

## Disentangling Conflict and Minerals: How NGOs and Lawmakers Ought to Rebrand Their Flawed Narrative of Eastern Congo

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*The “conflict minerals” provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 requires publicly traded companies in the United States to disclose whether certain minerals used in their products have been sourced from mines in eastern Congo operated by rebel groups who perpetrate violence. The legislation, championed by NGOs, was intended to bring peace to the region—the epicenter of the deadliest conflict since World War II—but after more than a decade of regulation, little has changed. Conflict smolders on and economic growth remains stagnant. This is because the underlying premise of the regulation—that there is an inextricable link between conflict in eastern Congo and the trade of certain minerals—is flawed. Recent studies show that conflict in the region is complex and fueled by much more than the trade of minerals, and that the region’s mining communities have suffered economically since the introduction of such regulations. What’s more, further evidence shows a mounting humanitarian and environmental crisis involving the extraction of cobalt and other minerals in central Africa that fall outside the narrow definition of “conflict minerals.” This Note explores these data to challenge the existing narrative of conflict minerals in eastern Congo while offering a new framework for the regulation of mineral extraction in central Africa moving forward—one that disentangles the issues of conflict and minerals to focus on economic growth and environmental protection.*

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## I. INTRODUCTION

The fight for regulation of so-called conflict minerals coming out of eastern Congo marks one of the most successful campaigns in the history of humanitarian activism. It began in the mid-2000s with a simple and convincing narrative championed by a network of non-governmental organizations (NGOs): Conflict in eastern Congo—the epicenter of the deadliest conflict since World War II—is perpetrated by armed rebel groups. These groups fund their rampage through the illicit sale of minerals. Large multinational corporations purchase minerals for their products from these illicit sources, putting money in the pockets of rebels. By forbidding said corporations from purchasing from said sources, rebel groups will lose funding and be choked out. Without any rebel groups, conflict in the Congo will die out, bringing peace to the region.<sup>1</sup>

Lawmakers quickly latched on to the narrative, and the conflict minerals campaign soon culminated in legislation around the world obliging corporate compliance—the jackpot of humanitarian activism. Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (hereinafter “section 1502”) requires publicly traded companies in the U.S. to disclose whether “conflict minerals”—tantalum, tin, tungsten, and gold (3TG)—used in their products have been sourced from mines in the Congo operated by rebel groups.<sup>2</sup> The European Union (EU) has adopted similar legislation,<sup>3</sup> the United Nations (UN) has adopted resolutions on the matter,<sup>4</sup> even China has implemented due diligence guidelines for responsible mineral supply chains.<sup>5</sup>

Despite this ostensive success, however, the conflict minerals campaign has also proven to be utterly futile. Nearly ten years since section 1502 became law, virtually nothing has changed in the daily lives of those living in eastern Congo. In fact, there is mounting evidence that the situation has become worse. In general, violence is up, and the economy is down. This is because the conflict minerals narrative is flawed. The most recent data show that there is no systematic relationship between conflict and minerals—the underlying assumption in the conflict minerals narrative. While it’s true that

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1 See, e.g., *Opinion: Electronics Companies and Consumers can Help Stop Congolese Bloodshed*, THE MERCURY NEWS (July 28, 2009), <https://www.mercurynews.com/2009/07/28/opinion-electronics-companies-and-consumers-can-help-stop-congolese-bloodshed/>.

2 Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C. § 78 (2012).

3 2017 O.J. (L 130/1).

4 S.C. Res. 1857 ¶ 15 (2008) (calling on member states to “take measures, as they deem appropriate, to ensure that importers, processing industries and consumers of Congolese mineral products under their jurisdiction exercise due diligence on their suppliers and on the origin of the minerals they purchase.”).

5 [*Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains*] (promulgated by China Chamber Comm. Metals, Min. & Chem. Imp. & Exp., 2015), <https://mneguidelines.oecd.org/chinese-due-diligence-guidelines-for-responsible-mineral-supply-chains.htm>.

some of the conflict perpetrators have turned to the illicit sale of minerals for funding, this resource is only exploited by select few rebel groups and can be easily replaced with other illicit sources of funding. Thus, the conflict rages on despite conflict minerals regulation. Nevertheless, NGOs, lawmakers, and even some corporations remain bent on forwarding the conflict minerals narrative, pushing the rest of the world, essentially, to adopt legislation similar to section 1502.

Many have noted these flaws in the conflict minerals narrative, but those suggesting changes to this narrative have only offered cosmetic adjustments, tinkering with the regulatory nature of minerals. This Note calls for a more fundamental shift in the narrative—one that disentangles the campaign against the conflict from the campaign for ethically sourced minerals. The conflict and minerals—separate issues—have become so deeply enmeshed that advocacy aimed at the conflict has become unnecessarily dependent on finding a solution to the minerals problem, and advocacy around 3TG is eclipsed by the conflict. The conflict in eastern Congo is rooted in deep-seated ethnic tension, politics, and land rights, among a kaleidoscopic array of other micro-conflicts; not minerals. And the problems surrounding 3TG mining—working conditions, environmental pollution, economic development—deserve attention that is not inexorably filtered through the goal of ending the conflict.

Section I of this Note provides context and background for the issues, illustrating the enormous complexity that has produced the seemingly unending conflict in eastern Congo today. Section II details the origin of the conflict minerals campaign and the unvetted assumptions it relies on. Section III evaluates the shortcomings of section 1502 and related legislation. Section IV proposes a narrative shift away from the conflict and onto a campaign for a clean energy future.

#### *A. Context*

Understanding (or at least attempting to understand) the complicated and troubling history of what is now called the Democratic Republic of the Congo (DRC)<sup>6</sup> is imperative to understanding the humanitarian campaigns aimed at helping the country today. The purpose of this section is not to comprehensively unpack this complex history but to infuse an appreciation of the complexity itself. As will be demonstrated below in Section III, the failure of the conflict minerals campaign, in part, lies in its crude

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<sup>6</sup> The country has gone through several name changes throughout its history. I generally refer to the country as “the Congo” unless “the DRC” or some other name is more useful depending on context and convenience.

simplification of these complexities. I will briefly<sup>7</sup> highlight several key elements of the Congo's natural and political history that continue to influence the country today.

### 1. *Natural Wealth*

The Congo is the richest country there ever wasn't. Between copper, diamonds, cobalt, gold, silver, zinc, coltan, uranium—the list goes on—the Congo's untapped mineral reserves are estimated to be worth upwards of US \$24 trillion.<sup>8</sup> These minerals are spread across the country's vast landscape. Diamonds are found in south-central Congo, cobalt and copper comes from the Copperbelt in the south, and the 3TG minerals are concentrated in eastern Congo near the border with Uganda, Rwanda, and Burundi.<sup>9</sup>

Many of these minerals are vital to powering our modern electronics, everything from cell phones to jet engines.<sup>10</sup> Cobalt and the 3TG minerals in particular are essential to power lithium-ion batteries, rechargeable batteries central to the likes of smart phones and electric vehicles.<sup>11</sup> The Congo currently supplies more than 60% of the world's cobalt<sup>12</sup> and houses upwards of 60% of the world's coltan (derived from the 3Ts) reserves (though the Congo currently only supplies about 1% of the world's demand).<sup>13</sup> The global demand for these minerals is expected to skyrocket

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7 See generally SÉVERINE AUTESSERRE, *THE TROUBLE WITH THE CONGO: LOCAL VIOLENCE AND THE FAILURE OF INTERNATIONAL PEACEBUILDING* (2010); FILIP REYNTJENS, *THE GREAT AFRICAN WAR: CONGO AND REGIONAL GEOPOLITICS, 1996-2006* (reprt. ed. 2010); JASON STEARNS, *DANCING IN THE GLORY OF MONSTERS: THE COLLAPSE OF THE CONGO AND THE GREAT WAR* (2011), for a fuller sense of the Congo's history.

8 UNEP, *The Democratic Republic of the Congo: Post-Conflict Environmental Assessment Synthesis for Policy Makers*, U.N. Doc. DEP/1467/GE, at 22 (2011).

9 See *Maps of DRC*, IPIS RESEARCH (last visited Aug. 24, 2021), <https://ipisresearch.be/home/maps-data/maps-of-drc/> (several interactive maps of mining sites in the Congo).

10 See Siddharth Kara, *Is Your Phone Tainted by the Misery of the 35,000 Children in Congo's Mines?*, THE GUARDIAN (Oct. 12, 2018), <https://www.theguardian.com/global-development/2018/oct/12/phone-misery-children-congo-cobalt-mines-drc>.

11 See generally ADVANCED BATTERY MATERIALS (Chunwen Sun ed., 1st ed. 2019). As it happens, the 2019 Nobel Prize in Chemistry was awarded "for the development of lithium-ion batteries." Press Release, The Royal Swedish Academy of Sciences, Press Release: The Nobel Prize in Chemistry 2019 (Oct. 9, 2019), <https://www.nobelprize.org/prizes/chemistry/2019/press-release/>.

12 See U.S. GEOLOGICAL SURV., *Mineral Commodity Summaries: Cobalt* (2019 Ann. Publ'n), [https://prd-wret.s3-us-west-2.amazonaws.com/assets/palladium/production/s3fs-public/atoms/files/mcs-2019-cobal\\_0.pdf](https://prd-wret.s3-us-west-2.amazonaws.com/assets/palladium/production/s3fs-public/atoms/files/mcs-2019-cobal_0.pdf).

13 U.S. GOV'T ACCOUNTABILITY OFF., GAO-08-562T, *THE DEMOCRATIC REPUBLIC OF THE CONGO: MAJOR CHALLENGES IMPEDE EFFORTS TO ACHIEVE U.S. POLICY OBJECTIVES; SYSTEMATIC ASSESSMENT OF PROGRESS IS NEEDED* (2008), <https://www.govinfo.gov/content/pkg/GAOREPORTS-GAO-08-562T/html/GAOREPORTS-GAO-08-562T.htm>.

in the foreseeable future as energy consumption shifts from fossil fuels to battery powered sources.<sup>14</sup>

## 2. *Political Corruption and Conflict*

Despite this incredible natural wealth, the Congo has remained dismally poor. Nearly every chapter of the country's history is plagued with relentless exploitation. At the fever pitch of the trans-Atlantic slave trade, the Portuguese syphoned untold thousands of slaves from the Kingdom of Kongo.<sup>15</sup> In the mid-1800s, King Leopold II of Belgium usurped the entire area of present-day DRC (an arbitrary border with no regard to the existing kingdoms and tribes) as a privately-owned corporate state known as the Congo Free State.<sup>16</sup> Leopold forced the people to harvest and produce rubber and ivory goods that were exported to the rest of the world, ruling with a notoriously heavy hand, mutilating and murdering indiscriminately. Joseph Conrad famously called Leopold's rule "the vilest scramble for loot that ever disfigured the history of human conscience and geographical exploration."<sup>17</sup> Estimates vary widely, but some 10,000,000 people may have died under Leopold's reign.<sup>18</sup> At the turn of the twentieth century, political pressure compelled Leopold to relinquish his personal control of the Congo to become a colony of the Belgian government.<sup>19</sup> Little changed for the wellbeing of the Congolese people.

