

LEVERAGING INTERNATIONAL ECONOMIC TOOLS TO CONFRONT CHILD SOLDIERING

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“We must not rest until all children who have been recruited or used in violation of international law have been released, and until all children feel safe in their homes, schools and communities, without fear that they will be forced into war.”

-United Nations Secretary-General
Ban Ki Moon, 2009¹

I. INTRODUCTION

Children are the greatest casualties of war. Domestic and international laws have long singled out children as a specially protected group of persons, recognizing that children lack the autonomy afforded by an adult’s developed capacity for self-

1. Sarah Shatz, U.N. Secretary General Pledges to ‘Stamp Out’ the Use of Child Soldiers, HUMAN RIGHTS WATCH (Fed. 13, 2009), <http://www.hrw.org/en/news/2009/02/13/un-secretary-general-pledges-stamp-out-use-child-soldiers>.

protection, decision-making, responsibility, and accountability. John Stuart Mill's theory of liberal utilitarianism famously acknowledges this in *On Liberty*, when he proposes special treatment for children, who "must be protected against their own actions as well as against external injury."² This premise resonates most significantly in the laws of war, where children enjoy dual protections, first as civilians,³ and second as a special class of protected persons.⁴

A. *International Law Prohibitions on Child Soldiering*

The forcible conscription of children to serve as child soldiers in armed conflicts violates every norm of protection in international human rights and humanitarian law.⁵ While the 1949 Geneva Conventions do not contain specific norms dealing with the phenomenon of children as combatants, Article 77 of the First Additional Protocol to the Geneva Conventions ("Protocol I") explicitly requires parties to an international armed conflict to:

[T]ake all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the Parties to the

2. JOHN STUART MILL, *ON LIBERTY* 81 (David Bromwich & George Kateb eds., Yale Univ. Press 2003).

3. See, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Common Article 3]; see also Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 13-14, 24, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter G C IV].

4. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 77, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter, Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 4, June 8, 1977, 11 U.N.T.S. 3 [hereinafter Protocol II].

5. See generally JENNY KUPER, *MILITARY TRAINING AND CHILDREN IN ARMED CONFLICT: LAW, POLICY, AND PRACTICE* 45-57 (2005); MATTHEW HAPPOLD, *CHILD SOLDIERS IN INTERNATIONAL LAW* 54-118 (2005).

conflict shall endeavour to give priority to those who are oldest.⁶

Article 4(3)(c) of the Second Additional Protocol to the Geneva Conventions ("Protocol II") similarly binds parties to a non-international armed conflict to observe that "children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities."⁷ Children between the ages of fifteen and eighteen who take part in hostilities possess the status of combatants. As combatants, these children are entitled upon capture to the Third Geneva Convention ("GC III") privileges afforded to prisoners of war, with some additional favorable treatment on account of their age.⁸ Neither can child combatants be subjected to the death penalty for any offence related to armed conflict, where they are below eighteen years of age at the time the offence was committed.⁹ Where children below the age of fifteen years are captured while taking a direct part in hostilities, they remain subject to special protection regardless of any dispute over their prisoner of war status.¹⁰

Notwithstanding the presence of armed conflict, children are entitled to the fullest possible range of protections and entitlements accorded them under international human rights law. Article 38 of the Convention on the Rights of the Child ("CRC") specifically addresses the issue of child participation in armed conflict, and accordingly mandates states parties to "respect and to ensure respect for rules of international humanitarian law applicable to [states parties] in armed conflicts which are relevant to the child"; "take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities"; "refrain from recruiting any person who has not attained the age of fifteen years into their armed forces"; "give priority to those who are oldest" in recruiting children between the ages of fifteen and eighteen"; and "take all feasible measures to ensure protection

6. Protocol I, *supra* note 4, art. 77.

7. Protocol II, *supra* note 4, art. 77.

8. Geneva Convention Relative to the Treatment of Prisoners of War, arts. 16, 49, Aug. 12 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III].

9. Protocol I, *supra* note 4, art. 77(5).

10. Protocol I, *supra* note 4, art. 77(3).

and care of children who are affected by an armed conflict.”¹¹ Following the conclusion of armed conflicts, states continue to have duties to “take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of any form of neglect, exploitation or abuse, torture or any form of cruel, inhuman or degrading treatment or punishment, or armed conflicts.”¹²

Among many of the CRC’s fundamental rights, those most applicable to the circumstances faced by child soldiers include: (1) “the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development”;¹³ as well as the duties of states to (2) “prevent the use of children in the illicit production and trafficking of [narcotic drugs and psychotropic] substances”;¹⁴ (3) protect children against sexual exploitation, sexual abuse,¹⁵ and all other forms of exploitation prejudicial to the child’s welfare;¹⁶ (4) prevent the sale and trafficking of children;¹⁷ and (5) to ensure treatment of the child with humanity and respect for inherent dignity of a human person, “taking into account the needs of persons of his or her age.”¹⁸ The Optional Protocol to the CRC on the Involvement of Children in Armed Conflict more extensively implements these protections by requiring states to: (1) ensure that the members of their armed forces under eighteen years of age do not take a direct part in hostilities; (2) raise the minimum age for voluntary recruitment into the armed forces from fifteen to eighteen years of age; (3) ban compulsory recruitment of persons below the age of eighteen; and (4) prohibit independent armed groups within their territories from recruiting persons

11. United Nations Convention on the Rights of the Child, G.A.Res. 44/25, Annex, U.N. GAOR, 44th Sess. Supp. No. 49, at 167, U.N. Doc A/44/49, art. 38 (1989) (entered into force Sept.2, 1990).

12. *Id.* art. 39.

13. *Id.* art. 32(1).

14. *Id.* art. 33.

15. *Id.* art. 34.

16. *Id.* art. 36.

17. *Id.* art. 35.

18. *Id.* art. 37.

below eighteen.¹⁹ To date, there are 139 states parties to this Optional Protocol.²⁰

Child soldier enlistment is now subject to international criminal prosecution. Admittedly, neither the statute of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) nor that of the International Criminal Tribunal for Rwanda (“ICTR”) explicitly mention the crime of child soldier enlistment. However, subsequent international tribunals have since recognized child soldier enlistment as a war crime. The first international judgment on child recruitment began with the May 2004 decision of the Appeals Chamber of the Special Court for Sierra Leone in the *Hinga Norman* case.²¹ In *Hinga Norman*, the Appeals Chamber defined child recruitment as the conscription, enlistment, and use of children under 15 years of age to participate in hostilities. According to the Appeals Chamber, these activities had already been outlawed under customary international law since at least 1996.²² A year later, the International Criminal Court (“ICC”) included the crime of child soldier enlistment in its first set of arrest warrants, issued against members of the Lord’s Resistance Army (“LRA”) in Uganda²³ and members of armed groups in the Democratic Republic of Congo (“DRC”).²⁴ On January 26, 2009, the ICC commenced trial in *Prosecutor v. Thomas Lubanga*

19. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, G.A. Res. 54/263, Annex I, U.N. GAOR, 54th Sess. Supp. No. 49 (Vol.III), U.N. Doc. A/54/49 (Vol. III), at 7 (May 25, 2000), (entered into force Feb. 12, 2002) [hereinafter Optional Protocol on the Rights of the Child].

20. Status of Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=IV-11-b&chapter=4&lang=en (last visited Mar. 9, 2011).

21. *Prosecutor v. Sam Hinga Norman*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment) (May 31, 2004).

22. Alison Smith, *Child Recruitment and the Special Court of Sierra Leone*, 2 J. INT’L CRIM. JUST. 1141, 1141 (2004).

23. *Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, & Dominic Ongwen*, Case No. ICC-02/04-01/05-53, Warrant of Arrest for Joseph Kony, ¶ 42.5, 13 (Pre-Trial Chamber II Sept. 27, 2005).

24. *Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, Warrant of Arrest, para. 12 (i)-(iii) (Pre-Trial Chamber I, Aug. 22, 2006); *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Warrant of Arrest, para. 22(v) (Pre-Trial Chamber I, July 2, 2007).

Dyilo, where the accused is charged with “enlisting and conscripting of children under the age of 15 years into the *Forces patriotiques pour la liberation du Congo* [Patriotic Forces for the Liberation of Congo] (“FPLC”) and using them to participate actively in hostilities in the context of an international armed conflict from early September 2002 to 2 June 2003,”²⁵ and of “enlisting and conscripting children under the age of 15 years into the FPLC and using them to participate actively in hostilities in the context of an armed conflict not of an international character from 2 June 2003 to 13 August 2003.”²⁶

B. *Child Soldiering and Child Labor*

As officially defined, child soldiering encompasses not only direct combat participation, but all modes of participation in armed groups’ activities in their conduct and prosecution of armed conflicts. The 1997 Cape Town Principles and Best Practices on the Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa (“Cape Town Principles”) explicitly defines a child soldier as “any person under 18 years of age who is part of any kind of regular or irregular armed force *in any capacity*, including but not limited to cooks, porters, messengers, *and those accompanying such groups*, other than purely as family members. It includes girls recruited for sexual purposes and forced marriage. It does *not*, therefore, only refer to a child who is carrying or has carried arms.”²⁷ This definition recognizes the wide scope of conflict-related activities for which armed groups put children to use, as first narrated in the groundbreaking 1996 Report of Graça Machel to the U.N.

25. Summary of Prosecutor v. Thomas Lubanga Dyilo - ICC-01/04-01/06, INTERNATIONAL CRIMINAL COURT, <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/democratic%20republic%20of%20the%20congo?lan=en-GB> (last visited Dec. 7, 2010).

26. *Id.* See also *Use of Child Soldiers ‘Particularly Abusive,’ UN Expert Testifies*, UN NEWS CENTRE (Jan. 7, 2010), <http://www.un.org/apps/news/story.asp?NewsID=33418>.

27. Symposium on the Prevention of Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa, Apr. 27-30, 1997, *Cape Town Principles and Best Practices*, 12, available at [http://www.unicef.org/emerg/files/Cape_Town_Principles\(1\).pdf](http://www.unicef.org/emerg/files/Cape_Town_Principles(1).pdf) (emphasis added) [hereinafter *Cape Town Principles*].

General Assembly on the Impact of Armed Conflict on Children.²⁸ The International Labour Organization (ILO) likewise acknowledges the definitional nexus between child soldiering and child labor. Accordingly, the ILO categorizes child soldiering as among the “worst forms of child labor” in ILO Convention No. 182,²⁹ an international treaty ratified by about 165 states,³⁰ and which obligates states parties to take preventive and remedial measures against such worst forms of child labor.

According to the 2008 Child Soldiers Global Report (“CSG Report”), despite the increased internationalization of legal protections to prevent child soldiering, tens of thousands (although possibly reduced from initial estimates of around 300,000 in 2001) of child soldiers continue to be actively involved in armed conflicts in Afghanistan, Burundi, Central African Republic, Chad, Colombia, Cote d’Ivoire, the DRC, India, Indonesia, Iraq, Israel and the Occupied Palestinian Territory, Myanmar, Nepal, the Philippines, Somalia, Sri Lanka, Sudan, Thailand, and Uganda.³¹ The decrease in child soldiering might be attributed, in some degree, to the collective efforts of international institutions. From 1999 to 2005, the U.N. Security Council passed Resolutions 1261 (1999), 1314 (2000), 1379 (2001), 1460 (2003), 1539 (2004) and 1612 (2005), which collectively outline a system of mechanisms and programs for country-specific and region-specific fact-finding, reportorial, periodic review, support, and monitoring of States’ compliance with international obligations on child sol-

28. U.N. Secretary-General, *Promotion and Protection of the Rights of Children, Impact of Armed Conflict on Children: Note by the Secretary-General*, U.N. Doc. A/51/306 (Aug. 26, 1996) (Report of Graça Machel).

29. Int’l Lab. Org. [ILO], *Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*, art. 3(a), ILO Convention No. 182 (June 17, 1999) [hereinafter ILO Convention No. 182].

30. Ratification and promotion of fundamental ILO Conventions, ILO, Comm. on Legal Issues and Int’l Labour Standards, 300th Sess., Nov. 2007, ¶5, GB.300/LILS/7.

31. COALITION TO STOP THE USE OF CHILD SOLDIERS, CHILD SOLDIERS GLOBAL REPORT 2008, at 14, 389-407 (2008) [hereinafter 2008 CSG REPORT]; COALITION TO STOP THE USE OF CHILD SOLDIERS, CHILD SOLDIERS GLOBAL REPORT 2001, at 10 (2001) (estimating 300,000 child soldiers in more than thirty countries at any given time).

diering.³² During the 2003 “Children in the Crossfire” Conference organized by the ILO, then ILO Director General Juan Somavia proposed a three-point battle plan to prevent and end the use of children in armed conflict:

- 1) [i]mproving enforcement to go beyond conventions and laws. Awareness raising, adopting and implementing legislation in policies and practice are key elements;
- 2) [d]eveloping practical, targeted strategies to help children overcome their trauma and prepare for a better future, such as counselling, education, vocational training, assistance to parents to boost incomes and get decent jobs; and
- 3) [a] development strategy to get at the root causes, including promoting social and economic reconstruction, poverty eradication, employment, and education policies.³³

In 2007, seventy-six states, which included conflict-ridden countries, committed themselves under the Paris Commitments and Paris Guidelines to observe common guidelines on the disarmament, demobilization, and reintegration (DDR) of all categories of children associated with armed groups.³⁴ A 2009 report of the Coalition to Stop the Use of Child Soldiers indicates, however, that DDR strategies have not entirely been successful to date in stopping the re-recruitment of former child soldiers, much less in preventing their use for other conflict-related activities such as artisanal mining.³⁵

32. See S.C. Res. 1261, U.N. Doc. S/RES/1261 (Aug. 25, 1999); S.C. Res. 1314, U.N. Doc. S/RES/1314 (Aug. 11, 2000); S.C. Res. 1379, U.N. Doc. S/RES/1379 (Nov. 20, 2001); S.C. Res. 1460, U.N. Doc. S/RES/1460 (Jan. 30, 2003); S.C. Res. 1539, U.N. Doc. S/RES/1539 (Apr. 22, 2004); S.C. Res. 1612, U.N. Doc. S/RES/1612 (July 26, 2005).

33. *ILO Concern: The Unbearable Fate of Child Soldiers*, INTERNATIONAL LABOR ORGANIZATION, May 23, 2003, available at [http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Feature_stories/lang—en/WCMS_075611/index.htm](http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Feature_stories/lang-en/WCMS_075611/index.htm).

34. See U.N. Children’s Fund [UNICEF], *The Paris Principles: The Principles and Guidelines on Children Associated with Armed Forces or Armed Groups* (Feb. 2007); *The Paris Commitments to Protect Children from Unlawful Recruitment or Use by Armed Forces or Armed Groups*, Feb. 5-6, 2007.

35. International Interdisciplinary Conference on Rehabilitation and Reintegration of War-Affected Children, Oct. 22-23, 2009, Coalition to Stop the Use of Child Soldiers, *Release and Reintegration of Child Soldiers: One Part of a*

Despite the wide net of international legal prohibitions now operative and the direct involvement of top-tier international organizations and institutions seized of the matter,³⁶ child soldiering remains a persistent practice in many ongoing armed conflicts around the world. The 2008 CSG Report observes that while some progress has been made in reducing the incidence of child soldiering from the end of conflicts in Angola, Liberia, and Sierra Leone, and the signing of peace agreements in Burundi, Côte d'Ivoire, the DRC, Nepal, and Southern Sudan,³⁷ children continue to be recruited and used by paramilitaries, militias, civilian defense forces, or armed groups linked to, supported by, or acting as proxies for governments in Chad, Colombia, Myanmar, Peru, the Philippines, Sri Lanka, Sudan, Uganda, India, Iran, Libya, the DRC, and Côte d'Ivoire.³⁸ All of the previously discussed international instruments comprehensively propose long-term strategies to reduce the incidence of child soldiering, but they are by no means complete. The *gravitas* of most of these measures lies in the legal formalization of prohibitions, but is contingent on states' individual modes of implementation of the international prohibitions against child soldiering. Likewise, the nature and scale of the internal or international armed conflicts prevailing will also affect the method and capability of a state to enforce such international prohibitions against child soldiering. In a situation where both government armed forces and non-state armed groups are known to have enlisted child soldiers, it is difficult to see how the international prohibitions

Bigger Puzzle 1 (unpublished report), available at <http://www.child-soldiers.org/document/get?id=1584>.

36. See, e.g., Declaration on the Protection of Women and Children in Emergency and Armed Conflict, G.A. Res. 3318 (XXIX), U.N. Doc. A/9631 (Dec. 14, 1974); U.N. Secretary-General, *supra* note 28; Assembly of States Parties to the Rome Statute of the International Criminal Court, 144, UN Doc. ICC-ASP/1/3, Sales No. E.03.V.2 (2002); United Nations Educational, Scientific and Cultural Organization [UNESCO], *Montevideo Declaration on the Use of Children as Soldiers* (July 8, 1999); *Cape Town Principles*, *supra* note 27; Organization of African Unity [OAU], Resolution Of The Plight of African Children in Situation of Armed Conflicts, CM/RES.1659 (LXIV) REV.1, 64th Sess., July 1-5, 1996; OAU, *African Charter on the Rights and Welfare of the Child*, OAU. Doc. CAB/LEG/24.9/49 (1990) (entered into force Nov. 29, 1999).

37. 2008 CSG REPORT, *supra* note 31, at 23.

38. *Id.* at 18.

will be implemented fully and effectively without ultimately having to fall back on the self-imposed restraint of the combatting groups.

The continued proliferation of child soldiering evidences a fundamental disconnect between the root causes of child soldiering and the current range of international mechanisms and strategies used. Criminal prosecutions and international legal sanctions, while laudable, will likely have an attenuated effect on reducing the incidence of child soldiering in armed conflicts across the globe. These measures operate on an *ex post* paradigm,³⁹ and do little to cripple the immediate operational network and policy considerations of field commanders or armed groups that do enlist child soldiers. As the 2008 CSG Report acknowledges, “some armed groups and their leaders appear to attach little value to international law and display little inclination to adhere to it. The military imperatives of the group and the political, economic, and social factors that drive conflicts and cause children to enlist—often underpinned by local cultural attitudes towards the age of majority—can outweigh legal and moral arguments.”⁴⁰ Due to their malleability in assuming either direct combatant or logistical support roles, and with their unique psychological attributes, armed groups deliberately enlist child soldiers to advance short-term or immediate military objectives.⁴¹ One author notes that “[d]epending on the context, child soldiers may serve as sentries, bodyguards, porters, domestic labourers, medics, guards, sex slaves, spies, cooks, mine sweepers, or recruiters. Roles may vary significantly by age and gender. For example, smaller, younger children often serve as spies. Girl soldiers perform the same wide variety of roles performed by boy soldiers, and in African countries commanders frequently seek girls because of their impressive capacities for portaging

39. See generally James F. Alexander, *The International Criminal Court and the Prevention of Atrocities: Predicting the Court's Impact*, 54 VILL. L. REV. 1, 10-19 (2009); Benedetto Croce, *Against International Post-War Tribunals*, 5 J. INT'L CRIM. JUST. 1029 (2007); Okechukwu Oko, *The Challenges of International Criminal Prosecutions in Africa*, 31 FORDHAM INT'L L.J. 343 (2008).

40. 2008 CSG REPORT, *supra* note 31, at 24.

41. Cf. Susan Tiefenbrun, *Child Soldiers, Slavery, and the Trafficking of Children*, 31 FORDHAM INT'L L. J. 415, 431-33 (2008) (explaining that children may join an armed group for socio-psychological reasons, and armed groups may seek child soldiers for reasons pertaining to economic efficiency).

heavy loads. Girl soldiers also are frequently sought for purposes of sexual exploitation, as are boys in some contexts.”⁴² At any given moment, and depending on the armed group’s operational needs, a child soldier can be exploited for virtually every imaginable form of child labor. This is precisely why the Cape Town Principles do not limit the definition of child soldiering to direct combat participation or carrying of arms.

