LEVERAGING INTERNATIONAL ECONOMIC TOOLS TO CONFRONT CHILD SOLDIERING[1]

Diane A. Desierto[2]

Abstract:

Child soldiers in theatres of armed conflict represent the worst and most abusive forms of child labour. States parties to the conflict, as well as third party States, bear differentiated and continuing international legal obligations in relation to child soldiering. Not only are States parties to the conflict barred under international humanitarian law from drafting this class of protected persons into child soldiering, but it may also be argued that other States in the multilateral economic system can independently take measures pursuant to the General Exceptions (Article XX) and Security Exceptions (Article XXI) clauses of the GATT 1994 to ensure, prevent, and deter parties from enjoying economic advantages illicitly obtained from the labour of child soldiers. As the International Labour Organization has advocated in ILO Convention No. 182, States also have a significant role in post-conflict situations to guarantee effective and meaningful international human rights protection in the demobilization of child soldiers and their reintegration to their respective home communities and regional societies. Where child soldiers have been used en masse to perpetuate trade in both facially-licit and contraband goods, States can design policy measures that facially depart from the multilateral trading rules against non-discrimination, most favoured nation, market access, and unfair trade, but without incurring international legal sanction.

"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."
-UN Secretary General Ban Ki Moon, 2009[3]

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-protection, decision-making, responsibility, and accountability. John Stuart Mill's theory of liberal utilitarianism famously acknowledges this in *On Liberty*, when, as an exception, he proposes special treatment for

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2 Law Reform Specialist, Institute of International Legal Studies, University of the Philippines; Professorial Lecturer (Legal History, Agency & Partnership, Public International Law, Administrative Law), University of the Philippines College of Law and Lyceum of the Philippines College of Law; JSD candidate (2014), Howard Holtzmann Fellow for International Arbitration and Dispute Resolution, LLM, Yale Law School; BS Econ. *summa cum laude*, LLB *cum laude*, University of the Philippines. diane.desierto@yale.edu

3 "UN Secretary General pledges to stamp out the use of child soldiers", 13 February 2009, *available at* http://www.hrw.org/en/news/2009/02/13/un-secretary-general-pledges-stamp-out-use-child-soldiers (last visited 10 January 2010).

children, "who must be protected against their own actions as well as external injury."[4] This premise resonates most significantly in the laws of war, where children enjoy dual protections, first, as civilians,[5] and second, as a special class of protected persons.[6]

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.[7] While the 1949 Geneva Conventions do not contain specific norms dealing with the phenomenon of children as combatants, Article 77 of Protocol I explicitly requires parties to an international armed conflict to "take 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 conflict shall endeavour to give priority to those who are oldest." Article 4(3)(c) of Protocol II, on the other hand, 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." Children who are between the ages of fifteen and eighteen years and who take part in the hostilities possess the status of combatants. As combatants, these children are entitled upon capture to GC III privileges of prisoners of war, with some more favourably differentiated 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

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4 JOHN STUART MILL, ON LIBERTY (edited by Michael B. Mathias, Pearson Longman Inc. 2007), at p. 71.

5 *See among others* Common Article 3 to the 1949 Geneva Conventions; Arts. 13, 14, 24, Convention (IV) relative to the Protection of Civilians in Time of War, August 12, 1949 [hereafter, "GC IV"].

6 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, [hereafter, "Protocol I"], Art. 77; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, [hereafter "Protocol II"], Art. 4.

7 *See* JENNY KUPER, MILITARY TRAINING AND CHILDREN IN ARMED CONFLICT: LAW, POLICY, AND PRACTICE (Martinus Nijhoff Publishers, 2005), at pp. 45-57; MATTHEW HAPPOLD, CHILD SOLDIERS IN INTERNATIONAL LAW (Manchester University Press, 2005), at pp. 54-118.

8 *See* Articles 16 and 49 of Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949 [hereafter, "GC III"].

9 Art. 77, para. 5, Protocol I.

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 on 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 treats the issue of child participation in armed conflict, and accordingly, mandates States Parties to the CRC to "respect and to ensure respect for rules of international humanitarian law applicable to them 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", "[giving] priority to those who are oldest" in recruiting children between the ages of fifteen and eighteen"; and "take all feasible measures to ensure protection 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 "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 duty of States to "prevent the use of children in the illicit production and trafficking of [narcotic drugs and psychotropic] substances";[14] protect children against sexual exploitation, sexual abuse,[15] and all other forms of exploitation prejudicial to the child's welfare;[16] prevent the sale and trafficking of children;[17] and

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10 Art. 77, para. 3, Protocol I.