In the mid-1900s, as many African colonies were rising to independence, so too did the Congo, then called the Republic of the Congo.<sup>20</sup> The nationalist movement was led by Patrice Lumumba, who was the country's first democratically elected prime minister after independence in 1960. Soon thereafter, a Belgian-backed secessionist movement broke out in the army that sent the newly independent nation into constitutional crisis, threatening to topple Lumumba's government. After appealing to the

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14 See, e.g., Thomas Wilson, *We'll All Be Relying on Congo to Power Our Electric Cars*, BLOOMBERG (Oct. 26, 2017), <https://www.bloomberg.com/news/articles/2017-10-26/battery-boom-relies-on-one-african-nation-avoiding-chaos-of-past>.

15 See generally THE KONGO KINGDOM: THE ORIGINS, DYNAMICS AND COSMOPOLITAN CULTURE OF AN AFRICAN POLITY (Koen Bostoen & Inge Brinkman eds., 2018) (describing Congo's pre-colonial history).

16 See generally ADAM HOCHSCHILD, *KING LEOPOLD'S GHOST: A STORY OF GREED, TERROR AND HEROISM IN COLONIAL AFRICA* (1998) (providing an in-depth look at King Leopold II's reign and the ripple effects it has today).

17 JOSEPH CONRAD, *Geography and Some Explorers*, in *LAST ESSAYS* (THE CAMBRIDGE EDITION OF THE WORKS OF JOSEPH CONRAD), 14 (Ray Stevens and J. H. Stape eds, 2010).

18 See HOCHSCHILD, *supra* note 16.

19 See Matthew G. Stanard, *Belgium, the Congo, and Imperial Immobility: A Singular Empire and the Historiography of the Single Analytic Field*, 15 *FRENCH COLONIAL HIST.* 87 (2014) (describing Belgium's colonial rule of the Congo).

20 See generally GUY ARNOLD, *AFRICA: A MODERN HISTORY* (2nd ed. 2018) (providing an in-depth look at the Congo's rise to independence and subsequent fall).

United States and the United Nations for help to no avail, Lumumba turned to the Soviet Union. Fearing his (unfounded) sympathies for communism—the Congo was the source of key minerals used by the United States to produce the atomic bombs dropped on Japan—several international actors, including the Central Intelligence Agency, concocted an elaborate plot to assassinate Lumumba.<sup>21</sup> After only two months in office, Lumumba was removed and executed by forces loyal to Mobutu Sese Seko, chief of staff of the Congo army and a U.S.-backed secessionist.

A few years after Lumumba's execution, and in the wake of the leadership crisis that ensued, Mobutu led a successful coup that crowned him the new president in 1965.<sup>22</sup> Despite his dictatorial leanings, Mobutu gained the support of the U.S. government because of his outspoken opposition to communism. Mobutu's long subsequent rein, from 1965 to 1997, was defined by unprecedented corruption, kleptocracy, and humanitarian crisis. He established a single-party system that continued to reelect him as president in sham elections and embezzled billions of U.S. dollars from his country for his own personal gain. Infrastructure all but collapsed under his rule, and by the early 1990s the economy was in shambles. With the fall of the Soviet Union, U.S. support for Mobutu began to waver, leaving the country on the brink of collapse.<sup>23</sup>

By 1994, Mobutu was barely clinging onto power in Kinshasa, the country's westernmost corner, while 2,000 km away on the country's eastern border, the Rwandan genocide began to boil over. Millions of Rwandans—both Hutus and Tutsis—fled across the border to eastern Congo for refuge. Hutu extremist groups began to ally themselves with local Congolese Mai Mai militias and filled the power vacuum that Mobutu's inept government had left in the region. These alliances were initially used for defense, but they quickly turned hostile and began terrorizing Tutsi ethnic groups that had also sought refuge in eastern Congo. The Mobutu government began to feel threatened by the overflow of Rwandan rebels and began to provide training and supplies to counter-rebels who were staging an invasion of Rwanda.<sup>24</sup> The newly installed Tutsi government of Rwanda then joined forces with the Ugandan army and Congolese revolutionaries led by Laurent Kabila, a long-time opponent of Mobutu's regime, to fight back against Hutu-Mai Mai campaign and the Mobutu government. This war—the First Congo War—culminated in 1997 as Kabila and his army literally marched their way

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21 *See generally* EMMANUEL GERARD AND BRUCE KUKLICK, *DEATH IN THE CONGO: MURDERING PATRICE LUMUMBA* (2015) (describing the international plot to kill and replace Lumumba).

22 *See generally* MICHELA WRONG, *IN THE FOOTSTEPS OF MR. KURTZ: LIVING ON THE BRINK OF DISASTER IN MOBUTU'S CONGO* (2002) (describing Mobutu's reign).

23 *Id.*

24 FILIP REYNTJENS, *THE GREAT AFRICAN WAR: CONGO AND REGIONAL GEOPOLITICS, 1996-2006* (reprt. ed. 2010).

from the Congo's eastern border all the way to Kinshasa where they chased Mobutu out of office and set up a new government.<sup>25</sup>

Tensions quickly flared between Kabila's new government and the Rwandan forces that backed his rise to power. The Rwandans who had trained and supported Kabila's movement wanted to be rewarded with political influence in the newly established DRC. They wanted increased access to land, especially the resource rich areas of the eastern DRC that were just outside the Rwandan border—an area the Rwandans considered to be historically Rwandan, predating the arbitrary colonial borders. These pressures fueled Kabila's increasing fear that the Rwandan officers in his army were plotting to topple his regime and replace it with Tutsi forces. Kabila ordered the Rwandan officials in his government to leave. In response, Rwandan forces launched a new Tutsi-led militia movement in eastern Congo, the *Rassemblement Congolais pour la Democratie* (RCD), to fight against Kabila's government.<sup>26</sup>

The ensuing chaos between rebel groups and Kabila's government began in August 1998 and marked the start of the Second Congo War.<sup>27</sup> The war involved huge swaths of Africa: Uganda, Rwanda and Burundi were jointly fighting against the DRC. On the DRC side, Angola, Namibia, and Zimbabwe lent extensive military assistance; Sudan, Chad and the Central African Republic offered limited armed assistance; Tanzania, Zambia, and South Africa extended political support; and Libya and Israel offered logistical support. An estimated 5.4 million people died in the conflict—many through preventable illness and starvation.

A series of ceasefire agreements were signed in 1999, but tensions remained high and isolated clashes triggered continuing attacks. In early 2000, UN forces were deployed to enforce the ceasefire with little success. Kabila was assassinated in January 2001 under circumstances suggesting Rwandan involvement,<sup>28</sup> and Kabila's son, Joseph Kabila (Kabila II), at 29 years old, was sworn in as president days later by unanimous vote from the Congolese parliament. Kabila II brought commitment to the enforcement of peace talks and ceasefire agreements that had failed under his father's rule, but as the position of the RCD began to weaken, many members of the militia forces mutinied and began clashing against Rwandan and Congolese forces.<sup>29</sup>

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<sup>25</sup> *Id.*

<sup>26</sup> See generally GÉRARD PRUNIER, AFRICA'S WORLD WAR: CONGO, THE RWANDAN GENOCIDE, AND THE MAKING OF A CONTINENTAL CATASTROPHE (reprt. ed. 2011) (explaining the Second Congo War, also known as Africa's World War).

<sup>27</sup> *Id.*

<sup>28</sup> See MURDER IN KINSHASA: WHO KILLED PRESIDENT LAURENT KABILA, AND WHY? (Marlène Rabaud & Arnaud Zajtman, Aljazeera 2011), <https://www.aljazeera.com/programmes/general/2011/06/20116982418282293.html>.

<sup>29</sup> *Id.*



In 2003, the conflict technically ended with a signed agreement obliging the warring parties to yield to a transitional government, but violence in eastern Congo has continued to smolder. This lingering conflict, often referred to as the Kivu conflict, is an unwieldy and unpredictable one with no end in sight. To truncate a complicated history, between 2003 (the technical end of the Second Congo War) and 2010 (the year conflict minerals legislation was passed in the United States), many of the rebel leaders who were integrated into the national army of the transitional government after the 2003 agreement quickly defected to form various new rebel groups in the North and South Kivu regions of eastern DRC.<sup>30</sup> These groups all had mixed motives. For example, Laurent Nkunda, one such defector, led a rebel group in a series of attacks against the DRC and frustrated several peace negotiations. At the same time, troops from the RCD and the Movement for the Liberation of Congo, a Ugandan-backed Congolese rebel group, massacred between 60,000 to 70,000 Bambuti pygmies. The Bambuti were targeted because the rebel groups considered them to be subhuman. In 2009, the Democratic Forces for the Liberation of Rwanda (FDLR), a rebel group of Rwandan Hutus, killed roughly 100 people in South Kivu. Mai Mai militias have staged intermittent attacks on other rebel groups and UN soldiers. In 2009, a new faction of DRC soldiers mutinied against the government to form the March 23 Movement (M23) rebel group. All the while, sexual violence has been especially rampant in these conflicts.<sup>31</sup> Almost 40% of women in the eastern Congo are survivors of sexual violence.<sup>32</sup>

## II. THE CONFLICT MINERALS CAMPAIGN

When the war technically ended in 2003 but conflict continued, advocacy groups and international organizations began searching for a new approach to quell the violence. Peacekeeping missions and ceasefire agreements had clearly failed. It was time for a new narrative.

### *A. UN Minerals Report*

In the mid-2000s, the UN Security Council issued several reports that shifted the focus of humanitarian advocacy in the region. The reports focused on the illegal trade of Congolese minerals in eastern Congo:

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<sup>30</sup> See *supra* note 26.

<sup>31</sup> See BBC, *UN Official Calls DR Congo 'Rape Capital of the World'*, BBC (Apr. 28, 2010), <http://news.bbc.co.uk/2/hi/8650112.stm>.

<sup>32</sup> Kirsten Johnson et al., *Association of Sexual Violence and Human Rights Violations with Physical and Mental Health in Territories of the Eastern Democratic Republic of the Congo*, 5 J. AM. MED. ASS'N, 304, 553-61 (2010).