With these considerations in mind, I propose a complementary strategy to existing international approaches to stop child soldiering. Apart from targeting the grassroots causes of child soldiering and facilitating the demobilization and reintegration of child soldiers to their respective communities after the cessation of hostilities, I propose that we also consider the use of current international economic norms to permit states to specifically discriminate against and target the economic structures that incentivize armed groups to use, and continue using, child soldiers. As previously discussed, child soldiering is, in practice, a euphemism for a broad range of activities that children may be compelled to undertake in armed conflicts. While children may be particularly useful on the frontlines wielding contemporary light weapons (such as M16 and AK-47 assault rifles), hand grenades, landmines, and other cheap and widely available explosives,⁴³ their physical attributes and aptitude for learning skills are equally advantageous for economic activities which are contemporaneously undertaken to finance the operations of armed groups.⁴⁴ In modern armed conflicts, these economic activities can include diamond, oil, and other forms of natural resource mining,⁴⁵ opium and coca

42. MICHAEL WESSELLS, CHILD SOLDIERS: FROM VIOLENCE TO PROTECTION 8 (2006) (internal citations omitted).

43. ALCINDA HONWANA, CHILD SOLDIERS IN AFRICA 31 (2006); cf. *Strong Link Between Child Soldiers and the Small Arms Trade, UN Experts Say*, UN NEWS CENTRE (July 15, 2008), available at <http://www.un.org/apps/news/story.asp?NewsID=27382&Cr=child&Cr1=soldier> (explaining that the small arms trade has grown as child soldiering has increased).

44. See Tiefenbrun, *supra* note 41, at 432-33.

45. See Office of the Special Representative of the Secretary-General for Children and Armed Conflict, *Impact on Children of Illicit Exploitation of Natural Resources in Conflict Zones*, UN.ORG (“There is often also close interlinkage with other lucrative and mainly illicit trade such as in weapons and drugs, which serves to fuel and prolong conflict. Beyond conscription as soldiers and other categories of grave violations, children may also be forced to labour in mining activities or be exposed to criminal networks engaged in

cultivation,⁴⁶ and drug trafficking.⁴⁷ From the time a child is recruited into an armed group, he or she is vulnerable to assuming interchangeable roles as a direct combatant in the hostilities, or as a forced participant in the economic activities that finance and sustain the armed group's capability to wage war. In order to truly give effect to international legal responsibilities of prevention against child soldiering, states must also take measures to ensure that they do not accept or facilitate the entry into their territories of child soldier-produced, -distributed, and/or -trafficked goods that benefit and finance armed groups.

Part II examines the financing of contemporary armed groups through trade of both *facially licit* goods (such as diamonds, gold, minerals, oil, and other natural resources), and *prohibited substances* such as opium and cocaine. I show that international regulation to enforce bans on both types of goods qualitatively differ in terms of scope, the binding nature

child trafficking.”), available at <http://www.un.org/children/conflict/english/exploitation.html> (last visited Jan. 13, 2011); 2008 CSG Report, *supra* note 31, at 213 (“The majority of former combatants were still unemployed, and thousands had regrouped for the purpose of illegal diamond or gold mining, or on rubber plantations.”), available at <http://www.childsoldiersglobalreport.org/content/liberia>. See generally Michael L. Ross, *Oil, Drugs and Diamonds: The Varying Roles of Natural Resources in Civil War*, in THE POLITICAL ECONOMY OF ARMED CONFLICT: BEYOND GREED AND GRIEVANCE 47 (Karen Ballentine & Jake Sherman eds., 2003) (illustrating how plentiful natural resources can ignite civil war).

46. United States Department of Labor, *2008 Findings on the Worst Forms of Child Labour – Colombia*, UNHCR REFworld (Sept 10, 2009), <http://www.unhcr.org/refworld/country,,USDOL,,COL,,4aba3ee88,0.html>.

47. SCOTT GATES & SIMON REICH, *Introduction*, in CHILD SOLDIERS IN THE AGE OF FRACTURED STATES 3, 6 (Scott Gaines & Simon Reich eds., 2009) (“Criminal leaders often play a significant role in the dynamics of armed conflict, motivated by the drug trade or the control of natural resources. They have comparably easy access to arms. As a result, it is often functionally difficult to distinguish urban youth gangs from armed groups that recruit children.”); HUMAN RIGHTS WATCH, “MY GUN WAS AS TALL AS ME”: CHILD SOLDIERS IN BURMA 155 (2002) (discussing the Mong Tai army's emergence from a local drug trafficking militia to an army engaged in the drug trade and heavily recruiting child soldiers). See *Confronting Drug Trafficking in West Africa: Hearing Before the Subcomm. on African Affairs of the S. Comm on Foreign Relations*, 111th Cong. (2009) (statement of Douglas Farah, Senior Fellow, International Strategy and Assessment Center); see generally Paul Rexton Kan, *Drug Intoxicated Irregular Fighters: Complications, Dangers, and Responses*, STRATEGIC STUDIES INSTITUTE (Mar. 2008).

of such regulations, as well as the sanctions available under the international system. Despite criticisms on its implementation, the more developed international regulatory framework and institutional coordination fostered under the 1988 U.N. Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,⁴⁸ coupled with states' own enforcement of their respective domestic laws on prohibited substances, makes it more costly for armed groups to sustainably finance their conflict operations from cross-border trafficking of prohibited substances. It would be easier for states to collaterally enforce international prohibitions on child soldiering in relation to contraband or prohibited substances, since these goods are already banned *per se* at the state's territorial borders. Without having to verify that child soldiers were used to produce or distribute contraband goods or prohibited substances, states already exercise their respective customs jurisdiction to ban these prohibited or contraband goods from entering their borders.

Moreover, when armed groups use child soldiers to facilitate cross-border drug trafficking, the established system of international regulatory cooperation and coordination among states also enables early detection of child soldiers at the border. At that threshold of early detection, states can already devise and implement measures to ensure child soldiers' demobilization and safe reintegration into their home communities, among other duties incumbent upon them under the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. While child soldier detection at territorial borders raises its own corresponding set of immigration issues for states,⁴⁹ in these situations states at least possess clearer factual bases before them to implement the international prohibitions against child soldiering.

International regulation appears more elusive when armed groups use child soldiers for the production and distri-

48. United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 19, 1988, 1582 U.N.T.S. 164 [hereinafter 1988 U.N. Drug Convention].

49. See generally Jennifer C. Everett, *The Battle Continues: Fighting for a More Child-Sensitive Approach to Asylum for Child Soldiers*, 21 FLA. J. INT'L L. 285, 313-344 (2009).

bution of facially licit goods such as diamonds, oil, and other natural resources.⁵⁰ Private buyers of diamonds, oil, and other resources cannot be expected to investigate and determine for themselves if such goods originated from armed groups, or more so, if such goods had been produced and distributed using child soldiers. For an international ban to be effective at targeting these particular sources of financing of armed groups, states must be able to ensure that banned facially licit goods are imputable to, or identifiable with, an armed group that uses child soldiers in the production or distribution of such goods. However, at present, there is no international system or set of protocols for distinguishing goods produced or distributed by child soldiers from legitimate trade in goods.

In light of the contested dynamics of current international legal regulation on the trading activities of armed groups, I propose in Part III that states could also act in their own capacities, under the authority of the exceptions provisions in GATT Articles XX (General Exceptions) and XXI (Security Exceptions), to ban or restrict trade in goods attributable to armed groups that use the labor of child soldiers, without violating WTO principles and the GATT norms on non-discrimination, most-favoured nation (MFN) treatment, national treatment, and the prohibition against quantitative restrictions. These GATT exceptions enable WTO member states to vindicate core societal values and interests⁵¹ through trade-restrictive measures that would otherwise violate multilateral trading rules that require such states to treat goods of “other countries at least as well as it treats the “most favoured” country” (non-discrimination and MFN principles in GATT Article I),⁵² and prohibit internal “discrimination *against* foreign products” (national treatment principle in GATT Article III).⁵³ By creating economic disincentives for armed groups that enlist child soldiers, I contend that trade restrictions on

50. See Asif Efrat, *A Theory of Internationally Regulated Goods*, 32 FORDHAM INT'L L. J. 1466, 1466-67 (2009) (observing that, despite a general trend towards increasing regulated trade, illicit goods are generally left out of regulatory schemes).

51. See SIMON LESTER, ET AL., *WORLD TRADE LAW: TEXT, MATERIALS AND COMMENTARY* 381 (2008) (listing the public policy goals that governments may vindicate via Article XX).

52. *Id.* at 322.

53. *Id.* at 278.

goods produced through the labor of child soldiers apply the international duties of states under the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, to “take all feasible measures to prevent [their] recruitment and use,”⁵⁴ and to “take all necessary measures to ensure the effective implementation and enforcement of the provisions” of ILO Convention No. 182.⁵⁵ I argue that states could be justified in banning or otherwise restricting trade in goods produced or distributed by child soldiers on the ground that they are taking measures “necessary to protect public morals,”⁵⁶ “necessary to secure compliance with laws or regulations”⁵⁷ or “necessary for the protection of its essential security interests relating to the traffic in arms, ammunitions, and implements of war *and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment.*”⁵⁸ I argue that this proposal does not contradict the nascent trend of WTO Appellate Body jurisprudence, which interprets General Exceptions (GATT Article XX) and Security Exceptions (Article XXI) provisions according to multi-tiered tests that correlate the general chapeau of the provision, the necessary measure, and the objective purposes of these exceptions provisions. Finally, I submit that state-imposed bans have advantages over “soft” certification measures such as the Kimberley Process Certification Scheme for Rough Diamonds (KPCS) because they can be checked and duly challenged within the framework of the WTO Dispute Settlement mechanism.

Part IV closes the analysis with a brief review of current international methods to stop child soldiering, which focus on a common objective of monitoring and punishing armed groups for the direct participation of children in hostilities. I situate my proposal within the assumption that armed groups recruit children for their ability to assume diverse roles in armed conflicts. Terminating the financing sources of armed groups from trade in child soldier-produced goods is one possible way to further disincentivize the recruitment of children

54. Optional Protocol on the Rights of the Child, *supra* note 19, art. 4.2.

55. ILO Convention No. 182, *supra* note 29, art. 7(1).

56. General Agreement on Tariffs and Trade, arts. XX(a), Oct. 30, 1947, 61 Stat. A-3, 55 U.N.T.S. 187 [hereinafter GATT].

57. *Id.* at XX(d).

58. *Id.* at XXI(b)(ii) (emphasis added).

in war. In protracted armed conflicts sustained by an armed group's economic dependence on trade in facially licit goods produced or distributed through armed groups' use of child soldiers, state-imposed bans are necessary components to a comprehensive global strategy against child soldiering. These unilateral measures do not breach treaty obligations in the GATT, and absent breach or non-conformity with these primary obligations, states cannot be held internationally responsible under the general law of state responsibility. By imposing these bans, states could also argue that they act to fulfill their explicit international responsibilities, under the relevant international conventions and Security Council resolutions, to prevent and dismantle situations of impunity that make it conducive, in the first place, to enlist and subjugate children to military duties and economic labors that perpetuate armed conflicts. Finally, Part IV offers future research directions from interdisciplinary research and empirical analysis, including a brief analysis of a 2009 legislative proposal from the United States, H.R. 4128 (otherwise known as the Conflict Minerals Trade Act), as a possible model in designing policies to ban or restrict the flow of child soldier-produced or -distributed goods.

II. THE INTERNATIONAL REGULATORY ASYMMETRY: DIFFICULTIES IN MONITORING AND TRACKING ARMED GROUPS' TRADE IN FACIALLY LICIT GOODS AS OPPOSED TO TRADE IN PROHIBITED SUBSTANCES

Since the end of the Cold War, armed groups and government forces alike more frequently rely on revenues from trade in goods to finance their operations in armed conflicts. A survey of armed conflicts from 1994-2001 observes that "[t]he resources most frequently linked to civil conflict are diamonds and other gemstones (seven conflicts, all of them civil wars); oil and natural gas (seven conflicts, six of them civil wars); illicit drugs (five conflicts, all of them civil wars); and timber (three conflicts, all of them civil wars). Legal agricultural crops played a role in two conflicts (both civil wars), although in each case other natural resources played larger roles."⁵⁹ Steady decreases in post-Cold War foreign assistance to gov-

59. Ross, *supra* note 45, at 48.

ernments and armed groups have impelled them to seek private sources of funding to finance their military activities. Armed groups today draw funding from multiple revenue sources, such as lucrative trade in natural resources like timber, oil, and other facially licit goods; proceeds from criminal activities; and diversion of relief aid. Trade in "conflict goods," as described by one author, persists from a combination of strategies, such as: armed groups' taxation of resources or commercial sectors; extraction of payment for the protection of resources; outright sale of resources or goods, as had occurred in Angola (oil), Afghanistan (heroin), Liberia (timber, diamonds, and rubber), and Sierra Leone (passports sold to facilitate outsiders' arms trade); the importation of non-military resources; the provision of trading concessions to private parties in return for direct military support; and "diaspora" trade, or trade of conflict goods (both facially licit and prohibited goods) facilitated by middlemen for resale in third countries.⁶⁰ Unsurprisingly, the strategic value of natural resource assets, as both tools and objectives to maintain the power dynamics in favor of armed groups, has led to a "growing concern that whereas resources were once a means of funding and waging armed conflict for states to a political end, armed conflict is increasingly becoming the means to individual commercial ends: gaining access to valuable resources."⁶¹

While the U.N. Security Council has used its sanctioning power over the past two decades to effectuate embargoes in armed conflicts, sanctions have not always been timely, nor have they been specifically targeted against the trading capacity of armed groups for facially licit goods. Commodity sanctions, for example, have been sparingly imposed, and usually only in tandem with other peacekeeping measures, as was done in Cambodia,⁶² Angola,⁶³ Sierra Leone,⁶⁴ Afghanistan,⁶⁵

60. Neil Cooper, *Conflict Goods: The Challenges for Peacekeeping and Conflict Prevention*, 8 INT'L PEACEKEEPING 21, 24-26 (2001). Significantly, Cooper argues that "strategies to restrict the flow of conflict goods may actually be more effective in promoting peace than initiatives aimed at restricting arms proliferation." *Id.* at 21-22.

61. Philippe le Billon, *The Political Ecology of War: Natural Resources and Armed Conflicts*, 20 POL. GEOGRAPHY 561, 562 (2001).

62. See S.C. Res. 792, ¶ 10, U.N. Doc. S/RES/792 (Nov. 30, 1992) (threatening future petroleum sanctions).

Liberia,⁶⁶ and Côte d'Ivoire.⁶⁷ In 2007, the U.N. Secretary-General recommended to the U.N. Security Council that it consider imposing targeted measures against parties to armed conflicts who continue to systematically commit grave violations against children, including "a ban on the export or supply of arms, a ban on military assistance, the imposition of travel restrictions on leaders, their exclusion from any governance structures and amnesty provisions, and restriction of the flow of financial resources to the parties concerned."⁶⁸

What is most disturbing in the changed complexion of financing for armed conflicts is the increasing long-term convertibility of child soldiers, from being direct participants in hostilities to abused laborers in armed groups' diverse economic activities. It is not unheard of for a child to participate in direct combat during an internecine conflict, and to revert to resource extraction, mining, and trafficking activities for the armed group during temporary ceasefires. In Myanmar, children as young as nine years old are enlisted:

[i]n some cases, children were taken from their parents under the guise of wanting to give them educational opportunities, but they were in fact placed in military schools and expected to join the army. Children are given the same basic training as other soldiers, but if they are not strong enough to carry their own guns or backpacks they can be kept in battalion camps for months or years. If they are too young to be sent out on operations (ie under the age of 12 or 13), they can be used as forced labor on

63. See S.C. Res. 1173, ¶ 12(a)-(d), U.N. Doc. S/RES/1173 (June 12, 1998) (employing sanctions on diamonds, mining, motorized vehicles, and vehicle parts).

64. See S.C. Res. 1306, *passim*, U.N. Doc. S/RES/1306 (July 5, 2000) (imposing sanctions on diamonds).

65. See S.C. Res. 1333, ¶ 5, U.N. Doc. S/RES/1333 (Dec. 19, 2000) (restricting the sale of arms, materiel, and technical advice).

66. S.C. Res. 1343, ¶ 6, U.N. Doc. S/RES/1343 (Mar. 7, 2001) (demanding that all states prevent the import of rough diamonds).

67. S.C. Res. 1643, ¶ 6, U.N. Doc. S/RES/1643 (Dec. 15, 2005) (demanding that all states prevent the import of rough diamonds).

68. U.N. Secretary General, *Children and Armed Conflict: Rep. of the Secretary-General*, ¶ 163, U.N. Doc. A/62/609-S/2007/757 (Dec. 21, 2007) (emphasis added).

projects such as digging roads, taking care of animals or cutting grass and bushes.⁶⁹

The interchangeability of children's roles is also exacerbated when conflicts metamorphose into situations of instability for an indeterminate duration, often involving "cross-border operations of armed opposition groups, the international and local arms trade, and the sale of natural resources, narcotics, and other commodities used to sponsor conflict. "Around centres of conflict, there are often extended zones of 'bounded instability' which experience sporadic violence. Long-term situations of 'neither peace nor war' can therefore ensue."⁷⁰ Where the prolonged conduct of war blurs the lines between direct hostilities and support or financing activities, armed groups easily utilize child soldiers for one form of labor or another, depending on operational expedience and military necessity.

For these reasons, the U.N. Secretary-General's Special Representative for Children and Armed Conflict reports that child soldiers are especially vulnerable in contemporary asset or resource wars, where their roles have indefinitely expanded beyond direct participation in hostilities to forced labor.

The illicit exploitation of natural resources in zones of conflict, has a direct and significant bearing on children. They are exploited as cheap labor and forced to work in unhealthy and dangerous conditions with devastating consequences for their future. This practice of plunder is robbing children of their birthright to education, healthcare and development. Moreover, this has become a principal means of fueling and prolonging conflicts in which children suffer the most. Closely related to the grey area in which

69. Submission by the Burma U.N. Service Office-New York and the Human Rights Documentation Unit to the Office to the Office of the Special Representative of the Secretary General for Children and Armed Conflict for the preparation of the Secretary-General's third report to the Security Council on children and armed conflict, on the implementation of resolutions 1261 (1999), 1314 (2000), and 1379 (2001), *The Impact of Armed Conflict on the Children of Burma*, at 24 (Aug. 2002).

70. United Nations Environment Programme, *Environmental and Socioeconomic Impacts of Armed Conflict in Africa*, THE ENCYCLOPEDIA OF EARTH, http://www.eoearth.org/article/Environmental_and_socioeconomic_impacts_of_armed_conflict_in_Africa?topic=49473 (last visited Mar. 10, 2011).

criminality and politically motivated action intersect is the phenomenon of asset or resource wars, where conflict often revolves around the control of territory or the State apparatus as a direct means of commanding natural resources such as oil, diamonds, gold, coltan, timber or cocoa. Empirical evidence indicates that in these asset wars there are often a multiplicity of actors vying for a stake, from government-armed forces and armed groups opposed to the State, to international interests such as other States, multinational corporations and criminal cartels. There is often also close interlinkage with other lucrative and mainly illicit trade such as in weapons and drugs, which serves to fuel and prolong conflict. Beyond conscription as soldiers and other categories of grave violations, children may also be forced to labor in mining activities or be exposed to criminal networks engaged in child trafficking.⁷¹

The further use of child soldiers for economic activities supporting armed groups has been reported in Africa, Asia, and Latin America:

In many regions, armed conflicts are financed through the illicit exploitation and trade in natural resources and precious minerals like diamonds, gold and timber, but also in narcotics. Child soldiers have been used to protect the mining and other extractive operations, since the parties to the conflict rely on the exploitation and marketing of the resources, sometimes with the cooperation of the private sector and neighbouring countries. In sub-Saharan Africa, the illicit trade in diamonds has financed civil wars in Angola, Liberia, and Sierra Leone. In Colombia, Myanmar and Afghanistan drugs are traded by many parties in the armed conflicts. In the Democratic Republic of the Congo, parties to armed conflict exploit gold, diamonds, timber and coltan—an important resource in high-technology industries—and export

71. U.N. Office of the Special Representative of the Sec'y-Gen. on Children and Armed Conflict, *Impact on Children of Illicit Exploitation of Natural Resources in Conflict Zones*, U.N., <http://www.un.org/children/conflict/english/exploitation.html> (last visited Jan. 10, 2010).

those resources illegally across the country's borders.⁷²

As will be shown in the subsections below, there is a clear disparity in the nature of international regulation affecting armed groups' trade in contraband and prohibited substances, and their trade in facially licit goods and commodities. While the former is covered by a rigorous international cooperative network policing the trade of such goods, states have not yet reached internationally binding measures on facially licit goods and commodities. (As will be shown later, the KPCS is not an internationally obligatory system.) Instead, states appear to await U.N. Security Council action imposing trade embargoes on facially licit goods and commodities in relation to armed conflicts, before implementing any such bans or quantitative restrictions in their territories.⁷³

72. Lilian Peters, *War is No Child's Play: Child Soldiers from Battlefield to Playground* 10-11 (Geneva Ctr. for the Democratic Control of Armed Forces, Occasional Paper No. 8, 2005). The DRC also holds the world's largest reserves of tantalum. Dena Montague, *Stolen Goods: Coltan and Conflict in the Democratic Republic of the Congo*, 22 S.A.I.S. REV. 103, 105 (2002). Montague also explains that "coltan is but one of many resources illegally mined and sold into western markets to profit invading armies and rebel forces. Trade in diamonds, timber, copper, gold and cobalt also helped finance invading armies and rebel movements. Coltan happened to be the most lucrative raw material, and, more than any other mineral resource, it attracted the invading forces and lured them into establishing full-fledged commercial operations." *Id.* at 104-05.

