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Rich and Rare are the Gems They War:

Holding De Beers Accountable for Trading Conflict Diamonds

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INTRODUCTION

The insurgents n1 broke through the gate to Alpha's house in Freetown, the capital of Sierra Leone. n2 They had cuts on their faces covered with adhesive strips. n3 The insurgents put cocaine [*1403] into their bloodstreams through these incisions. n4 They entered Alpha's house and demanded money from his parents. n5 Alpha's father handed over all the money he had in his possession. n6 The fighters then abducted Alpha and his two younger brothers, along with many other young people in the area. n7 They took their captives up a nearby hill where a young combatant named Tommy chopped off the captives' arms with an axe. n8 Alpha and his brother, Amadu, survived the amputations and were taken in by a family that cared for them. n9 Alpha later found out that his other brother, Dawda, died from loss of blood and that the insurgents burned his parents and sister alive in their house. n10

This incident stands as one of many in an ongoing civil conflict in Sierra Leone. n11 Experts claim that political ideologies do [*1404] not motivate this insurgent group. n12 Instead, they argue that control of diamond production is a root cause behind the war in Sierra Leone. n13

RICH AND RARE ARE THE GEMS THEY WAR

Observers note that in several African nations insurgent groups use diamonds to fund civil wars. n14 The revenue that insurgents [*1405] obtain from smuggling diamonds across borders allows them to buy more arms and to continue fighting. n15 The fighting [*1406] in these nations has led to extensive human rights abuses by these insurgent groups. n16 The insurgents would not have the money to buy arms and commit human rights abuses without the willingness of diamond buyers to trade with them. n17 For these [*1407] diamond buyers, the practice of indirectly funding human rights violations represents a possible violation of international law. n18

This Note focuses on the accountability of corporations for indirectly fueling civil wars by purchasing diamonds from insurgent groups. While many corporations are involved in the diamond industry, n19 De Beers n20 controls a majority of the uncut diamond n21 [*1408] market, including mining, buying, and selling uncut diamonds. n22 Therefore,

this Note will analyze whether De Beers may be held liable for knowingly funding war criminals under the Alien Tort Claims Act ("ATCA"). n23

Part I of this Note examines the trade in conflict diamonds n24 in Angola and Sierra Leone and De Beers's involvement [*1409] in this trade. Part II examines case law developments under the ATCA and obstacles to recovery against multinational corporations n25 ("MNCs") under the ATCA. Part II also outlines efforts made by international organizations, the U.S. government, and MNCs to regulate the activities of MNCs in host countries. n26 Part III argues that De Beers should be liable under the ATCA for complicity in war crimes and crimes against humanity by funding insurgent groups engaged in human rights violations. n27 This Note concludes that the ATCA should be amended and offers a proposal for legislation to make MNCs liable for their involvement in human rights abuses. Under an amended ATCA, De Beers could be held accountable for its part in the conflict diamond trade.

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

A. Conflict Diamonds: The Setting

Observers note that the conflict diamond trade occurs in regions where diamonds are mined by insurgent groups and then sold for arms or cash. n28 While commentators claim that ending the conflict diamond trade may be an important element [*1410] of ending the civil wars in Angola and Sierra Leone, there are serious difficulties with stopping these exchanges. n29 Particularly, no technology currently exists that can identify diamonds by their source once they are on the market. n30 Additionally, smuggling and trading through multiple intermediaries present obstacles to determining where a diamond originated. n31

1. Clarifying the Terms

Conflict diamonds are diamonds mined or stolen by insurgent forces in opposition to the legitimate government. n32 Insurgent [*1411] groups sell diamonds to buy arms and obtain cash flow for their war effort. n33 Commentators speculate that the conflict diamond trade comprises between four and fifteen percent of the world trade in diamonds. n34 Presently, conflict diamonds come from Angola, Sierra Leone, and the Democratic Republic of Congo. n35 Until recently, international law has not deterred traders from engaging in trade with rebels groups. n36

[*1412]

2. A Rock in a Hard Place

The United States has responded to the trade in conflict diamonds by proposing that all diamonds imported into the United States have certificates of origin. n37 Because many nations' economies profit from legitimate diamond trade, and only certain countries

produce conflict diamonds, determining the origin of diamonds is preferable to a total ban on diamonds. n38 Thus, identification of a diamond's source is essential to stopping the conflict diamond trade in these countries. n39

Representatives from the diamond industry have asserted the impossibility of identifying the source of individual rough diamonds without destroying the diamond. n40 Commentators allege, [*1413] however, that experts can identify diamonds from different regions through a variety of techniques, including simply looking at their surface features. n41 Although identifying diamonds by surface features is not a precise science, a combination of identification techniques could be used to determine a diamond's origin. n42 At least one commentator argues that these methods may be equally useful to exclude those regions from where a diamond did not originate. n43

3. Dealer in the Rough

Commentators note that tracing the origin of conflict diamonds is further complicated by the smuggling culture in the diamond business. n44 A recent U.N. report on the Angolan conflict diamond trade explains the complex organizational structure of modern day diamond smuggling. n45 Diamonds are susceptible [*1414] to smuggling because they are small and easy to conceal. n46 Observers state that the diamond industry's lack of transparency makes it difficult to combat smuggling. n47 Smuggling usually involves trading diamonds through multiple buyers, or intermediaries, which presents further difficulties in tracing diamond trade routes. n48

B. The Civil Wars: The Carat and the Stick

The civil wars in Angola and Sierra Leone are examples of insurgent movements using diamonds to finance wars against official governments. n49 The civil war in Angola has continued on [*1415] and off since the 1960s, n50 and diamonds are essential to maintaining the insurgent war effort there. n51 The civil war in Sierra Leone is more recent, beginning in 1991, n52 and insurgent groups there also use diamonds to buy weapons for use in the fighting. n53 Commentators assert that the trade in conflict diamonds has prolonged the length of the violence in Angola and Sierra Leone. n54

[*1416]

1. Angola

The Portuguese colonized Angola and controlled the region until 1975 when the Portuguese government granted Angola's independence. n55 Since Angola's independence, civil war has engulfed Angola as insurgent forces struggle against the Popular Movement for the Liberation of Angola n56 ("MPLA"), the ruling party in Angola. n57 The insurgent forces, called the National Union for the Total Independence of Angola n58 ("UNITA"), occupied a majority of the diamond producing areas in Angola in the 1990s n59 and have used revenues from diamond mining and trading to buy more arms for continued fighting. n60

a. History of Angola

For most of the twentieth century, the Portuguese controlled [*1417] Angola. n61 Although the first Portuguese explorer arrived in Angola in 1483, n62 the Portuguese did not establish a colony in Angola until 1576 when they founded their first town in Angola, called Luanda. n63 Portugal subsequently used Angola as its primary source of slaves in the seventeenth and eighteenth centuries. n64 Portugal continued to gain control over Angolan territory throughout the nineteenth century and by 1930, Portugal considered Angola an important Portuguese colony. n65

The war in Angola began in 1961 as a war of independence against Portuguese colonialism. n66 In the 1950s and 1960s, anti-colonialist sentiment gave rise to three nationalist movements. n67 [*1418] The MPLA, founded in 1956, n68 drew support from urban dwellers n69 and professed a Marxist ideology. n70 The National Front of Liberation of Angola n71 ("FNLA"), originally known as the Union of the Peoples of Northern Angola and subsequently the Union of Angolan Peoples, n72 was composed mostly of Kikongo, or Bakongo, people and had significant ties to Zaire. n73 The third nationalist group in Angola is UNITA, founded by Jonas Savimbi in 1966. n74 UNITA drew most of its support from the [*1419] Ovimbundu people, the largest ethnic group in Angola. n75 Commentators note that the ideology of UNITA is largely an expression of Savimbi's own ideals, which have changed over the years from Maoist to anti-communistic. n76

After years of war between Angolan nationalist groups and Portuguese colonialists, Portugal granted independence to Angola on November 11, 1975. n77 In the time preceding the date of independence, the three nationalist groups turned against each other in a struggle to gain control over Luanda, the capital, by November 11. n78 The MPLA eventually gained control. n79 The FNLA joined forces with UNITA, realizing that neither group could defeat the MPLA alone, and the combined forces declared [*1420] full-scale civil war against the Angolan government. n80

Angola had democratic elections in 1992 as a result of a short-lived peace agreement. n81 The war resumed after Savimbi rejected the election results. n82 In November 1994, UNITA and the government signed the Lusaka Protocol, n83 attempting to end the war, but fighting continues. n84

b. Two Months Salary: Funding a Civil War

Commentators claim that UNITA controlled the majority of diamond production and exportation in Angola in the 1990s. n85 UNITA used the revenue generated from the sale of diamonds [*1421] extracted from their occupied territory to fund the war effort. n86 Commentators speculate that UNITA made several billion dollars in revenue in the 1990s in diamond trade alone. n87

In June 1998, the U.N. Security Council passed Resolution 1176, n88 accelerating Resolution 1173, responding to the conflict diamond trade. n89 These resolutions

combined to prohibit the export of diamonds from Angola that are not certified by the government. n90 Nevertheless, there are significant loopholes, through which conflict diamonds may still reach the outside market. n91 [*1422]

2. Sierra Leone

The British colonized Sierra Leone as a settlement sight for freed slaves. n92 In 1961, Sierra Leone achieved independence from the British n93 and functioned as a one party state for many years. n94 The civil war in Sierra Leone began in 1991 as a coup d'etat organized by the Revolutionary United Front ("RUF"). n95 The RUF insurgents have occupied many of the diamond producing areas in Sierra Leone n96 and they use the profits from diamond sales to finance their continued fighting. n97

a. History of Sierra Leone

The history of Sierra Leone is unique because Britain's initial involvement with the nation was an effort to repatriate slaves [*1423] from the Western World. n98 These repatriated slaves, known as Creoles, n99 settled in and around Freetown, a city in Sierra Leone, in the late 1700s. n100 The British claimed the Freetown area as a Crown Colony in 1808, n101 and later extended their control over inland areas, declaring the larger region a British Protectorate in 1896. n102 The British maintained control of Sierra Leone until 1961 when Sierra Leone achieved independence. n103

Initially after independence, Sierra Leone experienced a brief period of democratic rule. n104 Siaka Stevens, representing the All People's Congress, n105 was elected prime minister in [*1424] 1967, n106 and he established a one party state in 1978. n107 In 1985, Stevens handed power over to his chosen successor, Major General Joseph Saidu Momoh. n108

The civil war in Sierra Leone started in 1991 as an attempted coup d'etat by the Revolutionary United Front n109 ("RUF"). n110 The RUF never clearly expressed the political objectives of the insurgency. n111 Fighting continued in Sierra Leone [*1425] throughout the 1990s n112 and, in May 1999, the RUF and the Sierra Leone government signed a cease-fire agreement called the Lome Peace Accord. n113

Under the peace agreement terms, Foday Sankoh, the leader of the RUF, became Chairman of the Commission on the Management of Strategic Resources, National Reconstruction and Development, n114 which officially gave him control over the diamond mines that his forces were already controlling. n115 Additionally, the Lome agreement granted Sankoh and his insurgent fighters amnesty for their crimes. n116 Violence continues in Sierra [*1426] Leone n117 and the peace agreement has broken down. n118 The U.N. is establishing a war crimes tribunal for Sierra Leone since the failure of the Lome agreement. n119

b. Two Months Salary: Funding a Civil War

During the 1990s, RUF forces controlled the major diamond mines in Sierra Leone. n120 Commentators discuss that some RUF fighters were illicit diamond miners and traders before becoming combatants. n121 Some observers speculate that control of the diamond mines in Sierra Leone is an important [*1427] underlying reason for the insurgency. n122 On July 6, 2000, the U.N. Security Council imposed an embargo on diamonds from Sierra Leone. n123 This resolution called on nations to take all necessary measures to prevent direct or indirect importation of diamonds from Sierra Leone that are not officially certified by the Sierra Leone government. n124

C. De Beers: Diamonds Scar Forever

Corporate actors facilitate the conflict diamond trade by buying illicit diamonds directly or indirectly from insurgent groups. n125 De Beers's control of the diamond trade makes its involvement with conflict diamonds particularly relevant. n126 For [*1428] years, De Beers has set the price of diamonds for the entire diamond industry by acquiring the majority of diamonds before they reach the market. n127 De Beers is able to acquire these diamonds both through its own mining activities and by purchasing diamonds from sellers outside the organization. n128 Although De Beers no longer operates any buying activities in Angola or Sierra Leone, n129 commentators claim that the organization acquires diamonds from these areas by buying from outside dealers. n130 De Beers has recently guaranteed that their diamonds do not originate in conflict areas. n131

1. Corporate Structure

De Beers is a corporation controlled by the Oppenheimer family. n132 Commentators note that De Beers's corporate structure [*1429] is complex. n133 For the past decade, two closely related public companies, De Beers Consolidated Mines Limited, incorporated in South Africa, and De Beers Centenary AG, incorporated in Switzerland, have controlled the De Beers syndicate. n134 In addition to these two large corporations, the De Beers syndicate controls many other subsidiary companies. n135 Prior to February 2001, De Beers maintained a thirty- five percent interest in the Anglo American Corporation, a large mining company. n136 Some observers have criticized De Beers's corporate structure as lacking transparency. n137 De Beers recently announced its decision to change its organizational form and create a new private company with Anglo [*1430] American. n138 Under the new arrangement, a consortium called DB Investments, with most shares controlled by the Oppenheimer family and Anglo American, will buy out De Beers shareholders. n139 Although the new company will be private, representatives claim that De Beers will not retreat into secrecy. n140