The regional conflict that drew the armies of seven African States into the Democratic Republic of the Congo has diminished in intensity, but the overlapping microconflicts that it provoked continue. These conflicts are fought over minerals, farm produce, land and even tax revenues. Criminal groups linked to the armies of Rwanda, Uganda and Zimbabwe and the Government of the Democratic Republic of the Congo have benefited from the microconflicts. Those groups will not disband voluntarily even as the foreign military forces continue their withdrawals. They have built up a self-financing war economy centered on mineral exploitation.<sup>33</sup>

The report focused on highly sophisticated “elite networks:” “These transactions, which are controlled through secret contracts and off-shore private companies, amount to a multi-billion-dollar corporate theft of the country’s mineral assets.”<sup>34</sup> The reports claimed that such trade was one of the largest sources of income for rebel groups in the region, and the Security Council subsequently passed a series of resolutions to control illegal mining.<sup>35</sup>

### *B. An NGO Narrative Emerges*

NGOs advocating for peace in the DRC—the Enough Project, Global Witness, Human Rights Watch, and Amnesty International to name a few among countless other international and local organizations—had long been searching for a narrative that would exercise international action.<sup>36</sup> As one activist put it in a retrospective interview, “With Congo we were struggling to find that narrative for people to understand what’s taking place, something that’s so far beyond comprehension, at least in the Western world.”<sup>37</sup>

The search for a narrative began with a plea for international pressure to stop the sexual violence rampant in eastern Congo. Human Rights Watch issued a comprehensive report on the issue in 2002. Discussion of minerals is completely absent from the 100+ page document. Instead, the organization called on “Donor Governments” to:

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33 U.N. Security Council, *Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo* ¶ 12, U.N. Doc. S/2002/1146 (Oct. 16, 2002), <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/DRC%20S%202002%201146.pdf>.

34 *Id.* at ¶ 36.

35 *See, e.g.*, S.C. Res. 1857 ¶ 15 (2008).

36 Juliane Reinecke & Shaz Ansari, *Taming Wicked Problems: The Role of Framing in the Construction of Corporate Social Responsibility*, 53:3 J. OF MANAGEMENT STUD., 299, 308 (2016).

37 *Id.* at 308.

Strongly denounce crimes of sexual violence, as well as other violations of human rights and humanitarian law by all parties and insist on accountability for the perpetrators. Apply strong and constant pressure on all governments and non-state actors involved in the conflict to observe their obligations under human rights and humanitarian law. Provide greatly increased financial, technical, and political support for monitoring and documenting sexual violence...Encourage the Security Council to create a U.N. Commission of Experts to investigate and determine responsibility for grave violations of human rights...Assist the development and maintenance of programs and services related to HIV/AIDS...Scrutinize all economic assistance to states involved in the conflict in Congo to ensure that funds earmarked for social and economic development programs do not end up financing abusive conduct by any party to the conflict...the World Bank should add an explicit focus on issues affecting women and girls in eastern Congo.<sup>38</sup>

Five years later, the NGO narrative still avoided pointing to the trade of minerals. Consider the Enough Project's two-pronged approach to the conflict in 2007:

First of all, the U.S. must focus its policy priorities on the humanitarian and national security implications of the continuing chaos in eastern Congo. Washington must lead international efforts to end the violence, *through negotiations with those militias amenable to dialogue and UN military action against those continuing to attack civilians*. In tandem with these international efforts, *the U.S. must step up its own support and training of the Congolese army* to ensure it becomes a professional force for peace and stability in the country and region. Secondly, *the U.S. must lead international efforts to rebuild eastern Congo's collapsing infrastructure* – its roads, bridges, schools, and hospitals – in order to bring hope and order to the region. At the same time, the U.S. and its allies must help the newly elected Congo government effectively govern the nation with targeted institution-building

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38 HUMAN RIGHTS WATCH, THE WAR WITHIN THE WAR: SEXUAL VIOLENCE AGAINST WOMEN AND GIRLS IN EASTERN CONGO, 6-7 (2002), <https://www.hrw.org/reports/2002/drc/Congo0602.pdf>; see also Edward R. Sekyewa, *Trade in Congolese Gold: A Dilemma*, KAMPALA DISPATCH (May 12, 2011), <https://web.archive.org/web/20120907054704/http://www.dispatch.ug/trade-in-congolese-gold-a-dilemma/1905/>.

support for its national and provincial legislative and judicial branches.<sup>39</sup>

None of these tactics stuck. They garnered a few headlines but no action. Part of the problem was the lack of a clear villain. As illustrated above, the conflict in the Congo is incredibly complicated and convoluted. When one rebel leader is taken out, another one fills the void. While one rebel group is interested in exterminating an ethnic rival, another rebel group is more interested in land grabs. The conflict isn't *a* conflict—it's a clump of conflicts.

In 2009, NGOs changed tune. Inspired by the recent “blood diamonds” campaign—a wildly successful campaign that produced an internationally accepted trading standard (the Kimberley Process Certification Scheme) and a Leonardo DiCaprio film<sup>40</sup>—NGOs began to forge a similar narrative around the mineral trade in eastern Congo that the UN reports highlighted a few years earlier.<sup>41</sup> That year, the Enough Project released “An Action Plan to End The World’s Deadliest War.” In it, a call for mineral regulation was front and center:

To understand why conflict in eastern Congo continues to boil with devastating consequences for civilian populations, we have to follow the money trail...Grievances surrounding land and identity—particularly *vis a vis* Congolese of Rwandan descent—help organize the factions, but greed ensures these conflicts remain violent and unsettled....There is a pre-existing structure of conflict that is fueled by the mineral business.... [R]oughly one-tenth of one percent of what we spend on aid and peacekeepers is spent on dealing with what has become a principal driver of conflict in Congo: the trade in conflict minerals. Mineral wealth did not cause the war in Congo, but it sustains armed combatants and fuels ongoing atrocities. Just as with the ‘blood diamonds’ of Sierra Leone and Angola, until there was a change in the way the world purchased diamonds, there was little chance for peace in those countries. Similarly, there will be little chance for peace in Congo until the world figures out a way to purchase that country’s minerals without fueling horrific violence.<sup>42</sup>

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39 ENOUGH PROJECT, MARCH MONTHLY UPDATE—EASTERN CONGO (Mar. 31, 2007), <https://enoughproject.org/reports/march-monthly-update-eastern-congo> (emphasis added).

40 See Howard, Audrie, *Blood Diamonds: The Successes and Failures of the Kimberley Process Certification Scheme in Angola, Sierra Leone and Zimbabwe*, 15:1 WASH. U. GLOBAL STUD. L. REV 137 (2016) (providing an overview of the blood diamonds campaign).

41 See, e.g., *supra* note 1.

42 John Prendergast, *Eastern Congo: An Action Plan to End the World’s Deadliest War*, ENOUGH PROJECT (July 16, 2009), <https://enoughproject.org/reports/eastern-congo-action-plan-end-worlds->

Journalists also began peddling this narrative laden with blunt causal conclusions. Consider *Vice's Guide to Congo*: “As the tech boom drove up the price of these minerals, violence skyrocketed.”<sup>43</sup> “Today, it’s the global demand for technology that is inadvertently fueling the conflict in the Congo.”<sup>44</sup>

In the search for a root cause—something that was easily communicable with a clear enemy—NGOs zeroed in on the trade of conflict minerals with large corporations as the bad guy. Juliane Reinecke and Shaz Ansari explain this shift in narrative:

The frame shift was enabled by championing a single, tractable root cause of the conflict. Among possible explanations for the crisis in Eastern DRC, NGOs focused on trade in ‘conflict minerals’ as the root cause. Revenues from minerals allegedly financed rebel groups, militias, and criminal networks in the Congolese army, who secured control over mines and trading routes.... Narrowing the scope of conflict to trade in minerals allowed actors to reduce complexity and portray the Congolese crisis as being potentially resolvable.<sup>45</sup>

### C. Legislators Follow Suit

The campaign worked. After years of unfruitful advocacy, lawmakers finally began to take note. Senator Sam Brownback (R-KS) championed the cause in the United States. In an impassioned floor speech, he brought attention to the issue:

One of the key things we need to go at in reducing the conflict is getting the money out of the conflict....I believe most of this is funding a good portion of the conflict in Eastern Congo.... And the conflict is funded by this stuff: It is funded by coltan....The war appears now to be self-financing....1,500 people a day dying because of this; \$400 a pound for coltan, financing this death and destruction daily.<sup>46</sup>

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deadliest-war#\_ednref2; see also *Mineral Firms Fuel Congo Unrest*, BBC News (July 21, 2009), <http://news.bbc.co.uk/2/hi/africa/8159977.stm> (“Global Witness says companies sourcing minerals used in electronic gadgets are buying them from traders who finance rebel and government troops.”).

43 *Conflict Minerals, Rebels and Child Soldiers in Congo*, YOUTUBE (May 22, 2012), <https://www.youtube.com/watch?v=kYqrflGpTRE> (ironically, the Vice journalists offered a much different perspective on the artisanal mine they actually visited: “The mine that we finally saw was so different from the horror stories that we had heard. We were expecting to see forced child labor, inhumane conditions, and rebels everywhere. Maybe things were changing in eastern Congo, or at least that’s how this mine made it seem.”).

44 *Id.*

45 Johnson et al., *supra* note 32, at 308-09.

46 154 Cong. Rec., 1539, 2282-84 (statement of Sen. Brownback).

Senator Dick Durbin (D-IL) joined in. “Without knowing it, tens of millions of people in the United States may be putting money in the pockets of some of the worst human rights violators in the world, simply by using a cell phone or laptop computer.”<sup>47</sup>

The resultant legislation—section 1502 of the Dodd-Frank Wallstreet Reform and Consumer Protection Act of 2010—targeted the mineral trade as the panacea for conflict in the Congo. Jeff Schwartz summarizes how the law functions:

Just as the legislation instructs, under the SEC rules the first step is for companies to determine whether conflict minerals are necessary to their products. If not, companies need not file anything. If a company does make use of conflict minerals, however, it is required to conduct a so-called “reasonable country of origin inquiry” (an “RCOI”) with respect thereto. If the RCOI does not reveal the presence of conflict minerals from the Congo region, the company need only file a Form SD, which must “briefly” describe the company’s RCOI process and its conclusion. The company also needs to post this information on its website. If the RCOI reveals that the company is sourcing conflict minerals from the Congo region or gives the company reason to believe that this is the case, then the company is required to conduct due diligence “on the source and chain of custody” of such minerals. If, based on its due diligence, the company determines that its minerals are not actually from the Congo region, then it must briefly describe its due-diligence efforts, its RCOI, and its conclusion both on a Form SD and its website.<sup>48</sup>

Since 2010, the European Union has adopted similar legislation,<sup>49</sup> the United Nations has adopted resolutions on the matter,<sup>50</sup> even China has implemented due diligence guidelines for responsible mineral supply chains.<sup>51</sup> Corporations were initially resistant to the legislation, but many, especially those dependent on public reputation, quickly acceded to section 1502. The potent naming and shaming campaign led companies “who could barely locate the Congo on the map” to become “part of a constituency for peace in Congo.”<sup>52</sup> Some corporations have even adopted voluntary internal codes to comply with the demands of the conflict minerals narrative:

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47 Office of U.S. Senator Sam Brownback, *Brownback, Durbin, Feingold Introduce Congo Conflict Minerals Act*, News Release, Apr. 24, 2009, <https://justfacts.votesmart.org/public-statement/419962/>

48 Jeff Schwartz, *The Conflict Minerals Experiment*, 6 HARV. BUS. L. REV. 129, 136 (2016).

49 2017 O.J. (L 130/1).