73. Historically, states directly intervened to monitor and restrict the diamond trade only *after* the U.N. Security Council issued commodity sanctions specific to the diamond trade. See DAVID CORTRIGHT ET AL., SANCTIONS AND THE SEARCH FOR SECURITY 181-200 (2002). For a recent discussion of the "new" jurisdiction of the U.N. Security Council in economic issues, such as illegal exploitation and trade of natural resources and conflict goods by armed groups, see Kristin E. Boon, *Coining a New Jurisdiction: The U.N. Security Council as Economic Peacekeeper*, 41 VAND. J. TRANSNAT'L L. 991, 1007-08 (2008). *But see* JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION 242 (2004) (arguing that unilateral embargoes are less efficacious than multilateral embargoes, and may simply serve to frustrate business groups at the expense of human rights goals).

A. *Comprehensive International Regulations on Armed Groups' Trade in Prohibited Substances*

Armed conflicts create numerous opportunities and incentives for armed groups to trade in contraband goods and prohibited substances, so much so that:

whatever posture they assume—either as guerrillas turning into criminals or as members of mafias with an alliance of crime and revolution—[they create] mutual resources of monies and weapons to the war machines of terror, counterterror, revolution, and counterrevolution. The links between crime and terrorist insurrections masquerading as revolutions appear to be growing stronger and also perpetrate conflicts that encourage terrorism and make peace more elusive.⁷⁴

Illicit trade, however, can be undertaken both by states and by rebel groups within a state:

[i]n one case (Peru), only the rebels systematically raised money from the drug trade. In the other cases, both sides earned money from drugs—in two cases (Afghanistan and Burma) because the government was willing to endure international sanctions, and in the third case (Colombia) because drug revenues were collected by paramilitary forces, which were allied with the government but sufficiently independent from it (at least nominally) to allow the government to avoid international sanctions.⁷⁵

Child soldiers are especially useful to armed groups engaged in the drug trade, since drugs, like diamonds, gold, and other gemstones, are “easily extracted and transported by individuals or small teams of unskilled workers.”⁷⁶

Three international treaties comprehensively promote international cooperation to police and criminalize trafficking in illegal drugs and other prohibited substances: (1) the 1988

74. ROBERT J. KELLY, ET AL., *ILLICIT TRAFFICKING: A REFERENCE HANDBOOK* 14 (2005).

75. Ross, *supra* note 45, at 63.

76. Alexandra Guáqueta, *The Colombian Conflict: Political and Economic Dimensions*, in *THE POLITICAL ECONOMY OF ARMED CONFLICT: BEYOND GREED AND GRIEVANCE* 73 (Karen Ballentine & Jake Sherman eds., 2003).

U.N. Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, with about 170 states parties;⁷⁷ (2) the 1961 U.N. Single Convention on Narcotic Drugs, with about 180 states parties;⁷⁸ and (3) the 1971 U.N. Convention on Psychotropic Substances, with 183 states parties.⁷⁹ Under these conventions, states harmonize rules criminalizing the use, possession, sale, production, manufacture, and trafficking of various types of illegal drugs, under combined international schedules of prohibited substances and quantities of such substances.⁸⁰ Among these conventions, the 1988 Convention specifically qualifies the gravity of offenses in relation to trafficking of illegal drugs as “particularly serious” when they involve the “victimization or use of minors.”⁸¹ All three conventions establish interrelated rules on subject matter and personal jurisdiction;⁸² standardized procedures for determining the estimation, cultivation, and confiscation of prohibited substances;⁸³ legal and administrative cooperation among states in actions against the illicit traffic of such substances;⁸⁴ customs,

77. 1988 U.N. Drug Convention, *supra* note 48.

78. United Nations Convention Single Convention on Narcotic Drugs, Mar. 30, 1961, 520 U.N.T.S. 151 [hereinafter 1961 U.N. Drug Convention].

79. United Nations Convention on Psychotropic Substances, Feb. 21, 1971, 1019 U.N.T.S. 175 [hereinafter 1971 U.N. Drug Convention].

80. See Int'l Narcotics Control Board [INCB], *List of Precursors and Chemical Frequently Used in the Illicit Manufacture of Narcotic Drugs and Psychotropic Substances under International Control* (11th ed. Jan. 2007) (prepared in accordance with the 1988 U.N. Drug Convention); INCB, *List of Narcotic Drugs Under International Control* (48th ed. Dec. 2008) (prepared in accordance with the 1961 U.N. Drug Convention); INCB, *List of Psychotropic Substances under International Control* (23d ed. Aug. 2003) (prepared in accordance with the 1971 U.N. Drug Convention).

81. 1988 U.N. Drug Convention, *supra* note 48, art. 3.5(f).

82. See *id.* art. 4; 1971 U.N. Drug Convention, *supra* note 79, arts. 2-7; 1961 U.N. Drug Convention, *supra* note 78, art. 4.

83. See 1988 U.N. Drug Convention, *supra* note 48, art. 5 (setting forth protocol regarding confiscation of drugs); 1961 U.N. Drug Convention, *supra* note 78, arts. 19-21 (setting forth protocol regarding estimation of drug requirements by states), 22-24 (setting forth protocol regarding cultivation), 36-37 (confiscation).

84. 1988 U.N. Drug Convention, *supra* note 48, arts. 6-10 (setting forth obligations regarding extradition and various avenues of mutual legal assistance); 1971 U.N. Drug Convention, *supra* note 79, art. 21 (requiring the parties to pursue a coordinated campaign against illegal drugs); 1961 U.N. Drug Convention, *supra* note 78, arts. 4, 35 (requiring the parties to coordinate in order to combat illegal traffic in narcotic drugs).

trade, and commercial regulation, including permitted quantities of such substances for medical or scientific purposes;⁸⁵ and the settlement of disputes.⁸⁶

Most importantly, all three conventions operate under common centralized international authorities and institutions, such as the Commission on Narcotic Drugs of the Economic and Social Council of the United Nations and the International Narcotics Control Board. While these international conventions have not completely eradicated drug trafficking, they have contributed significantly to international efforts to dismantle drug trafficking groups and curb the illegal drug trade. Until the 1988 U.N. Drug Convention, anti-drug-trafficking measures were largely dependent on national initiatives. International cooperation under the 1988 U.N. Drug Convention developed mutual legal assistance in investigations, prosecutions, confiscations, extradition, controlled deliveries and money laundering into a coherent international regime.⁸⁷

Under the established system of international cooperation, information-sharing, and regulatory protocols against illegal trafficking, states have the means not just to apprehend the illicit entry of prohibited substances within their borders, but also to investigate and determine the origin of such substances. Transnational investigations have led to the detection of child soldier involvement and participation in the production, use, or trafficking of prohibited substances, as in Brazil,⁸⁸

85. See 1988 U.N. Drug Convention, *supra* note 48, arts. 15-18 (articulating measures in the realm of commercial trade to suppress the illegal drug trade) 1971 U.N. Drug Convention, *supra* note 79, arts. 12-15 (international trade and shipping); 1961 U.N. Drug Convention, *supra* note 78, arts. 29-32 (manufacturing and international trade).

86. 1988 U.N. Drug Convention, *supra* note 48, art. 32; 1971 U.N. Drug Convention, *supra* note 79, art. 31; 1961 U.N. Drug Convention, *supra* note 78, art. 48.

87. Sandeep Chawla & Thomas Pietschmann, *Drug Trafficking as a Transnational Crime*, in HANDBOOK OF TRANSNATIONAL CRIME & JUSTICE 160, 177-180 (Philip Reichel ed., 2005); cf. Stephen David Brown, *Controlled Deliveries*, in COMBATING INTERNATIONAL CRIME: THE LONGER ARM OF THE LAW 199, 199-204 (Stephen David Brown ed., 2008) (discussing controlled deliveries as a technique to combat international drug trafficking).

88. Jens Glüsing, *Violence in Rio de Janeiro: Child Soldiers in the Drug Wars*, SPIEGEL ONLINE INT'L (Mar. 2, 2007), <http://www.spiegel.de/international/spiegel/0,1518,469510,00.html>.

Colombia,⁸⁹ Myanmar,⁹⁰ and Africa.⁹¹ In the past decade, this interlinkage between child soldiering and illegal drug trafficking has become much clearer in internal armed conflicts, civil disturbances and urban unrest, and transnational criminal activities.⁹² As one author contends:

[a]s most of these governments, movements, or armed groups do not have access to the free global economy the situation is only exacerbated by the fact that these actors must often fund their war efforts through illegal channels. Rebel groups and non-state actors may resort to plundering and blackmailing civilian populations for sources of finance. . . . The children abducted or enrolled in armed groups are, in numerous cases, held under influence by alcohol, drugs, or other substances . . . We will therefore argue that the fight against child soldiers necessitates increased cooperation and collaboration in the fight against drugs and crime: from narcotics to corruption, illegal traffics, and small arms smuggling.⁹³

The 1988 U.N. Drug Convention recognizes the practical utility of children to illegal drug trafficking, and as such, enables states' domestic courts to consider the "involvement of the offender in other international organized criminal activities,"⁹⁴ "involvement of the offender in other illegal activities facilitated by the commission of the offence,"⁹⁵ as well as the "victimization or use of children," as qualifying circumstances to merit more severe punishment against drug traffickers.⁹⁶

89. 2008 CSG Report, *supra* note 31, at 99.

90. *Child soldiers and opium cultivation, two faces of Burma's dark pit*, ASIA NEWS (Dec. 15, 2009), <http://www.asianews.it/index.php?art=17124&l=en&size=A>.

91. *AFRICA: Too Small to be Fighting in Anyone's War*, IRINNEWS.ORG (Dec. 2003), <http://www.irinnews.org/InDepthMain.aspx?InDepthId=24&ReportId=66280>.

92. John P. Sullivan, *Child Soldiers: Despair, Barbarization, and Conflict*, AIR & SPACE POWER J., Mar. 2008, available at <http://www.airpower.maxwell.af.mil/apjinternational/apj-s/2008/1tri08/sullivaneng.htm>.

93. Alexandre J. Vautravers, *Why Child Soldiers are Such a Complex Issue*, 27 REFUGEE Q. SURV. 4, 106 (2009).

94. 1988 U.N. Drug Convention, *supra* note 48, art. 3(5)(b).

95. *Id.* art. 3(5)(c).

96. *Id.* art. 3(5)(f).

B. *Minimal International Regulation on Armed Groups' Trade in Facially Licit Goods*

Child soldiers are also invaluable to sustaining armed groups' trade in facially licit goods such as diamonds, gold, oil, timber, and other natural resources, and legal agricultural crops. In the Philippines, a democracy still besieged by some of the longest-running insurgencies in Southeast Asia, paramilitary units and separatist groups give children economic tasks around the camp, a form of enlistment where the children could later become combatants.⁹⁷ The use of children in economic activities of armed groups appears more starkly in the DRC, where children have been used repeatedly for mining and quarrying activities that help finance the military operations of armed groups.⁹⁸ These cases demonstrate the distinct utility children bring to armed groups in a wide spectrum of operations involved in conducting a protracted armed conflict. Apart from serving to augment combat units' manpower in the field, children also comprise the backbone of armed groups' mining and quarrying workforces, particularly sought for their small size, dexterity, trainability, cheap food intake, and large supply in impoverished civilian populations. The International Labour Organisation (ILO) attributes this phenomenon to the fact that armed conflicts cause rampant disruptions to regular economic activities, leading families and children to seek or accept work in mines and quarries:

[. . .C]hild labour in mining is one of those forms of work which is particularly closely associated with economic and social disruption. Even if virtually disap-

97. See *Philippines: Child soldiers in the spotlight as Mindanao battle rages*, IRINNEWS.ORG (Oct. 21, 2008), <http://www.irinnews.org/Report.aspx?ReportId=81015> (explaining that children have chores around the camp, and that some eventually fight).

98. See GLOBAL WITNESS, *FACED WITH A GUN, WHAT CAN YOU DO? WAR AND THE MILITARISATION OF MINING IN EASTERN CONGO* 24 (“[T]ens of thousands of people, including children, work as artisanal miners” in Eastern Congo) (2009) [hereinafter 2009 GLOBAL WITNESS REPORT]; see also U.N. Secretary-General Panel of Experts, *U.N. Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo*, ¶¶ 69, 109-212 (Apr. 12, 2001) (reporting on the use of child labour in mining activities, and analysing how resource exploitation helps to finance the war).

pearing for a time, it tends to reassert itself when civil wars break out and cut off normal commerce, when drought destroys livelihoods or whenever else times get tough. It usually occurs far from sight: up in the mountains or out in the border areas. And it relocates swiftly, responding to hints and whispers of a gold strike here or jobs there . . . Far from the public eye, children in small-scale mining are vulnerable to a panoply of social, psychological, and physical dangers not found in many other forms of work.⁹⁹

Noting this reality, ILO Convention No. 138 (the Minimum Age Convention) permits states parties to exclude specific categories of work or economic activity from the minimum age requirement of eighteen years, but specifically bars such states from excluding mining and quarrying, which by nature jeopardize the health and safety of children.¹⁰⁰

To date, KPCS is the only known attempt to enforce quantitative restrictions or bans to curb the financing of armed conflicts. The KPCS is a non-binding “soft law” instrument banning the export and import of rough diamonds to and from non-participants in the certification scheme. Participating governments in the KPCS certify that rough diamond shipments are free of “conflict diamonds,” defined by the U.N. General Assembly as rough diamonds “used by rebel movements to finance their military activities, including the attempts to undermine or overthrow legitimate governments.”¹⁰¹ Participating countries in KPCS can only trade rough diamonds with fellow participants. They must also pass legislation that devises control systems for the export and import of rough diamonds. As observed by the United States Government Accountability Office, “[t]o succeed, KPCS depends on all participants having strong control systems and procedures for collecting and sharing trade data on rough

99. Int'l Programme on the Elimination of Child Labour, *Mining and Quarrying*, ILO, <http://www.ilo.org/ipecc/areas/Miningandquarrying/lang-en/index.htm> (last visited Nov. 12, 2010).

100. ILO, *Minimum Age Convention*, June 26, 1973, arts. 3(1), 5(3), ILO Convention No. 138, June 26, 1973; see also GERALDINE VAN BUEREN, *THE INTERNATIONAL LAW ON RIGHTS OF THE CHILD* 267 (1998) (discussing specific economic activities that may not be excluded from the Minimum Age Convention).

101. G.A. Res. 55/56, pmb. 2, U.N. Doc. A/RES/55/56 (Jan. 29, 2001).

diamonds, for inspecting imports and exports of these diamonds, and for tracking confirmations of import and export receipts.”¹⁰²

On its face, the KPCS appears to contravene core norms of the GATT, such as prohibitions against quantitative restrictions, the principle of non-discrimination, the most-favoured nation clause, and the principle of national treatment. Pursuant to its authority under article IX(3) of the WTO Agreement, and taking into consideration U.N. General Assembly Resolution 55/56, which specifically called on the international community to create a “simple and workable international certification scheme for rough diamonds,”¹⁰³ the WTO General Council issued a waiver in May 2003 to suspend the operation of such GATT prohibitions for WTO Member States that participate in the KPCS.¹⁰⁴ Notwithstanding international cooperation at this level, however, the inherently non-binding nature of the KPCS, along with its lack of systematic monitoring and enforcement, lends weight to the criticism that it has not succeeded in eliminating the flow of conflict diamonds, particularly in the Republic of Congo.¹⁰⁵

Against its unique genesis and still-unproven record in segregating conflict diamonds from legitimate diamond trade, it is difficult to replicate the KPCS as a general paradigm for enforcing international prohibitions against child soldiering. For one, the KPCS creates a certification system specific to the

102. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-978, CONFLICT DIAMONDS: AGENCY ACTIONS NEEDED TO ENHANCE IMPLEMENTATION OF THE CLEAN DIAMOND TRADE ACT 38 (2005).

103. G.A. Res. 55/56, *supra* note 101, ¶ 3(a).

104. Isabel Feichtner, *The Waiver Power of the WTO: Opening the WTO for Political Debate on the Reconciliation of Competing Interests*, 20 EUR. J. INT'L L. 615, 624 (2009); Karen E. Woody, *Diamonds on the Souls of Her Shoes: The Kimberley Process and the Morality Exception to WTO Restrictions*, 22 CONN. J. INT'L L. 335, 348 (2007).

105. See Seth A. Malamut, *A Band-Aid on a Machete Wound: The Failures of the Kimberley Process and Diamond-Caused Bloodshed in the Democratic Republic of the Congo*, 29 SUFFOLK TRANSNAT'L L. REV. 25, 41-55 (2005) (documenting the ways in which diamond exporters have worked around the KPCS); Haley Blaire Goldman, *Between a ROC and a Hard Place: The Republic of Congo's Illicit Trade in Diamonds and Efforts to Break the Cycle of Corruption*, 30 U. PA. J. INT'L L. 359, 374-77 (2008) (citing reports that demonstrate a discrepancy from the Republic of Congo between massive export of rough diamonds and the lack of reported production or importation of rough diamonds).

diamond trade, while armed groups' trade in facially licit goods produced with the labor of child soldiers are not limited to diamond resources. Second, a voluntary certification system such as the KPCS does not authoritatively determine the provenance of a good. Where the origin of state-certified rough diamonds is disputed, the KPCS does not contain any definitive procedure for resolving the controversy. As a self-regulatory system dependent on the voluntary participation of diamond-trading states, enforcement of quantitative restrictions or outright bans cannot be compelled. Finally and most importantly, it would have to take another article IX(3) waiver decision from the WTO General Council to authorize any such certification system for facially licit goods produced and distributed through the labor of child soldiers. There is no assurance that a new waiver decision of this nature could be obtained under the same substantial international political consensus as the Kimberley Process. Mobilizing an influential majority within the WTO system in support of such a waiver would require more states to expend political resources and allocate favours that they may need for their respective ongoing trade negotiations.¹⁰⁶

Outside of the soft law initiatives under the KPCS for conflict diamonds, and the select U.N.-imposed trade embargoes previously discussed,¹⁰⁷ there is no international regulation directly applicable to armed groups' trade in facially licit goods such as minerals and commodities. Even the KPCS—which came into effect in January 2003 under a popular climate of international and cross-sectional support from key players of the diamond industry, states, NGOs, and the U.N. Security Council's endorsement under resolution 55/56—suffers several fatal design problems. First, while the certification system depends greatly on the reliability of information brought in by participating states in KPCS, there is still no "comprehensive system for the gathering and analysis of diamond production and trading statistics. . . . Without a comprehensive database on the production and trade of rough diamonds, the KPCS will be unable to identify anomalies or do even the most rudi-

106. On the structural problems of decision-making rules in the WTO, see generally Debra P. Steger, *The Future of the WTO: The Case for Institutional Reform*, 12 J. INT'L ECON. L. 803, 808-14 (2009).

107. See *supra* notes 62-67 and accompanying text.

mentary tracking of diamond flows.”¹⁰⁸ Second, states participating in the KPCS did not reach any consensus whatsoever on the international monitoring process to ascertain states’ compliance with their unilateral promises under the system. Third, it was not until April 2003 that the KPCS launched membership procedures that tied continuing membership in the system with states’ enactment of KPCS-related domestic legislation. In practice, KPCS does not have any functional sanctions that could be imposed against such states other than exclusion from KPCS membership. Exclusion, however, would only be counter-productive to the objectives of the KPCS, since it would foreclose *any* possibility of cooperation on stopping the illicit diamond trade, as KPCS realized in the case of the Democratic Republic of the Congo, which it expelled in 2004 and readmitted in 2007. By failing to reach any binding agreement among states on these issues and subjecting the entire process of compliance to cyclical negotiations among KPCS participants, there is little prospect of imposing an “enforcement net” on armed groups’ trade in diamonds that comes anywhere near the web of international regulation and enforcement cooperation in drug trafficking.