11 Article 38, Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), *entered into force* Sept. 2 1990. [hereafter, "CRC"]

12 Article 39, CRC.

13 Article 32(1), CRC.

14 Article 33, CRC.

15 Article 34, CRC.

16 Article 36, CRC.

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 their 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; 4) and prohibit independent armed groups within their territories from recruiting persons below eighteen.[19] To date, there are 131 States Parties to this Optional Protocol.[20]

According to the 2008 Child Soldiers Global Report (CSG Report),[21] 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 Democratic Republic of Congo (DRC), India, Indonesia, Iraq, Israel and the Occupied Palestinian Territory, Myanmar, Nepal, the Philippines, Somalia, Sri Lanka, Sudan, Thailand, and Uganda. The decrease in child soldiering might be attributed, in some degree, to the collective efforts of international institutions. From 1999 to 2005, the UN Security Council passed Resolutions 1261 (1999), 1314 (2000), 1379 (2001), 1460 (2003), 1539 (2004) and 1612 (2005), which collectively design 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 soldiering.[22] During the 2003 "Children in the Crossfire" Conference organized by the

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17 Article 35, CRC.

18 Article 37, CRC.

19 *See* Arts. 1-4, 6-7 of the Optional Protocol on the Involvement of Children in Armed Conflict, G.A. Res. 54/263, Annex I, 54 U.N. GAOR Supp. (No. 49) at 7, U.N. Doc. A/54/49, Vol. III (2000), *entered into force* February 12, 2002. [hereafter, "Optional Protocol"]

20 *See status as of 26 January 2010 at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&lang=en (last visited 26 January 2010).

21 CHILD SOLDIERS GLOBAL REPORT 2008, COALITION TO STOP THE USE OF CHILD SOLDIERS [hereafter, "2008 CSG Report"], *complete report available online at* http://www.childsoldiersglobalreport.org/files/country_pdfs/FINAL_2008_Global_Report.pdf (last visited 10 January 2010).

22 Security Council resolution 1261, S/RES/1261(1999), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/248/59/PDF/N9924859.pdf?OpenElement (last visited 10 January

International Labour Organization (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) improving enforcement to go beyond conventions and laws. Awareness raising, adopting and implementing legislation in policies and practice are key elements; 2) developing 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."[23] The ILO had long categorized child soldiering among the "worst forms of child labour" in ILO Convention No. 182,[24] an international treaty ratified by around 165 States,[25] and which obligates States Parties to take preventive and remedial measures against the worst forms of child labour. In 2007, 76 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 of all categories of children associated with armed groups.[26]

2010); Security Council resolution 1314, S/RES/1314 (2000), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N00/604/03/PDF/N0060403.pdf?OpenElement (last visited 10 January 2010); Security Council resolution 1379, S/RES/1379 (2001), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/651/10/PDF/N0165110.pdf?OpenElement (last visited 10 January 2010); Security Council resolution 1460, S/RES/1460 (2003) ("Children and armed conflict"), 30 January 2003, *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N03/231/16/PDF/N0323116.pdf?OpenElement (last visited 10 January 2010); Security Council resolution 1539, S/RES/1539 (2004) ("Children and Armed Conflict"), 22 April 2004, *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/318/63/PDF/N0431863.pdf?OpenElement (last visited 10 January 2010); Security Council resolution 1612, S/RES/1612 (2005) ("Children and Armed Conflict"), 26 July 2005, *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/439/59/PDF/N0543959.pdf?OpenElement (last visited 10 January 2010).

23 ILO Communication and Public Information Unit, "ILO concern: the unbearable fate of child soldiers", 23 May 2003, *available at* http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Feature_stories/lang--en/WCMS_075611/index.htm (last visited 10 January 2010).

24 Art. 3(a) of ILO Convention No. 182 ("Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour"), 17 June 1999.

25 ILO Committee on Legal Issues and International Labour Standards, "Ratification and promotion of fundamental ILO Conventions", GB.300/LILS/7 300th session, November 2007. *Available at* http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_084298.pdf (last visited 10 January 2010).