50 S.C. Res. 1857 ¶ 15 (2008).

51 China Chamber Comm. Metals, Min. & Chem. Imp. & Exp., *supra* note 4.

52 Johnson et al., *supra* note 32, at 307.

Apple,<sup>53</sup> Intel,<sup>54</sup> and Hewlett-Packard,<sup>55</sup> to name a few, have all committed to cutting out rebel groups from their supply chains. Since 2010, the conflict in the Congo has been indelibly tethered to minerals—hence “conflict minerals.” And international attention on the Congo has focused almost exclusively on the topic ever since.

### III. SHORTCOMINGS OF CONFLICT MINERALS LEGISLATION

Ten years since the enactment of section 1502, the conflict minerals campaign has failed to bring meaningful change to the Congo. The latest data reveal that the connection between minerals and conflict in the Congo is far more tenuous than advocacy narratives assumed.<sup>56</sup> It also shows that since 2010, in general, conflict has increased and economic wellbeing has decreased in eastern Congo.<sup>57</sup>

#### *A. The Tenuous Relationship Between Conflict and Minerals*

Unlike the bona fide connection between conflict and diamonds in countries like Sierra Leone,<sup>58</sup> the underlying assumption in the conflict minerals campaign—that the sale of minerals is what is fueling conflict in eastern Congo—has proven to be nothing more than an assumption. The Congo Research Group, in partnership with New York University, has compiled the most recent data on the subject. The report issued in August 2019 analyzes trends of violence in eastern Congo over the past several years and cautions against the conflict minerals narrative:

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53 See APPLE, SUPPLIER RESPONSIBILITY: 2019 PROGRESS REPORT 49 (2019), [https://www.apple.com/supplier-responsibility/pdf/Apple\\_SR\\_2019\\_Progress\\_Report.pdf](https://www.apple.com/supplier-responsibility/pdf/Apple_SR_2019_Progress_Report.pdf) (“Apple is committed to meeting and exceeding internationally accepted standards [including section 1502] to safeguard the well-being of people in the supply chain.”).

54 See INTEL, INTEL RESPONSIBLE MINERALS SOURCING POLICY (last visited Dec. 16, 2019), <https://www.intel.com/content/www/us/en/policy/policy-conflict-minerals.html> (“As part of Intel’s commitment to responsible sourcing, it is our goal to ensure that the 3TG in our products do not directly or indirectly finance or benefit armed groups in the DRC or adjoining countries while continuing to support responsible mineral sourcing in the region.”).

55 See HEWLETT-PACKARD, SUSTAINABLE IMPACT: RESPONSIBLE MINERALS SOURCING (last visited Dec. 16, 2019), [https://www8.hp.com/us/en/hp-information/global-citizenship/human-progress/conflictminerals.html?jumpid=in\\_r138\\_us/en/corp/responsible\\_minerals/in-page-nav/responsible-minerals](https://www8.hp.com/us/en/hp-information/global-citizenship/human-progress/conflictminerals.html?jumpid=in_r138_us/en/corp/responsible_minerals/in-page-nav/responsible-minerals).

56 See generally Adam S. Chilton & Galita A. Sarfaty, *The Limitations of Supply Chain Disclosure Regimes*, 53 STAN. J. OF INT’L L. 1 (2017); *supra* note 37 (discussing other lesser shortcomings of section 1502, such as a lack of corporate compliance).

57 *Id.*

58 See, e.g., Iryna Marchuk, *Confronting Blood Diamonds in Sierra Leone: The Trial of Charles Taylor*, 4 YALE J. OF INT’L AFF. 87 (2009); Philippe Le Billon and Estelle Levin, *Building Peace With Conflict Diamonds? Merging Security and Development in Sierra Leone*, 40 DEV. & CHANGE 693 (2009); Roy Maconachie & Tony Binns, *Beyond the Resource Curse? Diamond Mining, Development and Post-Conflict Reconstruction in Sierra Leone*, 32 RES. POL’Y 104 (2007).

Advocacy groups have often focused on the mining of tin, tantalum, tungsten, and gold as a source of revenue for armed groups....The data...however, shows that there is no systematic correlation between violence and mining areas. Only 20 percent of violent incidents occur within 20 kilometers of a mine, and only 3 percent occur within 2 kilometers....[T]he epicenters of violence are in areas with no mines: the vicinity of Beni town, for example, all of Rutshuru territory, and the Ruzizi Plain.<sup>59</sup>

The report admits that mines have some influence on the violence: “In some cases, violence has been directly associated with battles for control of mining areas. There is also ample evidence that armed groups focus much of their attention on taxing mining sites and mineral trade routes. Artisanal mining sites also offer an important source of patronage for Congolese army commanders.”<sup>60</sup> “However,” the report continues, “armed groups derive revenues from many sources, including charcoal production, poaching, kidnapping, and the taxation of all types of commodities and movement. While some groups are closely linked to mining areas, many others occupy terrain with no mining sites at all.”<sup>61</sup> The article concludes by noting that “there is little evidence that, historically, the major bouts of conflict escalation in the region—[lists many of the wars outlined above in Section I]—were directly triggered by minerals.”<sup>62</sup>

Many NGOs knew the conflict minerals narrative was an oversimplification, but they pushed the agenda anyway because it was seen as an effective tool to garner international attention. Reineck and Ansari have documented these admissions in their study of the conflict minerals narrative. They conducted 29 interviews lasting 30 to 180 minutes with respondents from the U.S. government, NGOs, and gold and electronics industries who were involved with conflict minerals. Drawing upon those interviews, Reineck and Ansari note that:

NGOs that had long campaigned to involve the international community in the crisis recognized that focusing on ‘the economic drivers of conflict’ was a crude simplification of the Congolese conflict. Privately, some admitted that conflict minerals ‘may not be a root cause’ and could even mask other causes of the conflict. However, conflict minerals served as a comprehensible frame for

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59 CONGO RESEARCH GROUP, CONGO, FORGOTTEN: THE NUMBERS BEHIND AFRICA'S LONGEST HUMANITARIAN CRISIS 9 (Aug. 2019), <https://kivusecurity.nyc3.digitaloceanspaces.com/reports/28/KST%20biannual%20report%20August%2012%20%281%29.pdf>.

60 *Id.*

61 *Id.*

62 *Id.*



Western audiences. A field investigator justified the focus: ‘While we cannot grasp everything, we said ok, let's focus on this and see how we could break the silence, raising awareness in the USA, especially in target universities, youth, and also international civil society organizations back in Washington.’<sup>63</sup>

The reality of the relationship between conflict and minerals is far more complicated. The most comprehensive and nuanced studies involving the Congo—those that are uninterested in sloganeering—confirm that most of the conflicts in eastern Congo are primarily driven by local land disputes, corruption, failed public institutions, interference from neighboring Rwanda, ethnic polarities, a culture of mistrust, and legacies of wars, pillage, and colonial rule.<sup>64</sup> There is simply no evidence to support the conclusion that minerals are fueling the conflict. In a comprehensive review of studies analyzing the relationship between conflict and resources, Jeroen Cuvelier, Koen Vlassenroot, and Nathaniel Olin conclude that

Much attention has been paid to claims that resource abundance increases the risk of bad governance and conflict, and that economic incentives are the explanatory factor of armed groups’ strategies. While these claims have a significant impact on policy and have had the effect of narrowing down the attention to resource control in conflict settings, the evidence in support of these claims is largely macro-level orientated and tends to overlook the complexities of armed actors’ motivations and incentive structures.<sup>65</sup>

Even if some rebel groups do rely on the sale of minerals for their operations, that reliance is not existential. Rebels draw upon a vast array of sources for revenue. When a mineral supply dries up, they can easily turn to another source of illicit funding.<sup>66</sup>

Some scholars continue to defend the conflict minerals campaign, arguing that despite the narrative flaws, section 1502 still brought much needed awareness to the issue of supply chain transparency in the Congo.<sup>67</sup>

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63 Johnson et al., *supra* note 32, at 308-09.

64 See, e.g., Séverine Autesserre, *Dangerous Tales: Dominant Narratives on the Congo and their Unintended Consequences*, 111 AFRICAN AFF. 202 (Apr. 2012).

65 Jeroen Cuvelier et al., *Resources, Conflict and Governance: A Critical Review of the Evidence*, The Justice and Security Research Programme, Oct. 2013, at 16, [http://eprints.lse.ac.uk/56351/1/JSRP\\_Paper9\\_Resources\\_conflict\\_and\\_governance\\_Cuvelier\\_Vlassenroot\\_Olin\\_2013.pdf](http://eprints.lse.ac.uk/56351/1/JSRP_Paper9_Resources_conflict_and_governance_Cuvelier_Vlassenroot_Olin_2013.pdf).

66 See Laura Seay, *What's Wrong with Dodd-Frank 1502? Conflict Minerals, Civilian Livelihoods, and the Unintended Consequences of Western Advocacy*, 16-19 (Ctr. for Global Dev., Working Paper No. 284, January 2012), [https://www.cgdev.org/sites/default/files/1425843\\_file\\_Seay\\_Dodd\\_Frank\\_FINAL.pdf](https://www.cgdev.org/sites/default/files/1425843_file_Seay_Dodd_Frank_FINAL.pdf).

67 See, e.g., Karen E. Woody, *Can Bad Law do Good? A Retrospective on Conflict Minerals Regulation*, 78 MD. L. REV. 291 (2019).