2. Buying Habits

De Beers controls about sixty percent of the world's uncut diamond sales. n141 De Beers has recognized its past position as "custodian of the market," n142 and commentators note that this role has led to a policy of buying all of the diamonds on the market in an effort to control and stabilize the price of diamonds. n143 De Beers recently announced its intention to [*1431] abandon its policy of acquiring all diamonds on the market. n144

Before its change in policy, De Beers obtained diamonds both through production from its own mines and from outside markets, also known as the open market. n145 De Beers does not operate any mines in conflict areas, n146 thus, if De Beers obtains conflict diamonds, the company acquires them through the outside market buying process. n147 This system creates problems of accountability because there are a number of intermediaries involved. n148 In the past, when a government has been unable to [*1432] effectively prevent smuggling, experts argue that De Beers knowingly bought diamonds from smugglers or other third parties in order to maintain its control over the supply of diamonds. n149

3. Rules of Engagement

De Beers's involvement with diamonds from Angola and Sierra Leone reflects their old policy of acquiring the majority of diamonds produced in world in an effort to keep the diamond supply steady and diamond prices stable. n150 De Beers bought diamonds from Angola in the 1990s when UNITA occupied most diamond mines in the country. n151 Additionally, commentators assert that De Beers acquired diamonds from Sierra Leone through outside dealers. n152

a. Angola

Commentators state that De Beers openly bought diamonds [*1433] that originated in Angola in the 1990s, when the UNITA forces controlled the large majority of the diamond mines in the country. n153 Such individuals conclude that De Beers was engaged in trade with UNITA insurgents and thereby provided funds to combatants, who perpetuated strife in the region. n154 The United Nations also reports that De Beers was involved in the Angolan conflict diamond trade. n155 In the late 1990s, De Beers responded with a decision to refrain from buying Angolan diamonds. n156 [*1434]

b. Sierra Leone

Experts discuss that De Beers's involvement in conflict diamonds from Sierra Leone is linked with smuggling into Liberia. n157 Liberia has few diamond mines within its own borders and is a transit country for Sierra Leone diamonds. n158 De Beers asserts that their offices in Sierra Leone and Liberia have been closed for fourteen years. n159 Commentators allege that it is conceivable that De Beers bought illicit Sierra Leone diamonds through intermediaries given De Beers's policy of buying from outside markets combined with its extensive use of intermediaries. n160

4. "I Don't"

In June 2000, De Beers announced its intention to sign formal written contracts with its trading partners to ensure that [*1435] their diamonds do not originate in conflict zones. n161 The World Diamond Council, composed of the industry's two largest groups, also committed itself to ending the trade in conflict diamonds by setting up a global system of

identification for all diamonds on the market. n162 These steps to reform the industry are in response to an increase in public awareness about this issue. n163

II. MULTI-FACETED APPROACHES TO CORPORATE LIABILITY

With the increased influence of MNCs in the twentieth and twenty-first centuries, international organizations, national politicians, [*1436] and private actors have developed various techniques for holding MNCs accountable. n164 In the past decade, private individuals have invoked the ATCA as a method for demanding corporate responsibility for human rights violations. n165 More traditionally, international organizations, the United States, and private industry initiatives have developed codes of conduct to guide MNCs in their activities abroad. n166 Although these efforts are meaningful for drawing attention to the need for corporate accountability, no court has found an MNC liable under the ATCA n167 and codes of conduct are generally voluntary and rarely [*1437] enforced. n168

A. *Alien Tort Claims Act*

The ATCA acts as a tool for holding human rights violators liable to victims seeking redress when options in their own countries are limited. n169 Although the statute is over 200 years old, it [*1438] existed in relative obscurity until the plaintiffs in *Filartiga v. Pena- Irala* n170 used it to hold a Paraguayan state official liable for torture. n171 Since then, plaintiffs have attempted to use the ATCA against private individuals and MNCs, alleging violations of the "law of nations." n172 Nevertheless, plaintiffs utilizing this approach face many obstacles, making recovery unlikely. n173

1. General Background

The ATCA, initially passed as part of the Judiciary Act of 1789, n174 grants jurisdiction to U.S. district courts over any civil action brought by an alien for a tort committed in violation of the "law of nations" n175 or a U.S. treaty. n176 Commentators speculate [*1439] that the framers of the statute designed the legislation in order to avoid conflicts with other nations over mistreatment of non-U.S. citizens. n177 Although commentators hypothesize as to the possible purpose of this statute, little legislative history exists to indicate the framers' actual intent. n178 For almost 200 years, courts rarely used the ATCA. n179 This changed in 1980, when the Second Circuit court relied on the ATCA in the landmark case *Filartiga v. Pena-Irala*. n180 [*1440]

2. Case Law Development Under the ATCA

In 1980, the Court in *Filartiga v. Pena-Irala* found that State-sponsored torture constituted a part of the "law of nations" under the ATCA. n181 Over fifteen years later, a Second Circuit court in *Kadic v. Karadzic* found that private individuals can be liable under the ATCA where the allegations include war crimes and genocide. n182 Subsequently, plaintiffs began filing suits against MNCs under the ATCA alleging various human rights abuses related to MNC activity. n183 These suits have often

targeted MNCs involved in extractive industries, such as oil and mining, n184 but recently, plaintiffs have also attempted to hold banking institutions liable for knowingly profiting off of human rights abuses. n185

a. Filartiga

Filartiga involved a wrongful death suit against a Paraguayan police officer, Americo Norberto Pena-Irala. n186 The plaintiffs alleged that Pena-Irala kidnapped, tortured, and killed Joelito Filartiga on May 29, 1976. n187 The District Court dismissed the [*1441] case for lack of subject matter jurisdiction, n188 but the Second Circuit Court of Appeals reversed and allowed recovery under the ATCA. n189 The Court looked to international treaties and accords, as well as national laws, to determine whether torture formed a part of customary international law. n190 The Court [*1442] found that State-sponsored torture violates international customary law, n191 and therefore, if the allegations were proved, Pena-Irala could be liable under the ATCA. n192 The Court limited its holding to the issue of State-sponsored torture, recognizing that few other issues are as universally prohibited by the nations of the world. n193 [*1443]

b. Kadic

In 1995, the Second Circuit expanded the ATCA with the ruling in *Kadic v. Karadzic*. n194 In *Kadic*, the Court found that acts committed by non-state actors also fell within the realm of the ATCA. n195 The plaintiffs in *Kadic*, Croat and Muslim citizens of Bosnia-Herzegovina, brought suit against the leader of the rebel military forces that engaged in systematic violations of international human rights law. n196

The District Court held that the ATCA does not extend liability to private individuals and found that *Karadzic* was a private actor. n197 On appeal, the Court of Appeals held that certain violations of the "law of nations" do not require State action and, thus, private individuals may be held liable under the ATCA for these crimes. n198 The Court found that violations involving genocide [*1444] or war crimes do not require State action and, since these violations were among the allegations, the defendant faced liability as a private actor under the ATCA. n199

The *Kadic* court's extension of liability for certain crimes to non-State actors has significance. n200 Commentators argue that this expansion of the ATCA has left the application of the ATCA open to further enlargements. n201 Indeed, after *Kadic*, courts went on to recognize the possibility of extending ATCA liability to MNCs. n202

c. Beanal

In 1996, Tom Beanal, an Indonesian citizen and leader of an indigenous group there, brought suit under the ATCA against Freeport-McMoRan, a U.S. mining MNC operating in Beanal's town. n203 Beanal alleged human rights violations as well [*1445] as environmental abuses committed by Freeport-McMoRan. n204 Although the Court recognized the potential for MNCs to be liable under the ATCA, n205 it dismissed the

case for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. n206

Beanal alleged cultural genocide as a basis for finding a violation of international law. n207 Although private actors are liable for genocide without a showing of state action, n208 the Court found that Beanal's allegation did not amount to genocide. n209 Therefore, the Court would not find Freeport-McMoRan liable for acts committed in furtherance of genocide under the facts pled by Beanal. n210

Beanal also alleged other human rights abuses, including torture, arbitrary detention, and destruction of property. n211 [*1446] Freeport-McMoRan's liability for these violations requires State action since these acts were not committed in furtherance of genocide. n212 After examining relevant tests for determining whether a private actor engaged in State action, n213 the Court found that Freeport-McMoRan did not have sufficient connections with the State to establish liability for these allegations. n214

d. Unocal

In 1997, a district court in the Ninth Circuit heard another ATCA case against an MNC. n215 In *Doe v. Unocal*, farmers from Myanmar sued Unocal and Total S.A., two large oil companies [*1447] operating in Myanmar. n216 The plaintiffs alleged a variety of human rights abuses, including forced labor, torture, and rape, committed by the repressive regime in Myanmar. n217 The claim revolves around Unocal's funding of, knowledge of, and benefit from human rights abuses committed by the State Law and Order Restoration Council n218 ("SLORC") in furtherance of a joint pipeline project between Unocal and SLORC. n219

The Court held that private corporations could be held liable under the ATCA for joint action in complicity with the State. n220 The Unocal Court asserted that joint action is found [*1448] where there is a considerable amount of cooperation between the government and private entities in depriving people of their rights. n221 Furthermore, because the plaintiffs alleged forced labor, the Court found that Unocal might be liable without State action since forced labor can be considered within the ambit of slave trading. n222 The Court denied Unocal's motion to dismiss. n223

At trial in *Doe v. Unocal* n224 ("*Unocal II*"), the Court held that Unocal was not liable for the violations because Unocal did not have the necessary degree of connection to the State to establish joint action. n225 The Court acknowledged that Unocal knew of the practice of using forced labor, but it did not take active steps to further such a practice, and, therefore, the Court dismissed the case against Unocal. n226 Although, the initial District Court opinion in *Unocal* provides a framework for holding corporations [*1449] accountable for their complicity with repressive regimes, n227 the final decision of the Unocal Court reveals that establishing a case against an MNC under this framework will be extremely difficult. n228

e. Swiss Bank Litigation

In late 1996 and early 1997, Holocaust survivors and their descendants filed three suits against Swiss banks alleging that the banks knowingly profited from slave labor and stolen property during the Nazi reign in Germany. n229 They alleged participation and complicity with the Nazi regime in perpetrating crimes against humanity, crimes against the peace, and war crimes, and claimed liability under the ATCA. n230 The Eizenstat Report, n231 officially [*1450] ordered by the U.S. government, speculates that Swiss banks prolonged the war by providing funds to the Nazis. n232

The Holocaust plaintiffs invoked the Nuremberg Principles n233 to prove liability on the part of the banks. n234 The Nuremberg Principles are a restatement of the legal principles developed by the International Law Commission and recognized in the Nuremberg Charter, the decisions of the International Military Tribunal n235 ("IMT") that convicted Nazi war criminals ("Nuremberg Tribunals"), and customary international law. n236 Principle VI of the Nuremberg Principles defines crimes against the peace, war crimes, and crimes against humanity. n237 Principle VII provides that complicity in committing a crime against the [*1451] peace, a war crime, or a crime against humanity violates international law. n238 These Principles are accepted as precedent in international law. n239

At the Nuremberg Tribunals, Frederick Flick, a German industrialist, was convicted of spoliation and plunder for his takeover of a cement plant in France. n240 Although the IMT was hesitant to equate property crimes to crimes against humanity, the IMT found Flick guilty for accepting and retaining property that he knew the Nazi regime had obtained unlawfully. n241 Thus, [*1452] knowingly supporting and accepting looted property from war criminals is a violation of international law under the Nuremberg precedent. n242

The Nuremberg trials in general, and the Flick conviction in particular, strengthen the Holocaust plaintiffs' claims. n243 The Unocal II summary judgment decision, however, required a high degree of cooperation between a State and private actor to find individual liability under the ATCA, presenting a potential problem for the Holocaust plaintiff's claims. n244 The parties to the Holocaust litigation eventually settled, and therefore, no judicial opinion was ever made regarding the legitimacy of the claims under international law. n245

3. Criticisms of ATCA

Courts' willingness to entertain claims n246 against MNCs under the ATCA reveals a changing sentiment towards such suits. n247 Commentators generally agree, however, that the ATCA [*1453] is a weak method of holding corporations accountable for their activities in nations outside their home country. n248 ATCA plaintiffs face several obstacles in bringing suit against an MNC, including meeting the high factual threshold, n249 overcoming a forum non conveniens motion, n250 obtaining personal jurisdiction over the defendant, n251 and showing State action for most human rights allegations. n252

a. High Factual Threshold

The first potential problem with utilizing the ATCA to hold [*1454] MNCs accountable is that the plaintiff must meet a high threshold of factual evidence. n253 Often, a judge will grant a defendant's failure to state a claim motion in ATCA cases. n254 The plaintiff will struggle to satisfy this requirement because evidence of an MNC's participation in violations of international law is often difficult to obtain. n255 Although in some instances courts have allowed limited discovery for the plaintiff to establish the requisite facts, n256 generally courts demand a highly developed factual basis for the continuation of a case under the ATCA. n257

b. Forum Non Conveniens

Defendants also will likely object to an ATCA suit based on forum non conveniens. n258 Forum non conveniens is granted when a case can be pursued more effectively and fairly in another country. n259 The events giving rise to an ATCA claim often [*1455] occur in another nation, and because of this, defendants argue that the United States is not the proper place for a trial. n260