26 *See* Paris Principles, February 2007, *available at* http://www.un.org/children/conflict/_documents/parisprinciples/ParisPrinciples_EN.pdf (last visited 10 January 2010); Paris Commitments, February 2007, *available at*

Child soldier enlistment has also been subject of international prosecution. Admittedly, neither statute of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) explicitly mentioned the crime of child soldier enlistment. However, subsequent international tribunals have since recognized child soldier enlistment as a war crime. The first international decision 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.[27] 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, which, according to the Chamber, had already been outlawed as part of customary international law since at least 1996.[28] A year later, the International Criminal Court (ICC) featured the crime of child soldier enlistment in the first set of issued arrest warrants against members of the Lord's Resistance Army (LRA) in Uganda,[29] and members of armed groups in the DRC.[30] On 26 January 2009, the ICC commenced trial in *The Prosecutor v. Thomas Lubyanga 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] and using them to participate actively in hostilities in the context of an international armed conflict from early September 2002 to 2 June 2003", and of "enlisting and conscripting children under the age

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http://www.un.org/children/conflict/_documents/pariscommitments/ParisCommitments_EN.pdf (10 January 2010).

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

28 *See* Alison Smith, *Child Recruitment and the Special Court of Sierra Leone*, 2 J. Int'l Crim. Justice (2004), 1141-1153.

29 *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, and Dominic Ongwen*, Pre-Trial Chamber II, ICC-02/04-01/05-53, *available at* http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0204/Related+Cases/ICC+0204+0105/Court+Records/Chambers/Pre+Trial+Chamber+II/Warrant+of+Arrest+for+Joseph+Kony+issued+on+8th+July+2005+as+amended+on+27th+September+2005.htm (last visited 10 January 2010).

30 *The Prosecutor v. Bosco Ntaganda*, Pre-Trial Chamber I, ICC-01/04-02/06, *available at* http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0104/Related+Cases/ICC+0104+0206/Court+Records/Chambers/Pre+Trial+Chamber+I/Warrant+of+arrest.htm (last visited 10 January 2010); *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Pre-Trial Chamber I, ICC-01/04-01/07, *available at* http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0104/Related+Cases/ICC+0104+0107/Court+Records/Chambers/Pre+Trial+Chamber+I/Warrant+of+arrest+for+Germain+Katanga.htm (last visited 10 January 2010).

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."[31]

Despite the wide net of international legal prohibitions now operative and the direct involvement of top-tier international organizations and institutions seised of the matter,[32] however, 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, children continue to be recruited and used by paramilitaries, militias, civilian defence 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.[33] All of the previously-discussed international instruments comprehensively propose long-term strategies to reducing 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 which are 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

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31 *The Prosecutor v. Thomas Lubyanga Dyilo*, ICC-01/04-01/06, *available at* 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 10 January 2010). *See also* "Use of child soldiers 'particularly abusive', UN expert testifies", UN News Centre, 7 January 2010, *available at* http://www.un.org/apps/news/story.asp?NewsID=33418 (last visited 10 January 2010).

32 *See among others* OAU Resolution Of The Plight of African Children in Situation of Armed Conflicts, CM/RES.1659 (LXIV) REV. 1 *available at* http://www.chr.up.ac.za/hr_docs/african/docs/cm/cm58.doc (last visited 10 January 2010); African Charter on the Rights and Welfare of the Child, O.A.U. Doc. CAB/LEG/24.9/49 (1990); Declaration on the Protection of Women and Children in Emergency and Armed Conflict, Proclaimed by General Assembly resolution 3318(XXIX) of 14 December 1974; Elements of Crimes for the International Criminal Court, UN doc. ICC-ASP/1/3; Promotion and Protection of the Rights of Children, Impact of armed conflict on children, Note by the Secretary-General, GA Res. A/51/306 (26 Aug. 1996) (Report of Graça Machel); Cape Town Principles and Best Practices, Adopted at the Symposium on the Prevention of Children into Armed Forces and Demobilisation and Social Reintegration of Child Soldiers in Africa, UNICEF (27-30 Apr. 1997), *available at* http://www.unicef.org/emerg/files/Cape_Town_Principles(1).pdf (last visited 10 January 2010); Montevideo Declaration on the Use of Children as Soldiers, Latin American and Caribbean Conference on the Use of Children as Soldiers, UNESCO (8 July 1999), *available at* http://www.unesco.org/cpp/uk/declarations/montevideo.htm (last visited 10 January 2010).