That might be true,<sup>68</sup> but it fails to consider the bigger picture: the flawed narrative has obscured the reality of the Congo. Enormous amounts of resources have been diverted away from conflict prevention to corporate supply chain due diligence. The vast majority of scholars on the Congo agree with this perspective. A group of seventy academics and experts on the Congo wrote an open letter in 2014 to governments, companies, NGOs, and other stakeholders insisting that “the conflict minerals campaign fundamentally misunderstands the relationship between minerals and conflict in the eastern DRC.”<sup>69</sup> The letter notes that while minerals may help perpetuate the conflict, “they are not its cause,” and that “armed groups are not dependent on mineral revenue for their existence.”<sup>70</sup>

### *B. The Ineptitude and Unintended Consequences of Section 1502*

After over ten years of fierce campaigning and corporate regulation, section 1502 has done little to bring meaningful change to the DRC: “eastern Congo continues to see levels of violence as high as some of the other most violent places in the world.”<sup>71</sup> Since 2010, the M23 rebellion took control of Goma, a provincial capital in North Kivu, and terrorized the region between 2012 and 2013;<sup>72</sup> Mai Mai and Allied Democratic Forces (ADF) rebels conducted a series of attacks on UN peacekeeping soldiers, making the Congo one of the United Nations’ most dangerous peacekeeping mission in the world (fifteen UN peacekeeping soldiers were killed in 2017);<sup>73</sup> continued ADF attacks have forced 1.7 million people to

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68 But it also might not be true. See Muhammad Azizul Islam & Chris J. Van Staden, *Social Movement NGOs and the Comprehensiveness of Conflict Mineral Disclosures: Evidence from Global Companies*, 65 ACCT., ORGS. AND SOC’Y 1, 1 (Feb. 2018) (“Our findings have practical and policy implications in that improved corporate transparency is the result of social movement actions via NGOs, i.e., regulation on its own may not result in comprehensive disclosures.”); Jeff Schwartz, *The Conflict Minerals Experiment*, 6 HARV. BUS. L. REV. 129, 130 (analysis of SEC disclosures from companies shows that Congress’s hope of supply chain transparency goes unfulfilled.); Woody, *supra* note 67, at 315 (“On the whole, it seems Section 1502 did not make any major waves in terms of radical corporate response or robust efforts into transparent supply chains, given the small number of companies that undertook the exercise [of filing conflict mineral reports with the SEC].”).

69 Open letter from Aloys Tegera et al. to “governments, companies, non-governmental organisations, and other stakeholders implicated in efforts of various kinds related to the issue of ‘conflict minerals’” (2014), <https://ethuin.files.wordpress.com/2014/09/09092014-open-letter-final-and-list.pdf>.

70 *Id.*

71 CONGO RESEARCH GROUP, *supra* note 59, at 5 (the article draws comparisons to put this rate in perspective: “Nigeria’s Borno state—the state most affected by Noko Haram and Al Qaeda in West Africa—had a death rate of 6.87 per 100,000....The comparable rate for all of Yemen was 4.13 last year.” *Id.*).

72 *Goma: M23 Rebels Capture DR Congo City*, BBC NEWS (Nov. 20, 2012), <https://www.bbc.com/news/world-africa-20405739>.

73 See Rick Gladstone & Alan Cowell, *At Least 15 U.N. Peacekeepers Are Killed in Congo*, N.Y. TIMES (Dec. 8, 2017), <https://www.nytimes.com/2017/12/08/world/africa/congo-un-peacekeepers-killed.html>.

flee their homes since 2017;<sup>74</sup> and the sheer number of rebel groups has increased significantly in recent years, from 70 in 2015, to 120 in 2017, to 130 in 2019, suggesting no signs of the conflict slowing.<sup>75</sup> This is all to say nothing of the thousands of untold robberies, kidnappings, rapes, and murders that have continued to plague eastern Congo these last ten years.<sup>76</sup>

What's worse, section 1502 appears to be exacerbating some of this increased violence. Upon the enactment of section 1502, corporations fearful of liability who were previously purchasing minerals from the DRC suddenly pulled out of the Congo to source elsewhere, creating "a *de facto* ban on Congolese mineral exports, [that] put anywhere from tens of thousands up to 2 million Congolese miners out of work."<sup>77</sup> Some have argued that this shock to the mining industry has fueled some of the conflict in the past ten years because when jobs are lacking, people are more likely to turn to rebel factions for the support their government cannot provide.<sup>78</sup>

Meanwhile, the legislation has done virtually nothing to curb funding for armed groups. Parker and Vadheim conducted a study of the short-term effects of section 1502 and concluded that the legislation resulted in increased violence.<sup>79</sup> Their data show that the loss of income brought on by section 1502's regulation pushed armed groups to increase taxes levied on T3 mines and scour the region for new gold mines.<sup>80</sup> These movements increased violence overall.<sup>81</sup> Nik Stoop, Marijke Verpoorten, and Peter van der Windt updated and expanded that research in 2018 using data from the Armed Conflict Location and Event Data Project (ACLED), which records information on conflict events in developing countries in Africa and Asia, including the DRC.<sup>82</sup>

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<sup>74</sup> See Fergal Keane, *DR Congo: UN Peacekeepers Killed in Attack in North Kivu*, BBC NEWS (Dec. 8, 2017), <https://www.bbc.com/news/world-africa-42285871>.

<sup>75</sup> CONGO RESEARCH GROUP, *supra* note 59, at 3 (citing data from CONGO RESEARCH GROUP, *THE LANDSCAPE OF ARMED GROUPS IN THE EASTERN CONGO* 5 (Jason K. Stearns and Christoph Vogel eds., 2015), <http://congo-researchgroup.org/wp-content/uploads/2015/11/The-Landscape-of-Armed-Groups-in-Eastern-Congo1.pdf>); Kivu Security Tracker, *The Landscape of Armed Groups in Eastern Congo: Fragmented, politicized networks* 1 (Jason K. Stearns and Christoph Vogel eds., Dec. 2017), <https://reliefweb.int/sites/reliefweb.int/files/resources/Landscape%20of%20Armed%20Groups%20Essay%20KST.pdf>.

<sup>76</sup> See generally CONGO RESEARCH GROUP, *supra* note 59.

<sup>77</sup> Seay, *supra* note 66, at 1.

<sup>78</sup> Nik Stoop, Marijke Verpoorten & Peter van der Windt, *More Legislation, More Violence? The Impact of Dodd-Frank in the DRC*, 13 PLOS ONE 1, 6-13 (2018).

<sup>79</sup> Dominic P. Parker & Bryan Vadheim, *Resource Cursed or Policy Cursed? US Regulation of Conflict Minerals and Violence in the Congo*, 4 J. OF ASS'N OF ENVTL. & RESOURCE ECONOMISTS 1, 44 (2016).

<sup>80</sup> *Id.* at 13-19.

<sup>81</sup> *Id.* at 44.

<sup>82</sup> For more studies using ACLED's data, see generally *id.*; Nicolas Berman, Mathieu Couttenier, Dominic Rohner & Mathias Thoenig, *This Mine Is Mine! How Minerals Fuel Conflicts in Africa*, 107 AM. ECON. REV. 1564 (2017); Jean-François Maystadt, Giacomo De Luca, Petros G. Sekeris & John Ulimwengu, *Mineral Resources and Conflicts in DRC: A Case of Ecological Fallacy?*, 66 OXFORD ECON.

We find that, in the short-term, the legislation strongly and significantly increased the likelihood of violent conflict in affected territories, especially in relatively unregulated gold mining areas. Battles between armed actors became more frequent, and events of looting and violence committed against civilians increased. In addition, we find that D[odd]F[rank]-targeted mining areas further witnessed a strong increase in riots, which is a clear sign of social upheaval. In the longer term, these effects seem to abate for the average DF-territory, while remaining highly significant for gold mining areas, which may suggest that rebels continue to fight for the control over gold sites. On a less pessimistic note, we do not find evidence that conflict events increased with the number of 3T mines in a territory. Moreover, when looking at the longer term, we find an indication that looting of civilians (slightly) decreased in 3T mining areas compared to the pre-DF period. This does not necessarily mean that the average civilian in this area has become less exposed to looting. DF has triggered a movement from 3T to gold mines, not only of armed actors, but also of artisanal miners. Hence, ‘per capita looting’ in 3T mining areas may not have decreased.<sup>83</sup>

They conclude by noting that

Any policy measure, targeting DRC or another war-torn region, will lack ambition if it keeps its narrow focus on the mineral supply chain, instead of taking a more systemic approach that seeks to address the root causes of the ongoing conflict. And, at the very least, the policy should give much more attention to so-called ‘accompanying measures’ that could strengthen mining communities, and mitigate unintended economic and political effects, including the effect on the short- and long(er)-run behavior of armed groups.<sup>84</sup>

Proponents of section 1502 argue that these unintended consequences are exaggerated and over-emphasized.<sup>85</sup> They suggest that the unintended consequences of section 1502 are merely short-term consequences

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PAPERS 721 (2014); CLIONADH RALEIGH AND CAITRIONA DOWD, ARMED CONFLICT LOCATION AND EVENT DATA PROJECT (ACLED) CODEBOOK 2016 (2016); FILIP HILGERT & STEVEN SPITTAELS, ANALYSIS OF THE INTERACTIVE MAP OF ARTISANAL MINING AREAS IN EASTERN DR CONGO (2013), [https://ipisresearch.be/wp-content/uploads/2013/11/20131113\\_Promines\\_analysis.pdf](https://ipisresearch.be/wp-content/uploads/2013/11/20131113_Promines_analysis.pdf).

<sup>83</sup> Stoop et al., *supra* note 78, at 14-15.

<sup>84</sup> *Id.* at 15.

<sup>85</sup> See, e.g., Dirk-Jan Koch & Sara Kinsbergen, *Exaggerating Unintended Effects? Competing Narratives on the Impact of Conflict Minerals Regulation*, 57 RESOURCES POL’Y 255 (2018).

necessary for more fundamental change to take hold. It remains to be seen whether these assertions will be proven true, but this theory relies on two assumptions that are far from certain. First, that armed groups will have no other source of funding once they are cut off from the trade of minerals. Simply cutting one source of funding for rebel groups will not choke them out. There is increasing evidence that rebel groups are turning to other forms of illicit funding that dwarf the revenue derived from minerals.<sup>86</sup> Second, that once rebel groups are chased away, the government will fill the void with stability. The DRC's history of rampant corruption and ineptitude suggests that the transition from rebel groups to government power will be anything but smooth or fast.

### *C. NGOs Remain Committed to the Conflict Minerals Narrative*

Despite the mounting evidence on the tenuous relationship between minerals and conflict and the unintended negative consequences of section 1502, the NGOs that championed the conflict minerals narrative have remained fixed in their commitment to the campaign. When the EU was considering the implementation of a regulatory regime similar to that of section 1502 in 2015, over 150 NGOs signed an open letter calling for legislation that “[r]equires all companies bringing minerals into the EU—whether in their raw form or contained in products—to carry out supply chain due diligence and publicly report in line with international standards [like section 1502].”<sup>87</sup> Moreover, when President Trump suggested that his administration might do away with section 1502 in a leaked memorandum,<sup>88</sup> the policy adviser to Global Witness, a key voice in the conflict minerals campaign, insisted that “[a]ny executive action suspending the US conflict minerals rule would be a gift to predatory armed groups seeking to profit from Congo’s minerals as well as a gift to companies wanting to do business with the criminal and the corrupt. This law helps stop US companies funding conflict and human rights abuses in the Democratic Republic of Congo and surrounding countries.”<sup>89</sup> Some corporations are also ardently defending the conflict minerals narrative. Apple, which the Enough Project

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<sup>86</sup> See CONGO RESEARCH GROUP, *supra* note 59; Seay, *supra* note 66; Jason K. Stearns, *Causality and Conflict: Tracing the Origins of Armed Groups in the Eastern Congo*, 2 PEACEBUILDING 157 (2014).