For example, in *Wiwa v. Royal Dutch Petroleum*, Nigerian plaintiffs brought suit against Shell and Royal Dutch Petroleum, two oil companies, for their direct and indirect involvement in human rights abuses perpetrated by the Nigerian State. n261 The defendants moved to dismiss the case on forum non conveniens grounds. n262 The Second Circuit held that the defendants failed to establish that the claims would be more appropriately addressed in a court outside the United States. n263 The Court also set out additional factors for a forum non conveniens analysis, n264 such as the principle that there should be increased deference to the plaintiff's choice of forum when the plaintiff has substantial ties to that forum. n265 The Court found that since the plaintiffs lived in the United States, changing the forum of the suit would impose a significant hardship on them. n266

Additionally, where the United States has an interest in litigating the claim, courts should strive to maintain the suit in U.S. court. n267 The plaintiff in *Wiwa* argued against a forum non conveniens dismissal by appealing to the U.S. policy interest in litigating [*1456] human rights claims. n268 The Court recognized that forum non conveniens represents a major setback for victims of human rights abuses seeking redress. n269 The Court claimed that the passage of the Torture Victims Protection Act n270 ("TVPA") in 1991 is acknowledgement by Congress that victims of gross human rights violations need an accessible forum. n271 Allowing defendants to avoid law suits by claiming forum non conveniens would run contrary to Congress's policy reflected in the TPVA. n272

c. Personal Jurisdiction

Another obstacle to an ATCA suit against an MNC is personal jurisdiction, particularly when the MNC is not based in the United States. n273 Courts apply the minimum contacts test to determine whether exercising jurisdiction over the defendant is in

accordance with principles of "fair play and substantial justice." n274 The minimum contacts test requires that the court assess [*1457] the degree of contact of the party with the forum state as well as the relatedness of the contacts to the claim at issue. n275

In *Asahi Metal Industry Co. v. Superior Ct.*, the Supreme Court held that where a non-U.S. company simply places a product in the stream of commerce in the United States, minimum contacts have not been met and jurisdiction is improper. n276 The Asahi Court provided examples of activities that may subject a non-U.S. defendant to personal jurisdiction, including advertising in the particular jurisdiction. n277 Jurisdiction over a corporation also is available where the level of activity in the forum state is "continuous and systematic." n278 Notably, in a suit against a defendant that is not a U.S. entity, the court may find that the corporation has sufficient minimum contacts with the United States, rather than any particular state. n279

A possible exception to the minimum contacts test arises if the alleged violation is a "universal offense," n280 such as slave trading, [*1458] hijacking planes, genocide, and war crimes. n281 Any state has jurisdiction over these claims, regardless of the nationality of the parties or the place where the event giving rise to the suit occurred. n282 In an ATCA claim, it is often possible that the allegations will include universal offenses. n283

d. State Action

Traditionally, international law binds States rather than individuals or corporations. n284 To hold a private individual liable under principles of international law, a showing of State action is often necessary. n285 Although courts have held that genocide, war crimes, slavery, and piracy do not require State action, n286 the vast majority of human rights violations will require State action for the ATCA to apply. n287

[*1459] The *Unocal II* decision applied a joint action test n288 to ascertain whether the corporation had sufficient connections with the State to be liable. n289 The joint action test requires that the State and the MNC work together for the specific purpose of depriving people of their rights. n290 The standard established by *Unocal II* requires that the private entity actually commit the alleged acts in cooperation with the State or exercise control over the State's action. n291

This standard presents difficulties in holding MNCs liable under the ATCA because often MNCs and States develop a relationship for mutually beneficial business purposes. n292 MNCs that partner with governments, who commit human rights abuses, do so for financial reasons. n293 Similarly, governments enjoy the prominence associated with large MNCs and the money generated by MNC operations in their country. n294 The MNC need not directly commit human rights abuses nor unduly influence an already corrupt government to realize its profits because the government is willing to engage in these practices to maintain the business relationship. n295 The MNC's main goal is profit, [*1460] not violating human rights. n296

Furthermore, State actors are often shielded from liability under the Foreign Sovereign Immunities Act n297 ("FSIA"). n298 One strategy utilized by corporate defendants in ATCA litigation is to win a dismissal for State actors in the suit under the FSIA and then plead indispensable parties under Rule 19 of the Federal Rule of Civil Procedure. n299 If a court finds that a party is essential to the litigation but cannot be joined to the suit, the court then must analyze whether the case should proceed with the remaining parties considering the potential prejudice to any party, the possible relief available without the absent party, and alternative locations for trial. n300 When a government is dismissed under the FSIA and an MNC successfully claims that the [*1461] government actor is an indispensable party, the MNC avoids liability through the benefit of the State partner's sovereign immunity. n301

B. Methods of Regulating MNCs

Little uniform binding law exists to regulate MNC activity when they operate outside their country of incorporation. n302 International organizations, governments, and private industry actors have recognized the need for corporate accountability in MNC activities outside their home country and have responded to this need with corporate codes of conduct. n303 Codes of conduct are helpful to MNCs operating in countries other than their home nation because they provide standards and guidelines for respecting human rights. n304 Codes of conduct, however, are often criticized for being unenforceable due to their voluntary nature. n305

[*1462]

1. General Background

While some scholars have claimed that the only responsibility of a business is to use its resources to the fullest extent to raise profits while staying within the bounds of the law, n306 others argue that MNCs have increasing social obligations. n307 Presently, MNCs do not have many legal obligations with respect to the countries in which they are operating. n308 Corporate regulations are particularly necessary for MNCs operating in countries engaged in civil war, since absence of rule of law often creates an economic opportunity for MNCs that can be detrimental to the [*1463] local citizens who live in the instability. n309 In response to the lack of regulation, there have been several attempts to design codes for the protection of both foreign investment and host countries. n310

2. Approaches

The Organisation for Economic Co-operation and Development ("OECD"), International Labour Organisation ("ILO"), and the United Nations all have developed guidelines for MNCs operating in countries other than their home country. n311 The U.S. government also has encouraged MNCs to observe certain minimum standards in their operations abroad with respect to fundamental rights. n312 Additionally, turbulent political

situations in certain regions, such as South Africa and Northern Ireland, have given rise to private efforts to develop standards for MNC activities in those areas. n313

a. International Efforts

Recognizing the growing importance of international investment, the OECD developed their Declaration on International [*1464] Investment and Multinational Enterprises ("Declaration"). n314 The ILO developed standards for MNC activities with respect to treatment of workers in 1978. n315 The United Nations similarly has attempted to develop a code of conduct for MNCs, but the General Assembly never adopted the proposed draft. n316

i. Organisation for Economic Co-operation and Development

In 1976, the OECD introduced their Declaration. n317 This Declaration calls on MNCs to respect the policy choices of the nation in which they are operating, to provide any information requested by national authorities while taking account of business confidentiality, to work closely with local businesses and communities, to refuse bribes in all circumstances, and to refrain from participation in political activities. n318 These standards are voluntary and unenforceable. n319

ii. International Labour Organisation

The ILO developed international standards for MNCs with the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy ("Tripartite Declaration"). n320 The Tripartite Declaration urges MNCs to create employment opportunities in the countries where they operate, promote [*1465] equality of opportunity, ensure stable employment, provide vocation training in cooperation with national government, guarantee favorable work conditions and workplace safety, and protect freedom of association and the right to collective bargaining. n321 These standards, like the OECD Guidelines, are also voluntary and they lack an enforcement mechanism. n322 Acknowledging the deficiencies of the principles, the ILO initiated a new Declaration on Fundamental Principles and Rights at Work ("Fundamental Principles"). n323 At least one commentator claims that since the Fundamental Principles are relatively new, their potential to ensure observance of human rights is still unclear. n324

iii. United Nations

More recently, the United Nations developed the United Nations Code of Conduct on Transnational Corporations ("Draft U.N. Code"). n325 The Draft U.N. Code makes explicit reference [*1466] to human rights and encourages MNCs to respect the sovereignty of the nations in which they operate. n326 The U.N. General Assembly never officially adopted the Draft U.N. Code and, therefore, the code remains a hortatory document, with no means of enforcement. n327

b. United States Efforts

In May 1995, President Clinton revealed the Model Business Principles n328 ("Model Principles"). n329 The Model Principles set [*1467] standards for the treatment of workers and encourage a corporate atmosphere that values freedom of expression, condemns political oppression, contributes to the local community, and [*1468] promotes ethical conduct. n330 The Model Principles are voluntary and non-binding. n331

c. Private Efforts

Another method of regulating MNCs is through self-imposed codes of conduct. n332 In response to public pressure, some MNCs have individually adopted their own codes of conduct. n333 These efforts vary in specificity and degree. n334 Corporations that have recognized the value of corporate codes of conduct include Levi Strauss, Nike, Gap, and Sears. n335 Occasionally, where a particular nation has consistent human rights problems, companies will adhere to industry-wide codes of conduct, such as the Sullivan Principles in South Africa and the MacBride Principles in Northern Ireland. n336

i. Sullivan Principles

Reverend Leon Sullivan, a General Motors board member, first initiated the concept of an industry-wide code of conduct in [*1469] response to the public outcry against apartheid in South Africa in the 1970s and 1980s. n337 Reverend Sullivan created the Sullivan Principles, establishing standards of corporate responsibility for MNCs operating in South Africa. n338 The Sullivan Principles not only called for the eradication of discrimination in the workplace, but also required MNCs to use their influence to work for the end of apartheid. n339 The MNCs that signed on to the Sullivan Principles also agreed to external audits and public reports to guarantee compliance. n340 Although the Sullivan Principles cannot claim to have caused the demise of apartheid, they served as a basic model for other codes of conduct aimed at corporate responsibility. n341 [*1470]

ii. MacBride Principles

The MacBride Principles address the corporate responsibilities of U.S. MNCs in Northern Ireland. n342 Named after Dr. Sean MacBride, an Irish nationalist and the founder of Amnesty International, n343 these principles attempt to ensure non-discrimination in employment and oblige MNCs to protect the safety of their workers not only at work, but also during their commute to and from work. n344 In February 1995, the MacBride Principles had thirty-two MNC signatories out of the eighty U.S. MNCs operating in Northern Ireland. n345

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

Codes of conduct often fail to be effective because they are not enforced. n346 Past international efforts have proven ineffective because they lack power to punish those who

do not comply. n347 Commentators also criticize Clinton's Model Principles as [*1471] being vague and inadequate because they are voluntary and unenforceable. n348 Additionally, private initiatives are often self-imposed, making it difficult to assess whether a corporation is actually complying with its own code. n349

III. DE BEERS'S LIABILITY UNDER THE ATCA

As governments and the United Nations seek permanent solutions to end these civil wars, n350 attempts will be made to rebuild these societies. In this century, countries have addressed war crimes by setting up tribunals to hold the perpetrators accountable. n351 Still, these tribunals suffer from multiple problems, inhibiting their overall effectiveness. n352

There is no court of human rights in Africa and national courts are not likely to provide a fair forum for the victim. n353 [*1472] The ATCA provides an alternative method for victims of human rights abuses to hold their violators accountable. n354 Therefore, plaintiffs may seek redress in American courts under the ATCA. n355

Although a cause of action against the insurgent groups may seem logical, these groups may be unavailable for suit. n356 Thus, plaintiffs may institute a suit against De Beers for its involvement in the trade in conflict diamonds. The plaintiffs will assert that De Beers knowingly funded war crimes and crimes against humanity. n357 Since complicity in war crimes and crimes against humanity are possible violations of the "law of nations," n358 and the plaintiffs are likely to be aliens, the ATCA provides a cause of action for these plaintiffs in U.S. court.

De Beers will likely object to a suit in U.S. court, claiming forum non conveniens and that the court does not have personal jurisdiction over the company. Given the recent trend of forum non conveniens motions in ATCA cases, n359 the court will probably not accept this objection. Angola and Sierra Leone do not provide adequate forums for these claims. n360 Furthermore, South Africa, De Beers's headquarters, does not present an appropriate forum because of the burden it imposes on plaintiffs, who probably do not reside in South Africa. n361 Courts also have recognized that the United States has an interest in adjudicating [*1473] human rights claims. n362 Thus, De Beers will probably not succeed on a forum non conveniens motion.

Although De Beers is not a U.S. corporation, a court may be able to exercise jurisdiction over the company. Applying the minimum contacts test to De Beers, the plaintiff must establish that De Beers has a high degree of contact with the United States and that the claim is sufficiently related to those contacts. n363 De Beers is not subject to U.S. jurisdiction simply because its diamonds reach the U.S. market. n364 Nevertheless, De Beers's contacts may be established by examining whether De Beers's advertising campaign in the U.S. shows that the company can reasonably expect to be haled into U.S. court and whether these contacts rise to the level of "continuous and systematic." n365

The second part of the test requires that the claim be related to the contacts. n366 In this situation, the claim revolves around illicit diamonds that De Beers bought from insurgent groups and then marketed to U.S. customers, amongst others. De Beers's advertising campaign in the United States is inherently related to the diamonds that De Beers buys and sells.