33 2008 CSG Report, at pp. 18-24.

enlisted child soldiers, it is difficult to see how the international prohibitions will be implemented fully and effectively, without ultimately having to fall back on the self-imposed restraint of the combating 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,[34] 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."[35] 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.[36] 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 heavy loads. Girl soldiers also are frequently sought for purposes of sexual exploitation, as are boys in some

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34 *See* Okechukwu Oko, *The Challenges of International Criminal Prosecutions in Africa,* 31 Fordham Int'l L. J. 343 (January 2008); Benedetto Croce, *Against International Post-War Tribunals*, 5 J. of Int'l Crim Justice (2007), 1029-1030; James F. Alexander, *The International Criminal Court and the Prevention of Atrocities: Predicting the Court's Impact*, 54 Vill. L. Rev. 1 (2009), at 10-19.

35 2008 CSG Report, at p. 24.

36 Susan Tiefenbrun, *Child Soldiers, Slavery, and the Trafficking of Children*, TJSL Legal Studies Research Paper No. 1020341, October 2007, at pp. 17-19. *Available at* http://ssrn.com/abstract=1020341 (last visited 10 January 2010), 31 Fordham Int'l L. J. 415 (2008).

contexts."[37] 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 labour.

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,[38] 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.[39] In modern armed conflicts, these economic activities can include diamond, oil, and other forms of natural resource mining,[40] opium and coca cultivation,[41] and drug trafficking.[42] From the time a child is recruited into an armed group, he or she is vulnerable to

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37 MICHAEL WESSELLS, CHILD SOLDIERS: FROM VIOLENCE TO PROTECTION (Harvard University Press, 2006), at p. 8.

38 ALCINDA HONWANA, CHILD SOLDIERS IN AFRICA (University of Pennsylvania Press, 2006), at p. 31. *See* "Strong link between child soldiers and the small arms trade, UN experts say", UN News Centre, 15 July 2008, *available at* http://www.un.org/apps/news/story.asp?NewsID=27382&Cr=child&Cr1=soldier (last visited 10 January 2010).

39 *See* Tiefenbraun, at 433; Sandrine Valentine, *Trafficking of Child Soldiers: Expanding the United Nations Convention on the Rights of the Child and its Optional Protocol on the Involvement of Children in Armed Conflict*, 9 New Eng. J. Int'l & Comp. L. 109 (2003).

40 HAPPOLD, at 11. *See also* Michael L. Ross, *Oil, Drugs and Diamonds: The Varying Roles of Natural Resources in Civil War*, pp. 47-67 [hereafter, "Ross article"] in KAREN BALLENTINE AND JAKE SHERMAN (EDS.), THE POLITICAL ECONOMY OF ARMED CONFLICT: BEYOND GREED AND GRIEVANCE (Lynne Rienner Publishers Inc., 2003) [hereafter, BALLENTINE & SHERMAN]

41 *See* 2008 Findings on the Worst Forms of Child Labour – Colombia, 10 September 2009, *at* http://www.unhcr.org/refworld/country,,USDOL,,COL,,4aba3ee88,0.html (last visited 10 January 2010);

42 *See* Testimony of Douglas Farah, Senior Fellow, International Strategy and Assessment Center, before the Senate Committee on Foreign Relations, Subcommittee on African Affairs, "Confronting Drug Trafficking in West Africa", June 23, 2009, *available at* http://foreign.senate.gov/testimony/2009/FarahTestimony090623a.pdf (last visited 10 January 2010); Paul Rexton Kan, *Drug Intoxicated Irregular Fighters: Complications, Dangers, and Responses*, Strategic Studies Institute, March 2008, *available at* http://www.strategicstudiesinstitute.army.mil/pdffiles/pub850.pdf (last visited 10 January 2010).

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 I 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 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 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,[43] 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

[43] United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 19, 1988, 1582 U.N.T.S. 164, 28 I.L.M. 497.

borders raises its own corresponding set of immigration issues for States,[44] 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 distribution of facially-licit goods such as diamonds, oil, and other natural resources.[45] 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 child soldier-produced or distributed goods from legitimate trade in goods.

To date, the Kimberley Process Certification Scheme for Rough Diamonds ("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 UN General Assembly as rough diamonds "used by rebel movements to finance their military activities, including the attempts to undermine or overthrow legitimate governments."[46] 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

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44 *See* 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 (August 2009).