<sup>87</sup> Open Letter from Amnesty International et al. to the European Union (May 18, 2015), [https://www.fidh.org/IMG/article\\_PDF/article\\_a17679.pdf](https://www.fidh.org/IMG/article_PDF/article_a17679.pdf).

<sup>88</sup> See Ed Pilkington, *Proposed Trump Executive Order Would Allow US Firms to Sell ‘Conflict Minerals’*, THE GUARDIAN (Feb. 8, 2017), <https://www.theguardian.com/us-news/2017/feb/08/trump-administration-order-conflict-mineral-regulations>.

<sup>89</sup> Press Release, Global Witness, *An Executive Order Suspending the US Conflict Minerals Law Would be a ‘Gift to Warlords and Corrupt Businesses’, Says Global Witness* (Feb. 8, 2017), <https://www.globalwitness.org/en/press-releases/executive-order-suspending-us-conflict-minerals-law-would-be-gift-warlords-and-corrupt-businesses-says-global-witness/>.

identified as one of the worst conflict minerals purchasers in 2010, has recently made ambitious commitments to following conflict minerals legislation and is now ranked as one of the best companies for efforts to develop conflict-free mineral supply chains from the Congo.<sup>90</sup> The tech giant has stated that even if section 1502 was revoked, it would continue to voluntarily abide by its standards.<sup>91</sup> The company has even gone beyond the scope of section 1502's narrow definition of conflict minerals (only including 3TG minerals) to voluntarily disclose information about its cobalt sources in the Congo.<sup>92</sup>

The defense of the conflict minerals narrative is becoming increasingly brazen. Consider the M23 saga mentioned above. When the rebel group collapsed in November 2013 after a series of military defeats led by Congolese army forces backed by UN troops, John Prendergast, founder of the Enough Project, credited conflict minerals regulations for M23's downfall:

Numerous corporations, including Apple, Hewlett-Packard, Intel, and Motorola Solutions worked to reform international supply chains that had allowed illegally extracted minerals to trade on global markets and end up in cell phones and computers everywhere. Congressional legislation and corporate initiatives have dramatically reduced the money available to armed groups such as the M23, *which previously financed themselves by smuggling minerals and other natural resources.*<sup>93</sup>

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<sup>90</sup> See, e.g., ANNIE CALLAWAY, 2017 CONFLICT MINERALS COMPANY RANKINGS (Nov. 2017), [https://enoughproject.org/wp-content/uploads/2017/11/DemandTheSupply\\_EnoughProject\\_2017Rankings\\_final.pdf](https://enoughproject.org/wp-content/uploads/2017/11/DemandTheSupply_EnoughProject_2017Rankings_final.pdf).

<sup>91</sup> See Todd C. Frankel, *Why Apple and Intel Don't Want to See the Conflict Minerals Rule Rolled Back*, THE WASH. POST (Feb. 23, 2017), [https://www.washingtonpost.com/business/economy/why-apple-and-intel-dont-want-to-see-the-conflict-minerals-rule-rolled-back/2017/02/23/b027671e-f565-11e6-8d72-263470bf0401\\_story.html](https://www.washingtonpost.com/business/economy/why-apple-and-intel-dont-want-to-see-the-conflict-minerals-rule-rolled-back/2017/02/23/b027671e-f565-11e6-8d72-263470bf0401_story.html). See also Open Letter from Gene Levoff, Senior Director of Corporate Law and Corporate Secretary of Apple, Inc. (Feb. 22, 2017), <https://www.apple.com/tr/supplier-responsibility/pdf/Apple-Combat-Human-Trafficking-and-Slavery-in-Supply-Chain.pdf> ("We do this because it's the right thing to do, not because it's required by law.").

<sup>92</sup> Todd C. Frankel, *Apple Cracks Down Further on Cobalt Supplier in Congo as Child Labor Persists*, THE WASH. POST (Mar. 3, 2017), <https://www.washingtonpost.com/news/the-switch/wp/2017/03/03/apple-cracks-down-further-on-cobalt-supplier-in-congo-as-child-labor-persists/> ("Apple has said it intends this year to begin scrutinizing its cobalt suppliers like it does its 'conflict mineral' suppliers.... Apple said it plans to publish a list of the cobalt smelters, just as it does for its conflict mineral smelters.").

<sup>93</sup> John Prendergast, *The New Face of African Conflict*, FOREIGN AFF. (Mar. 12, 2014), <https://www.foreignaffairs.com/articles/africa/2014-03-12/new-face-african-conflict>.

Laura Seay notes, “His claim that Dodd-Frank 1502 contributed to an end to the M23 violence is simply false.”<sup>94</sup> Why? Because “M23 never controlled mining areas.”<sup>95</sup>

#### IV. SHIFTING THE NARRATIVE

In light of the studies highlighted above, it is due time for NGOs and lawmakers to shift the narrative behind conflict minerals. Others have called for such action, but these recommended narrative shifts have remained in the conflict minerals paradigm—they focus on adjustments to the legislative approach to conflict minerals, calling for tax incentives, more robust disclosure requirements, etc. This Note calls for a more fundamental shift in the narrative—one that disentangles the conflict from minerals. Until now, nearly all advocacy surrounding 3TG minerals has been filtered through the lens of solving the conflict in eastern Congo. The conflict, of course, makes mining more difficult in eastern Congo, but to conceptualize the problem around the conflict is to lose the forest for the trees. The existing narrative has eclipsed the more fundamental issue that will continue to affect those living in the country for the foreseeable future, perhaps long after the conflict settles down: The problem with minerals in east Congo is not that they provide some small amount of funding to rebel groups in the area. The problem with minerals in the Congo is that miners work under extremely dangerous conditions, frequently risking their lives, to extract those minerals. The problem is that those miners are only paid a few dollars a day for their labor. The problem is that these mining practices are severely pollutant, endangering the health of entire communities and ecosystems. The problem is that the world is on the brink of an energy revolution that will be dependent on 3TG minerals, and the history of relentless exploitation in the Congo is at risk of repeating itself. This moment (like most moments in the Congo’s history) is reminiscent of Joseph Conrad’s *Heart of Darkness*, when the world’s craving for ivory was beginning to take hold:

The word ‘ivory’ rang in the air, was whispered, was sighed. You would think they were praying to it. A taint of imbecile rapacity blew through it all, like a whiff from some corpse. By Jove! I’ve never seen anything so unreal in my life. And outside, the silent wilderness surrounding this cleared speck on the earth struck me as something

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<sup>94</sup> Laura Seay, *Did Cutting Access to Mineral Wealth Reduce Violence in the DRC?*, THE WASH. POST (Mar. 25, 2014), <https://www.washingtonpost.com/news/monkey-cage/wp/2014/03/25/did-cutting-access-to-mineral-wealth-reduce-violence-in-the-drc/>.

<sup>95</sup> *Id.*

great and invincible, like evil or truth, waiting patiently for the passing away of this fantastic invasion.<sup>96</sup>

Today, the word *minerals* rings in the air. There are whispers everywhere about the unimaginable wealth to be found in the Congo, “the Saudi Arabia of the electric vehicle age.”<sup>97</sup> Once again, cleared specks are cropping up in the dense jungle as the entire world races to secure key mineral deposits in eastern Congo. But it’s not guaranteed that the Congolese will benefit from that natural wealth. This section does not offer a comprehensive solution to the complex challenges facing the mining sector in eastern Congo, but it presents an outline of the main issues on which the new narrative ought to focus.

### A. Changing Perspective

This shift should start with a change of perspective. It’s a painful irony that the U.S. effort to help the Congo is wrapped up in the Dodd-Frank Wall Street Reform and *Consumer Protection Act*, as if to say iPhone *purchasers* are at higher risk than the miners in eastern Congo who produce the product. The goal of the conflict minerals campaign—to end the conflict in eastern Congo—is a laudable goal, but it comes from a wide-lens angle. It ignores the perspective of those miners actually living in eastern Congo. Demographers estimate that up to one fifth of the country’s population—12.5 million people—are dependent on artisanal and small-scale mining (ASM) for their livelihood.<sup>98</sup> The conflict, while large, affects the daily lives<sup>99</sup> of a small percentage of those employed through mining in rural areas. “[A]rmed violence is concentrated in the densely populated highlands in the far east of the Kivu provinces, close to the Ugandan, Rwandan, and Burundian borders.”<sup>100</sup> These areas are generally far away from the mines:

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96 JOSEPH CONRAD, HEART OF DARKNESS 22 (1899).

97 Franz Wild, Vernon Silver & William Clowes, *Trouble in the Congo: The Misadventures of Glencore*, BLOOMBERG BUSINESSWEEK (Nov. 15, 2018), <https://www.bloomberg.com/news/features/2018-11-16/glencore-s-misadventure-in-the-congo-threatens-its-cobalt-dreams> (adding to the whisper-ness of this quotation, the authors have credited it to “the words of one [unidentified] analyst”).

98 NICHOLAS GARRETT, THE EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE (EITI) AND ARTISANAL AND SMALL-SCALE MINING (ASM): PRELIMINARY OBSERVATIONS FROM THE DEMOCRATIC REPUBLIC OF THE CONGO (DRC) 6 (2007), [https://eiti.org/files/documents/Garrett\\_EITI\\_10\\_2007.pdf](https://eiti.org/files/documents/Garrett_EITI_10_2007.pdf).

99 At least insofar as employment is concerned. Of course, the conflict affects the daily lives of virtually everyone in eastern Congo, but that conflict does not prevent as many from engaging in ASM. See generally Beth J. Maclin et al., *Moving to the Mines: Motivations of Men and Women for Migration to Artisanal and Small-Scale Mining Sites in Eastern Democratic Republic of the Congo*, 51 RESOURCES POL’Y 115 (2017) (arguing that increase in conflict has fueled the growth of the ASM sector because conflict makes other forms of work, especially agriculture, impractical).

100 CONGO RESEARCH GROUP, *supra* note 59, at 5. See also *Maps of DRC*, *supra* note 9 (relevant maps of the region).



“Only 20 percent of violent incidents occur within 20 kilometers of a mine, and only 3 percent occur within 2 kilometers.”<sup>101</sup>

Recent surveys show that those involved with ASM are generally less concerned with conflict financing and more concerned with financing themselves in conditions that are safe and healthy. “Risks related to occupational health and safety (OHS) are the most prevalent in the ASM sector....[These risks] are far more prevalent at sites than the risks outlined in Annex II of the OECD Due Diligence Guidance on Responsible Mineral Supply Chains from Conflict-Affected and High-Risk Countries such as serious human rights abuses.”<sup>102</sup> The new narrative should approach the problems surrounding minerals from this perspective.