To recover under the ATCA against De Beers, the potential plaintiffs must establish that the MNC committed a violation of the "law of nations." n367 First, the Nuremberg Principles establish that complicity in war crimes violates international law. n368 The case against Frederick Flick confirms that knowingly profiting off of war crimes and accepting looted property from known war criminals violates international law. n369 The Holocaust plaintiffs [*1474] also rely on this theory of liability, amongst other theories, in their suit against the Swiss banks. n370

De Beers's policy of buying and controlling all of the diamonds on the market means that they buy both official, legal diamonds and illicit diamonds from the black market. n371 Given De Beers's history of trading with smugglers, it seems likely that De Beers bought diamonds smuggled out of Angola and Sierra Leone by insurgent groups. n372 This trade provided the insurgent groups with the money to continue their wars, subjecting the civilian populations to human rights violations. n373 De Beers's policy of valuing profits and control of the diamond market above all else allowed these terrible crimes to happen in a systematic fashion.

War crimes are included amongst universal offenses, which are punishable anywhere. n374 Although complicity in committing war crimes violates international law, n375 this offense is not a universal offense according to the Restatement. n376 Additionally, complicity to commit war crimes suggests that the plaintiff must show a connection between the war criminals and the entity acting in complicity. The test for complicity may be similar in construction to the joint action test for State action. n377

Plaintiffs will encounter difficulties in showing a substantial connection between De Beers and the insurgent groups because [*1475] of De Beers's use of multiple middlemen in the acquisition of its diamonds. n378 De Beers has dealt with smugglers in the past, particularly where the black market proved more profitable than official trade routes. n379 Due to the lack of transparency in De Beers's operations and the diamond industry as a whole, n380 it is difficult to ascertain exactly how much the company knew about the diamonds it acquired. Although many inferences can be drawn about De Beers's participation in the conflict diamond trade, it is doubtful that a plaintiff will establish the requisite degree of proof necessary to show complicity between De Beers and the insurgent groups. Additionally, since plaintiffs will likely fail to allege the necessary facts to show complicity, a court may dismiss a claim against De Beers on a 12(b)(6) motion for failure to state a claim upon which relief can be granted. n381

Given the increasing influence of MNCs, many commentators claim that MNCs should observe international human rights standards. n382 Efforts by international organizations to regulate MNCs have been ineffective, as have government initiatives. n383 The

voluntary nature of these principles and codes is their fatal flaw. n384 Therefore, these initiatives need legally binding force.

The ATCA is a potentially useful tool for preventing human rights abuses by MNCs, but in its present form, the ATCA presents many obstacles for plaintiffs to overcome. n385 As of yet, [*1476] no ATCA case against an MNC has been successful. n386 The ATCA should be re- examined and amended to reach the conduct of MNCs.

Commentators have recognized the limitations of the ATCA and have suggested that new federal legislation called the Foreign Human Rights Abuse Act should be adopted. n387 This proposed legislation should prohibit MNCs from engaging in practices that cause or facilitate human rights abuses, including complicity in war crimes by funding war criminals. The legislation should call on the U.S. government to develop standards that MNCs can use as guidelines in achieving compliance with the new legislation. Violation of the proposed law should give rise to civil and criminal liability. Amending the ATCA in this way to target MNCs will assist aggrieved individuals bringing suit in U.S. court and hold MNCs to higher standards of accountability.

CONCLUSION

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

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

*J.D Candidate 1992. In loving memory of George V. Comfort. Much appreciation to Professor Chantal Thomas for her feedback on this Note, and to my family and friends for their support and patience during many long lectures on conflict diamonds.

FROM ATR/DAACLIT

(FBI) 2.20.04 14:31/ST. 14:30/NO. 4261227323 P 2

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA

NO. CR-3-94-619

v.

15 U.S.C. § 1
18 U.S.C. § 2

**GENERAL ELECTRIC COMPANY
DE BEERS CENTENARY AG
PETER FRENZ
PHILIPPE LIOTIER**

Filed: 2/17/94

INDICTMENT

Judge: Smith

THE GRAND JURY CHARGES:

1. **GENERAL ELECTRIC COMPANY, DE BEERS CENTENARY AG, PETER FRENZ and PHILIPPE LIOTIER are indicted and made defendants herein.**

OFFENSE CHARGED

2. Beginning at least as early as 1991 and continuing through at least sometime in 1993, the exact dates being unknown to the Grand Jury, the defendants and co-conspirators formed, joined, and participated in a conspiracy to raise list prices of various industrial diamond products worldwide. The conspiracy restrained interstate and foreign trade and commerce.

DEFENDANTS AND CO-CONSPIRATORS

3. Defendant **GENERAL ELECTRIC COMPANY (GE)** is a Delaware corporation headquartered in Fairfield, Connecticut. GE operates worldwide and had approximately \$61 billion in sales in 1993. At all times relevant to this

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Indictment, defendant GE manufactured, distributed, and sold industrial diamond products through GE Superabrasives, an operating unit of GE's Plastics division. GE Superabrasives is headquartered in Worthington, Ohio.

4. Defendant DE BEERS CENTENARY AG is a Swiss corporation headquartered in Lucerne, Switzerland. Defendant DE BEERS CENTENARY AG has linked corporate ownership with De Beers Consolidated Mines, Ltd., a South African corporation. At all times relevant to this Indictment, defendant DE BEERS CENTENARY AG and De Beers Consolidated Mines, Ltd. owned or controlled various companies that manufactured, distributed, and sold industrial diamond products (collectively referred to as DE BEERS).

5. DE BEERS manufactures industrial diamond products in South Africa, Ireland, and Sweden through a 50/50 joint venture with Sibeka Société d'Entreprise et d'Investissements, S.A. (SIBEKA), a Belgian corporation. Defendant DE BEERS CENTENARY AG has approximately a 20% ownership interest in SIBEKA. The majority of the shares of SIBEKA are indirectly owned by Société Générale de Belgique (Société Générale), a Belgian corporation. Defendant DE BEERS CENTENARY AG markets, distributes, and sells, through De Beers Industrial Diamonds (Ireland), an Irish corporation, all of the industrial diamond products manufactured through the joint venture with SIBEKA.

6. Defendant PETER FRENZ (FRENZ) was, at all times relevant to this Indictment, the Managing Director of GE Superabrasives Europe, GmbH. FRENZ

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oversaw the European operations of GE Superabrasives and reported directly to GE Superabrasives management in Worthington, Ohio.

7. Defendant PHILIPPE LIOTIER (LIOTIER) held several positions during the time period relevant to this Indictment. By approximately mid-1990, LIOTIER was the Director in Charge of Industrial Holdings and Strategy at Société Générale, a Director of SIBEKA, and a Director of SIBEKA's wholly-owned subsidiary, Diamant Boart, S.A. (Diamant Boart), a Belgian corporation. Diamant Boart is a diamond tool manufacturer that purchases industrial diamond products from both GE and DE BEERS. From approximately mid-1990 until January 1, 1992, LIOTIER served as the chief executive of Diamant Boart. LIOTIER's tenure as chief executive of Diamant Boart ended on January 1, 1992; LIOTIER assumed other duties with Société Générale and continued to serve as a Director of SIBEKA. In early November 1993, LIOTIER left Société Générale to join Compagnie Financière de Suez, a French company that is the majority shareholder of Société Générale.

8. Whenever this Indictment refers to any act, deed, or transaction of a corporation, the allegation means that the corporation engaged in the act, deed, or transaction by or through its officers, directors, agents, employees, or representatives while they were actively engaged in the management, direction, control, or transaction of the corporation's business or affairs.

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9. Various persons and firms, not made defendants in this Indictment, participated in and performed acts and made statements in furtherance of the charged conspiracy.

THE INDUSTRIAL DIAMOND INDUSTRY

10. GE and DE BEERS are the two dominant manufacturers of industrial diamond products in the world. Industrial diamond is manufactured by applying extremely high pressure and temperature to carbon-rich material to transform it into diamond.

11. Industrial diamond products are generally sold to diamond tool manufacturers. DE BEERS sells almost all of its industrial diamond products through distributors. GE sells most of its industrial diamond products directly to diamond tool manufacturers. Diamond tool manufacturers incorporate industrial diamond products into cutting and polishing tools that are used for a variety of manufacturing and construction applications, including road construction, stone cutting and polishing, automobile manufacturing, mining, and oil drilling.

12. The list price increases that GE and DE BEERS implemented in early 1992 that are the subject of this Indictment affected three separate industrial diamond products: saw diamond, compacts tooling, and drilling products.

(a) Saw diamond is manufactured and sold in single crystal form in various grades and mesh sizes. Diamond tool manufacturers bond the saw diamond to cutting edges for industrial saw blades and other cutting

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tools. GE's saw diamond is trademarked Metal Bond Sawing (MBS).

DE BEERS' saw diamond is trademarked Saw Diamond Abrasive (SDA).

(b) Compacts tooling is manufactured by bonding diamond onto a tungsten carbide base to form a cutting surface. Compacts tooling is manufactured as round discs that can be cut to numerous specific shapes and sizes by either the industrial diamond manufacturer or the diamond tool manufacturer. Compacts tooling is used in various machining tools. GE's compacts tooling is trademarked Compax. DE BEERS' compacts tooling is trademarked Syndite.

(c) Drilling products are manufactured by bonding diamond onto a tungsten carbide base. Drilling products are then incorporated into drill bits to form the cutting surface used for oil drilling and mining. GE's drilling products are trademarked Stratapax and Geoset. DE BEERS' drilling products are trademarked Syndrill.

DESCRIPTION OF THE CONSPIRACY

13. The charged conspiracy consisted of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators to raise list prices of industrial diamond products. To coordinate and carry out the conspiracy to raise list prices, GE and DE BEERS provided each other with advance, detailed information reflecting their future list prices and pricing plans.

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MEANS AND METHODS OF THE CONSPIRACY

14. Beginning at least as early as 1991, the defendants and co-conspirators used the following scheme and mechanism to raise list prices for industrial diamond products:

(a) FRENZ provided DE BEERS, through LIOTIER, with advance, detailed information reflecting GE's future list prices and pricing plans. FRENZ provided the GE future pricing information to LIOTIER under the pretext and cover that LIOTIER was receiving the information for the sole benefit of Diamant Boart, an industrial diamond customer, rather than for the benefit of the industrial diamond manufacturing interests of SIBEKA and DE BEERS; and

(b) LIOTIER provided GE, through FRENZ, with advance, detailed information reflecting DE BEERS' future list prices and pricing plans. LIOTIER provided the DE BEERS' future pricing information to FRENZ under the pretext and cover that LIOTIER was providing the information to GE for the sole benefit of Diamant Boart, rather than for the benefit of the industrial diamond manufacturing interests of SIBEKA and DE BEERS.

15. In furtherance of the charged conspiracy, the defendants and co-conspirators did the following things, among others:

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(a) In or around mid-November 1991, FRENZ provided LIOTIER with detailed written information regarding GE's future list prices and pricing plans for saw diamond. FRENZ did not provide any other person or company with these detailed GE pricing plans at the time that he provided them to LIOTIER.

(1) On or about November 13, 1991, FRENZ faxed to LIOTIER written details of GE's plans for a future saw diamond price increase, including GE's proposed price list for saw diamond. FRENZ obtained the information that he faxed to LIOTIER from preliminary drafts of GE's future price lists and pricing plans that: (a) had not been circulated among GE management; (b) had not been finalized; and (c) even when finalized, directed that the price lists and pricing plans not be disclosed either to other GE personnel or to customers.

(2) On or about November 13, 1991, FRENZ received a finalized internal GE memo detailing GE's saw diamond price increase plans. The memo was sent only to select GE managers, and directed that the pricing information be kept strictly confidential and not be disclosed either to other GE personnel or to customers. Following receipt of the memo, on or about November 14, 1991, FRENZ faxed to LIOTIER a complete future price list for saw diamond, and corrections to the GE future pricing plans that he had faxed to LIOTIER the previous day.

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(b) In or around mid-December 1991, LIOTIER provided FRENZ with detailed written information regarding DE BEERS' future list prices and pricing plans for saw diamond, compacts tooling, and drilling products. LIOTIER did not provide other people or companies with these detailed DE BEERS pricing plans at the time that he provided them to FRENZ.

(1) On or about December 13, 1991, LIOTIER provided FRENZ with written details of DE BEERS' plans for future price increases for saw diamond, compacts tooling, and drilling products. The DE BEERS plans included future list prices for saw diamond that would be announced on February 3, 1992 and implemented on March 2, 1992. The plans also specified the percentage by which prices for compacts tooling and drilling products would be increased, and stated that these increases would be announced on January 8, 1992 and implemented on February 3, 1992.

(2) On or about December 16, 1991, FRENZ faxed the information that he had received from LIOTIER on or about December 13, 1991 to the GE Superabrasives International Sales Manager in Worthington, Ohio. FRENZ's cover memorandum states, in part:

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(FRI) 2 20 04 14:39/ST. 14:30/NO. 4261227323 P 10

Ph. Liotier of DIAMANT BOART (SOCIETE GENERALE) informed me about planned price increases of DE BEERS early 1992. The attached information was given to him confidentially. Please treat the information carefully.