While the KPCS imperfectly targets the “blood diamond” trade, there are virtually no other similar international mechanisms in place for armed groups’ trade in other facially licit minerals and commodities. One author implicitly acknowledges this dearth of international regulation in his proposal for states to conclude international agreements to curb trade in conflict goods:

. . . trade in conflict goods depends on companies operating in legitimate markets (e.g. diamonds, timber, etc.). Such companies have to work within the framework of domestic and international law. . . . [B]oth international agreements and/or pressure from civil society have the potential to influence the willingness of such actors to support the trade in conflict goods.¹⁰⁹

108. Ian Smillie, *What Lessons from the Kimberley Process Certification Scheme?*, in PROFITING FROM PEACE: MANAGING THE RESOURCE DIMENSIONS OF CIVIL WAR 47, 60 (Karen Ballentine & Heiko Nitzschke eds., 2005).

109. Cooper, *supra* note 60, at 28.

As a result of the regulatory gap, foreign companies can continue to purchase minerals and commodities, having to comply only with the local customs regulations of states where such minerals and commodities are sold, as well as the more general contract obligations between buyers and sellers under the Convention on the International Sale of Goods.¹¹⁰ This burdens individual states to themselves police, monitor, and prevent the entry and exit of armed groups' trade in facially licit goods in their respective territories.

Absent a common set of international rules analogous to the international framework on prohibited substances, and without specifically applicable domestic regulations against child soldier-produced, -distributed, -assembled and/or -manufactured goods, state practice to date has been uneven on the enforcement of child soldier prohibitions in relation to trade. In the DRC, multinational companies from Europe, Asia, and elsewhere have reportedly been "buying minerals from *comptoirs* known to be trading with armed groups for several years, apparently without adjusting their practices in light of the conflict or carrying out sufficient due diligence to ensure that their trade is not fuelling the violence."¹¹¹ Some of the companies identified as having participated in the minerals trade from conflict zones include Belgian companies Trademet, Traxys, SDE, STI and Specialty Metals; Thailand Smelting and Refining Corporation (the world's fifth-largest tin producing company) owned by a British metals company, Amalgamated Metal Corporation (AMC) Group; MPC, a Rwanda-based subsidiary of South African-owned Kivu Resources; African Ventures Ltd in China; Met Trade India Ltd in India; Eurosib Logistics JSC in Russia; BEB Investment Inc. in Canada; Novosibirsk Integrated Tin Works in Russia; and the Blattner Elwyn Group in the United States.¹¹² The DRC is a particularly significant mining resource for tantalum and cassiterite, which is indispensable for making the miniature high-voltage capacity for circuits in high-end technology goods such as mobile phones, PDAs, laptops, video game consoles, among

110. See U.N. Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3 (entered into force Jan. 1, 1988) (making no exceptions for trade of minerals or commodities) [hereinafter 1980 U.N. Convention for the Sale of Goods].

111. 2009 GLOBAL WITNESS REPORT, *supra* note 98, at 59.

112. *Id.* at 59-69.

others. The highest numbers of child soldiers have been used in the DRC, where they are interchangeably used for mining operations apart from participation in hostilities, numbering “up to 40% of rebel and government forces at the war’s height, with more than 10,000 yet to be demobilized.”¹¹³

Notably, there appears to be growing international recognition of the need for state action on armed groups’ trade in facially licit goods. The 2008 Final Report of the U.N.’s Group of Experts on the Democratic Republic of Congo revealed that “a number of mineral-exporting companies, transport companies and fuel businesses could be acting as fronts for the *Congres national pour la defense du peuple*.”¹¹⁴ In the same Report, the Group of Experts found evidence that “Rwandan authorities have been complicit in the recruitment of soldiers, including children”¹¹⁵ and that virtually all armed groups (primarily the National Congress for the Defence of the People (CNDP) and the PARECO, or Coalition of Congolese Patriotic Resistance) have conducted “large-scale child recruitment” and “re-recruitment” of former child soldiers.¹¹⁶ Among its recommendations, the Group of Experts strongly urged that “Member States take appropriate measures to ensure that exporters and consumers of Congolese mineral products under their jurisdiction conduct due diligence on their suppliers and not accept verbal assurances from buyers regarding the origin of their product.”¹¹⁷ This recommendation was particularly significant, since it implicitly underscored the *preventive* duties and responsibilities of states with respect to armed groups’ global trade in facially licit goods. This recommendation took a different direction from civil society groups’ advocacy of corporate social responsibility (CSR) within the domestic jurisdic-

113. Brian Ashby, Program Assistant, Lecture at the University of Chicago Summer Teacher Institute: *From Congo to Chicago: Understanding the Life-Cycles of Metal Commodities in the Global Economy*, (June 22-25, 2009).

114. Note that the *Congres national pour la defense du peuple* is “a political movement with a military wing call the Congolese National Army.” U.N. Group of Experts on the Democratic Republic of Congo, letter dated Dec. 10, 2008 from the Chairman of the Security Council Comm. established pursuant to resolution 1533 (2004) concerning the Democratic Republic of Congo addressed to the President of the Security Council, ¶¶ 19, 32, U.N. Doc. S/2008/773, (Dec. 12, 2008) [hereinafter Group of Experts Report].

115. *Id.* ¶ 61.

116. *See id.* ¶¶ 167-185 (discussing recruitment of child soldiers).

117. *Id.* at sec. XII.14 (emphasis in original).

tional frameworks of states,¹¹⁸ which seeks to establish host state control and accountability mechanisms over multinational corporations operating in a state's territory. The Group of Experts' recommendation critically recognized that it was the positive duty, or *obligation*, of states to require proper verification of the origin or provenance of conflict-related goods. Unlike CSR mechanisms which are negotiated, mobilized, and mediated within states, the Group of Experts' recommendation was a landmark legal and policy development, since it implied that states held a shared international obligation to prevent inadvertently contributing to the financing of groups in armed conflicts through international trade.

The Group of Experts' recommendation for proper verification of the origin of conflict-related goods should also not be seen hijowutfas a mere magnified version of the KPCS system on conflict diamonds. As previously discussed, the KPCS system depends on the voluntary participation of states in its certification process. Its constitutive processes are not legally binding on states, and neither are its deliberations transparent to the international community. States cannot, as a matter of right, require the disclosure of information in relation to the functioning of the KPCS system. When the Republic of Congo was expelled from the KPCS in 2004 and readmitted in 2007, KPCS officials did not offer any concrete explanation for these decisions.¹¹⁹ As one NGO observes,

[t]he Kimberley Process was seriously flawed from the beginning. The Kimberley system of "voluntary self-regulation" on the part of the diamond industry has meant a significant lack of transparency and independent monitoring efforts. The World Diamond Council, initially established to represent the diamond industry at the Kimberley Process, has failed to coordinate effective industry monitoring. Governments, too, have been uninterested in monitoring and regulating the diamond trade. Some say the Kim-

118. See, e.g., Olefumi O. Amao, *Corporate Social Responsibility, Multinational Corporations and the Law in Nigeria: Controlling Multinationals in Host States*, 52 J. AFR. L. 1, 89-113 (2008) (examining the Nigerian legal framework for regulation of multinational corporations, and arguing that even well-developed corporate responsibility practices by multinational corporations cannot replace the need for effective host state regulation).

119. Goldman, *supra* note 105, at 360.

berley Process amounted to little more than a public relations stunt for the diamond industry, and recent reports by Global Witness and other NGOs have found little evidence of genuine attempts to deliver on industry commitments.¹²⁰

In contrast, the Group of Experts' recommendation for state measures on due diligence verification, bans, and other forms of quantitative restrictions against armed groups' trade in commodities and minerals appears clearly premised on the international obligations of all states under Security Council resolutions in relation to the DRC, as well as the applicable international humanitarian law conventions, including the prohibitions against child soldiering.

While there is admittedly no specific set of international regulations controlling armed groups' trade in facially licit goods, the international responsibilities of states to take *preventive* measures against such trade may be reasonably embraced within the full range of international conventions and Security Council resolutions on children and armed conflict. The Convention on the Rights of the Child repeatedly obligates states to take *all* necessary measures to "protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances,"¹²¹ to ensure the implementation of the "right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health, or physical, mental, spiritual, moral or social development,"¹²² and in accordance with obligations under international humanitarian law to protect the civilian population in armed conflicts, to "take all feasible measures to ensure the protection and care of children who are affected by an armed conflict."¹²³ Imposing quantitative restrictions in armed

120. *Kimberley Process*, GLOBAL POLICY FORUM, <http://www.globalpolicy.org/component/content/article/182/33876.html> (last visited Jan. 10, 2010).

121. United Nations Convention on the Rights of the Child, *supra* note 11, art. 33.

122. *Id.* art. 32.1.

123. *Id.* art. 38.4.

groups' trade in facially licit goods produced through the participation of child soldiers has also not been ruled out in the encompassing language of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, which provides, among others, that states parties "shall take all necessary legal, administrative and other measures to ensure the effective implementation and enforcement of the provisions of the present Protocol within its jurisdiction"¹²⁴ and "shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices."¹²⁵ Taking these child-specific international obligations together with the Security Council's repeated resolutions obligating states to bring an end to impunity for those responsible for child soldiering, to implement "special measures" to protect children in armed conflict, and to take measures against state and non-state actors that engage in illicit trade in natural resources and small arms,¹²⁶ collectively demonstrates the corollary that states also bear international responsibility to restrict the flow of armed groups' trade in facially licit goods produced with the participation of child soldiers.

C. *Synthesis: International Frameworks on the Control of Financing of Armed Groups through Cross-Border Trade*

As shown in the previous subsections, the descriptive summaries of the relative international regulatory regimes applicable to armed groups highlight several important distinctions in the institutional enforcement of international prohibitions

124. Optional Protocol on the Rights of the Child, *supra* note 19, art. 6.1.

125. *Id.* art. 4.2.

126. See S.C. Res. 1261, *supra* note 32, ¶¶ 3, 10 (urging "all parties to armed conflicts to take special measures to protect children"); S.C. Res. 1314, *supra* note 32, ¶¶ 2, 16(c) ("Undertak[ing] initiatives to curb the cross-border activities deleterious to children in times of armed conflict, such as the cross-border recruitment and abduction of children"); S.C. Res. 1379, *supra* note 32, ¶¶ 9(a)-(d) (urging states to consider taking measures that protect "children in armed conflict"); S.C. Res. 1460, *supra* note 32, ¶¶ 3, 7 (urging conflict resolution to control arms trade with states that do not protect the rights of children); S.C. Res. 1539, *supra* note 32, ¶¶ 3-4 (calling upon states to curb illicit trade, which can have a negative impact on children); S.C. Res. 1612, *supra* note 32, ¶¶ 14-16 (urging states to ensure that children are embraced by peace process, unaffected by illicit trade, and saved from abduction).

against child soldiering. First, armed groups' trade in illicit goods or prohibited substances such as drugs and small arms is more easily distinguishable from other types of goods. Whether these goods or substances were produced or distributed with child soldier intervention (as is more likely the case, for example, in Burma, Colombia, Brazil, or the DRC), states can ultimately prevent armed groups from profiting from the labor of child soldiers in these goods through the *per se* ban on the entry and subsequent sale of such goods into their respective territories. This is not necessarily the case with facially licit goods such as minerals, natural resources, and other commodities, where states inimitably have to determine for themselves the origins or provenance of such goods. If such goods *are* indeed attributable to child soldier labor for armed groups, states must thereafter decide if they can lawfully impose quantitative restrictions against their entry, absent specific domestic laws or customs regulations providing this effect within their respective jurisdictions. (As I argue in Part III, states not only have the capability to do this without infringing multilateral trading rules, but they have the positive obligation to effectuate such quantitative restrictions under the current architecture of international prohibitions against child soldiering.)

Second, the highly centralized framework of cooperation among states on prohibited substances appears more conducive for states to obtain timely and updated information on armed groups' trafficking activities. This level of information exchange makes it easier for states to remain alert to the possible flow of such substances across or into their respective jurisdictions. This is not the case with respect to armed groups' trading activities in relation to facially licit goods, where there is no such institutionalized cooperation or information exchange among states. The discovery of the "blood diamond" trade as a source of armed groups' financing came midstream into armed conflicts, sometimes decades after these conflicts began as in the case of Sierra Leone, Angola, and the DRC.

The interchangeable terms "conflict diamonds" and "blood diamonds" were originally used in connection with the civil war in Angola. The link between the exploitation of diamond resources and extensive human rights abuses was brought to international attention by a U.N. Security Council Expert Panel dealing with Angola. Nevertheless, the term "blood diamonds" did not appear in any official U.N. docu-

ment; instead it was a media creation that successfully and succinctly communicated the horror of the conflict.¹²⁷

While in the past decade, the United Nations has facilitated dialogue and investigations into the linkages between the exploitation of natural resources and armed conflicts, there is no definitive database to date that authoritatively identifies and associates armed groups with various types of traded facially-licit, traded goods. The length of years intervening between the release of U.N. Group of Experts' reports on armed groups' exploitation of natural resources also creates bureaucratic and logistical obstacles for states bent on stopping the flow of trade in their respective jurisdictions.

Finally, the absence of specific international rules on jurisdiction, subject-matter, and settlement of disputes in relation to restrictions on the flow of armed groups' trade in facially-licit goods can dampen states' rigour and initiative in policing the flow of such goods within their borders. Unlike trafficking in prohibited substances, which is tightly regulated in an international scheduling, policing and monitoring system administered by the International Narcotics Board and the Commission on Narcotic Drugs of the Economic and Social Council of the United Nations, in cooperation with states, there is no equivalent "red flag" system for trade in minerals and commodities. States are left to their own information and discretion in determining whether or not to impose quantitative restrictions on minerals and commodities. Often as not, states are loathe to resort to such restrictions for fear of being accused of violating multilateral trade rules and obligations in the GATT, and provoking retaliatory measures from fellow states affected by the restrictions.

As a consequence of the asymmetrical international regulations on the flow of armed groups' trade in prohibited substances and facially licit goods, it should not be surprising that armed groups continue to thrive even when forced to cut back on the more high-risk trade in prohibited substances. Armed groups' trade in facially licit goods such as minerals and commodities can be done innocuously with the complicity of fronting corporations or individuals that "legitimize" trade with international counterpart entities on behalf of armed groups.

127. Iryna Marchuk, *Confronting Blood Diamonds in Sierra Leone: The Trial of Charles Taylor*, 4 YALE J. INT'L AFF. 2, 88 (2009) (internal citations omitted).

The magnitude of such trade barely registers in official government economic statistics, unless the trade could be linked to the suspicious involvement of high-ranking public figures. This is precisely what unravelled in the case of Charles Taylor, a former president of Liberia standing trial before the Special Court for Sierra Leone. In January 2000, an NGO called Partnership Africa Canada first released its report on the financing of armed conflict in Sierra Leone through Taylor's diamond smuggling activities into neighboring Liberia. Two months thereafter, the Angola Sanctions Committee presented the U.N. Security Council with its Final Report (the "Fowler Report") which drew similar conclusions, and also identified heads of state, such as the presidents of Togo and Burkina Faso, as violators of the U.N. sanctions regime.¹²⁸ Taylor was reported to have backed the Revolutionary United Front (RUF) by providing assistance, supplying arms and ammunition in exchange for diamonds, and enlisting masses of child soldiers to participate in the hostilities as well as to furnish labor for diamond mining and quarrying.¹²⁹

To date, more and more reports are surfacing on the financing of armed conflicts through trade in facially licit goods, such as the cocoa trade in Côte d'Ivoire,¹³⁰ and the

128. See U.N. Panel of Experts on Violations of U.N. Security Council Sanctions against UNITA, transmitted by letter dated Mar. 10, 2000 from the Chairman of the Security Council Comm. established pursuant to resolution 864 (1993) concerning the situation in Angola addressed to the president of the Security Council, ¶¶ 32-35, 83, 101-103, 137, U.N. Doc. S/2000/203 (Mar. 10, 2000) (detailing various countries' violations of the U.N. sanctions regime, including Togo and Burkina Faso).

129. See *Prosecutor v. Taylor*, Case No. SCSL-03-01-PT, Second Amended Indictment, ¶¶ 22, 26-27 (May 29, 2007) (alleging Taylor's responsibility for use of children in hostilities and as forced laborers); see also *U.S., Britain Say Liberia's Charles Taylor Fuels War in Sierra Leone*, CNN.COM, (Jul. 31, 2000, 8:07 PM EDT), <http://archives.cnn.com/2000/WORLD/africa/07/31/le-one.un.diamonds.reut/>; Victor A. B. Davies, *Sierra Leone: Ironic Tragedy*, 9 J. AFRN. ECON. 349, 358-359 (2000).

130. See, e.g., *Cocoa Seen Funding Ivory Coast Conflict*, UPI.COM, Jun. 8, 2007, http://www.upi.com/Business_News/Security-Industry/2007/06/08/Co-coa-seen-funding-Ivory-Coast-conflict/UPI-53851181327698/; David Bamford, *Report Warns of "Conflict Cocoa"*, BBC NEWS, Jun. 8, 2007; GLOBAL WITNESS, *HOT CHOCOLATE: HOW COCOA FUELLED THE CONFLICT IN CÔTE D'IVOIRE* (2007), available at [http://www.reliefweb.int/rw/RWFiles2007.nsf/FilesByRWDocUnidFilename/DHRV-73Y4WZ-full_report.pdf/\\$File/full_report.pdf](http://www.reliefweb.int/rw/RWFiles2007.nsf/FilesByRWDocUnidFilename/DHRV-73Y4WZ-full_report.pdf/$File/full_report.pdf); Lydia Polgreen, *Ivory Coast: Cocoa Fueled Civil War*, N.Y. TIMES, Jun.

global timber trade from conflict zones in Africa and Asia.¹³¹ It is highly likely that armed groups engaged in protracted conflicts will take advantage of the current regulatory gaps, and shift more of their financing operations towards trade in facially licit goods and commodities. In 2002, and well before the KPCS came into being, a British NGO, Global Witness, proposed a general framework for tracking the trade in goods and commodities that finance armed conflict. Among their recommendations, Global Witness stressed the need for harmonization of reporting requirements, labelling procedures, an audited chain of custody arrangements, international cooperation on information exchanges, transparency and accountability among participating states, and an internationalized structure for monitoring the flow of such goods.¹³² Notably, the proposal clarifies that eventual tracking mechanisms must be WTO-compliant and harmonized with existing international law.

International conflict policy experts remain optimistic that “[t]argeting the finances of combatants may be a cost-effective means of influencing the behaviour of recalcitrant factions in civil conflicts. The required technology and expertise are already highly developed in the context of drug traffickers and terrorists and could be applied to belligerents.”¹³³ As I show in Part III, states need not wait for the international community to reach a definitive consensus on how to fill in international regulatory gaps with respect to armed groups’ trade in facially licit goods. Even without more specialized international treaty instruments, states can act within their respective competencies to vindicate their shared international responsibilities to prevent child soldiering. As recent literature sug-

9, 2007, at A5 (reporting on the facially-licit trading of cocoa in Côte d’Ivoire).

131. See GLOBAL WITNESS, *THE LOGS OF WAR: THE TIMBER TRADE AND ARMED CONFLICT*, 16, 23-24 (2002), available at http://www.illegal-logging.info/uploads/Global_Witness_-_Logs_of_War.pdf (describing logging as facially licit goods in the context of Liberian civil conflict).

132. See Corene Crossin, et al., *Where Did It Come from? Commodity Tracking Systems*, in *NATURAL RESOURCES AND VIOLENT CONFLICT: OPTIONS AND ACTIONS* 97, 97-159 (Ian Bannon & Paul Collier eds., 2003).