45 *See* Asif Efrat, *A Theory of Internationally Regulated Goods*, 32 Fordham J. Int'l L. J. 1466 (May 2009).

46 UN General Assembly Resolution 55/56 ("The role of diamonds in fuelling conflict: breaking the link between the illicit transaction of rough diamonds and armed conflict as a contribution to prevention and settlement of conflicts"), A/RES/55/56, 29 January 2001, *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N00/562/75/PDF/N0056275.pdf?OpenElement (last visited 10 January 2010).

procedures for collecting and sharing trade data on rough diamonds, for inspecting imports and exports of these diamonds, and for tracking confirmations of import and export receipts."[47]

On its face, the KPCS appears to contravene core norms of the General Agreements on Tariffs and Trade (GATT), such as prohibitions against quantitative restrictions [GATT Art. XI(1)], the principle of non-discrimination [GATT Art. XIII(1)], and the most-favoured nation clause [GATT Art. I(1)]. Pursuant to its authority under Article IX(3) of the WTO Agreement, and taking into consideration UN General Assembly Resolution 55/56 which specifically called on the international community to create a "simple and workable international certification scheme for rough diamonds",[48] the WTO General Council issued a waiver in May 2003 to suspend the operation of these GATT prohibitions for WTO Member States that participate in the KPCS.[49] 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.[50]

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 diamond trade, while armed groups' trade in facially-licit goods produced with the labour 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

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47 United States Government Accountability Office Report to Congressional Committees, "Conflict Diamonds: Agency Actions Needed to Enhance the Implementation of the Clean Diamond Trade Act", September 2006, *available at* http://www.gao.gov/new.items/d06978.pdf (last visited 10 January 2010).

48 UN G.A. Res. 55/56, U.N. GAOR, 55th Sess., U.N. Doc. A/RES/55/56 (2001).

49 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 (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 (2007).

50 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 Congo*, 29 Suffolk Transnat'l L. Rev. 25 (2005); *See* 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 (Fall 2008).

quantitative restrictions and/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 labour 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.[51]

In light of the contested dynamics of current international legal regulation on the trading activities of armed groups, I propose in **Part II** that States could also act on their own capacity, 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 labour of child soldiers, without violating WTO principles and the GATT norms on non-discrimination, most-favoured nation treatment, and the prohibition against quantitative restrictions. These provisions enable WTO Member States to vindicate core societal values and interests through trade-restrictive measures that would otherwise violate multilateral trading rules. I contend that trade restrictions on goods produced through the labour 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",[52] and to "take all necessary measures to ensure the effective implementation and enforcement of the provisions" of ILO Convention No. 182.[53] In my proposal, States could be justified in banning or otherwise restricting trade in child soldier-produced or distributed goods as a measure "necessary to protect public morals" under GATT Article XX(a), or as a GATT Article XX(b)(ii) measure "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*."[54] I submit that this proposal does not contradict

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51 On the structural problems of decision-making rules in the WTO, *see* Debra P. Steger, *The Future of the WTO: The Case for Institutional Reform*, 12 J. Int'l Econ. L.803 (2009), at 808-814.

52 Art. 4, Optional Protocol.

53 Arts. 7(1) and 7(2), ILO Convention No. 182.

54 Italics supplied.

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 can be checked and duly challenged within the framework of the WTO Dispute Settlement mechanism, unlike the KPCS which does not contain a precise procedure to contest a State's certification.

Part III 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 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. By imposing these bans, States could also argue that they act in fulfilment of 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 labours that perpetuate armed conflicts.

I. TRADE IN GOODS AND THE FINANCING OF ARMED GROUPS

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."[55] Steady decreases in post-Cold War foreign assistance to governments 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. The strategic value of natural resource assets, as both tools and objectives to maintain the power dynamics in favour 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."[56] While the UN 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 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, Angola, Afghanistan, Sierra Leone, Liberia, and Côte d'Ivoire.[57] In 2007, the UN Secretary-General recommended to the UN Security Council that it consider imposing targeted measures against parties to armed conflict 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

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55 Ross article, at p.48.