... Liotier is supporting a price increase and would like to know by December 18, 1991, 18.00 hours European time whether GES (GE Superabrasives) is going to follow.

On or about December 18, 1991, at 18.00 hours European time,

FRENZ met with LIOTIER.

(3) On or about December 19, 1991, LIOTIER faxed DE BEERS' future list prices for certain compacts tooling and drilling products to FRENZ. The English translation of the fax cover sheet from LIOTIER states: "Enclosed [is] the information requested on Syndite and Syndrill." On or about December 20, 1991, FRENZ faxed the DE BEERS future list prices for compacts tooling and drilling products to the GE Superabrasives International Sales Manager in Worthington, Ohio.

(c) On or about January 6, 1992, FRENZ received GE's formal announcement to its sales force detailing GE's saw diamond price increase. GE had intentionally omitted its medium-grade saw diamond (MBS-70) from the saw diamond price increase. Upon receiving the announcement,

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FRENZ immediately requested that GE increase prices for MBS-70 because DE BEERS was planning to raise the price of its comparable medium-grade saw diamond. Based on FRENZ's request, GE added MBS-70 to its price increase.

(d) On or about January 6, 1992, FRENZ requested and received a fax from GE Superabrasives containing GE's revised future price list for saw diamond, modified by hand to reflect the addition of an increase for MBS-70. That evening, FRENZ met privately with LIOTIER. Other than FRENZ, GE's sales force did not receive the revised future price list with the addition of MBS-70 until January 9, 1992.

(e) On or about January 6, 1992, at FRENZ's request, the GE Superabrasives product manager for compacts tooling sent FRENZ draft written details of GE's plans for a future compacts tooling price increase. These plans: (i) had not been circulated among GE management; (ii) had not been finalized; and (iii) even when finalized, directed that the price lists and pricing plans not be disclosed to customers until January 20, 1992.

(f) On or about January 8, 1992, LIOTIER provided DE BEERS' comprehensive future price lists for compacts tooling and drilling products to FRENZ.

(g) On or about January 17, 1992, FRENZ faxed to LIOTIER the final version of GE's compacts tooling price list, containing handwritten

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notes showing the changes to the compacts tooling price list that FRENZ had previously provided to LIOTIER.

(h) On or about January 24, 1992, at FRENZ's request, the GE Superabrasives product manager for drilling products prepared and sent to FRENZ an advance draft of GE's proposed future list prices for drilling products for FRENZ's private meeting with LIOTIER on January 27, 1992. These plans had not been circulated among GE management and had not been finalized.

(i) On or about February 18, 1992, FRENZ faxed to LIOTIER a confidential, internal GE memo to reassure DE BEERS that GE had increased list prices for drilling products in accord with the price list FRENZ had previously provided to LIOTIER.

(j) In or around late February 1992, GE decided to delay for two weeks the effective date of its price increases for compacts tooling and drilling products. On or about February 26, 1992, after FRENZ learned of the delay, he informed GE Superabrasives managers that a delay in the effective date for the compacts tooling and drilling products price increases would "jeopardize (GE's) entire price increase including saw diamond." On or about February 27, 1992, GE rescinded the delay, and FRENZ informed LIOTIER that the delay would not occur.

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(k) GE issued new saw diamond and compacts tooling price lists to customers and distributors on or about January 20, 1992. The saw diamond increase was effective on February 17, 1992, and the compacts tooling increase was effective on March 2, 1992. GE issued a new drilling products price list on or about January 29, 1992, effective March 2, 1992.

(l) DE BEERS' distributors issued new compacts tooling and drilling products price lists to customers on or about January 29, 1992, effective February 1, 1992. DE BEERS' distributors issued a new saw diamond price list on or about February 17, 1992, effective March 9, 1992.

(m) The advance, detailed information reflecting GE's future list prices and pricing plans for saw diamond, compacts tooling, and drilling products that FRENZ provided to LIOTIER starting in November 1991 was not provided to GE distributors or customers at the time FRENZ gave LIOTIER this information.

(n) The advance, detailed information reflecting DE BEERS' future list prices and pricing plans for saw diamond, compacts tooling, and drilling products that LIOTIER provided to FRENZ in December 1991 was not provided to DE BEERS' distributors or customers at the time LIOTIER gave FRENZ this information.

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TRADE AND COMMERCE

16. At all times relevant to this Indictment, the defendants and co-conspirators were the dominant manufacturers of industrial diamond products worldwide.

17. At all times relevant to this Indictment, the defendants and co-conspirators sold and distributed industrial diamond products in a continuous and uninterrupted flow of interstate and foreign commerce to customers located in states and countries other than the state and countries in which the industrial diamond products were manufactured.

18. In particular, GE manufactured industrial diamond products in Worthington, Ohio, and sold and shipped them to customers in states other than Ohio and countries other than the United States.

19. DE BEERS' industrial diamond products were not manufactured in the United States, but they were sold and shipped throughout the United States by a distributor located in New York, New York.

20. The activities of the defendants and co-conspirators that are the subject of this Indictment were within the flow of, and substantially affected, interstate and foreign trade and commerce.

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JURISDICTION AND VENUE

21. The conspiracy charged in this Indictment was carried out, in part, within the Southern District of Ohio and within the five years preceding the return of this Indictment.

ALL IN VIOLATION OF TITLE 15, UNITED STATES CODE, SECTION 1,
AND TITLE 18, UNITED STATES CODE, SECTION 2.

A TRUE BILL.

FOREPERSON

Anne K. Bingham

ANNE K. BINGAMAN
Assistant Attorney General

MAX L. GILLAM

Joseph H. Widmar

JOSEPH H. WIDMAR

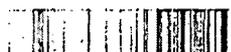
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EDMUND A. SARGUS, JR.
United States Attorney
Southern District of Ohio



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED
TIME: _____
JUL 13 2004

JAMES BONINI, Clerk
COLUMBUS, OHIO

UNITED STATES OF AMERICA

v.

DE BEERS CENTENARY AG,

Defendant.

Case No. CR-2-94-019

JUDGE SMITH

PLEA AGREEMENT

The United States of America and De Beers Centenary AG ("defendant"), a company organized and existing under the laws of Switzerland, hereby enter into the following Plea Agreement pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure ("Fed. R. Crim. P."):

RIGHTS OF DEFENDANT

1. The defendant understands its rights:
 - (a) to be represented by an attorney;
 - (b) as a company organized and existing under the laws of Switzerland, to decline to accept service of the Summons in this case, and to contest the jurisdiction of the United States to prosecute this case against it in the United States District Court for the Southern District of Ohio;
 - (c) to plead not guilty to any criminal charge brought against it;
 - (d) to have a trial by jury, at which it would be presumed not guilty of the charge and the United States would have to prove every essential element of the charged offense beyond a reasonable doubt for it to be found guilty;
 - (e) to confront and cross-examine witnesses against it and to subpoena witnesses in its defense at trial;

- (f) to appeal its conviction if it is found guilty at trial; and
- (g) to appeal the imposition of sentence against it.

**AGREEMENT TO PLEAD GUILTY
AND WAIVE CERTAIN RIGHTS**

2. The defendant waives the rights set out in Paragraph 1(b)-(f) above, including all jurisdictional defenses to the prosecution of this case, and agrees voluntarily to consent to the jurisdiction of the United States solely to prosecute this case against it in the United States District Court for the Southern District of Ohio. The defendant also waives the right to appeal the imposition of sentence against it, so long as the sentence imposed is consistent with the recommendation in Paragraph 8(a) of this Plea Agreement. Nothing in this paragraph, however, shall act as a bar to the defendant perfecting any legal remedies it may otherwise have on appeal or collateral attack respecting claims of ineffective assistance of counsel or prosecutorial misconduct.

3. The defendant, pursuant to the terms of this Plea Agreement, will plead guilty to the Indictment pending in the United States District Court for the Southern District of Ohio, No. CR-2-94-019, which charges it with forming, joining and participating in a conspiracy to raise list prices of various industrial diamonds worldwide, beginning at least as early as 1991 and continuing through at least sometime in 1992, in violation of Title 15 U.S.C. § 1, and will make a factual admission of guilt to the Court in accordance with Fed. R. Crim. P. 11, as set forth in Paragraph 4 below.

FACTUAL BASIS FOR OFFENSE CHARGED

4. Had this case gone to trial, the United States would have presented evidence to prove the following facts:

- (a) For purposes of this Plea Agreement, the "relevant period" is that period beginning at least as early as 1991 and continuing through at least sometime in 1992. During the relevant period, the defendant was a company organized and existing under

the laws of Switzerland. The defendant has its principal place of business in Lucerne, Switzerland. Defendant's common shares were linked with respect to certain economic rights to shares of De Beers Consolidated Mines, Ltd., a South African corporation. During the relevant period, the defendant and De Beers Consolidated Mines, Ltd., owned or controlled various companies that manufactured, distributed and sold industrial diamonds in the United States and elsewhere. Industrial diamonds are manufactured by applying extremely high pressure and temperature to carbon-rich material to transform it into diamond. Industrial diamond products are generally sold to diamond tool manufacturers. The relevant industrial diamond products are saw diamond, compacts tooling and drilling products.

(b) During the relevant period, the defendant, through its officers, employees and agents acting on its behalf, participated in a conspiracy with another manufacturer of industrial diamonds, the primary purpose of which was to raise list prices of saw diamond, compacts tooling and drilling products sold in the United States and elsewhere. In furtherance of the conspiracy, the defendant, through its officers, employees and agents acting on its behalf, had communications and discussions with, attended meetings with, and transmitted detailed future pricing information and plans to its co-conspirator. From time to time, defendant and its co-conspirator used the cover of an officer of a customer, who was actually acting on behalf of defendant, to transmit detailed future pricing information and plans to each other. Through these communications, discussions and meetings, defendant and its co-conspirator reached agreements to raise list prices of saw diamond, compacts tooling and drilling products to be sold in the United States and elsewhere.

(c) During the relevant period, industrial diamonds sold by one or more of the conspirator firms, and equipment and supplies necessary to the production and distribution of industrial diamonds, as well as payments for industrial diamonds, traveled

in interstate and foreign commerce. The business activities of the defendant and its co-conspirator in connection with the manufacture, distribution and sale of industrial diamonds affected by this conspiracy were within the flow of, and substantially affected, interstate and foreign trade and commerce.

(d) Acts in furtherance of this conspiracy were carried out within the Southern District of Ohio, Eastern Division. Conspiratorial communications described above originated in, or terminated in, this District.

POSSIBLE MAXIMUM SENTENCE

5. The defendant understands that the maximum penalty which may be imposed against it upon conviction for a violation of Section One of the Sherman Antitrust Act is a fine in an amount equal to the greatest of:

- (a) \$10 million (15 U.S.C. § 1);
- (b) twice the gross pecuniary gain the conspirators derived from the crime (18 U.S.C. § 3571(c) and (d)); or
- (c) twice the gross pecuniary loss caused to the victims of the crime by the conspirators (18 U.S.C. § 3571(c) and (d)).

6. In addition, the defendant understands that:

- (a) pursuant to § 8B1.1 of the United States Sentencing Guidelines ("U.S.S.G."), the Court may order it to pay restitution to the victims of the offense;
- (b) pursuant to 18 U.S.C. § 3013(a)(2)(B) and U.S.S.G. § 8E1.1, the Court is required to order the defendant to pay a \$200 special assessment upon conviction for the charged crime; and
- (c) pursuant to 18 U.S.C. § 3561(c)(1), the Court may impose a term of probation of at least one year, but not more than five years.

SENTENCING GUIDELINES

7. Sentencing for the offense to be charged will be conducted pursuant to the U.S.S.G. Manual in effect on the day of sentencing.

SENTENCING AGREEMENT

8. (a) Pursuant to Fed. R. Crim. P. 11(c)(1)(C), the United States and the defendant agree that the appropriate disposition of this case is, and agree to recommend jointly that the Court impose, a sentence requiring the defendant to pay to the United States a criminal fine of \$10 million, pursuant to 18 U.S.C. § 3601 and U.S.S.G. § 8C3.1(b), payable in full before the fifteenth (15th) day after the date of judgment ("the recommended sentence").

(b) In addition to any fine imposed, the defendant understands that the Court will order it to pay a \$200 special assessment, pursuant to 18 U.S.C. § 3013(a)(2)(B) and U.S.S.G. § 8E1.1.

(c) The United States and the defendant will recommend against the imposition of a term of probation, but the defendant understands that the Court is free to impose a term of probation.

(d) The United States and the defendant jointly submit that this Plea Agreement, together with the record that will be created by the United States and the defendant at the plea and sentencing hearings, will provide sufficient information concerning the defendant, the crime charged in this case, and the defendant's role in the crime to enable the meaningful exercise of sentencing authority by the Court under 18 U.S.C. § 3553. The United States and defendant agree to request jointly that the Court accept the defendant's guilty plea and impose sentence on an expedited schedule as early as the date of arraignment, based upon the record provided by the defendant and the United States, under the provisions of Fed. R. Crim. P. 32(c)(1)(A)(ii) and U.S.S.G. § 6A1.1. The Court's denial of the request to impose sentence on an expedited schedule will not void this Plea Agreement.