133. David M. Malone & Jake Sherman, *Economic Factors in Civil Wars: Policy Considerations*, in *RETHINKING THE ECONOMICS OF WAR: THE INTERSECTION OF NEED, CREED, AND GREED* 234, 241 (Cynthia J. Arnson & I. William Zartman eds., 2005).

gests, it is possible to track the movement of armed groups' trade in facially licit goods using states' own customs powers.¹³⁴ Applying the U.N. Group of Experts' recommendation, states can also, of their own volition, require companies operating within their respective jurisdictions to conduct due diligence and certify to domestic regulatory authorities that facially licit goods and commodities were not sourced from armed groups or their affiliated fronting companies as reported by the U.N. Group of Experts. Finally, where states have a reasonable basis to conclude that facially licit goods produced or distributed through child soldier participation have been traded by armed groups, they are well within their authority and international responsibility to ban such trade. Part III will show that while these domestic measures might facially violate specific multilateral trade rules against non-discrimination, prohibition against discriminatory and arbitrary quantitative restrictions, and the most-favoured nation clause, states could justify their measures by availing of the exceptions clauses in GATT articles XX and XXI.

III. A PROPOSAL: WTO-COMPLIANT UNILATERAL MEASURES TO BAN, MONITOR, AND TRACK GOODS PRODUCED OR DISTRIBUTED BY CHILD SOLDIERS

Treaties and instruments that provide for tracking, monitoring, and institutional enforcement mechanisms applicable to specific substances, goods, or items are hardly new. They frequently predominate in international environmental law, most especially on issues of endangered species,¹³⁵ genetically modified organisms,¹³⁶ hazardous wastes¹³⁷ and chemicals,¹³⁸

134. Jonathan Winer, *Tracking Conflict Commodities and Financing*, in PROFITING FROM PEACE: MANAGING THE RESOURCE DIMENSIONS OF CIVIL WAR, *supra* note 108, at 83.

135. See United Nations Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Mar. 3, 1973, 993 U.N.T.S. 243.

136. See Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Jan. 29, 2000.

137. See 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal, Mar. 22, 1989, 1673 U.N.T.S. 57.

138. See 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, Sept. 10, 1998, 2244 U.N.T.S. 337.

and ozone-depleting substances.¹³⁹ However, there is no counterpart binding, international regulatory framework in place for tracking and monitoring armed groups' cross-border trade in facially licit goods and commodities. Even the European Union, which pioneered fair trade labelling and eco-labelling, has not yet institutionalized policy instruments to address this form of trade.¹⁴⁰

Current proposals to address this form of trade largely focus on the administrative regulation of corporations and other entities that are implicated in armed groups' trading activities: (1) initiatives that seek to increase payments and financial transparency from natural resource corporations and governments in conflict zones;¹⁴¹ (2) heightened institutional oversight over financial aid extended by international development agencies;¹⁴² (3) direct distribution of revenue resources to citizens, bypassing government intermediation;¹⁴³ (4) strengthening citizen participation in public administrative agencies that exercise oversight over natural resource corporations;¹⁴⁴ and (5) general reforms of corporate practices,¹⁴⁵ as seen in the United Nations Global Compact's Ten Principles,¹⁴⁶ the Organisation for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises,¹⁴⁷ the Extractive Industries Transparency Initiative

139. See 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16 1987, 1522 U.N.T.S. 3.

140. See Natalie Pauwels, *Conflict Commodities: Addressing the Role of Natural Resources in Conflict* 3-9 (Int'l Security Info. Serv., Briefing Paper No. 27, 2003) (describing European Union measures currently in place to prevent trade from supporting conflict, and making recommendations to address gaps).

141. Macartan Humphreys, *Natural Resources and Armed Conflicts: Issues and Options*, in *PROFITING FROM PEACE: MANAGING THE RESOURCE DIMENSIONS OF CIVIL WAR*, *supra* note 108, at 25, 28.

142. *Id.* at 29.

143. *Id.* at 30.

144. *Id.* at 29.

145. *Id.* at 33-34.

146. See UNITED NATIONS GLOBAL COMPACT, CORPORATE CITIZENSHIP IN THE WORLD ECONOMY 1 (2008), http://www.unglobalcompact.org/docs/news_events/8.1/GC_brochure_FINAL.pdf.

147. See ORGANIZATION OF ECONOMIC CO-OPERATION AND DEVELOPMENT, GUIDELINES ON MULTINATIONAL ENTERPRISES (2008) [hereinafter OECD GUIDELINES].

(EITI) Statement of Principles and Agreed Actions,¹⁴⁸ and the U.N. Subcommission on Human Rights' draft *Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights*.¹⁴⁹ As of this writing, current international initiatives remain in their nascent stages. The previously discussed non-binding certification process in the KPCS system for conflict diamonds requires improvement, and although a U.N. Small Arms Treaty regained momentum after the United States reversed its position and declared its support in 2009, the drafting process is still ongoing.¹⁵⁰ U.N. experts have advocated an international agreement on small arms and light weapons to reduce, if not eliminate, the global incidence of child soldiering.¹⁵¹ These measures are more general and universal in scope, in contrast to the U.N. Security Council's conflict- or region-specific measures.¹⁵²

148. Extractive Industries Transparency Initiative London Conference, June 17, 2003, *Statement of Principles and Agreed Actions*.

149. Comm'n on Human Rights, Subcomm'n on the Promotion and Protection of Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, 55th Sess., Aug. 13, 2003, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2.

150. Bill Varner, *US Backs Arms Trade Treaty at the U.N., Abandoning Bush Opposition*, BLOOMBERG, Oct. 30, 2009, available at <http://www.bloomberg.com/apps/news?pid=20601103&sid=abkyS4.975YM>.

151. Suzanne Hoeksema, *Arms Treaty Could Be Powerful Tool to Protect Children*, IPS, Oct. 23, 2009, available at <http://ipsnews.net/news.asp?idnews=48970>.

152. See S.C. Res. 1643, *supra* note 67 (threatening sanctions against individuals violating the arms embargo or the peace process in Côte d'Ivoire by broadening the embargo to include diamond exports); S.C. Res. 1343, *supra* note 66 (imposing sanctions on Monrovia for aiding the Revolutionary United Front in Sierra Leone); S.C. Res. 1306, *supra* note 64 (banning diamond trading in Sierra Leone); see also U.N. Group of Experts on Côte d'Ivoire, Rep., transmitted by letter dated Nov. 7, 2005 from the Chairman of the Security Council Committee established pursuant to resolution 1572 (2004) concerning Côte d'Ivoire addressed to the President of the Security Council, ¶¶ 48-51, U.N. Doc. S/2005/699 (Nov. 7, 2005); U.N. Group of Experts on Liberia, Rep., transmitted by letter dated Apr. 19, 2002 from the Chairman of the Security Council Committee established pursuant to resolution 1343 (2001) concerning Liberia addressed to the President of the Security Council, ¶¶ 8-9, U.N. Doc. S/2000/470 (Apr. 19, 2002); U.N. Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, Add., transmitted by letter dated Nov. 10, 2001 from the Secretary-General to the President of the Security Council, ¶¶ 36-37, U.N. Doc. S/2001/1072 (Nov. 13, 2001); U.N. Group of Experts on Liberia, Rep., transmitted by letter dated Oct. 26, 2001

All of these initiatives contribute, regardless of degree, to the creation of economic disincentives to armed groups that enlist child soldiers. It would be equally desirable for the international community to reach agreement that enhances cooperation, monitoring, and enforcement on armed groups' trade in facially licit goods and commodities, similar to the tightly synchronized normative and institutional network on international drug trafficking. Pending such an agreement, however, I submit that states have the capability to impose a range of domestic measures designed to prevent and deter facilitating armed groups' trade in such child soldier-produced or -distributed goods and commodities, and are justified in doing so under international economic law. The next subsection outlines possible features of such domestic measures, followed by a subsection discussing how these measures comply with multilateral trading rules.

A. *Possible Domestic Measures Against Armed Groups' Trade in Facially Licit Goods*

Policy analysts have offered numerous recommendations that states can adopt to track the flow of armed groups' trade in facially licit goods and commodities. Jonathan Winer proposes a customs-based regime, using Unique Consignment Reference (UCR) and Container Security Initiative (CSI).¹⁵³ Developed in the aftermath of the 9/11 terrorist attacks, the World Customs Organization (WCO) administers UCRs for many customs jurisdictions throughout the world.¹⁵⁴

A UCR number is the equivalent of a bar code applied as early as possible to track all international movements of goods

from the Chairman of the Security Council Committee established pursuant to resolution 1343 (2001) concerning Liberia addressed to the President of the Security Council, ¶ 351, U.N. Doc. S/2001/1015 (Oct. 26, 2001); U.N. Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, Rep., transmitted by letter dated Apr. 12, 2001 from the Secretary-General to the President of the Security Council, ¶¶ 109-212, U.N. Doc. S/2001/357 (Apr. 12, 2001).

153. Winer, *supra* note 134, at 69, 83-89; *see also* Clyde McElman, *Trade Corridor Transparency and Security*, 8 THE INNOVATION J. 4 (2003) (arguing for enhancements to the Unique Consignment Reference); WORLD CUSTOMS ORGANIZATION [WCO], WCO UNIQUE CONSIGNMENT REFERENCE (2004).

154. *See generally* WCO, WCO UNIQUE CONSIGNMENT REFERENCE (2004) (providing an overview of UCRs).

for which customs control is required and then used as an access key for audit, consignment tracking, and information reconciliation. By requiring every good moving in international trade to have a unique number attached to it, the UCR system would create a mechanism to monitor and track the identity and movement of goods by region, by country, by type of good, by seller, by buyer, by shipper, or by any other broadly useful characteristic.¹⁵⁵

On the other hand, the Container Security Initiative (CSI) is the brainchild of the United States government, a system designed to enhance the security of sea cargo containers by pre-screening high-risk containers and employing advanced detection technology to uncover hidden contraband.¹⁵⁶ CSI-compliance standards have already been adopted in at least forty-four of the world's largest seaports,¹⁵⁷ while UCRs have already been tested and deployed in several jurisdictions.¹⁵⁸

[UCR] could potentially be applied to goods moving across national borders not only in containers and barrels but in briefcases and envelopes: all that is required is the international political will to mandate the use of UCR numbers for all commercial shipments of all types of goods across borders. When the activities of particular firms have been found to be suspect, their use of the UCR system would be prohibited, and any effort at further evasion would necessarily involve falsification of UCR documentation. Once a customs agency detects improper UCR documentation, other UCR documentation with the same characteristics could then be traced and matched to containers, and the ports participating in the CSI

155. Winer, *supra* note 134, at 84.

156. *Id.* at 84-85.

157. See Nicholas Hughes Allen, *The Container Security Initiative: Costs, Implications, and Relevance to Developing Countries*, 26 PUB. ADMIN. & DEV. 445, 445 (2006) (listing, *inter alia*, Singapore, Shanghai, and Hong Kong, as ports that have adopted the compliance standards).

158. See Juha Hintsa & Dietmar Jost, *Impact Analysis of Two World Custom Organization Technical Instruments – Customs Data Model and Unique Consignment Reference – On Customs Operations and Performance: Survey at 18 Customs Administrations*, 3183 LECTURE NOTES IN COMPUTER SCI. 134, 134 (2004) (presenting the results of a survey of experts regarding the potential impacts of UCR on customs administrations).

could treat this information as a red flag to apply to any containers relating to the persons, entities, or goods covered by the suspect UCR documentation.¹⁵⁹

Using UCR and CSI technologies, customs authorities could distinguish armed groups' trade in facially licit child soldier-produced or -distributed goods from legitimate trade in goods. Armed groups' trade in such goods could be better detected at the border where such goods lack proper UCR and CSI documentation, or where they do not match the corresponding UCR and CSI databases of customs authorities.

Another measure that states could consider is to work with multinational enterprises to encourage them not to inadvertently or deliberately purchase such goods. Patricia Feeney and Tom Kenny theorize the possible application of the OECD Guidelines for Multinational Enterprises to corporate conduct in conflict zones.¹⁶⁰ Among its many recommendations for business practices, the OECD Guidelines encourage multinational enterprises to "respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments";¹⁶¹ "abstain from any improper involvement in local political activities";¹⁶² "ensure that timely, regular, reliable and relevant information is disclosed regarding their activities, structure, financial situation and performance";¹⁶³ and "within the framework of [the] applicable law, regulations and prevailing labour relations and employment practices . . . contribute to the effective abolition of child labour . . . [and] contribute to the elimination of all forms of forced or compulsory labour."¹⁶⁴ These Guidelines "apply not only to companies operating in adhering countries but also to companies based in adhering countries operating in any other country. In this way, their scope

159. Winer, *supra* note 134, at 85.

160. See Patricia Feeney & Tom Kenny, *Conflict Management and the OECD Guidelines for Multinational Enterprises*, in PROFITING FROM PEACE: MANAGING THE RESOURCE DIMENSIONS OF CIVIL WAR, *supra* note 108, at 345, 346-52 (discussing the ways in which the OECD guidelines may or may not apply to corporate conduct).

161. OECD GUIDELINES, *supra* note 147, ch. II.2.

162. *Id.* ch. II.11.

163. *Id.* ch. III.1.

164. *Id.* ch. IV.1(b)-(c).

includes company operations in non-adhering countries, where most of today's conflicts take place."¹⁶⁵ While the Guidelines comprise a set of recommendations OECD governments have agreed upon in encouraging corporate conduct, there is nothing barring individual states from formally legislating the key measures to make them legally binding within their respective jurisdictions. Conflict-relevant provisions in the OECD Guidelines that could be useful to stopping the flow of armed groups' trade in facially licit goods and commodities include its Chapter VI provisions on combating bribery and establishing proper auditing and accountability practices;¹⁶⁶ Chapter III provisions on disclosure regarding enterprises' activities, structure, financial situation and performance;¹⁶⁷ Chapter IV provisions on contributing to the effective abolition of child labor;¹⁶⁸ Chapter V provisions on environmental activities;¹⁶⁹ and most importantly, the Chapter II provisions on general policies, including "respect [for] the human rights of those affected by their activities consistent with the host government's international obligations and commitments."¹⁷⁰

Finally, combining the U.N. Group of Experts' 2008 recommendation with some features of the certification system in KPCS, states can themselves design measures purposefully requiring exporters and consumers of commodities to certify that they have conducted due diligence on their respective supply chains and have ensured, to the best of their knowledge that none of their known suppliers of primary or intermediate goods or commodities are linked, affiliated, or otherwise used to finance armed groups' trade in goods produced or distributed by child soldiers. Such a certification system, even if localized for now to particular states that undertake to adopt it, eventually could be developed toward a common international customs database on exporters, consumers, goods, and supply chains. Where such certifications cannot be produced, a state could prohibit the entry of such non-certified goods into its territory for a certain period while the source and transmission channels used for the goods in question are investigated. The

165. Feeney & Kenny, *supra* note 160, at 347.

166. OECD GUIDELINES, *supra* note 147, ch. VI.

167. *Id.* ch. III.

168. *Id.* ch. IV.1(b).

169. *Id.* ch. V.

170. *Id.* ch. II.2.

next subsection discusses salient considerations in devising these processes, to avoid non-conformity with GATT Articles XI or III.

To date, modern certification systems in some countries such as the United States and E.U. countries have incrementally expanded beyond conflict diamonds to gemstones and minerals.¹⁷¹ Considering the presence of various regional and bilateral customs cooperation agreements today that tackle related issues of fraud, money laundering, and the flow of illegal goods and contraband, it is not too remote to envisage a situation in the future where states that internally impose domestic measures to stop the flow of armed groups' trade in goods and commodities produced or distributed by child soldiers could subsequently build on regulatory experiences and possibly extend cooperation in these matters as part of the scope of their international customs agreements with fellow states.

Regardless of the qualitative contours of the domestic measure that a state might impose in relation to armed groups' trade in facially licit goods produced or distributed by child soldiers, the state will inevitably have to ensure that this trade restriction does not violate multilateral trade rules. The next section discusses a state's possible justifications, under the Exceptions Clauses of GATT articles XX and XXI, for unilaterally imposing trade restrictions against commodities and goods produced or distributed by child soldiers. Before proceeding to discuss these exceptions, however, I first discuss possible GATT-compliant design features for border measures that customs authorities could implement to prevent the flow of such goods into their respective territories.

171. See Richard A. Schroeder, *Tanzanite as a Conflict Gem: Certifying a Secure Commodity Chain in Tanzania*, 41 *GEOFORUM* 56, 60-61 (2010) (discussing the Tuscon Tanzanite Protocol); Philippe Le Billon, *Fatal Transactions: Conflict Diamonds and the (Anti)Terrorist Consumer*, 38 *ANTIPODE* 778, 786 (2006) (describing activism leading to the creation of the Kimberley Process). There is also some movement to address other natural resources, such as timber, but the regulatory response has been slow. See Steven Price et al., *Confronting Conflict Timber*, in *EXTREME CONFLICT AND TROPICAL FORESTS* 117 (Wil de Jong et al. eds., 2007).

B. *Mapping GATT/WTO Conformity for Unilateral Measures Against Trade in Goods Produced or Distributed by Child Soldiers*

States imposing trade restrictions on the flow of goods and commodities can anticipate challenges based on the following core norms of GATT law:

- The Most-Favoured Nation (MFN) clauses of Article I:1;¹⁷²
- Article XI:1, which is the cornerstone prohibition against quantitative restrictions;¹⁷³
- Article XIII:1, which further qualifies that quantitative restrictions should be non-discriminatorily administered;¹⁷⁴
- Article III:4, which mandates national treatment for non-fiscal measures imposed after post-customs clearance and which affect the offer, sale, transportation, distribution or use of an imported product;¹⁷⁵

172. GATT, art. I:1, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 (“With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any [Member] to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other [Members].”); see also RAJ BHALA, *MODERN GATT LAW: A TREATISE ON THE GENERAL AGREEMENTS ON TARIFFS AND TRADE* 44 (2005).

173. GATT, *supra* note 172, art. XI:1 (“No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any [Member] on the importation of any product of the territory of any other [Member] or on the exportation or sale for export of any product destined for the territory of any other [Member].”); see also BHALA, *supra* note 172, at 356.

174. GATT, *supra* note 172, art. XIII:1 (“No prohibition or restriction shall be applied by any [Member] on the importation of any product of the territory of any other [Member] or on the exportation of any product destined for the territory of any other [Member], unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted.”); see also BHALA, *supra* note 172, at 393.

175. GATT, *supra* note 172, art. III:4 (“The products of the territory of any contracting party imported into the territory of any other contracting party

- Article X:3(a), which prohibits the arbitrary application of trade measures;¹⁷⁶ and
- Article VIII:1(c) and article VIII:3,¹⁷⁷ which, when read together, stresses the need for uniform and proportional rules on customs formalities and procedures.

Absent specific details on a state's chosen design for quantitative restrictions for goods produced or distributed by child soldiers, it is impossible to determine *a priori* how a given restriction would comply with the foregoing norms. While there is, to date, no jurisprudence applicable to these provisions of GATT law on such goods, states should nevertheless also be mindful of some WTO decisions on quantitative restrictions that might affect how they ultimately design quantitative measures or restrictions. Let us assume that a state can choose to implement any or all of the following set of domestic measures:

- An outright ban on goods produced or distributed by child soldiers, as identified at the border (presumably using UCR or CSI technologies);
- A KPCS-like certification system applicable at customs inspection, which requires foreign and local companies trading in facially licit goods or commodities (and

shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations, and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.”); *see also* BHALA, *supra* note 172, at 135.

176. GATT, *supra* note 172, art. X:3(a) (“Each [Member] shall administer in a uniform, impartial, and reasonable manner all its laws, regulations, decisions, and rulings of the kind described in paragraph 1 of this Article.”); *see also* BHALA, *supra* note 172, at 460.

177. GATT, *supra* note 172, art. VIII:1(c) (“The [Members] . . . recognize the need for minimizing the incidence and complexity of import and export formalities and for decreasing and simplifying import and export documentation requirements.”); art. VIII:3 (“No [Member] shall impose substantial penalties for minor breaches of customs regulations or procedural requirements. In particular, no penalty in respect of any omission or mistake in customs documentation which is easily rectifiable and obviously made without fraudulent intent or gross negligence shall be greater than necessary to serve merely as a warning.”); *see also* BHALA, *supra* note 172, at 524.

which might belong to the same category of conflict goods or commodities as reported to the UN Security Council, such as timber, diamonds and other minerals, and oil),¹⁷⁸ to certify to the state to which such goods or commodities are being imported that the goods or commodities were not produced or distributed by child soldiers;

- Non-fiscal measures that apply *after* goods and commodities have cleared customs, which require foreign and local companies to report that they have conducted due diligence to verify that their supply chains do not include goods produced or distributed by child soldiers.

Each of the above measures, albeit generally described, could respectively yield potential GATT violations. In the following subsections, I present several ways in which these measures could be GATT/WTO-compliant, and within the scope of the corresponding jurisprudential interpretations issued in the applicable Panel Reports and the Appellate Body Reports.