### *B. Aligning with the Cobalt Narrative*

If the goal of NGO activism over minerals in the Congo is to educate and exercise consumers, NGOs ought to consolidate their diverse mineral campaigns in central Africa. Beyond conflict minerals, there is a burgeoning campaign around the ethical sourcing of cobalt.<sup>103</sup> Like 3TG, cobalt is another essential mineral for electric batteries, and the Congo is home to a vast majority of the world’s production<sup>104</sup> and supply.<sup>105</sup> But the mineral doesn’t fall under the umbrella of “conflict mineral” because it’s not found in heated conflict zones (it’s sourced primarily in the Copperbelt region in

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101 CONGO RESEARCH GROUP, *supra* note 59, at 9.

102 RCS GLOBAL GROUP, SAVING THE EV REVOLUTION: BETTER MINING: DIGITAL MONITORING, DATA-DRIVEN RISK MANAGEMENT AND POSITIVE IMPACT GENERATION IN COBALT, COPPER & 3TG ASM SUPPLY CHAINS (2019), <https://www.rcsglobal.com/pdfs/20191810%20RCS%20Global%20Group%20Better%20Mining%20Saving%20EVs%20Report%20Public.pdf>.

103 See, e.g., ANNIE CALLAWAY, POWERING DOWN CORRUPTION: TACKLING TRANSPARENCY AND HUMAN RIGHTS RISKS FROM CONGO’S COBALT MINES TO GLOBAL SUPPLY CHAINS (Oct. 2018) [https://enoughproject.org/wp-content/uploads/PoweringDownCorruption\\_Enough\\_Oct2018-web.pdf](https://enoughproject.org/wp-content/uploads/PoweringDownCorruption_Enough_Oct2018-web.pdf); Todd C. Frankel, *The Cobalt Pipeline: Tracing the Path from Deadly Hand-Dug Mines in Congo to Consumers’ Phones and Laptops*, THE WASH. POST (Sept. 30, 2016), <https://www.washingtonpost.com/graphics/business/batteries/congo-cobalt-mining-for-lithium-ion-battery/?noredirect=on> (among the top national newspapers in the U.S., the Washington Post has consistently been the most involved with investigative reporting on conflict minerals and cobalt from the Congo); AMNESTY INTERNATIONAL, AMNESTY CHALLENGES INDUSTRY LEADERS TO CLEAN UP THEIR BATTERIES (Mar. 21, 2019), <https://www.amnesty.org/en/latest/news/2019/03/amnesty-challenges-industry-leaders-to-clean-up-their-batteries/>.

104 See Adam Vaughan & Samuel Gibbs, *Ion Age: Why the Future Will be Battery Powered*, THE GUARDIAN (Jan. 14, 2019), <https://www.theguardian.com/news/2019/jan/14/on-the-charge-why-batteries-are-the-future-of-clean-energy> (“More than 60% [of the] world’s cobalt is produced in the Democratic Republic of Congo.”).

105 RCS GLOBAL, THE EMERGING COBALT CHALLENGE: COMPETITION, CONCENTRATION, AND COMPLIANCE: UNDERSTANDING THE COBALT SUPPLY CHAIN AND HOW TO RESPOND (accessed Dec. 17, 2019), <https://www.rcsglobal.com/wp-content/uploads/rcs/pdfs/RCS-Global-The-Emerging-Cobalt-Challenge.pdf> (DRC houses “half of the world’s known [cobalt] reserves.”).

the Congo's south). Instead, NGOs and journalists have focused their campaign on the poor working conditions and environmental damage involved with the sourcing of cobalt that ends up in consumer electronics.

Without advocating for legislation, the clean cobalt campaign has been relatively successful in spurring changes to corporate behavior. For example, this year the BMW Group in partnership with Samsung Electronics and BASF SE has commissioned an auditor to

examine over a period of three years how the living and working conditions in small-scale [cobalt] mining in the Democratic Republic of the Congo can be improved....[A] better labour standard for artisanal cobalt mines is to be gradually developed, which will then be further pursued by the local participants and—provided the project is successful—will be scaled up to other artisanal mines in the Congo. At the same time, programmes such as those facilitating simplified access to quality education or the improvement of living conditions in neighbouring communities are being implemented.<sup>106</sup>

The challenges facing cobalt are virtually the same as those facing 3TG mineral production in eastern Congo, but because the 3TG narrative is focused on conflict, the 3TG private sector initiatives have been exclusively focused on preventing funds from flowing to rebel groups. In an effort to improve working conditions for 3TG miners and simplify the disparate mineral narratives in central Africa, it would be wise for NGOs and lawmakers to drop the “conflict minerals” moniker and gravitate toward the movement for ethical sourcing of minerals writ large.

### *C. Health, Safety, and the Environment—The Large-Scale Mining Industry*

A major tenet of the new 3TG narrative must be health and safety. A recent survey of the available data on miners' health and safety in the Congo shows a general increase in environmental pollution with increased mining activity and an increase in individual exposure to toxic metals due to poorly managed mining waste.<sup>107</sup> These trends show no signs of slowing without continual pressure for reform. It's difficult, for now, to trace and regulate the working conditions and environmental impact involved with the ASM sector (and there's significant evidence that the ASM sector generally

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<sup>106</sup> *Greater Transparency in Cobalt Mining*, BMW GROUP (accessed Dec. 17, 2019), <https://www.bmwgroup.com/en/responsibility/sustainable-stories/popup-folder/Kobalabbau.html>.

<sup>107</sup> See generally Jean-Paul Otamonga & John W. Poté, *Abandoned Mines and Artisanal and Small-Scale Mining in Democratic Republic of the Congo (DRC): Survey and Agenda for Future Research*, 208 J. GEOCHEMICAL EXPLORATION 106394 (2020).

worsens health, safety, and the environment),<sup>108</sup> but NGOs and lawmakers can advocate for realistic change in these areas in the large-scale mining sector.

Consider the Mopani Copper Mine, a large-scale mine in the township of Kankoyo in Zambia's Copperbelt region near the border with the DRC. The mine is not in a conflict zone, but it is the kind of large-scale mine typical of central Africa—the kind that might be expected in eastern Congo in the future. The mine was formally owned by the multinational mining behemoth Glencore, which sold its controlling interest in the mine to Zambia Consolidated Copper Mines Limited, Zambia's mining investment arm, in 2021.<sup>109</sup> NGOs have documented the negative health effects and property damage from Mopani's operations over many years.<sup>110</sup> Mopani's sulfur dioxide emissions have caused severe respiratory damage for the community,<sup>111</sup> the mine's blasting has left hundreds of houses with structural cracks,<sup>112</sup> acid rain has pierced holes in the community's roofs,<sup>113</sup> soil contamination has caused severe crop failure for many farmers in the area,<sup>114</sup> and effluents leakage from the mine's acid plant into the local water source causes frequent city-wide bouts with diarrhea.<sup>115</sup> As one Kankoyo resident described his experiences living near the mine, "You can't move outside when [sulfur dioxide is] emitted. You can't. The eyes get irritated.

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108 See *infra* Part IV.D of this section for more on the ASM sector. See *infra* Conclusion for discussion on the inherent tension between the promotion of health, safety, and the environment alongside the promotion of the ASM sector.

109 Matthew Hall, *Glencore Agrees \$1.5bn Sale of Mopani to Zambian Government*, MINING TECHNOLOGY (Jan. 19, 2021), <https://www.mining-technology.com/news/deal-news/glencore-zambia-mopani-sale/>.

110 See, e.g., ZAMBIA: GOOD COPPER, BAD COPPER (Canadians for Tax Fairness 2012) (<https://www.youtube.com/watch?v=uamzirLswjk>) (film); Brigadier Siachitema, *A Legal Analysis of the Human Rights Violations in the Zambian Mining Sector* (Nov. 2, 2018) (LLM thesis, University of Pretoria) ([https://repository.up.ac.za/bitstream/handle/2263/70005/Siachitema\\_Legal\\_2018.pdf?sequence=1&isAllowed=y](https://repository.up.ac.za/bitstream/handle/2263/70005/Siachitema_Legal_2018.pdf?sequence=1&isAllowed=y)).

111 See, e.g., *Mopani Sulphur-dioxide Emissions Cause Mufulira District Commissioner to Collapse*, LUSAKA TIMES (Oct. 18, 2013), <https://www.lusakatimes.com/2013/10/18/mopani-sulphur-dioxide-emissions-cause-mufulira-district-commissioner-to-collapse/>.

112 See James Musonda, *Mine Workers Experiences with Externalized Costs of Mining in Kankoyo Township, Mufulira-Zambia* (presented at the GLU Conference in Johannesburg, Sep. 2016) at 12-14, [https://www.global-labour-university.org/fileadmin/GLU\\_conference\\_2016/papers/7B/Musonda.pdf](https://www.global-labour-university.org/fileadmin/GLU_conference_2016/papers/7B/Musonda.pdf).

113 Phenny Mwaanga et al., *Preliminary Review of Mine Air Pollution in Zambia*, 5 HELIYON 1, 5 (Sept. 2019), <https://www.sciencedirect.com/science/article/pii/S2405844019361456>.

114 *Id.* at 7-8.

115 James Musonda, *Mine Workers Social Recognition of the Environmental Costs of Mining: A Case Study of Mopani Copper Mine and Kankoyo Township, Mufulira-Zambia* (2015) (dissertation, University of Witwatersrand) (<http://wiredspace.wits.ac.za/bitstream/handle/10539/24474/James%20Musonda.pdf?sequence=2&isAllowed=y>).

The nose gets irritated as well. The chest starts getting impaired.”<sup>116</sup> These cumulative effects stymie any hope for economic growth beyond the mine and leave the entire community suffering from ill health.

Mopani is able to operate this way, in part, because Zambia lacks the environmental standards to compel reasonable limits to Mopani’s emissions. A key tenant of the clean minerals campaign has to be environmental standards aimed at protecting people’s health and property. There should be a push for the DRC (and Zambia, for that matter) to adopt such standards, but as this is likely to be a slow process, there should be a demand on corporations to buy from sources with environmental standards that will ensure the wellbeing of miners and the communities surrounding mines.

This area of environmental standards will require special attention from NGOs specifically. While corporations are likely to implement and advocate for measures that curb, say, child labor, they will be far more reluctant to push for stricter environmental standards on their own. Things like child labor are both obviously objectionable and conveniently objectionable. A corporation can score easy points in the eyes of the public by opposing child labor because child labor is unnecessary to their operations. What’s harder for these corporations is to follow stricter environmental standards. They need loose standards for their operations to be most profitable. An objection to child labor is also more rhetorically powerful than an objection to an environmental standard, even if their impacts are comparable in damage. NGOs should vigilantly watch for smoke screens like child labor campaigns to ensure that proper attention is paid to environmental and health issues in addition to child labor advocacy.