9. The United States and the defendant understand that the Court retains complete

discretion to accept or reject the recommended sentence provided for in Paragraph 8(a) of this Plea Agreement.

(a) If the Court does not accept the recommended sentence, the United States and the defendant agree that this Plea Agreement, except for Paragraph 9(b) below, shall be rendered void.

(b) If the Court does not accept the recommended sentence, the defendant will be free to withdraw its guilty plea (Fed. R. Crim. P. 11(c)(5) and (d)). If the defendant withdraws its plea of guilty, this Plea Agreement, the guilty plea, and any statement made in the course of any proceedings under Fed. R. Crim. P. 11 regarding the guilty plea or this Plea Agreement or made in the course of plea discussions with an attorney for the government shall not be admissible against the defendant in any criminal or civil proceeding, except as otherwise provided in Fed. R. Evid. 410. In addition, the defendant agrees that, if it withdraws its guilty plea pursuant to this subparagraph of the Plea Agreement, the statute of limitations period for any offense referred to in Paragraph 10 of this Plea Agreement will be tolled for the period between the date of the signing of the Plea Agreement and the date the defendant withdrew its guilty plea or for a period of sixty (60) days after the date of the signing of the Plea Agreement, whichever period is greater.

GOVERNMENT'S AGREEMENT

10. Upon acceptance of the guilty plea called for by this Plea Agreement and the imposition of the recommended sentence, the United States agrees that it will not bring further criminal charges against the defendant, related companies as listed on pages 113 and 116 of the 2000 De Beers Annual Report, or any of their current or former directors, officers, employees and agents for any act or offense committed in furtherance of the antitrust conspiracy charged in the Indictment. The nonprosecution terms of this paragraph do not apply to civil matters of any kind, to any violation of the federal tax or securities laws, or to any crime of violence.

11. In light of the court-approved settlement by defendant's affiliate of *In re Industrial Diamonds Antitrust Litigation*, No. MDL-948 (WCC), (S.D.N.Y., Oct. 19, 2001), a class action brought on behalf of purchasers of relevant industrial diamond products in the United States during the relevant period, the United States agrees that it will not seek a restitution order with respect to the offense charged.

REPRESENTATION BY COUNSEL

12. The defendant has been represented by counsel and is fully satisfied that its attorneys have provided competent legal representation. The defendant has thoroughly reviewed this Plea Agreement and acknowledges that counsel has advised it of the nature of the charge, any possible defenses to the charge, and the nature and range of possible sentences.

VOLUNTARY PLEA

13. The defendant's decision to enter into this Plea Agreement and to tender a plea of guilty is freely and voluntarily made and is not the result of force, threats, assurances, promises, or representations other than the representations contained in this Plea Agreement. The United States has made no promises or representations to the defendant as to whether the Court will accept or reject the recommendations contained within this Plea Agreement.

VIOLATION OF PLEA AGREEMENT

14. The defendant agrees that, should the United States determine in good faith that the defendant has violated any provision of this Plea Agreement, the United States will notify counsel for the defendant in writing by personal or overnight delivery or facsimile transmission and may also notify counsel by telephone of its intention to void any of its obligations under this Plea Agreement (except its obligations under this paragraph), and the defendant shall be subject to prosecution for any federal crime of which the United States has knowledge including, but not limited to, the substantive offenses charged in the Indictment resulting in this Plea Agreement.

ENTIRETY OF AGREEMENT

15. This Plea Agreement constitutes the entire agreement between the

Case 2:94-cr-00019-GCS Document 294 Filed 07/13/2004 Page 8 of 9

United States and the defendant concerning the disposition of the criminal charge in this case. This Plea Agreement cannot be modified except in writing, signed by the United States and the defendant.

16. The undersigned is authorized to enter this Plea Agreement on behalf of the defendant as evidenced by the Resolution of the Board of Directors of the defendant attached to, and incorporated by reference in, this Plea Agreement.

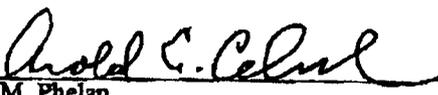
17. The undersigned attorneys for the United States have been authorized by the Attorney General of the United States to enter this Plea Agreement on behalf of the United States.

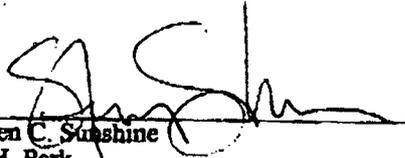
18. A facsimile signature shall be deemed an original signature for the purpose of executing this Plea Agreement. Multiple signature pages are authorized for the purpose of executing this Plea Agreement.

DATED: July 13, 2004

Respectfully submitted,

BY: 
Glenn Turner
General Counsel
De Beers Centenary AG

BY: 
Lisa M. Phelan
David A. Blotner
Arnold C. Celnicker
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BY: 
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Tai H. Park
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801 Pennsylvania Ave., N.W.
Washington, D.C. 20004
202-508-8022
Counsel for De Beers Centenary AG

DE BEERS CENTENARY AG

Certified extract of the minutes of a meeting of the Board held
on Monday, 2 February 2004.

Plea Agreement : United States Department of Justice

Resolved that the Company hereby authorizes the execution, delivery and performance of the Plea Agreement between the Company and the United States Department of Justice, substantially in accordance with the draft submitted.

Resolved further that Glenn E. Turner, General Counsel for the De Beers Group, is hereby authorized, directed and empowered:

to execute and deliver, in the name and on behalf of the Company, the Plea Agreement;

to represent the Company at any hearing in order to plead guilty in accordance with the provisions of the Plea Agreement and

to take any and all actions reasonably required or appropriate in order to carry out the intent and purpose of this resolution.



R W Ketley
Secretary of the meeting

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO**

UNITED STATES OF AMERICA

-vs-

Case No. CR-2-94-19(2)

DE BEERS CENTENARY AG

**COURTROOM MINUTES
GUILTY PLEA AND SENTENCING HEARING**

COURTROOM MINUTESJUDGE:	George C. Smith	DATE AND TIME:	July 13, 2004 2:00 PM
DEPUTY CLERK:	Lisa V. Wright	COUNSEL FOR GOVT:	Arnold Celnicker
CT. REPORTER:	Gina Wells	COUNSEL FOR DEFT(S):	Steven Sunshine Tai Park Maria Raptis Drew Campbell
INTERPRETER:		PRETRIAL/PROBATION:	David Walden

Defendant waived arraignment on indictment.

Parties waived reading of indictment. Defendant pled guilty to count 1 of the indictment. Court accepted plea and plea agreement. Presentence Report previously prepared upon agreement of all parties. Court will proceed to sentencing.

Defendant sentenced to \$10,000,000.00 fine and \$200.00 special assessment. All monetary penalties to be paid within 15 days of the date of sentence.

Defendant waived right to appeal pursuant to the plea agreement.

Case 2:94-cr-00019-GCS Document 296 Filed 07/13/2004 Page 1 of 5

AO 245B (Rev. 12/03) Judgment in a Criminal Case Sheet 1

UNITED STATES DISTRICT COURT

SOUTHERN

District of

OHIO

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

V.

DE BEERS CENTENARY AG

Case Number: CR-2-94-19(2)

USM Number: n/a

Steven C. Sunshine
Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) ONE OF AN INDICTMENT

pleaded nolo contendere to count(s) _____
which was accepted by the court.

was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
15:1 and 18:2	Conspiracy to Violate Antitrust Law	1992	ONE

The defendant is sentenced as provided in pages 2 through 3 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) _____

Count(s) _____ is are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

July 13, 2004
Date of Imposition of Judgment

George C. Smith
Signature of Judge

GEORGE C. SMITH, UNITED STATES DISTRICT JUDGE
Name and Title of Judge

July 13, 2004
Date

DEFENDANT: DE BEERS CENTENARY AG
 CASE NUMBER: CR-2-94-19(2)
CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 200.00	\$ 10,000,000.00	\$

- The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case(AO 245C) will be entered after such determination.
- The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
----------------------	--------------------	----------------------------	-------------------------------

TOTALS \$ _____ \$ _____

- Restitution amount ordered pursuant to plea agreement \$ _____
- The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- The court determined that the defendant does not have the ability to pay interest and it is ordered that:
 - the interest requirement is waived for the fine restitution.
 - the interest requirement for the fine restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: DE BEERS CENTENARY AG
CASE NUMBER: CR-2-94-19(2)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

- A Lump sum payment of \$ 10,000,200.00 due immediately, balance due
 - not later than 15 days from sentencing, or
 - in accordance C, D, E, or F below; or
- B Payment to begin immediately (may be combined with C, D, or F below); or
- C Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

The defendant shall pay the cost of prosecution.

The defendant shall pay the following court cost(s):

The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

JUSTIFICATION

This case required the Court to consider three sentencing components: the fine, restitution, and probation. The Court imposes a fine of \$10 million, which is the maximum fine allowable under the applicable statute, and is also within the guideline range.

The government and the probation officer agree that full restitution has been made through a civil settlement in a separate action and, therefore, a restitution order would be inappropriate.

The Court also carefully considered the imposition of a term of probation. After conducting an investigation into the matter, the Probation Officer concluded that a term of probation is not necessary. Notably, the government not only does not seek probation in this case, it actively opposes it.

United States Sentencing Guidelines § 8D1.1 requires the Court to order probation in certain circumstances, none of which appear to be present in the instant case. The Court specifically finds that pursuant to § 8D1.1(a)(3), there is no evidence in the record contradicting the Probation Officer's finding that defendant recently adopted an effective program to prevent and detect violations of law.

Section 8D1.1 indicates only those circumstances in which probation is *required*. It does not limit the Court's authority to impose probation as a matter of *discretion*.

The Court, however, is not inclined to take upon itself the mantle of becoming a regulatory agency overseeing the worldwide distribution of diamonds. The enormous burden on judicial resources, which would be present regardless of the appointment of independent experts, would outweigh any slight value probation might have in detecting or deterring future misconduct. The goal of deterrence is better served by existing mechanisms. For example, defendant is already subject to rigorous regulation by the European Union. Furthermore, defendant apparently plans to do business directly in the United States. Hence, in contrast to the circumstances that existed ten years ago, defendant will be subject to the jurisdiction of Courts in the United States should the Department of Justice bring criminal charges in the future.

For these reasons the Court, in its discretion, declines to order probation.



De Beers Société Anonyme
(Incorporated under the laws of Luxembourg)

MEDIA RELEASE

30 November 2005

It was announced today that agreement has been reached, and a preliminary approval order issued, to settle the majority of civil class action suits filed against De Beers in the United States. This settlement does not involve any admission of liability on the part of De Beers and will bring an end to a number of outstanding disputes.

"We believe that settling these suits is the most sensible and responsible course of action for the company to take. It is consistent with the other steps we have taken in both the US and Europe to restructure and modernise both our operations and business model, and is in the best interests of De Beers' partners and stakeholders in southern Africa and elsewhere in the world" said Gary Ralfe, De Beers Managing Director.

"With this settlement behind us, De Beers can now focus greater attention and resources on being a leader in all of our markets and playing a leading role to address humanitarian issues such as the fight against HIV/AIDS. We will continue to work on these issues in consultation with the international community", he added.

The settlement is subject to final approval by the Honourable Stanley R. Chesler, District Court Judge for the United States District Court for the District of New Jersey. De Beers hopes that the settlement will be approved during 2006.

De Beers believes that a successful conclusion to these suits will allow the company to more effectively pursue its global interests by removing the cost, risk, reputational impact and distraction from the company's core activities required to defend multiple class actions and possible further-litigation.

We do not wish to comment or speculate on the approval process itself, or the issues under consideration by the court. Therefore, for the time being, we have nothing further to add to this statement.

DE BEERS

A DIAMOND IS FOREVER

De Beers Société Anonyme
(Incorporated under the laws of Luxembourg)

Note to Editors

The settlement agreements relate to claims brought by a nationwide class of indirect purchasers in Sullivan v. DB Investments, INC., et. al., Hopkins v. De Beers Centenary AG, et. al, Cornwell v. D.B. Investments, Inc., and Null v. DB Investments, et. al. for \$250 million.

It is important to note that the settlement of the US class action litigations against the international business of De Beers will not be financed from, nor will it have any material impact on, any of the company's mining operations in southern Africa. Indeed, we believe that the settlement will be beneficial to De Beers' partners and stakeholders in southern Africa as well as elsewhere in the world.

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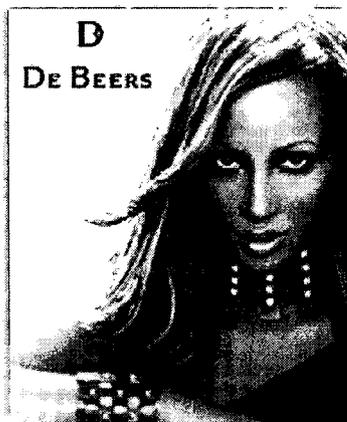
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It may be past but it's not over. A previous lead story.



Is De Beers Forever?