178. See *supra* notes 77-87, 110, 130, 128, 134-139 and accompanying text; see also S.C. Res. 1625, ¶ 6, U.N. Doc. S/RES/1625 (Sept. 14, 2005) (“[The Security Council] reaffirms its determination to take action against illegal exploitation and trafficking of natural resources and high-value commodities in areas where it contributes to the outbreak, escalation or continuation of armed conflict.”); U.N. Group of Experts on the Democratic Republic of the Congo, Interim Rep., transmitted by letter dated Jan 25, 2007 from the Chairman of the Security Council Committee established pursuant to resolution 1533 (2004) concerning the Democratic Republic of the Congo addressed to the President of the Security Council, ¶¶ 18-22, S/2007/40, Jan. 31, 2007 [hereinafter DRC Interim Report]. For further discussions of conflict commodities as observed from civil wars or internal armed conflicts, see also Michael Ross, *How Do Natural Resources Influence Civil War? Evidence from Thirteen Cases*, 58 INT’L ORG. 35, 48 tbl.2 (2004); Governance of Natural Resources Revenues, Paris, Fr., Dec. 9-10, 2002, Michael Ross, *Natural Resources and Civil War: An Overview with Some Policy Options* 21-22 (Dec. 13, 2002). See generally PHILIPPE LE BILLON, *FUELLING WAR: NATURAL RESOURCES AND ARMED CONFLICT* (2005). For an overview of commodity-tracking regimes, see generally Corene Crossin et al., *Where Did it Come From? Commodity Tracking Systems*, in *NATURAL RESOURCES AND VIOLENT CONFLICT: OPTIONS AND ACTIONS* 97 (Ian Bannon & Paul Collier eds., 2003).

1. *Outright Ban on Goods Identifiably Produced or Distributed by Child Soldiers*

The ideal administrative design features for a state-imposed domestic measure against goods produced or distributed by child soldiers, consistent with the latest interpretations of WTO panels on specific GATT principles on quantitative restrictions, could be the subject of an entirely separate study.¹⁷⁹ For purposes of this subsection's analysis, I refer to a ban against the import of goods identifiably produced by or distributed through child soldiers.

An outright ban on goods that are identifiably produced or distributed by child soldiers is vulnerable to allegations of violating primarily GATT article I:1 (the most favoured nation clause), GATT article XI: 1 (the core prohibition against quantitative restrictions), GATT article XIII:1 (which requires non-discriminatory administration of any permissible quantitative restrictions), and GATT article X:3(a) (which prohibits the arbitrary application of trade measures). In all of these alleged violations, the core issue will be the state's rules of origin in determining the provenance of goods produced or distributed by child soldiers. As defined by the World Trade Organization (WTO), rules of origin are "the criteria needed to determine the national source of the product."¹⁸⁰ GATT does not provide for these rules, leaving member states "free to determine its own origin rules . . . even [to] maintain several different rules

179. Useful insights can be drawn from the already extensive literature on possible administrative and institutional designs for control, tracking, and restriction of trade in conflict goods, commodities, and natural resources. See generally U.S.A.I.D., JAMIE THOMSON & RAMZY KANAAN, *CONFLICT TIMBER: DIMENSIONS OF THE PROBLEM IN ASIA AND AFRICA: SYNTHESIS REPORT* (2003); DRC Interim Report, *supra* note 178, annx. 1 (providing a sample geochemical analysis control system for minerals, as designed by the Société Générale de Surveillance); Crossin, *supra* note 178 (discussing commodity tracking systems); Carola Kantz, *The Power of Socialization: Engaging the Diamond Industry in the Kimberley Process*, 9 BUS. POWER & GLOBAL GOVERNANCE art. 2 (2007); Pauwels, *supra* note 140 (discussing the role of natural resources in armed conflicts); Steven Price et al., *Confronting Conflict Timber*, in *EXTREME CONFLICT AND TROPICAL FORESTS* 126-131 (Wil de Jong, Deanna Donovan, & Kenichi Abe eds., 2007) (reviewing measures for tracking and verifying conflict timber); Lesley Wexler, *Regulating Resource Curses: Institutional Design and the Blood Diamond Regime*, 31 CARDOZO L. REV. 1717 (2010).

180. Technical Information on Rules of Origin, WTO, http://www.wto.org/english/tratop_e/roi_e/roi_info_e.htm (last visited 1 May 2010).

of origin depending on the purpose of the particular regulation."¹⁸¹

To illustrate the potential violations, let us assume that State A imposes an outright ban on goods from State X, alleging that such goods from State X were produced or distributed by child soldiers. The ban facially violates the MFN guarantee under GATT article I:1, since State A discriminates against such goods originating from a particular State X, thereby giving preferential treatment to all other states exporting the same goods. State X can also argue that the ban is an impermissible quantitative restriction under GATT article XI:1, such ban not being a duty, tax, or other similar charge.¹⁸² Even if such ban could ever be deemed as a permissible quantitative restriction, State X could argue that State A violates GATT article XIII:1 by discriminating in its administration of the ban, if State A does not extend the same ban on other similar goods or like products from all other states. Finally, if State A does not observe a form of procedural due process in its administration of the ban, State X could argue that State A violates its GATT article X:3(a) obligation to "administer in a uniform, impartial, and reasonable manner all its laws, regulations, decisions, and rulings" as defined in GATT article X:1 (in this case, the prohibition of imports).

State A's proffered substantive reason for the disparate treatment of such goods (such as the use of child soldiers in the production or distribution of such goods), must therefore be justified on other GATT provisions. I propose that articles XX(a), XX(d), and XXI(b) might furnish legal bases for a state's imposition of a domestic measure curtailing the flow of armed groups' trade in facially licit goods that were produced or distributed by child soldiers. As there is, to date, no comparable jurisprudence on armed groups' trade in such goods and commodities, these interpretive arguments might have persuasive value for states considering quantitative restrictions on the trade of such goods and commodities. The following subsec-

181. *Id.*

182. *Cf.* PETROS C. MAVROIDIS, *TRADE IN GOODS: THE GATT AND THE OTHER AGREEMENTS REGULATING TRADE IN GOODS* 50-51 (2007) (explaining that, generally, the prohibition on quantitative restrictions applies to those measures imposed by governments that are not duties, taxes, or other charges) [hereinafter MAVROIDIS, *TRADE IN GOODS*].

tions separately sketch interpretive theories under the General Exceptions provision of article XX from the Security Exceptions provision of article XXI.

a. *General Exceptions: Articles XX(a) and XX(d)*

GATT article XX furnishes exceptions that apply to “all obligations under the General Agreement: the national treatment obligation and the most-favoured nation obligation, of course, but others as well.”¹⁸³ WTO jurisprudence has developed a two-tiered test for interpreting GATT article XX, otherwise known as the General Exceptions clause. GATT article XX contains a general chapeau (“*Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any [Member] of measures. . .*”) and ten specifically enumerated exceptions, (a) to (j). The settled two-tiered methodology first requires that a measure be provisionally evaluated or justified according to the specific exception. If the measure is found to be provisionally justified under the specific exception, then the next step would be to test the measure’s compliance with the requirements of the chapeau.¹⁸⁴

The WTO Appellate Body recognizes the differentiated language within article XX, with the specific exceptions respectively carrying different qualifiers, such as “*necessary*,” “*essential*,” “*relating to*,” “*for the protection of*,” “*in pursuance of*,” and “*involving*.”¹⁸⁵ These differences in terminology would bear

183. Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, 24 WT/DS2/AB/R (Apr. 22, 1996) [hereinafter U.S.-Gasoline AB Report]. *But see* PETROS C. MAVROIDIS, *THE GENERAL AGREEMENT ON TARIFFS AND TRADE: A COMMENTARY* 185-86, 257-59 (2005) (taking a minority position against prevailing jurisprudential interpretations on the wholesale applicability of GATT art. XX) [hereinafter MAVROIDIS, *GATT COMMENTARY*].

184. Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 118-120, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter U.S.-Shrimp AB Report].

185. U.S.-Gasoline AB Report at 17.

upon the corresponding interpretive test that would be applied for each of the specific exceptions.¹⁸⁶

Article XX's drafting history shows that states were motivated by the desire to meet particular conditions existing in specific countries in construing exceptions from multilateral trade obligations under the GATT.¹⁸⁷ The chapeau is intended to guard against the abusive interpretation of any of the itemized exceptions:

[t]he chapeau is animated by the principle that while the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rule of the *General Agreement*. If those exceptions are not to be abused or misused, in other words, the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned.¹⁸⁸

The particular phraseology of the chapeau in article XX “embodies the recognition on the part of WTO Members of the need to maintain a balance of rights and obligations between the right of a Member to invoke one or another of the exceptions under Article XX, specified in paragraphs (a) to (j), on the other hand, and the substantive rights of the other Members under the GATT 1994, on the other hand.”¹⁸⁹

With these methodological interpretations in mind, we can provisionally scrutinize a state's quantitative restriction against goods produced or distributed by child soldiers at its most extreme application—in this case, an outright ban on such goods—and determine whether it can be justified under article XX. For purposes of this legal analysis, I assume that the state has duly identified the origin or provenance of such goods as attributable to an armed group that enlists child soldiers for its operations. I submit that the measure could be embraced under the “public morals” exception in article

186. *Id.* at 18.

187. See BHALA, *supra* note 172, at 531-533.

188. U.S.-Gasoline AB Report at 22.

189. U.S.-Shrimp AB Report ¶ 156.

XX(a), and also the “customs enforcement” exception in article XX(d).

i. *The “Public Morals” Exception in Article XX(a)*

Until the August 2009 Panel Report in *China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, there was no available jurisprudence interpreting GATT article XX(a).¹⁹⁰ The Appellate Body in *Korea-Various Measures on Beef* and *EC-Asbestos* generally recognized that WTO Members have the right to determine the level of protection they consider appropriate insofar as other specific exceptions in GATT article XX were concerned.¹⁹¹ At best, scholars analogized WTO jurisprudence that interpreted a similarly worded provision in the General Agreement on Trade and Services (GATS) article XIV(a) (“measures necessary to protect public morals or to maintain public order”).¹⁹² The Panel in *US-Gambling* interpreted the “public morals” exception as one that requires a measure “must be aimed at protecting the interests of the people within a community or a nation as a whole,” such that “the term ‘pub-

190. See Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶¶ 7.746-759, WT/DS363/R (Aug. 12, 2009) (analysing in Art. XX(a), and referring to GATS XIV(a) jurisprudence to determine the meaning of “public morals”) [hereinafter *China-Publications Panel Report*]; see also Appellate Body Report, *China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶¶ 336-37, WT/DS363/AB/R (Dec. 21, 2009) (departing from the Panel’s GATT article XX(a) only insofar as “the State plan requirement in Article 42 of the *Publications Regulation* . . . can be characterized as “necessary” to protect public morals in China”).

191. Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled, and Frozen Beef*, ¶ 176, WT/DS161/AB/R, WT/DS169/AB/R (Dec. 11 2000) [hereinafter *Korea-Beef AB Report*]; Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 168, WT/DS135/AB/R (Mar. 12, 2001) [hereinafter *EC-Asbestos AB Report*].

192. See Donald H. Regan, *The Meaning of ‘Necessary’ in GATT Article XX and GATS Article XIV: The Myth of Cost-Benefit Balancing*, 6 *WORLD TRADE REV.* 3 (2007), at 347, 350 (applying the *U.S.-Gambling* Appellate Body’s analysis of GATS XIV(a) in order to analyse “necessary” in GATT XX); Julia Ya Qin, *Defining Nondiscrimination under the Law of the World Trade Organization*, 23 *B.U. INT’L L. J.* 215, 252-73 (2005) (juxtaposing the similar approaches to non-discrimination between GATT art. XX and GATS art. XIV).

lic morals' denotes standards of right and wrong conduct maintained by or on behalf of a community or nation."¹⁹³ The Appellate Body in *US-Gambling* also laid the balancing test for determining the "necessity" of a measure to the objective of protecting public morals:

306. The process begins with an assessment of the 'relative importance' of the interests or values furthered by the challenged measure. Having ascertained the importance of the particular interests at stake, a panel should then turn to the other factors that are to be 'weighed and balanced.' The Appellate Body has pointed to two factors that, in most cases, will be relevant to a panel's determination of the 'necessity' of a measure, although not necessarily exhaustive of factors that might be considered. One factor is the contribution of the measure to the realization of the ends pursued by it; the other factor is the restrictive impact of the measure on international commerce.

307. A comparison between the challenged measure and possible alternatives should then be undertaken, and the results of such comparison should be considered in the light of the importance of the interests at issue. It is on the basis of this 'weighing and balancing' and comparison of measures, taking into account the interests or values at stake, that a panel determines whether a measure is 'necessary' or, alternatively, whether another, WTO-consistent measure is 'reasonably available.'¹⁹⁴

In the absence of WTO jurisprudence specifically interpreting GATT article XX(a) until August 2009 in *China-Publications*, some scholars have argued that this "public morals" exception could be used to justify adopting or maintaining a ban on products of child labor, such as blood diamonds.¹⁹⁵ I sub-

193. Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶¶ 6.463, 6.465, WT/DS285/R (Nov. 10, 2004).

194. Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶¶ 306-07, WT/DS285/AB/R (Apr. 7, 2005) [hereinafter U.S.-Gambling AB Report].

195. E.g., Sarah H. Cleveland, *Human Rights Sanctions and International Trade: A Theory of Compatibility*, 5 J. INT'L ECON. L. 133, 157-59 (2002); Stephen J. Powell, *The Place of Human Rights Law in World Trade Organization*

mit that even the WTO Panel's interpretation of article XX(a) in *China-Publications* would not rule out a ban on goods produced or distributed by child soldiers.

China invoked article XX(a) to justify a set of measures which regulated the entry of foreign publications, audiovisuals and other media forms, contending that "Chinese regulations governing the importation of cultural goods establish a content review mechanism and a system for the selection of import entities directed at protecting public morals in China." China advanced the argument that, "cultural goods are unique in that they may have a potentially serious impact on societal and individual morals. . . . [I]mported cultural goods, because they are vectors of different cultural values, may collide with standards of right and wrong conduct which are specific to China."¹⁹⁶ The Panel noted that the United States did not specifically challenge the nature of the measures and their linkage to the objective of protecting public morals, but instead "challenged the means China has chosen to achieve its objective of protecting public morals. More particularly, the United States argues that it is not 'necessary' within the meaning of Article XX(a) for importers to perform content review . . . [which] is independent of importation and can be performed by individuals or entities unrelated to the importation process."¹⁹⁷ The Panel then proceeded to explicitly adopt the very same definition of "public morals" that was set by the Appellate Body in *US-Gambling* in relation to GATS article XIV(a).¹⁹⁸ Since the United States did not specifically deny that the measures had a link to China's public morals objective, the issue became the "necessity" of the measures China

Rules, 16 FLA. J. INT'L L. 219, 223 (2004) ("Article XX(a) likely. . . would support state action on a number of other human rights concerns, which might prompt a WTO Member to ban trade to protest immoral acts by a foreign government against its citizens, such as products made by indentured children or from countries. . ."); Michael J. Trebilcock & Robert Howse, *Trade Policy & Labor Standards*, 14 MINN. J. GLOBAL TRADE 261, 290 (2005); see also PETER VAN DEN BOSSCHE, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS* 615 (2005).

196. *China-Publications* Panel Report ¶ 7.712.

197. *Id.* at ¶ 7.756.

198. *Id.* at ¶ 7.759 ("Since Article XX(a) uses the same concept as Article XIV(a), and since we see no reason to depart from the interpretation of "public morals" developed by the panel in *US - Gambling*, we adopt the same interpretation for purposes of our Article XX(a) analysis.").

chose to advance its public morals objective, as to bring them within the purview of article XX(a).

The *China-Publications* Panel adopted the same “necessity” test in *US-Gambling*, but added another factor, “the restriction on the right to import,” to *US-Gambling*’s two factors (the contribution of the measure to the realization of the ends pursued by it, and the restrictive impact of the measure on international commerce):

We recall that we have agreed to proceed on the assumption that Article XX is available as a direct defence for measures that are inconsistent with China’s trading rights commitments under the Accession Protocol. Therefore, and consistently with the statement by the Appellate Body in *US-Gambling*, we think that in the case before us, an additional factor should be taken into account. Specifically, we think that we should weigh not only the restrictive impact the measures at issue have on imports of relevant products, but also the restrictive effect they have on those wishing to engage in importing, in particular on their right to trade. In our view, if Article XX is assumed to be a direct defence for measures in breach of trading rights commitments, *it makes sense to consider how much these measures restrict the right to import*. This would appear to parallel a situation where imposes a WTO-inconsistent ban on imports of products and where an article XX defence requires examination of how much the ban restricts imports of those same products.¹⁹⁹

The *China-Publications* Panel added the above factor (e.g. restrictions on the right to import) from its reading of China’s argument that the import restrictions were “necessary to ensure that the content review can be performed in respect of relevant imported products in a manner which achieves the high level of protection China seeks to achieve.”²⁰⁰ After weighing all three factors against the particular design of each measure, and further inquiring whether there were any other reasonably available measures to China, the Panel concluded

199. *Id.* at ¶ 7.788.

200. *Id.* at ¶ 7.791.

that “none of the provisions of China’s measures which we have determined to be inconsistent with China’s trading rights commitments under the Accession Protocol is ‘necessary’ within the meaning of article XX(a).”²⁰¹

Applying the foregoing jurisprudential developments to the interpretation of article XX(a), a state’s ban on goods produced or distributed by child soldiers could meet both the “public morals” definition²⁰² and the balancing test for “necessity.” As previously discussed, the international prohibitions against child soldiering extend to all “necessary” measures that *prevent* the use of children in this “worst form of child labour.”²⁰³ A state-imposed ban on such goods can be readily subsumed within the “public morals” definition for GATT article XX(a), as the enforcement of international prohibitions against child soldiering directly implicate “standards of right and wrong conduct maintained on behalf of a community or nation.” The fact that the majority of states throughout the world have obligated themselves to prohibit and outlaw child soldiering through numerous international treaty instruments sufficiently demonstrates how they have agreed to characterize standards of conduct in relation to child soldiering.

Likewise, a state-imposed ban could meet the three previously described aspects of the balancing test for the “necessity” of a measure. A ban “contributes to the realization of the ends,” or the objective of enforcing both international prohibitions against child soldiering and international responsibilities to prevent child soldiering under current treaty instruments such as the Optional Protocol to the Convention on the Rights of the Child involving children and armed conflict. By denying such goods access to the flow of trade, states ensure that armed groups do not profit from the exploitation of

201. *Id.* at ¶ 7.911.

202. *Cf.* Steve Charnovitz, *The Moral Exception in Trade Policy*, 38 VA. J. INT’L L. 689, 740-42 (1998) (arguing that products of slave labor and indentured children could be embraced within the GATT article XX(a) “public morals” exception).

203. *E.g.*, United Nations Convention on the Rights of the Child, *supra* note 11, art. 38-39; Optional Protocol on the Rights of the Child, *supra* note 19, art. 4.2, 6.1; S.C. Res. 1261, *supra* note 32, ¶¶ 3, 10; S.C. Res. 1314, *supra* note 32; S.C. Res. 1379, *supra* note 32, ¶ 9(a)-(d); S.C. Res. 1460, *supra* note 32, ¶¶ 3, 7; S.C. Res. 1539, *supra* note 32, ¶¶ 3-4; S.C. Res. 1612, *supra* note 32, ¶¶ 14-15.

child soldiers for all activities and operations that sustain their participation in armed conflict. When a state can properly distinguish the origin of goods produced by child soldiers from legitimately traded goods (such as, for example, by adopting the UCR and CSI mechanisms in customs enforcement), a ban would certainly have a “restrictive impact on international commerce.”²⁰⁴ Finally, it cannot be said that a ban causes unreasonable “restrictions on the right to import,” since goods produced or distributed by child soldiers, by nature, fall outside the scope of permitted imports due to states’ obligations to enforce international prohibitions against child soldiering. This is an entirely different situation from the qualitative restrictions on publications and audiovisual goods at issue in the *China-Publications* case, which did not involve goods for which there were comparable international restrictions or prohibitions. On its face, therefore, and without probing a state’s particular system design for a ban on goods produced by child soldiers, GATT article XX(a) could justify a state-imposed ban.

ii. *The “Customs Enforcement” Exception in Article XX(d)*

States can argue that the ban is meant to effectuate their international obligations to prevent child soldiering,²⁰⁵ which are either directly incorporated in their respective legal systems, or transformed through legislative enactment or statute.²⁰⁶ Assuming that their respective constitutional or statutory procedures have been observed, states will presumably enact or implement customs laws or regulations to implement the ban on the relevant goods. Thus the ban could be justified under article XX(d), being “necessary to secure compliance with laws or regulations which are not inconsistent with the

204. I discuss the potential policy problems in relation to identification and attribution in Part IV, *infra*, and show why the WTO dispute settlement framework is the better venue for resolving controversies on identification and attribution.