56 *See* Philippe le Billon, *The Political Ecology of War: Natural Resources and Armed Conflicts*, 20 Political Geography 5 (2001), at pp. 561-584, *available at* http://www.sciencedirect.com/science?_ob=ArticleURL&_udi=B6VG2-43B8B1M-2&_user=483702&_coverDate=06%2F30%2F2001&_rdoc=1&_fmt=high&_orig=search&_sort=d&_docanchor=&view=c&_searchStrId=1186745600&_rerunOrigin=google&_acct=C000022720&_version=1&_urlVersion=0&_userid=483702&md5=bde57bc8a6bcfba161e0715167367fdb (last visited 10 January 2010).

57 UN SC resolution 792, S/RES/792, 30 November 1992, *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N92/760/95/IMG/N9276095.pdf?OpenElement (last visited 10 January 2010); UN SC resolution 1173, S/RES/1173, 12 June 1998, *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N98/166/52/PDF/N9816652.pdf?OpenElement (last visited 10 January 2010); UN SC resolution 1306, S/RES/1306, 5 July 2000 *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N00/517/01/PDF/N0051701.pdf?OpenElement (last visited 10 January 2010); UN SC resolution 1333, S/RES/1333, 19 December 2000, *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N00/806/62/PDF/N0080662.pdf?OpenElement (last visited 10 January 2010); UN SC resolution 1343, S/RES/1343, 7 March 2001, *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/276/08/PDF/N0127608.pdf?OpenElement (last visited 10 January 2010); UN SC resolution 1643, S/RES/1643, 15 December 2005, *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/644/81/PDF/N0564481.pdf?OpenElement (last visited 10 January 2010).

structures and amnesty provisions, *and restriction of the flow of financial resources to the parties concerned.*"[58]

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 labourers in armed groups' diverse economic activities. It is not unheard of for a child to participate in direct combat during 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 9 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 projects such as digging roads, taking care of animals or cutting grass and bushes."[59]

Children's interchanging roles are 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."[60] Where the prolonged conduct of war blurs the lines between direct hostilities and support or financing activities, armed groups

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[58] Report of the Secretary-General ("Children and armed conflict"), 21 December 2007, General Assembly sixty-second session, at para. 163, *available at* http://www.crin.org/docs/SG2008.pdf (last visited 10 January 2010). (Italics supplied.)

[59] "The Impact of Armed Conflict on the Children of Burma", August 2002 Submission by the Burma UN Service Office – New York & the Human Rights Documentation Unit, National Coalition Government of the Union of Burma 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), *available at* http://www.burmalibrary.org/docs3/BURMA-submission_to_office_for_children_and_armed_conflict.htm (last visited 10 January 2010).

[60] Peter Saundry (ed.), *Environmental and socioeconomic impacts of armed conflict in Africa*, 17 October 2008, *available at* http://www.eoearth.org/article/Environmental_and_socioeconomic_impacts_of_armed_conflict_in_Africa (last visited 10 January 2010).

easily utilize child soldiers for one form of labour to the other, depending on operational expedience and military necessity.

For these reasons, the UN 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 labour: "The illicit exploitation of natural resources in zones of conflict, has a direct and significant bearing on children. They are exploited as cheap labour 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 fuelling and prolonging conflicts in which children suffer the most. Closely related to the grey area in which 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 labour in mining activities or be exposed to criminal networks engaged in child trafficking."[61] 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

[61] UN Office of the Special Representative of the Secretary-General on Children and Armed Conflict, "Impact on children of illicit exploitation of natural resources in conflict zones", *available at* http://www.un.org/children/conflict/english/exploitation.html (last visited 10 January 2010).

> 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 those resources illegally across the country's borders."[62]

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 goods 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. (The KPCS, as previously discussed, is not an internationally obligatory system.) Instead, States have tended to await UN 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.

A. International regulation 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."[63] Illicit trade, however, can be undertaken by both States and 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

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[62] Lilian Peters, *War is No Child's Play: Child Soldiers from Battlefield to Playground*, July 2005, Geneva Centre for the Democratic Control of Armed Forces, at p. 10, *available at* http://se2.dcaf.ch/serviceengine/Files/DCAF/.../op08_war-**child**.pdf (last visited 10 January 2010).

[63] ROBERT J. KELLY, JESS MAGHAN, AND JOSEPH D. SERIO, ILLICIT TRAFFICKING: A REFERENCE HANDBOOK (ABC CLIO Contemporary World Issues Series, 2005), at 14.