By Ron Irwin

What happens when your brand gets embroiled in a very public scandal? De Beers LV and fashion model Iman recently parted ways after Survival International used the two names in a publicity stunt to bring attention to its cause for indigenous peoples. Does that damage the De Beers brand? Does it help Survival International's cause?

[more...](#)

In May of 2004, former supermodel Iman parted ways with the two-year-old luxury retail brand De Beers LV. This might not seem unusual but Iman once referred to herself as "not a model but an icon and inspiration" in regard to her work with the high-end diamond retailer. What happened to cause De Beers not to be forever?

In 2002, De Beers LV, the namesake of the famous South African mining corporation, pledged to put a hundred million dollars into a retail chain that would see the establishment of 100 stores throughout the world by 2012. Iman's famous image had been significantly attached to this massive initiative.

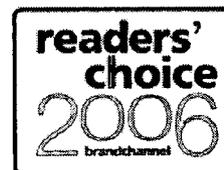
She claimed in 2002 that she chose to work with De Beers LV after seeing the company's hi-tech mining productions in South Africa and "speaking to Nelson Mandela and Thabo Mbeki." Like most high profile break-ups, this one is fraught with miscommunication, innuendo, and a disruptive third party that ended the two-year honeymoon between the legendary gem giant and the Somali-born beauty.

That third party is an activist group called Survival International, which campaigns for the rights of indigenous peoples around the world. Shortly after De Beers's May 2002 announcement of its union upon the famed catwalks of Cannes, Survival informed Iman that, in its opinion, De Beers was partly to blame for the relocation of the Gana and Gwi people (often referred to as bushmen in southern Africa) from their native land in the Central Kalahari Game Reserve in Botswana. According to Survival, this forced relocation is happening because De Beers's joint mining operations with the Botswana government require it. Soon after, Survival embarked on a campaign to break up the relationship between Iman and De Beers. In August of 2002, *Women's Wear Daily* reported that Iman was "frantically educating herself" about the issue of bushmen rights.



yourchance!
 Suggest a topic
 to feature.

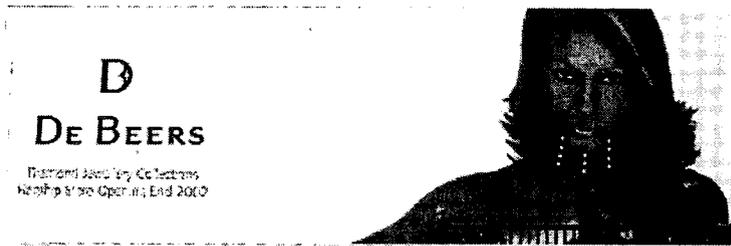
**See
 who
 won...**



Also of interest

De Beers is in need of some savvy branding techniques.





Things came to a head just before the opening of the De Beers LV flagship store in London's Old Bond Street on October 30, 2002. The opening itself had to be postponed due to a lack of diamonds, and, embarrassingly, because activists professionally altered the billboard outside the store by plastering Iman's face with that of a bushman and replacing the De Beers slogan "A diamond is forever" with a new one in De Beers' elegant typography that read, "The bushmen aren't forever."

Fiona Watson, a representative of Survival International, is cagey about who exactly was responsible for this defacement but the company gleefully posted pictures and a story about it the next day on its website; most news agencies that covered the story lay credit for the episode at Survival's doors. At the party soon after the Bond street store inauguration, Iman, whose famous visage had been changed from an icon of diamond-studded hope for the sub-continent into a symbol of human deprivation, was conspicuously absent.

The story illustrates the tenuous links between celebrities, high profile brands and low profile causes. More importantly, it illustrates the new challenge that activism poses to the brand manager. Activist groups interested in injustices ranging from environmental destruction to child labor have learned that they gain far more exposure for their efforts by linking them to famous brands than by simply spreading the word themselves.

Brands like Nike, Coke and McDonald's find themselves embroiled in non-business related controversies that have, at times, garnered more attention from consumers than the company's own brand initiatives. Some brands, like Ben & Jerry's and Avon (which, respectively, are involved in save the rainforest work and the fight against breast cancer) have linked themselves to causes successfully and benefited from the association. Those who have been linked to causes against their will, however, often face disaster.

De Beers has denied, time and again, having anything to do with the forced removals of the bushmen in Botswana. In an interview with brandchannel, international marketing director for De Beers LV Jean-Christophe Gandon starts out by reiterating, as he had in a De Beers LV press release posted on the company website, that the company simply decided not to renew Iman's contract when it came to an end because it "did not want to be limited by using one face" in association with the brand.

Survival, Gandon claims, "jumped on the opportunity to claim victory" when the contract between the two ended, where as the reality was much more mundane. "The contract between an icon and a brand is usually only for a limited period of time," he says, and it seems Iman's time had come.

Gandon indicates that in De Beers LV, Survival had found the perfect brand to promote a "very worthy" cause. "But the issue about the Bushmen in Botswana has nothing to do with De Beers selling jewelry. It is about a situation between the government of Botswana and the local population, and it's not our duty to get involved in such a situation." He further pointed out that he feels "people who understand the issue," as well as loyal De Beers LV customers, understand De Beers has nothing to do with [forced removals]."

Gandon further says "Survival used De Beers because it makes their case more sexy. From a marketing point of view, Survival understood that trying to draw attention to De Beers made their cause more interesting to people."

According to De Beers LV, as a retail subsidiary of the De Beers' mining operations, there is not a lot it can do to affect change. "When it comes to the reputation of De Beers as far as issues like conflict diamonds and the removal of the bushmen, it becomes a matter of concern of the De Beers Corporation," says Gandon. "We are not involved in mining. We are retailers who buy diamonds from the market with the guarantee they come from the

right sources.

"We are ourselves," says Gandon distancing his brand from De Beers at large, "and we know we conduct business in the right way: with integrity and respect for others. If we get drawn into an argument with Survival International we have to explain our position in regard to the structure of the De Beers companies and reiterate that the issue has nothing to do with us. Instead, we believe companies have to communicate what they do well to be less of a target for rumors. De Beers is about quality and expertise, and at the end of the day that is stronger than any false claim by a third party."

Stephen Correy, Director of Survival International, begs to differ. By email, he writes, "We remain convinced that diamonds are the root cause of the evictions," and refers to a paper on the subject entitled "Bushmen aren't forever" posted on the Survival website.

According to Correy, the managing director of De Beers mining operations in Botswana informed Survival, it "would not support the concept of indigenous rights in Africa.... [De Beers] now appear to be rapidly backtracking from that position (which would also be a success for the campaign, if true)." Clarifying De Beers LV's role in the fracas, Correy says, "We limit our concern solely to the role diamonds have played in the violation of bushman rights. We are not opposed to diamonds or diamond mining."

Correy added that Survival International had targeted "dozens of companies," in their efforts on behalf of indigenous peoples. And here lies the rub. The people whom Survival fights on behalf of—tribes such as the Mboboro in West Africa, the Amungme in Papua, Indonesia, and the Khanty in Siberia—are faceless to most of the Western world. The brands that the organization targets, however, are extremely high profile, and by making the association between them and the worldwide travails of marginalized tribal groups, Survival makes its cause known worldwide.

Brand managers probably read about the damage to the De Beers billboards and shuddered, but Gandon himself was philosophical about the alteration of his Old Bond Street billboard, which made the newspapers across the world. "It's very hard to say [if the activism has done harm to the brand]. This type of thing is hard to measure." Yet, it seems, at least at first blush, that activism against a brand on behalf a good cause, be it the rights of a downtrodden people or a virgin rainforest, *must* do damage to the brand.

Kalle Lasn is founder and self-proclaimed "creative mastermind" behind Adbusters.org, a notorious online resource for anti-branding efforts on the part of political activists and a group Lasn refers to as "mental environmentalists": people who are tired of the amount of brand imagery they are confronted with on a daily basis and who are prepared to do something about it. Made famous by Naomi Klein in her best-selling anti-brand book *No Logo*, the "jams" within Adbusters' pages attack well-known brands ranging from McDonald's to Coke to Ralph Lauren. Yet Lasn admits that he had personally spent "years in the ad game," and thus knows branding from the point of view of an insider. His main efforts are now centered around promoting exactly the same kind of brand activism that Survival appears to have spearheaded against De Beers.

Lasn says that the "billboard liberation" of De Beers on Old Bond Street represents "the lowest form of culture jamming," mainly because it only reaches a "few thousand people."

"It's the most ineffective kind of activism because it's not much good to either side," he says. "By and large it's just not much for anyone to worry about." In fact, Lasn points out, "some managers actually *like it*. Their brand is actually enhanced by jammers' paying attention to it, and it gives them a kind of 'rebel edge.'"

The liberation of the De Beers billboard, according to Lasn, is indicative of "the never-ending cat and mouse game [between activists and branders] that has gone on for years."

The real activism against brands, from Lasn's perspective, are activities designed to discourage stars like Iman to "sell their souls" to big brands. "My mission," he says, "is to make it increasingly uncool for celebrities to sell themselves to these corporations."

As far as Iman is concerned, Lasn says, "She was fighting for the wrong side. Increasingly, political radicals have more and more celebrities coming out of the woodwork to *support* them." He hopes that anti-branding efforts worldwide as well as

celebrities supporting good causes outright will make it harder for an icon like Iman to become the face of a major brand like De Beers for "just a few million dollars."

"By doing this, people will see they are being inauthentic prostitutes for the ad industry." Lasn says, adding a final warning aimed at brandchannel readers: "Tell them this: we're coming after you, watch out!"

Iman herself did not answer emails requesting an interview during the researching of this story. She has been thrust into the center of what seems to be the changing, and very risky business of branding, where being the public face of a major brand makes you just as susceptible to the company's enemies as the company itself. Survival claims that her final words on the subject came in an April 2004 interview with the British based magazine *Radio Times* when she reportedly said, "It was clear that the Bushmen were being destroyed—you take people from their element and you end up with AIDs, drugs and alcohol in the guise of advancement."

[22-Nov-2004]

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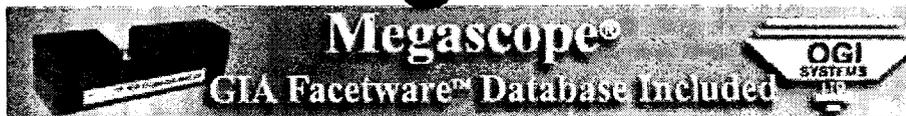
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Opposing Words Mark De Beers LV Opening

By Jeff Miller

Posted: 6/23/2005 7:06 AM

(Rapaport...June 23, 2005) Most Manhattanites (New Yorkers) have passed paper-covered windows of De Beers' retail store on the corner of 55th Street and Fifth Avenue for months. But by evening of June 22nd, the paper was scraped away by a team of window washers revealing the newest New York luxury jewelry store. Police barricades, tight security, and rain-soaked carpeting on the store front sidewalk greeted guests attending the opening reception.

Across the street however, barricades were set up for a gathering of Survival International -- an organization that says De Beers and the government of Botswana are responsible for displacing Bushmen from the Central Kalahari Game Reserve (CKGR) in order to mine diamonds.

The opening of De Beers LV in New York marks the second store opening protest against De Beers by Survival International, the first of which occurred at a London store in November 2002.

De Beers along with luxury retail partner LVMH Moët Hennessy Louis Vuitton planned to open two stores in the United States during 2005 -- the second of which is scheduled for the fourth quarter in Beverly Hills, California.

The De Beers Group has "neither sought, nor requires the removal of anyone from the Central Kalahari Game Reserve," said Lynette Hori, on behalf of De Beers. Survival International however claims that De Beers is in part responsible for "the eviction of the last remaining Gana and Gwi Bushmen and Bakgalagadi from their homes" in the Botswana game reserve.

But De Beers LV, is an independently managed retail venture with no involvement in mining issues, Hori told Rapaport News. Claims by Survival International are misleading, dishonest, and "De Beers challenges them to provide any credible evidence to support their claims," she said.



Finishing crew remove window paper in preparation for opening night of De Beers LV in New York.

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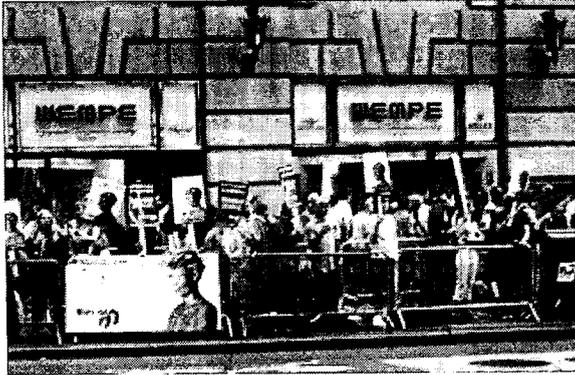
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As Miriam Ross of Survival International



Survival International and supporters gather across the street from De Beers LV on opening night.

handed colored maps of diamond concessions and brochures about the Bushmen to passersby on Fifth Avenue, she explained how diamond mining has affected the indigenous people. The government started relocating Bushmen outside of the reserve in 1997, which eventually led to 243 Bushmen taking Botswana to court, a case that is currently underway. Botswana contends that the reserve is a boost to tourism, and yet does not deny that mining for diamonds in the reserve would be illegal.