There should also be a push for increased safety standards. In 2019 alone, two accidents at Glencore mines in the Congo killed scores of miners. At least 41 artisanal miners were killed when a mine collapsed in the Kolwezi area,<sup>117</sup> and another 18 people died when a truck transporting sulfuric acid to Glencore’s Mutanda Mine crashed and spilled its contents onto two other vehicles.<sup>118</sup> Such catastrophes are unprecedented at other Glencore sites outside of Africa. NGOs and lawmakers should increase pressure on such mining companies to prevent future accidents.

Alongside campaigning, NGOs should also push for increased litigation against large-scale mining companies in violation of environmental standards and health and safety codes. Litigation success has been limited,

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<sup>116</sup> ZAMBIA: GOOD COPPER, BAD COPPER (Canadians for Tax Fairness 2012) (<https://www.youtube.com/watch?v=uamzirLswjk>) (film).

<sup>117</sup> Stanis Bujakera & Aaron Ross, *Accident at Glencore Mine Kills at Least 41 in Congo*, REUTERS (June 27, 2019), <https://www.reuters.com/article/us-congo-mining-glencore/accident-at-glencore-mine-kills-at-least-41-in-congo-idUSKCN1TS2CE>.

<sup>118</sup> William Clowes, *Acid Spill on Vehicles Near Glencore Mine Kills 18 People*, BLOOMBERG (Feb. 22, 2019), <https://www.bloomberg.com/news/articles/2019-02-22/truck-crash-near-glencore-mine-in-congo-kills-18-people>.

but that's in part because there has been relatively little litigation levied against large corporations involved with mining in the Congo. For example, in December 2019, Apple, Google, Dell, Microsoft, and Tesla were named as defendants in a lawsuit filed in Washington D.C.<sup>119</sup> As *The Guardian* points out, this is “the first time that any of the tech companies have faced such a legal challenge.”<sup>120</sup> Litigation is cumbersome and expensive, but central African nations are beginning to be receptive to pollution claims against mining corporations.<sup>121</sup>

#### *D. Economic Development—The Artisanal and Small-Scale Mining Sector*

Section 1502 strongly favors large-scale, highly regulated mines—the kinds that can easily trace where minerals are coming from. But as long as the conflict continues to smolder in eastern Congo, it will be a long time before such mines will be able to employ significant numbers of people in the region. Until then, NGOs and lawmakers should focus on improving and legitimizing the ASM sector, which has the potential to ignite economic growth in eastern Congo.

The crude techniques of the ASM sector are often framed in negative terms—due to its unregulated nature, the practice can be damaging to the environment and the work is often dangerous for miners—but what is often ignored is ASM's undeniable economic benefit. The sector offered a “viable and lucrative income generating activity for many prior to the implementation of...section 1502.”<sup>122</sup> As Hayes puts it, ASM is “one of the most important livelihood activities in Africa.”<sup>123</sup> The sector “often

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119 Complaint, Doe et al. v. Apple Inc. et al., (D.D.C. 2019).

120 Annie Kelly, *Apple and Google Named in US Lawsuit over Congolese Child Cobalt Mining Deaths*, THE GUARDIAN (Dec. 16, 2019), <https://www.theguardian.com/global-development/2019/dec/16/apple-and-google-named-in-us-lawsuit-over-congolese-child-cobalt-mining-deaths>.

121 Consider the scramble that litigation has stirred up in Zambia in recent years for Glencore and Vedanta: see, e.g., Rob Davies, *Glencore Court Ruling in Zambia May Trigger New Pollution Claims*, THE GUARDIAN (Sept. 18, 2016), <https://www.theguardian.com/business/2016/sep/18/glencore-court-ruling-in-zambia-may-trigger-new-pollution-claims>; Sudarshan Varadhan & Muvija M, *Vedanta Seeks International Arbitration to Settle Zambia Dispute*, REUTERS (May 31, 2019), <https://www.reuters.com/article/us-zambia-mining-vedanta/vedanta-seeks-international-arbitration-to-settle-zambia-dispute-idUSKCN1T113T>; Neil Hume, *Vedanta Suffers Legal Setback in Zambia*, FINANCIAL TIMES (June 20, 2019), <https://www.ft.com/content/46c13e7c-9373-11e9-b7ea-60e35ef678d2>.

122 Frankel, *supra* note 92 at 117.

123 Karen Hayes, 2008 Regional Workshop: Small-scale Mining in Africa—A Case for Sustainable Livelihood 11 (2008) [https://delvedatabase.org/uploads/resources/Hayes\\_2008\\_CFC\\_Regional-Workshop-Small-Scale-Mining-in-Africa.pdf](https://delvedatabase.org/uploads/resources/Hayes_2008_CFC_Regional-Workshop-Small-Scale-Mining-in-Africa.pdf).

functions as a safeguard for impoverished populations against the descent into extreme poverty.”<sup>124</sup>

Central to the problem with 3TG minerals is the unfathomably complex supply chain that moves the minerals from the hands of miners in eastern Congo to consumer products. The trade involves inordinate numbers of middlemen between the miner and the corporation that are untraceable in most cases. NGOs should push corporations to purchase from more direct sources, like verified ASM coalitions. The private sector has begun to experiment with verification schemes, such as using blockchain technology to trace minerals, and this should be encouraged.<sup>125</sup> Blockchain isn't perfect,<sup>126</sup> but it has the potential to increase the visibility of the chain of custody that can trace wages paid for labor, working conditions, and environmental sustainability.

This kind of NGO pressure works. In 2017, Apple stopped buying cobalt from ASM sources in the Congo after investigative reports found that child labor was involved in the process.<sup>127</sup> The next year, rumors swirled that Apple was in talks to buy cobalt directly from miners in the Congo with no middlemen.<sup>128</sup> Tesla is reportedly in similar talks.<sup>129</sup> These talks were allegedly focused on large-scale mining options—not purchasing from ASM sources—but the news signaled a potential new direction for giant end users of Congolese minerals, like Apple, who may be able to cut out significant abuse in the chain of custody by purchasing from verified ASM coalitions that are integrated into the large-scale mining sector as has been done in South Africa.<sup>130</sup>

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124 Shefa Siegel & Marcello M. Veiga, *The Myth of Alternative Livelihoods: Artisanal Mining, Gold and Poverty*, 41 INT'L J. ENV'T. & POLLUTION 272, 273 (2010).

125 See Geneva Abdul, *Is Blockchain the New Ethical Gold Rush? Maybe*, N.Y. TIMES (Dec. 6, 2019), <https://www.nytimes.com/2019/12/06/fashion/jewelry-blockchain-gold-mining-world-economic-forum.html>; Aaron Ross & Barbara Lewis, *Congo Mine Deploys Digital Weapons in Fight Against Conflict Minerals*, REUTERS (Oct. 1, 2019), <https://www.reuters.com/article/us-congo-mining-insight/congo-mine-deploys-digital-weapons-in-fight-against-conflict-minerals-idUSKBN1WG2W1> (note, however, that the effort is still framed as a strategy against the conflict; not human rights more generally).

126 See Fritz Brugger, *Blockchain is Great, but It Can't Solve Everything. Take Conflict Minerals*, AFRICAN ARGUMENTS (Apr. 23, 2019), <https://africanarguments.org/2019/04/23/blockchain-is-great-but-it-cant-solve-everything-take-conflict-minerals/>.

127 Don Reisinger, *Child Labor Revelation Prompts Apple to Make Supplier Policy Change*, FORTUNE (Mar. 3, 2017), <https://fortune.com/2017/03/03/apple-cobalt-child-labor/>.

128 Jack Farhy & Mark Gurman, *Apple in Talks to Buy Cobalt Directly from Miners*, BLOOMBERG (Feb. 20, 2018), [https://www.bloomberg.com/news/articles/2018-02-21/apple-is-said-to-negotiate-buying-cobalt-direct-from-miners?utm\\_content=tech&utm\\_campaign=socialflow-organic&utm\\_source=twitter&utm\\_medium=social&cmpid%3D=socialflow-twitter-tech](https://www.bloomberg.com/news/articles/2018-02-21/apple-is-said-to-negotiate-buying-cobalt-direct-from-miners?utm_content=tech&utm_campaign=socialflow-organic&utm_source=twitter&utm_medium=social&cmpid%3D=socialflow-twitter-tech).

129 JP Casey & Molly Lempriere, *Debate: Can Tech Giants like Tesla and Apple Change Mining for the Better?*, MINING TECH. (Nov. 19, 2019), <https://www.mining-technology.com/features/tesla-apple-mining-technology/>.

130 See generally P.F. Ledwaba, *The Status of Artisanal And Small-Scale Mining Sector in South Africa: Tracking Progress*, 117 J. S. AFR. INST. OF MINING & METALLURGY 33 (2017), [http://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S2225-62532017000100010](http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S2225-62532017000100010).

## V. CONCLUSION

This Note has demonstrated the need for a narrative shift in the conflict minerals campaign. The existing narrative is based on an unfounded assumption connecting minerals to the perpetuity of conflict in eastern Congo, and the legislation that narrative has produced is utterly futile. After ten years of activism and regulation, almost nothing has changed for those living in the Congo. This isn't surprising considering the weak demand of the conflict minerals campaign, at least as it's spelled out in the legal requirements of section 1502: don't purchase minerals from sources that fund conflict. That's it. In theory, a corporation could purchase its minerals from a large-scale foreign-owned mining company with operations in eastern Congo that are severely polluting the air, poisoning the water, and contaminating the soil, posing significant health risks to the surrounding community. The same mining company might demand extremely dangerous work from its miners with unfair compensation and virtually no safety procedures. The same mining company might be evading taxes, paying bribes, and going to great lengths to avoid leaving any money in the Congo. That same mining company would technically be "conflict free," and so too would be the end products it helps produce. The new narrative should disentangle the enmeshed relationship between conflict and minerals in eastern Congo. At times these narratives will overlap, but the campaign to end the conflict in eastern Congo should remain focused on ending the conflict in eastern Congo. Meanwhile, the mission to clean up the Congo's mineral supply should remain fixed on cleaning up the Congo's mineral supply. This shift will offer better solutions for the development of the mining sector in the region—both large- and small-scale—but it will also help the conflict, too. Increased economic prosperity in the region will hopefully quell some of the violence that is fueled by despondency.

The DRC has the naturally endowed potential to become a great nation in the near future. The realization of this potential will depend on a myriad of untold factors, most of which will come from within the Congo, but if the international community is going to be involved with the process, NGOs and lawmakers must stand behind a narrative that works. The world has been telling the Congo's story for centuries, and it's a bad one. That story may remain bad or turn good. Whatever the case, the story should at least be true.

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