205. See *infra* text accompanying note 215.

206. For a comprehensive compilation of the constitutional methods by which states incorporate or transform international legal obligations into their respective legal systems, see generally LAMBERTUS ERADES, INTERACTIONS BETWEEN INTERNATIONAL AND MUNICIPAL LAW: A COMPARATIVE CASE LAW STUDY (Malgosia Fitzmaurice & Cees Flinterman eds., 1993).

provisions of this Agreement, including those relating to customs enforcement”

The Appellate Body also laid out a two-tiered test for applying article XX(d) in *Korea-Various Measures on Beef*.²⁰⁷

First, the measure must be one designed to ‘secure compliance’ with laws or regulations that are not themselves inconsistent with some provision of the GATT 1994. Second, the measure must be ‘necessary’ to secure such compliance. A Member who invokes Article XX(d) as a justification has the burden of demonstrating that these two requirements are met.²⁰⁸

A state-imposed ban on goods produced by child soldiers could also meet both aspects of the interpretive test for article XX(d).

First, a ban secures compliance with international prohibitions against child soldiering, as well as treaty-defined *preventive* duties under the Optional Protocol to the Convention on the Rights of the Child involving children and armed conflict and ILO Convention No. 182.²⁰⁹ The domestic legal effect lent to these international prohibitions (whether through direct incorporation or transformation through legislative enactment) supplies the customs enforcement “law or regulation” subject of GATT article XX(d). A bare textual examination of these prohibitions and duties shows that none of them are facially inconsistent with GATT 1994. Accordingly, if these international prohibitions and duties form part of the domestic law of a WTO member, they could be subsumed within the scope of “laws and regulations” in article XX(d). In *Mexico-Taxes on Soft Drinks*,²¹⁰ the Appellate Body carefully noted that international agreements *ipso facto* do not fall within “laws and regulations” in article XX(d), unless the rules within such agreements are found within the domestic legal

207. Korea-Beef AB Report *supra* note 191, ¶ 157; *see also* LESTER ET AL., *supra* note 51, at 396-400 (discussing jurisprudence regarding article XX(d)).

208. *Id.*

209. Optional Protocol on the Rights of the Child, *supra* note 19, art. 4; ILO Convention No. 182, *supra* note 29, art. 6-7.

210. Appellate Body Report, *Mexico-Tax Measures on Soft Drinks and Other Beverages*, ¶¶ 68-71, WT/DS308/AB/R (Mar. 6, 2006) [hereinafter Mexico-Taxes on Soft Drinks AB Report].

system of a WTO member. Matters relating to “customs enforcement” would “generally involve rights and obligations that apply to importers or exporters.”²¹¹ Where a state has incorporated the international prohibitions or preventive duties in relation to child soldiering as part of domestic law, therefore, it can rightfully invoke a state ban on goods produced or distributed by child soldiers as part of “customs enforcement” or “laws and regulations” within the meaning of article XX(d).²¹² Being customs enforcement laws and regulations, such laws and regulations “are by legislative *fiat* GATT consistent.”²¹³ A ban would “secure compliance” as understood in article XX(d), because it “enforces compliance”²¹⁴ with such domestically incorporated norms (whether contained in customs laws or regulations) on child soldiering.

Second, a ban is clearly “necessary” to secure compliance with “laws and regulations” or “customs enforcement” matters in relation to child soldiers. The Panel Report in *US-Section 337* adopted a similar balancing test for “necessity” as had been set by the Appellate Body in *US-Gambling*:

It was clear to the Panel that a contracting party cannot justify a measure inconsistent with another GATT provision as ‘necessary’ in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent

211. *Id.* ¶ 70.

212. To fall within the purview of “securing compliance” as understood in GATT article XX(d), the ban should directly enforce the customs law or regulation that prohibits the entry of goods produced by child soldiers, and it should not merely seek to “attain the objectives” of such laws or regulations. Report by the Panel, *EEC-Regulation of Imports of Parts and Components*, ¶¶ 5.17-18, L/6657 (Mar. 22, 1990), GATT B.S.I.D. (37th Supp.) at 132 (1990); see also Panel Report, *Canada-Certain Measures Containing Periodicals*, ¶ 5.9, WT/DS31/R (Mar 14, 1997) (rejecting Canada’s argument against following the interpretation advanced by the panel in *EEC-Regulation of Imports of Parts and Components*).

213. MAVROIDIS, *TRADE IN GOODS*, *supra* note 182, at 264 (“GATT Art. XX(d) covers measures which aim to secure compliance with laws (or regulations) which are GATT consistent. It does not define what a GATT consistent law (or regulation) is in an exhaustive manner. It does, however, provide an indicative list to this effect: customs enforcement, enforcement of monopolies, protection of patents, trade marks and copyrights, and prevention of deceptive practices. Such laws (and regulations) are by legislative *fiat* GATT consistent.” (emphasis in original)).

214. Mexico-Taxes on Soft Drinks AB Report, *supra* note 210, ¶ 73.

with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, *that which entails the least degree of inconsistency with other GATT provisions*. The Panel wished to make it clear that this does not mean that a contracting party could be asked to change its substantive patent law or its desired level of enforcement of that law, provided that such law and such level of enforcement are the same for imported and domestically-produced products. However, it does mean that, *if a contracting party could reasonably secure that level of enforcement in a manner that is not inconsistent with other GATT provisions, it would be required to do so*.²¹⁵

Arguably, a ban is a reasonably available measure to a state to enforce its laws, regulations, and customs enforcement rules in relation to child soldiers. Assuming that a state has been able to determine the provenance of the goods in question, the ban is “least inconsistent” with GATT provisions, because GATT norms (such as the substantive prohibitions against qualitative restrictions and the principles of non-discrimination and MFN) pertain to *legitimately traded* goods in the international stream of commerce. In contrast, goods produced by child soldiers could never be treated as legitimate subjects of international commerce. The measure that would achieve the objective of customs enforcement against such illegal goods or commodities (even if they appear to be facially-licit goods, such as minerals, oil, timber, and other natural resources) is nothing less than an outright ban or import prohibition.²¹⁶ Taking the plethora of international treaty prohibitions against child soldiering and international duties to pre-

215. Report of the Panel, *United States—Section 337 of the Tariff Act of 1930*, ¶ 5.26, L/6439 (Jan. 16, 1989), GATT B.S.I.D. (36th Supp.) at 345 (1989) (emphasis added).

216. Mere taxation of such goods would not be a “reasonably available alternative measure.” See EC-Asbestos AB Report ¶ 174 (“In our view, France could not reasonably be expected to employ *any* alternative measure if that measure would involve a continuation of the very risk that the Decree seeks to ‘halt.’ Such an alternative measure would, in effect, prevent France from achieving its chosen level of health protection . . .”).

vent child soldiering,²¹⁷ alongside Security Council resolutions that mandate states to take measures against the illicit trade and exploitation of natural resources,²¹⁸ a state-imposed ban on goods produced with the labor of child soldiers squarely meets the threshold necessity test as a “reasonably available measure” that is “least inconsistent with GATT 1994.”²¹⁹

States can also draw some comparative insight from another case, *EC-Tariff Preferences*,²²⁰ where the European Communities (EC) sought to defend measures to combat illegal drug production and trafficking. After considering the express provisions of the Council Regulation and implementing measures, as well as the design, architecture, and structure of the measures, the Panel rejected the EC’s asserted defence under GATT article XX(b) (the specific exception for measures necessary to protect “human life . . . or health”). In reaching its conclusions, the Panel identified several defects: (1) the Drug Arrangements did not contain any textual reference to the supposed objective of protecting human life or health;²²¹ (2) it was uncertain how its tariff preference scheme would contribute to the realization of the EC’s averred health objectives, especially considering the decreasing trend of ben-

217. See *supra* note 32 and accompanying text.

218. See *supra* notes 62-67 and accompanying text.

219. Note that the U.S.-Gambling AB Report, *supra* note 194, ¶¶ 304-11 provides guidance on the allocation of evidentiary burdens with respect to a “reasonably available measure.” The Appellate Body held that the respondent state does not have to “identify the universe of less trade-restrictive alternative measures and then show that none of those measures achieves the desired objective.” *Id.* at ¶ 309. The respondent state may also “point out why alternative measures would not achieve the same objectives as the challenged measure, but it is under no obligation to do so in order to establish, in the first instance, that its measure is ‘necessary.’” *Id.* at ¶ 310. The respondent state only has to “make a *prima facie* case that its measure is ‘necessary’ by putting forward evidence and arguments that enable a panel to assess the challenged measure, in light of the relevant factors to be ‘weighed and balanced’ in a given case.” *Id.* at ¶ 307. It is only when a complainant raises a possible WTO-consistent alternative measure that the respondent state “will be required to demonstrate why its challenged measure nevertheless remains ‘necessary’ in the light of that alternative.” *Id.* at ¶ 311.

220. Panel Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, ¶¶ 7.200-223, WT/DS246/R, (Dec. 1, 2003).

221. *Id.* ¶ 7.201.

efits from the Generalized System of Preferences;²²² (3) the Drug Arrangements did not contain any monitoring mechanism to ascertain the effectiveness of the measure for protecting human life or health in the EC;²²³ and (4) there were less-restrictive alternatives to accomplish the EC's claimed objective, such as financial and technical assistance combined with multilaterally negotiated tariff reductions that provided sufficient tariff reductions on products of export interest to drug-affected countries.²²⁴ Admittedly, this case involved tariff preferences, and not the kind of import prohibitions considered in this Article. However, the factual lens used in *EC-Tariff Preferences* is worth considering, since the "necessity" of a measure justified under a GATT article XX exception was scrutinized based on the text, structure, design, and architecture of the regulation in relation to the policy objective. Applying insights from *EC-Tariff Preferences*, therefore, a state designing a customs law or regulation to ban the import of goods produced by child soldiers must make sure that such law or regulation states its objective; clearly shows and affirms the contribution of the ban to the achievement of the objective; and (possibly) provides a monitoring or evaluation mechanism to assess the efficacy of the law in implementing the ban. Finally, there must not be any "reasonably available alternative" to the ban.

iii. *The Chapeau of GATT Article XX*

As the previous analyses have shown, a state-imposed ban on goods produced by child soldiers meets the first tier for applying GATT article XX laid down in *US-Gasoline*, since the measure could be "provisionally justified under specific exceptions," as in articles XX(a) and XX(d). The second tier for applying GATT article XX requires that a measure comply with the requirements of the chapeau to GATT article XX ("the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade"). In essence, the chapeau provides a good faith stan-

222. *Id.* ¶ 7.213.

223. *Id.* ¶ 7.202.

224. *Id.* ¶ 7.220.

dard that aids in assessing the *application* of a measure invoked under one of the specific exceptions in GATT article XX, and thereby prevents a state from abusing its right to invoke these exceptions:²²⁵

The focus of the chapeau, by its express terms, is on the application of a measure already found to be inconsistent with an obligation of the GATT 1994 but falling within one of the paragraphs of article XX. The chapeau's requirements are twofold. First, a measure provisionally justified under one of the paragraphs of article XX must not be applied in a manner that would constitute 'arbitrary or unjustifiable discrimination' between countries where the same conditions prevail. Secondly, this measure must not be applied in a manner that would constitute 'a disguised restriction on international trade.' Through these requirements, the chapeau serves to ensure that members' rights to avail themselves of exceptions are exercised in good faith to protect interests considered legitimate under Article XX, not as a means to circumvent one Member's obligations towards other WTO Members.

The foregoing requirements in the chapeau should be built into the regulatory design of any ban. To ensure that a ban would not be deemed a measure that results in arbitrary or unjustifiable discrimination, or operates as a disguised restriction on international trade, a state must have a system that enables it to make reliable factual verifications on the source of such goods. As a matter of fairness, it must also enable private parties to contest such factual conclusions on the source of such goods under pre-established procedures that guarantee transparency, notice, and hearing. These regulatory considerations are not novel departures from existing customs practices throughout the world on determining non-preferential rules of origin in relation to quantitative restrictions and origin labelling.²²⁶ So long as a state can show that it has im-

225. See Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, ¶ 215, WT/DS332/AB/R (Dec. 3, 2007).

226. For a useful comparison of rules of origin across jurisdictions, see generally EDWIN VERMULST, PAUL WAER, & JACQUES BOURGEOIS, *RULES OF ORIGIN IN INTERNATIONAL TRADE: A COMPARATIVE STUDY* (1994).

partially undertaken its customs investigation to determine the origin of such goods, there should be little difficulty complying with the good faith requirements of the chapeau in GATT article XX.

b. *Security Exception: Article XXI(b)(ii)*

GATT article XXI has been described as “an all-embracing exception to GATT obligations. . . . Once a WTO Member relies on Article XXI to implement a measure against another Member, there is no GATT obligation to which the sanctioning Member must adhere with respect to the target Member.”²²⁷

Unlike GATT article XX, the Security Exceptions under GATT article XXI do not contain a chapeau. While the wording of GATT article XXI(b)(ii)²²⁸ appears to afford latitude towards a state’s discretionary determination of what comprises its “essential security interests,”²²⁹ it also does not appear to preclude the possibility of judicial review under the WTO dispute settlement system.²³⁰ There has been no panel report adopted thus far on GATT article XXI,²³¹ and as of this writing it has scarcely been invoked.

227. BHALA, *supra* note 172, at 557.

228. “Nothing in this Agreement shall be construed . . . to prevent any [Member] from taking any action which it considers necessary for the protection of its essential security interests . . . relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment.”

229. BHALA, *supra* note 172, at 558 (“The word ‘it’ means sole discretion to determine whether an action conforms to the requirements set forth in Article XXI(b) rests with the WTO Member invoking sanction measures.”). *But see* Andrew Emmerson, *Conceptualizing Security Exceptions: Legal Doctrine or Political Excuse?*, 11 J. INT’L ECON. L. 135 (Feb. 2008) (arguing against the self-judging nature of GATT article XXI).

230. *See* Rene Browne, Note, *Revisiting “National Security” in an Interdependent World: The GATT Article XXI Defense After Helms-Burton*, 86 GEO. L.J. 405, 412 (1997) (arguing that the WTO Charter removes the formerly available option of opting out of judicial review by citing “essential security”); Peter Lindsay, Note, *The Ambiguity of GATT Article XXI: Subtle Success or Rampant Failure?*, 52 DUKE L.J. 1277, 1287-1296 (2003).

231. Nicaragua did invoke GATT article XXI when the United States imposed a two-way embargo in the 1980s. However, the subsequent panel report, *United States – Trade Measures Affecting Nicaragua*, L/6053 (Oct. 13,

Anthony Cassimatis observes that GATT article XXI “is rarely relied upon. When it has been, it has usually been in cases of serious disruptions in international relations. In such serious cases Article XXI appears available to justify trade measures designed to protect human rights. The limited discipline imposed by Article XXI enhances its potential human rights application.”²³² However, this interpretation can be contested, since the few instances where states invoked GATT article XXI never reached an adjudicated conclusion.²³³

In the absence of jurisprudential guidance on the scope of GATT article XX(b)(ii), I submit that a textual interpretation of this provision, according to its ordinary meaning, could accommodate a state-imposed ban on goods produced by child soldiers. GATT article XX(b)(ii) entitles a member to take action necessary for the protection of its essential security in interests “relating to . . . *such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment.*” As with their trade in prohibited substances and goods (such as arms, narcotics and other illegal drugs), armed groups’ trade in goods produced by child soldiers are undertaken to finance their military operations in hostilities. A state could thus be well-justified in barring the entry of such goods that finance the prosecution and conduct of armed conflicts. Contributing to the financing of armed groups through the trade of such goods can threaten the security interests of a state by making the state indirectly supply a military establishment. These justifications should apply with greater force where states are internationally obligated to take all necessary measures to prevent the “worst forms of child labor,” such as child soldiering and child labor in the illegal and hazardous exploitation of natural resources. A state can rea-

1986), was never adopted. MAVROIDIS, GATT COMMENTARY, *supra* note 183, at 215; *see also* LESTER ET AL., *supra* note 51.

232. ANTHONY E. CASSIMATIS, HUMAN RIGHTS TRADE RELATED MEASURES UNDER INTERNATIONAL LAW: THE LEGALITY OF TRADE MEASURES IMPOSED IN RESPONSE TO VIOLATIONS OF HUMAN RIGHTS OBLIGATIONS UNDER GENERAL INTERNATIONAL LAW 334 (2007).

233. *See* Alan S. Alexandroff & Rajeev Sharma, *The National Security Provision — GATT Article XXI*, in THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS 1571, 1572-78 (Patrick F. J. Macrory et al. eds., 2005) (discussing instances in which parties have invoked Article XXI); MAVROIDIS, TRADE IN GOODS, *supra* note 182, at 322-31.

sonably argue that its essential security interests reasonably necessitate its exercise of control over such trade flows into the state's territory, which ultimately redound to the benefit of armed groups engaged in internal or international armed conflicts.

2. *A KPCS-like Certification System Applicable at Customs Inspection*

States can also opt to implement a KPCS-like certification system as part of customs inspection procedures, where all foreign and local companies trading in facially licit goods or commodities are made to certify, to the best of their knowledge, that such goods or commodities were not produced or distributed by child soldiers. The certification mechanism need not be universally applied to all facially licit products, goods, or commodities, but instead limited to such types of goods or commodities that the U.N. Security Council has already identified to be the subject of armed groups' conflict trade.²³⁴ Thus, states could require all foreign and local companies trading in diamonds and other minerals, timber, oil, and other such natural resources traded in armed conflicts, to certify that such goods or commodities were not produced or distributed by child soldiers. Where a company (foreign or local) cannot make such a certification, a state would then be justified in barring the entry of such goods into its territory.

On its face, a certification system imposed as part of the customs processes can also be regarded as a form of quantitative restriction. As with an import ban discussed in the previous subsection, such a certification system would likewise be susceptible to challenge under GATT article I:1 (the most favoured nation/MFN clause), GATT article XI:1 (the core prohibition on quantitative restrictions), GATT article XIII:1 (non-discriminatory administration of quantitative restrictions), and GATT article X:3(a) (requiring uniform, impartial, and reasonable administration of laws and regulations as defined in GATT article X:1). A state which requires such certifications from foreign and local companies for suspected conflict commodities can be charged with violating the MFN clause by discriminating against some states, or conversely, ac-

234. See *supra* note 222 and accompanying text.

ording preferential treatment towards other states. The certification is a restriction which is *not* a duty, tax, or similar charge, and as such could be a prohibited quantitative restriction. Finally, even if such certification could be held as a permissible quantitative restriction, it could still be held as a GATT non-conforming measure if the state discriminates or acts arbitrarily in its administration of the certification system.

Since the certification system, like the ban discussed in the previous subsection, also partakes of a *customs* measure, I am of the view that a state can marshal similar arguments based on GATT article XX(a) (the “public morals” exception), article XX(d) (the “customs enforcement” exception), and GATT article XXI(b)(ii) (security exception involving a state’s essential security interests that are implicated by measures that relate directly or indirectly to supplying a military establishment) as discussed in the previous subsection. The ban only differs factually from this certification system insofar as the *identifiability* of child soldier-produced goods is concerned. In the previous subsection, the identity of such goods is already well-established at the border, whether through the state’s use of UCR or CSI technologies combined with information on reported conflict commodities from the U.N. Security Council and U.N. experts’ panels. On the other hand, in this proposed certification system, the state is uncertain about the origins of goods, and must rely on importing or exporting companies’ certifications attesting that goods were not produced or distributed by child soldiers.