While De Beers holds concessions on a large diamond deposit in Botswana, Hori stated that "the De Beers Group, which is a shareholder in De Beers LV, does mine diamonds elsewhere in Botswana in

partnership with the government....There is no mining activity --current or planned-- in the CKGR."

"Good," Ross told Rapaport, "It doesn't mean [De Beers] will not mine in the future. They hold concessions in the reserve now." Paperwork Ross provided shows that De Beers is no where near a majority concession holder. BHP Billiton Inc., owns the majority of concessions across the reserve, followed by Botswana and De Beers partnership (Debswana,) TNK Resources, and AMPAL Ltd.

When Rapaport asked Ross whether or not it was "fair" to target De Beers exclusively, she did not reply.

De Beers took out a retention license on Gope Settlement in November 2000, Survival International says, which was valid for three years and renewed in 2003, and it is the only retention license in Botswana. Gope is now the region where the High Court of Botswana will decide to investigate for diamond mining activity on August 2, 2005.

"Yes we do hold retention licences and we are prospecting, along with others, but so far we have not found a deposit that is economic to mine," Hori told Rapaport.

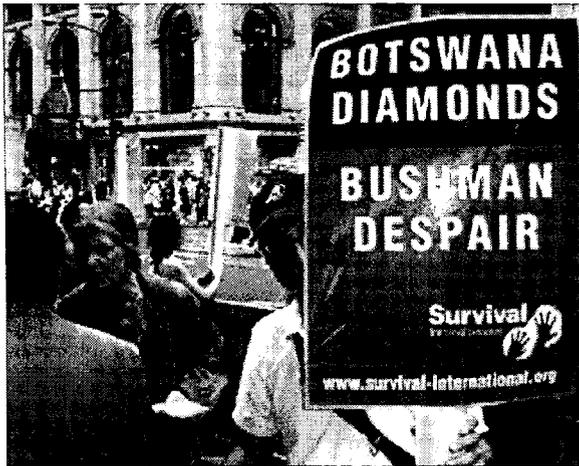
"Ironically, the best thing for the Bushmen would be for us to find a deposit that we could mine as that would provide jobs and an infrastructure for them offering up all sorts of new opportunities," Hori said. Any boycott of Botswana diamonds too, could "inflict untold damage on one of Africa's success stories," citing a negative revenue impact upon one of the world's top diamond producing nations.



Barricades separate journalists from pedestrians at the corner of 55th Street and Fifth Avenue.

"De Beers calls upon Survival International, and its director, Stephen Corry, to desist from their present, divisive campaign, based on unfounded allegations, and engage positively with interested parties to seek a secure future for all the people of Botswana, including the Bushmen of the Central Kalahari Game Reserve," Hori said.

Survival International said De Beers was not forthcoming with policies on indigenous peoples. However, according to a company statement, De Beers says its policy takes "seriously the rights and interests of communities living in the areas it operates." And where operations may impact a community's rights or interests,



Author Gloria Steinem, left, speaks to reporters on behalf of Survival International as unidentified man holds placard on Fifth Avenue in New York.

"we are committed to engaging with them transparently and openly with a view to seeking to secure their free and informed consent before initiating operations."

While a war of words continued behind the scenes, the lights of the new De Beers LV store twinkled at arriving guests. And those few pedestrians able to avoid being shooed away for loitering by store security watched the event from sidewalk view as dusk set in across midtown Manhattan.

One woman who was visiting New York from Pennsylvania tried to look past the curious crowd into a window display, and she remarked that the store opening was fascinating to watch, "but we leave tonight and I wanted to go inside to see their diamonds."

De Beers LV opens for regular business on June 23, 2005.

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Millionaire Magazine	December, 1999
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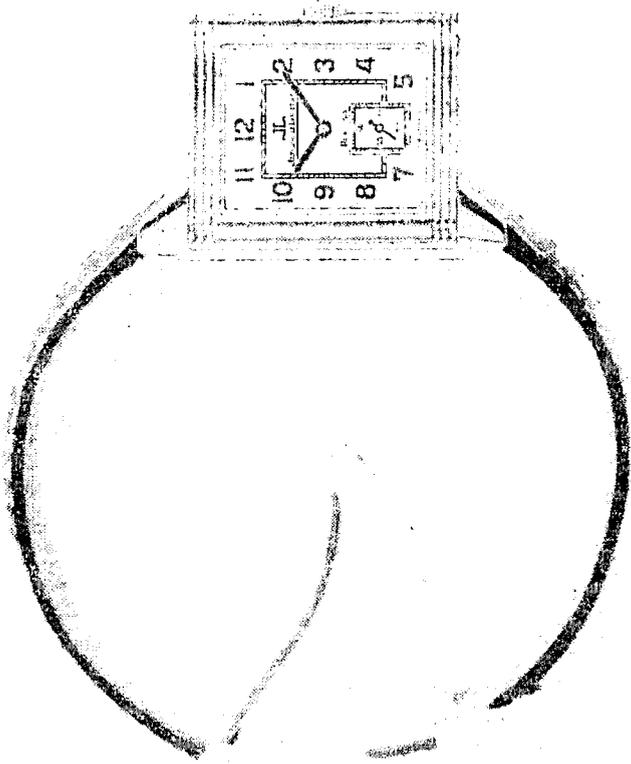


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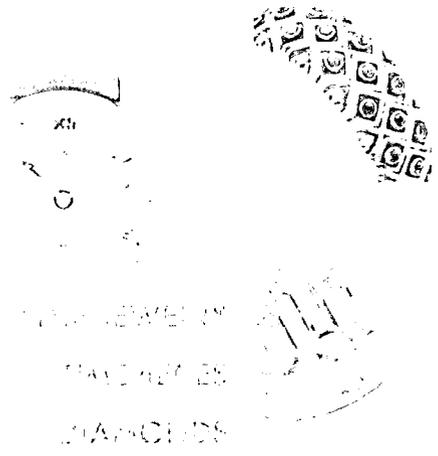



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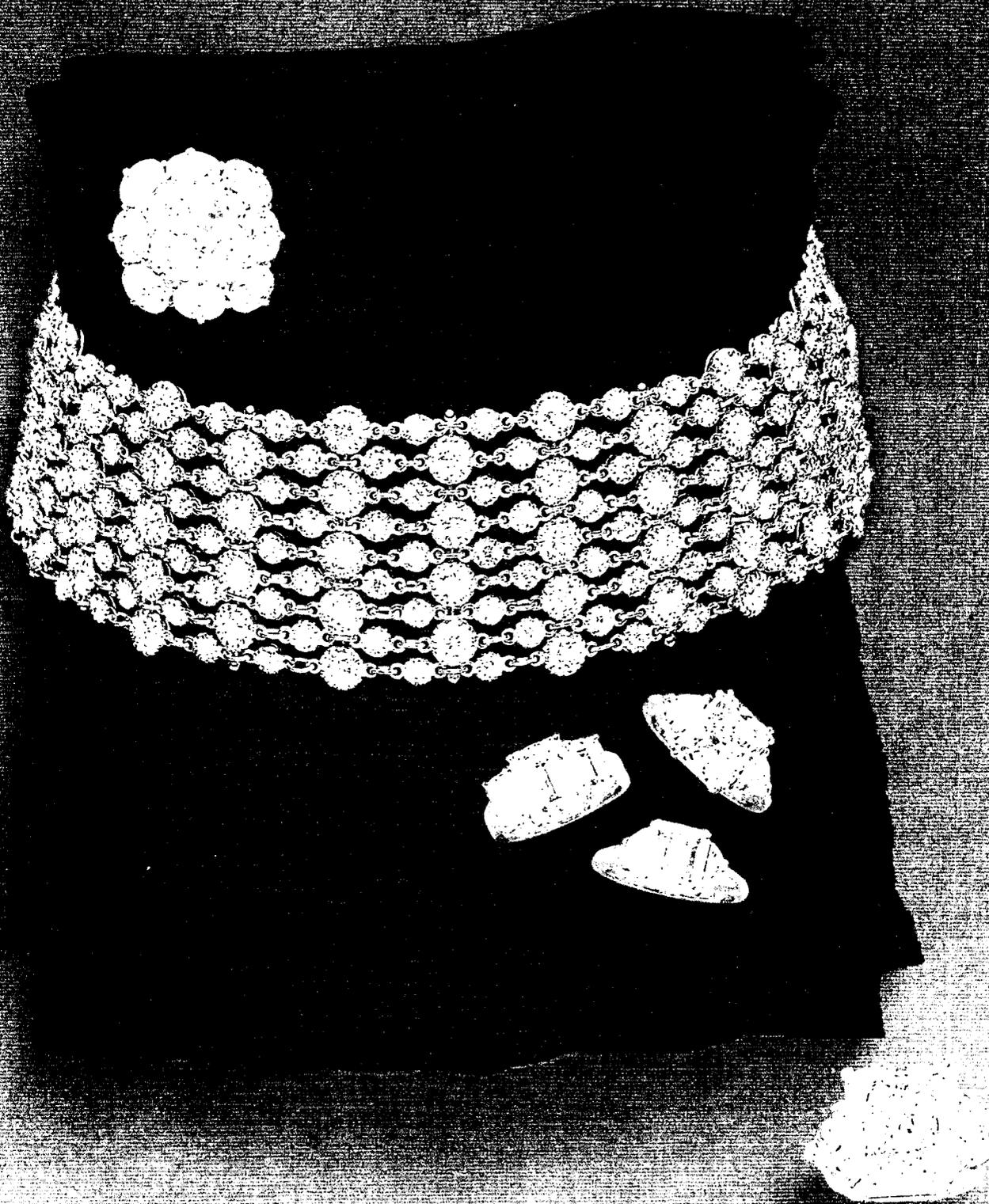
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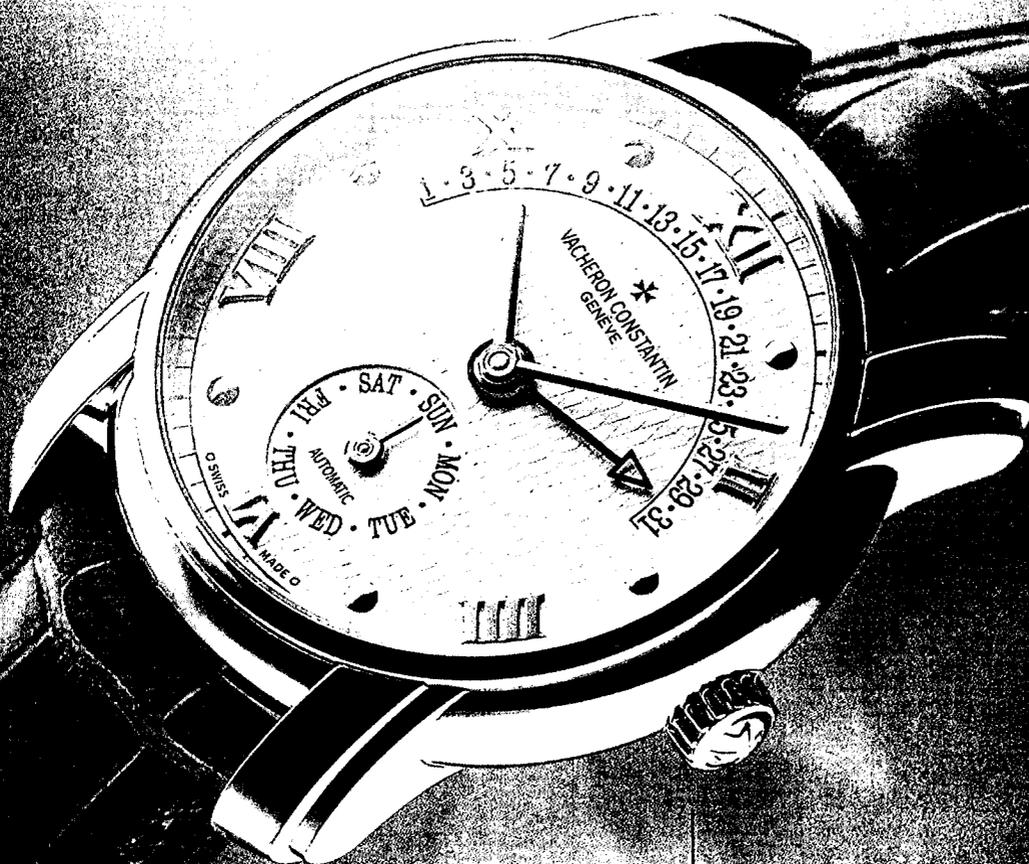
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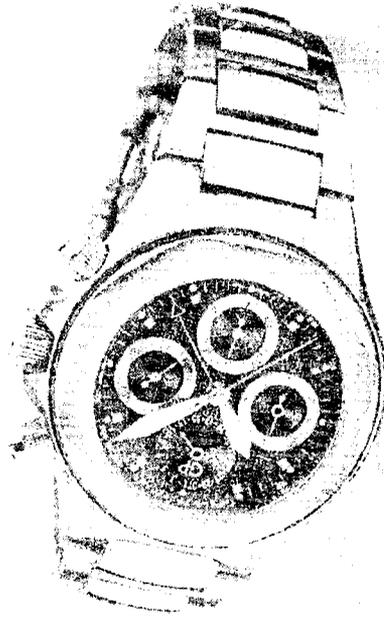
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