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."[64] 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."[65]

Three international treaties comprehensively promote international cooperation to police and criminalize trafficking in illegal drugs and other prohibited substances: 1) the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, with around 170 States Parties; 2) the 1961 UN Single Convention on Narcotic Drugs, with about 180 States Parties; and 3) the 1976 UN Convention on Psychotropic Substances, with about 175 States Parties.[66] 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.[67] Among these conventions, the 1988 Convention specifically qualifies the gravity of offences in relation to trafficking of illegal drugs as "particularly serious", when they involve the "victimization or use of minors."[68] All three conventions establish interrelated rules on subject matter and personal jurisdiction;[69] standardized procedures for determining the estimation, cultivation, and confiscation of prohibited substances;[70] legal and administrative cooperation among States in

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64 Ross article, at 63.

65 Alexandra Guáqueta, *The Colombian Conflict: Political and Economic Dimensions*, pp. 73-106, at 91 in BALLENTINE & SHERMAN.

66 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 19, 1988, 1582 U.N.T.S. 164, 28 I.L.M. 497, *available at* http://www.unodc.org/pdf/convention_1988_en.pdf (last visited 10 January 2010) [hereafter, "1988 UN Drug Convention"]; United Nations Convention Single Convention on Narcotic Drugs (as amended by the 1972 Protocol amending the Single Convention on Narcotic Drugs, 1961), Mar. 30, 1961, 520 U.N.T.S. 151, *available at* http://www.incb.org/pdf/e/conv/convention_1961_en.pdf (last visited 10 January 2010) [hereafter, "1961 UN Drug Convention]; United Nations Convention on Psychotropic Substances, Feb. 21, 1971, 1019 U.N.T.S. 175, *available at* http://www.incb.org/pdf/e/conv/convention_1971_en.pdf (last visited 10 January 2010) [hereafter, "1971 UN Drug Convention"].

67 *See* "Red List" in the 1988 UN Drug Convention, the "Yellow List" in the 1961 UN Drug Convention, and the "Green List" in the 1971 UN Drug Convention.

68 Art. 3(5)(f), 1988 UN Drug Convention.

69 Art. 4 et seq., 1988 UN Drug Convention; Art. 4 et seq., 1961 UN Drug Convention; Arts. 2-7, 1971 UN Drug Convention.

70 Art. 5 et seq., 1988 UN Drug Convention; Arts. 19-21, 22-24, 36-37, 1961 UN Drug Convention.

actions against the illicit traffic of such substances;[71] customs, trade, and commercial regulation, including permitted quantities of such substances for medical or scientific purposes;[72] and the settlement of disputes.[73]

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 UN Drug Convention, anti-drug trafficking measures were largely dependent on national initiatives. International cooperation under the 1988 UN Drug Convention innovated mutual legal assistance in investigations, prosecutions, confiscations, extradition, controlled deliveries and money laundering into a coherent international regime.[74]

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 and/or trafficking of prohibited substances, as in Brazil,[75] Colombia,[76] Myanmar,[77] and Africa.[78] In the past decade, this interlinkage between child soldiering and illegal drug trafficking has become much clearer in

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71 Arts. 6-10, 1988 UN Drug Convention; Arts. 14, 35, 1961 UN Drug Convention; Art. 21, 1971 UN Drug Convention.

72 Arts. 15-18, 1988 UN Drug Convention; Arts. 29-32, 1961 UN Drug Convention; Arts. 12-15, 1971 UN Drug Convention.

73 Art. 32, 1988 UN Drug Convention; Art. 48, 1961 UN Drug Convention; Art. 31, 1971 UN Drug Convention.

74 Sandeep Chawla and Thomas Pietschmann, *Drug Trafficking as a Transnational Crime*, pp. 160-180, at 177-180, in PHILIP REICHEL, HANDBOOK OF TRANSNATIONAL CRIME & JUSTICE (Sage Publications, 2005). *See also* Stephen David Brown, *Controlled deliveries*, pp. 199-214 in STEPHEN DAVID BROWN, COMBATING INTERNATIONAL CRIME: THE LONGER ARM OF THE LAW (Routledge-Cavendish, 2008).

75 Jens Glüsing, *Child Soldiers in the Drug Wars*, March 2, 2007, Spiegel Online, *available at* http://www.spiegel.de/international/spiegel/0,1518,469510,00.html (last visited 10 January 2010).

76 Child Soldiers Global Report 2008, Country Report on Colombia.

77 "Child soldiers and opium cultivation, two faces of Burma's dark pit", Asia News, December 15, 2009, *available at* http://www.asianews.it/index.php?art=17124&l=en&size=A (last visited 10 January 2010).

