶112 The UN Panel of Experts received criticism for its approach to investigating companies charged with violations of the OECD Guidelines for their operations in the DRC.[355] However, that panel faced political pressures since it received its mandate from interested states, and was composed of non-permanent staff members.[356] A more permanent UN body could fare better at monitoring the role of business in conflict zones. A permanent body would be able to develop constructive relationships with those charged with investigating alleged violations of international norms, such as the NCPs under the OECD Guidelines, and its procedures would be more transparent than those of an ad hoc panel.[357]

C. Adapting the Kimberley Process for Conflict Diamonds

¶113 The Kimberley Process, an initiative supported jointly by governments, the international diamond industry, and civil society organizations with the aim of stopping the flow of conflict diamonds, implemented the voluntary Certification Scheme that requires participants to certify that conflict diamonds are not included in rough diamond shipments.[358] The initiative includes participants that account for about 99.8% of the global production of rough diamonds.[359] While the success of the initiative continues to be a source of debate,[360] Bridgette Radebe, president of the South African Mining Development Association (SAMDA), has suggested that "the Kimberley Process to ensure diamonds are not fuelling conflict in Africa should be replicated to cover the whole mining sector and broadened to cover other areas like environmental destruction and corruption."[361] Adapting the Kimberley Process to the gold mining industry could serve as an important step in ensuring that gold does not come from conflict areas marked by human rights atrocities.

D. Local Organization

¶114 A "special gold monitoring body" involving all relevant actors, including representatives of international mining corporations, the DRC state, and civil society organizations, could monitor compliance with human rights standards, and seek to provide compensation for victims of human rights abuses related to gold mining.[362]

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[355] APPG, *supra* note 210, at 20.
[356] *Id.*
[357] *Id.*
[358] The Kimberley Process Home Page, http://www.kimberleyprocess.com/site/index.html (last visited Apr. 13, 2007).
[359] *Id.*
[360] *See* Annie Wallis, Comment, *Data Mining: Lessons from the Kimberley Process for the United Nations' Development of Human Rights Norms for Transnational Corporations*, 4 NW. U. J. INT'L. HUM. RTS. 388, *27-61 (analyzing the positive attributes and perceived flaws of the Kimberley Process).
[361] Eric Onstad, *S. Africans Want Wider Ethical Code for Mining*, THE MINING NEWS (Sep. 20, 2005), *available at* http://www.theminingnews.org/news.cfm?newsID=1370.
[362] Hum. Rts. Watch, *supra* note 2, at 6.

E. Strict Conditions on Foreign Aid to the DRC

¶115 The international community may impose strict conditions for the disbursement of aid to the DRC.[363] These strict conditions should include provisions that require the DRC state to regulate corporate activities to ensure corporations do not become involved, directly or indirectly, in human rights abuses.

F. Guidelines for Operating in Conflict Zones

¶116 In its recently published manual entitled Conflict-Sensitive Business Practice: Guidance for Extractive Industries, International Alert, an NGO focused on peacebuilding, provides a set of tools for companies to improve their impact on host countries and minimize conflict risk.[364] The manual provides background information about and strategies for addressing a variety of issues companies face in conflict zones, including dealing with armed groups and human rights. The manual advises companies to perform due diligence assessments of the local human rights situation,[365] and provides analysis of the risks and rewards of engaging armed groups.[366] Multinational companies choosing to operate in conflict zones should at the very least follow these guidelines.

G. Home Government Action

¶117 Home governments can play a more proactive role in policing companies operating outside of the home country's borders. Home countries can effectively enforce existing laws or pass new laws to hold companies accountable for their complicity in human rights abuses in host countries. Stricter enforcement of home country laws would likely cause companies to more seriously consider the implications of their decision to operate in areas where human rights abuses are occurring.

VII. CONCLUSION

¶118 AngloGold Ashanti is one of the biggest gold-mining companies in the world. Based on its wealth, it has power to influence human rights on the African continent, and more specifically, in the Democratic Republic of the Congo. The company continues to engage in gold-mining exploration activities in a region that faces instability.[367]

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[363] François Grignon, *International Response to the Illegal Exploitation of Resources in the DRC, in* CHALLENGES OF PEACE IMPLEMENTATION: THE UN MISSION IN THE DEMOCRATIC REPUBLIC OF THE CONGO 43, 51 (Mark Malan & João Gomes Porto eds., 2004).

[364] International Alert: Publications: Business: Multinationals: Conflict-Sensitive Business Practice: Guidance for Extractive Industries, http://www.international-alert.org/publications/234.php (last visited Apr. 13, 2007).

[365] International Alert, *Conflict-Sensitive Business Practice: Guidance for Extractive Industries*, Section 4, Flashpoint Issue 8: Human Rights at 6.

[366] *Id. at* Section 4, Flashpoint Issue 6: Dealing with Armed Groups at 2-3.

[367] *See* Nina Yacoubian, *W. Swing: We Are in the Process of Putting Another Plan in Place for Ituri*, MONUC.ORG, Mar. 22, 2007, http://www.monuc.org/News.aspx?newsId=14149. Steve Lenahan, AngloGold Ashanti's Executive Officer for Corporate Affairs, sees hope in that, since April 2005, "[a] democratically elected government and cabinet is in place, the institutions of national, regional and local government, while not complete, are being constructed, an integrated . . . army has been established under the close scrutiny of MONUC and, very importantly, AngloGold Ashanti has been working with local communities, politicians, institutions of civil society and NGOs (including our most vocal critics) to

However, no effective international or domestic approach currently exists to hold the company accountable for that decision, which has indirectly caused the company to be associated with human rights abuses.

¶119 The international community should address this problem and engage in serious discussions to develop an approach to ensuring that corporate actors do not become embroiled in human rights violations. Only then can the northeast DRC, and other similarly situated areas, turn its natural resource "curse" into a blessing.[368]

promote a sustainable change in the quality of community life in the region." E-mail Letter from Steve Lenahan, Executive Officer for Corporate Affairs, AngloGold Ashanti, to Brandon Prosansky, Author and Candidate for Juris Doctor, Northwestern University School of Law (Mar. 1, 2007) (on file with author).

[368] Press Release, Global Witness, Recent Legislation Introduced in Senate on DRC (Dec. 19, 2005), *available at* http://www.globalwitness.org/press_releases/display2.php?id=326.