In designing the full contours of such a certification system, however, states must also be mindful of current WTO jurisprudence that had involved customs regulations similar to certification systems. Some examples might suffice here. In devising customs regulations dependent on certification, states should consider *US – Shrimp*,²³⁵ where a WTO Panel held that the United States violated article XI:1²³⁶ when it required all shipments of shrimp and shrimp products to be accompanied by a declaration or certification “attesting that the product “has been harvested ‘either under conditions that do not adversely affect sea turtles . . . or in waters subject to the jurisdic-

235. Panel Report, *US-Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R (May 15, 1998).

236. *Id.* at ¶ 162.

tion of a nation currently certified pursuant to section 609.”²³⁷ The Panel found that, notwithstanding the United States’ admission of its violation of article XI:1, a textual examination of the challenged certification measure revealed the same to be a “prohibition or restriction” under article XI:1. (Upon resolving this issue, the Panel no longer addressed other challenges based on articles I:1 and XIII:1.) For states considering import licensing measures, they should also note how a non-automatic import licensing system (implemented to protect a balance of payments situation) was deemed a prohibited import restriction under article XI:1 in *India-Quantitative Restrictions*.²³⁸ States that permit private parties or trade associations to participate in the enforcement of customs regulations for goods produced or distributed by child soldiers should also examine *Argentina – Hides and Leather*. In this case, the Panel held that Argentina administered its regulation (providing for the participation of representatives of a domestic tanners’ association in customs inspection procedures) in a process that “inherently contains the possibility of revealing confidential business information . . . [as] an unreasonable manner of administering the laws, regulations and rules identified in Article X:1 and therefore inconsistent with Article X:3(a).”²³⁹

3. *Non-fiscal Measures that Apply After Goods and Commodities Have Cleared Customs*

Finally, a state might consider not just restricting the *entry* of goods produced or distributed by child soldiers, but also imposing due diligence or reportorial requirements on foreign and local companies operating within its territory, to verify that their supply chains do not include such goods. These are *post*-customs clearance non-fiscal measures, which would affect the internal sale or distribution of such goods within the state’s territory. As such, the GATT prohibition that would be facially infringed by these types of measures would be GATT article III:4 (Regulatory Measures and National Treatment), which states in full:

237. *Id.* at ¶ 21.

238. Panel Report, *India-Quantitative Restrictions on Imports of Agricultural, Textile, and Industrial Products*, ¶ 5.129, WT/DS90/R (Sept. 22, 1999).

239. Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, ¶ 11.94, WT/DS155/R (Dec. 19, 2000).

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations, and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution, or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.²⁴⁰

This provision refers to a state's imposition of measures within its territory that would alter the conditions of competition between domestic goods and imported goods.²⁴¹ Where such measures go "beyond the obligation to indicate the country of origin, [they] would violate Article III:4, unless the same measure also applied to domestic producers of a like product."²⁴² This position, however, has been clarified by the Appellate Body in *Korea-Beef*, where instead of the view that "[a]ny regulatory distinction that is based exclusively on criteria relating to the nationality or the origin of the products is incompatible with Article III,"²⁴³ the Appellate Body affirmed that "[a]ccording 'treatment no less favourable' means . . . according to *conditions of competition* no less favourable to the imported product than to the like domestic product."²⁴⁴ Based on this clarification, "[a] formal difference in treatment between imported and like domestic products is thus neither necessary, nor sufficient, to show a violation of Art. III:4. Whether or not imported products are treated 'less favourably' than like domestic products should be assessed instead by examining whether a measure modifies the *conditions of competi-*

240. GATT, *supra* note 172, art. III:4.

241. Report of the Panel, *Italian Discrimination Against Imported Agricultural Machinery*, ¶ 12, L/833 (July 15, 1958), GATT B.I.S.D. (7th Supp.) at 60, 64 (1959).

242. BHALA, *supra* note 172, at 137.

243. *Korea-Beef AB Report* at ¶ 138.

244. *Id.* at 135.

tion in the relevant market to the detriment of imported products.”²⁴⁵

Applying the foregoing principles, a state imposing reportorial or due diligence requirements on companies operating within its territory to verify that their supply chains do not include goods produced by child soldiers could be vulnerable to a GATT article III:4 challenge if such requirements indeed alter the conditions of competition to the detriment of imported products, or conversely, to the unwarranted benefit of domestic products. However, it is not altogether clear if conditions of competition would indeed be adversely affected if the reportorial and due diligence requirements were extended to both foreign *and* local companies producing or distributing such facially licit goods and commodities in a state’s territory. This conclusion would require more extensive empirical analysis that, considering space constraints, I will not attempt in this Article.

Assuming *arguendo*, therefore, that a state provisionally breaches GATT article III:4 when imposing such post-customs reportorial and due diligence requirements, can it avail of any defences under GATT article XX (General Exceptions) and GATT article XXI (Security Exceptions)?²⁴⁶ I submit that the “public morals” exception in GATT article XX(a) and the “essential security interests” exception in GATT article XXI(b) (ii) could be invoked as possible defences. Similar to the previous discussions on customs bans and customs certification systems, states would have to show that imposing post-customs reportorial and due diligence requirements to verify supply chains satisfy the specific exception (e.g. measures “necessary to protect public morals”). Likewise, the state must meet the chapeau requirements of GATT article XX, showing that the reportorial and due diligence requirements do not amount to “arbitrary discrimination,” “unjustifiable discrimination,” or a “disguised restriction on international trade.”²⁴⁷ Finally, in order to avail of the “essential security interests” exception in GATT

245. *Id.* at ¶ 137. The Appellate Body made a similar observation in an *obiter dictum* in EC-Asbestos AB Report ¶ 100 (emphasis in original).

246. Note that there is some subsisting doctrinal confusion on the relationship between the non-discrimination aspects in the chapeau of GATT article XX and the non-discrimination requirements in GATT article III. See LESTER ET AL., *supra* note 51, at 320, 387-388.

247. See U.S.-Gasoline AB Report at 22-29.

article XXI(b) (ii), the state must show that the reportorial and due diligence requirements are indeed designed to prevent “indirectly . . . supplying a military establishment.”

Undoubtedly, there will be numerous legal and policy nuances to be considered in designing measures to stop the flow of goods produced by child soldiers. The measures I have described here only present general sketches of such measures, and only for purposes of showing how these measures could still be GATT-compliant or WTO-consistent. This Part has shown that there are a variety of quantitatively restrictive regulatory measures that states can unilaterally adopt to prevent the flow of such goods into their respective territories. While international cooperation against this form of trade should ideally be undertaken on the same scale as the international regulatory framework against prohibited substances, states should not be dissuaded from harnessing domestic mechanisms, and exercising their respective customs enforcement powers, to ensure that they fulfill their international obligations to prevent child soldiering. States can use GATT articles XX(a), XX(d), and XXI(b) (ii) to justify these domestic restraints on trade. Nevertheless, states might have to consider some policy aspects in designing bans and quantitative restrictions. Part IV responds to these aspects alongside the international methods states have pursued to vindicate their international responsibility to stop and prevent child soldiering. Lastly, I examine a pending bill in the United States House of Representatives (H.R. 4128, otherwise known as the “Conflict Minerals Trade Act”), as a possible GATT-compliant design paradigm.

IV. COMPLIANCE WITH STATE RESPONSIBILITY AND FUTURE RESEARCH DIRECTIONS

On August 4, 2009, the U.N. Security Council unanimously passed Resolution 1882,²⁴⁸ which reaffirmed previous Council resolutions²⁴⁹ involving the protection of children in

248. S.C. Res. 1882, U.N. Doc. S/RES/1882 (Aug. 4, 2009).

249. *Id.* pmb1. 1. Previous resolutions are canvassed *supra* in note 32. See also Statement by the President of the Security Council, U.N. Doc. S/PRST/2006/33 (July 24, 2006); Statement by the President of the Security Council, U.N. Doc. S/PRST/2006/48 (Nov. 28, 2006); Statement by the President of the Security Council, U.N. Doc. S/PRST/2008/6 (Feb. 12, 2008); Statement

armed conflict, while emphasizing the primary role of national governments in providing protection and relief to all children affected by armed conflicts. Resolution 1882 summarizes current international methods to stop child soldiering:

- (1) public condemnation (or “naming and shaming”);²⁵⁰
- (2) fact-finding,²⁵¹ reporting,²⁵² monitoring,²⁵³ and information exchange;²⁵⁴
- (3) incorporating child protection concerns in U.N. peacekeeping missions;²⁵⁵
- (4) post-conflict demobilization of child soldiers and facilitating their transition and reintegration into their respective civil communities;²⁵⁶
- (5) criminal prosecution of individuals that commit the international crime of child soldier enlistment;²⁵⁷ and
- (6) calling for implementation of individual states’ time-bound action plans to halt the recruitment and use of children in armed conflict situations.²⁵⁸

Resolution 1882 shows that international efforts to stop child soldiering are marshalled under a complex web of international legal prohibitions and formal treaty instruments; the case-to-case involvement of the U.N. Security Council in particular situations of armed conflict; and an array of fact-finding and monitoring functions simultaneously discharged by U.N. agencies such as the Office of the Special Representative of the Secretary-General for Children and Armed Conflict. Apart from these latter agencies, there are also numerous international NGOs that comprise a robust international civil society independently investigating, monitoring, and reporting on the

by the President of the Security Council, S/PRST/2008/28 (July 17, 2008); Statement by the President of the Security Council, S/PRST/2009/9 (Apr. 29, 2009).

250. S.C. Res. 1882, *supra* note 248, ¶ 1.

251. *Id.* ¶ 9, 10.

252. *Id.* ¶ 3, 8, 17, 19.

253. *Id.* ¶ 2.

254. *Id.* ¶ 4.

255. *Id.* ¶¶ 11-12.

256. *Id.* ¶¶ 13-15.

257. *Id.* ¶ 16.

258. *Id.* ¶ 5.

incidence and continuing proliferation of child soldiering. Most prominent of these are the Coalition to Stop Child Soldiers, Amnesty International, Human Rights Watch, Global March Against Child Labour, Soldier Child International, among others.

The Security Council's directive to all states to submit and report on their time-bound anti-child-soldiering action plans sends a strong message that the prevention of child soldiering is also a matter of state responsibility. While the Rome Statute of the International Criminal Court clearly manifests the international community's agreement to treat child enlistment as a matter for individual criminal responsibility, prevention should also be seen from the prism of state responsibility in light of the express obligations to this end in both the Optional Protocol to the Convention on the Rights of Child involving Children and Armed Conflict and ILO Convention No. 182. States' international responsibility to prevent child soldiering puts into question their use of domestic and territorial powers, not just to formally prohibit and criminalize child soldier enlistment, but more importantly, to respond to conditions that have enabled armed groups—whether state or non-state—to exploit and conscript children into this worst form of child labor in military hostilities. If the Security Council's anti-impunity terminology in Resolution 1882 is any indication, it is that states have a duty to devise their own *ex ante* strategies to prevent child soldiering from arising in the first place within their borders.

This preventive duty in relation to child soldiering can also be situated within the broader consensus of states on an international "responsibility to protect" (RtoP). While RtoP doctrine has been often critically parsed in relation to one of its aspects on the use of force,²⁵⁹ its less controversial terminology in the 2005 World Summit Outcome document emphasizes the notion of states' individual and collective responsibilities to prevent war crimes and other serious violations of human rights.²⁶⁰ If the unanimous endorsement of the U.N.

259. See generally Nicholas J. Wheeler, *Operationalising the Responsibility to Protect: The Continuing Debate over Where Authority Should be Located for the Use of Force*, 3 NUPI REP. (2008).

260. 2005 World Summit Outcome, G.A. Res. 60/1, ¶¶ 138-39, U.N. Doc. A/RES/60.1 (Sept. 16, 2005) (describing the responsibilities of states and

General Assembly of RtoP doctrine is any indication, it is reasonable to infer that states have reconceptualised how they view their own international obligations towards more encompassing and firm commitments to prevent war crimes and other serious violations of human rights within their jurisdiction. Within this contemporary global consensus, it is not at all far-fetched to examine states' international obligations to prevent child soldiering as part of the corpus of state responsibility. It is on this understanding of state responsibility that I propose states use the norms of international economic law available to them, and domestically implement bans or quantitative restrictions against goods produced by child soldiers, pending institutional modes of cooperation similar to the international anti-drug-trafficking system.

Certainly, unilateral bans will not be without its attendant policy complications. For one, we can anticipate that most states will have the primary difficulty of identifying and attributing goods as originating from the labor of child soldiers serving in armed groups. If a state cannot show that it has justifiable reasons for segregating such goods from the legitimate trade of facially licit goods and commodities, it will encounter opposition and likely retaliation from other states within the trading system. The state in question will likely be burdened to respond before the WTO, incurring both logistical and legal costs in defending its trade-restrictive measure. In this sense, the entire strategy of using international economic legal norms to confront child soldiering is also contingent on the state's possession of information as well as its political will and capacity for vigorous customs enforcement. As I attempted to show in Part II, however, the task of identifying and tracking such goods is not altogether Herculean. There is already a viable roster of technologies (such as the UCR and CSI systems) and mechanisms (such as legislation on corporate conduct, a certification system, financial auditing, among others) that states can consider in designing their customs restrictions against goods produced by child soldiers. These technologies and mechanisms are no more invasive or costly than what

the international community to prevent against genocide, war crimes, ethnic cleansing, and crimes against humanity through appropriate and necessary means).

states already implement for anti-terrorism customs inspection and enforcement.

A late 2009 legislative proposal at the United States House of Representatives, H.R. 4128, otherwise known as the “Conflict Minerals Trade Act,”²⁶¹ appears to be a promising model of WTO-consistent legislation. Introduced by Democrat Representative James McDermott, the bill seeks to “improve transparency and reduce trade in conflict minerals.”²⁶² The bill recognizes the “use of child soldiers on the front lines, as bonded labor, and as sex slaves,”²⁶³ and acknowledges U.N. reports as well as Security Council resolution 1857, which:

(A) broadens existing sanctions relating to the Democratic Republic of the Congo to include “individuals or entities supporting the armed groups through illicit trade of natural resources;” and

(B) encourages member countries to ensure that companies handling minerals from the Democratic Republic of the Congo exercise due diligence on their suppliers, including—

(i) determining the precise identity of the deposits from which the minerals they intend to purchase have been mined;

(ii) establishing whether or not these deposits are controlled or taxed by armed groups; and

(iii) refusing to buy minerals known to originate, or suspected to originate, from deposits controlled or taxed by armed groups.²⁶⁴

H.R. 4128 calls for the creation of a “Congo Conflict Minerals Map” in consultation with the U.N. Group of Experts on the Democratic Republic of Congo, other U.N. members, as well as international NGOs, in order to identify armed groups’ conflict zone mining operations,²⁶⁵ and also provides for guidance for commercial entities in order to exercise due diligence, “including documentation on the origin and chain of custody for their products, on their suppliers to ensure that conflict minerals used in their products do not—

261. Conflict Minerals Trade Act, H.R. 4128, 111th Cong. (2009).

262. *Id.* at pmb1.

263. *Id.* § 2(5).

264. *Id.* §§ 2(7)-(8).

265. *Id.* § 4(a).

- (A) directly finance armed conflict;
- (B) result in labor or human rights violations; or
- (C) damage the environment.”²⁶⁶

H.R. 4128 relies on various international reports from the U.N. Security Council, U.N. specialized agencies, and the work of international organizations to enable the U.S. Government to draw up a “Potential Conflict Goods List,”²⁶⁷ and also sets customs declaration requirements to certify that goods are “conflict minerals free,” with corresponding criminal penalties for non-compliance.²⁶⁸

As seen from the example of H.R. 4128, states might have less reason to be apprehensive about information asymmetry when they unilaterally ban goods produced by child soldiers. The mass of publicly available reports from the U.N. Security Council, the U.N. specialized agencies, and international NGOs in the past decade regularly identify states that have reported incidences of child soldiering. States can build their own information databases from these regular reports, generating their own domestic indicators for “suspect” imports or exports. States may also consider concluding their own bilateral or regional agreements to guarantee information sharing to help track the flow of such goods and commodities across adjacent borders and territories.

Second, states would also have to consider private remedial procedures when they design bans or restrictions. What optimal administrative procedure will ensure that private parties have recourse and access to due process in challenging a state’s characterization of goods as having originated from the labor or participation of child soldiers, without sacrificing the demands of expediency in preventing the flow of such goods into a state’s territory? Could other factual indicators such as documentary receipts, company registrations, banking and financial information, be used to corroborate or bolster a state’s factual determination that such goods are illicitly traded by private parties acting as intermediaries for armed groups? While I have laid emphasis in Part II on customs mechanisms and procedures that might be used to track conflict goods and commodities, we should also not lose sight of a host of interna-

266. *Id.* § 4(b).

267. *Id.* § 6.

268. *Id.* §§ 7-9.

tional financial regulatory initiatives that enable states to trace proceeds from illicit activities, such as those implemented and supervised by the Financial Action Task Force,²⁶⁹ the World Bank, the International Monetary Fund, the Basel Group of Bank Supervisors, the International Organization of Securities Commissions, and the Offshore Group of Bank Supervisors, among others.²⁷⁰ All of these initiatives could be considered in complementing a state's chosen administrative procedural design for implementing its ban on goods produced by child soldiers.

Finally, a state that proactively uses international economic law norms to implement a ban on such goods must also be prepared to deal with both its internal constituencies as well as disgruntled states disputing the ban. An outright ban on trade in goods will inevitably impact domestic producers (who rely on such goods as intermediate inputs for their finished goods) or end-consumers. The state in question must be able to convince and persuade disaffected groups at home and abroad that the restrictions on the flow of goods are indeed factually and legally justified in light of the state's international responsibility to prevent child soldiering. This can only be done if the state has a well-designed process for information verification and rules of origin for goods. Otherwise, the costly political fallout from selective, arbitrary, or unjustified bans and quantitative restrictions will likely cause the state's decision-makers to abandon the strategy altogether, causing it to relapse into the inertia of awaiting international consensus to address this pressing problem.

269. FINANCIAL ACTION TASK FORCE, <http://www.fatf-gafi.org> (last visited Jan. 20, 2010) ("The task force is an inter-governmental body whose purpose is to create and oversee policies to combat money laundering and terrorist financing on both national and international levels.").

270. Winer, *supra* note 134, at 75; *see also* Phil Williams and John T. Picarelli, *Combating Organized Crime in Armed Conflict*, in PROFITING FROM PEACE: MANAGING THE RESOURCE DIMENSIONS OF CIVIL WAR, *supra* note 108, at 123 (outlining policy recommendations to address various organized criminal activities that both fuel and/or profit from armed conflict); Cynthia McClintock, *The Evolution of Internal War in Peru: The Conjunction of Need, Creed, and Organizational Finance*, in RETHINKING THE ECONOMICS OF WAR: THE INTERSECTION OF NEED, CREED, AND GREED, *supra* note 133, at 52 (examining the factors that contributed to the rise and fall of the Communist Party of Peru, known as the "Shining Path").

V. CONCLUSION

Child soldiers will not vanish overnight. For as long as incentives exist for armed groups to enlist children for these worst forms of child labor, no amount of legal formalization of prohibitions or rhetorical advocacy can eradicate the phenomenon of child soldiering. From pre-modern warfare to postmodern armed conflicts, the inherent advantages of children as logistical, support, or direct members of military units have rendered them vulnerable to exploitation to serve the ends of military necessity.²⁷¹ Their attractiveness to armed groups fighting protracted insurgencies, armed conflicts, or engaging in terrorist acts, has only increased in recent years with the proliferation of small-scale arms and incendiary weapons, and the expansion of armed groups' illicit trade in goods and commodities to finance their operations.

My proposal of state-imposed unilateral bans on certain goods aims to address a hitherto-unexplored area of disincentives. Scholars and policy analysts alike have multiple descriptive perspectives on the psychological, economic, and political root causes of child soldiering,²⁷² and few truly concretize the economic framework that undergirds this pernicious practice. If there is anything that the reportage of "blood diamonds" shows us, it is that child soldiers are not mere footmen that increase military advantage in the battlefield. They are, in the final analysis, hidden slaves that embolden and empower armed groups to sustain hostilities for years. Confronting the phenomenon of child soldiering must recognize the compelling force of this reality. By making states internationally and individually responsible for preventing the trade of goods produced by child soldiers, it is my hope that states will finally decide to leverage the international economic tools available to them to concretely realize their international obligations and duties toward the world's children.

271. See DAVID ROSEN, *ARMIES OF THE YOUNG: CHILD SOLDIERS IN WAR AND TERRORISM* 16-18 (2005) (explaining that children are recruited as soldiers because they are vulnerable and easily manipulated).

272. See *supra* notes 31-37 and accompanying text.