78 "AFRICA: Too small to be fighting in anyone's war", IRIN UN Office for Coordination of Humanitarian Affairs, *available at* http://www.irinnews.org/IndepthMain.aspx?IndepthId=24&ReportId=66280 (last visited 10 January 2010).

internal armed conflicts, civil disturbances and urban unrest, and transnational criminal activities.[79] 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....[t]he 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."[80] The 1988 UN 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", "involvement of the offender in other illegal activities facilitated by the commission of the offence", as well as the "victimization or use of children," as qualifying circumstances to merit more severe punishment against drug traffickers.[81]

B. International regulation on armed groups' trade in facially-licit goods

Child soldiers are also invaluable to sustaining armed groups' trade in facially-list 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.[82] The use of children in economic activities of armed groups appears more starkly in the Democratic Republic

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79 John P. Sullivan, *Child Soldiers: Despair, Barbarization, and Conflict*, Air Space & Power Journal, March 2008, *available online at* http://www.airpower.maxwell.af.mil/apjinternational/apj-s/2008/1tri08/sullivaneng.htm (last visited 10 January 2010).

80 Alexandre J. Vautrevers, *Why Child Soldiers are such a Complex Issue*, 27 Refugee Quarterly Survey 4 (2009), at p. 106.

81 Art. 3(5)(b)(c), and (f), 1988 UN Drug Convention.

82 "Philippines: Child soldiers in the spotlight as Mindanao battle rages", 21 October 2008, IRIN, UN Office for the Coordination of Humanitarian Affairs, *available at* http://www.irinnews.org/Report.aspx?ReportId=81015 (last visited 10 January 2010).

of the Congo (DRC),[83] where children have been used repeatedly for mining and quarrying activities that help finance the military operations of armed groups. 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: "...child labour in mining is one of those forms of work which is particularly closely associated with economic and social disruption. Even if virtually disappearing 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."[84] Noting this reality, ILO Convention no. 148 (the Minimum Age Convention) permits States Parties to exclude specific categories of work or economic activity from the minimum age requirement of 18 years, but specifically bars such States from excluding mining and quarrying, which by nature jeopardizes the health and safety of children.[85]

Outside of the soft law initiatives under the KPCS for conflict diamonds, and the select UN-imposed trade embargoes previously discussed,[86] there is no international regulation directly

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83 GLOBAL WITNESS REPORT 2009, FACED WITH GUNS, WHAT DO YOU DO?, *available at* http://www.globalwitness.org/media_library_detail.php/786/en/global_witness_report_faced_with_a_gun_what_can_yo (last visited 10 January 2010). [hereafter, "2009 Global Witness Report"]. *See also* UN 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, 2001, *available at* http://www.un.org/News/dh/latest/drcongo.htm (last visited 10 January 2010).

84 "Mining and Quarrying", International Programme on the Elimination of Child Labour, International Labour Organization, *available at* http://www.ilo.org/ipec/areas/Miningandquarrying/lang--en/index.htm (last visited 10 January 2010).

85 Arts. 3(1) and 5(3), ILO Convention no. 138 (Minimum Age Convention), 1973, *available at* http://www.ilocarib.org.tt/projects/cariblex/conventions_6.shtml (last visited 10 January 2010). *See* GERALDINE VAN BUEREN, THE INTERNATIONAL LAW ON RIGHTS OF THE CHILD (Martinus Nijhoff Publishers, 1998), at 267.

86 See note 56.

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 UN Security Council's endorsement under resolution 55/56 – fatally suffers from several key 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...[w]ithout a comprehensive database on the production and trade of rough diamonds, the KPCS will be unable to identify anomalies or do even the most rudimentary tracking of diamond flows."[87] Second, participating States 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 come anywhere near the web of international regulation and enforcement cooperation in drug trafficking.

As a result of this 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.[88] The international regulatory gap thus places the burden on individual States to police, monitor, and prevent the

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[87] Ian Smillie, *What Lessons from the Kimberley Process Certification Scheme?*, pp. 47-67 in KAREN BALLENTINE AND HEIKO NITZSCHKE, PROFITING FROM PEACE: MANAGING THE RESOURCE DIMENSIONS OF CIVIL WAR (Lynne Rienne Publishers, 2005). [hereafter, "BALLENTINE & NITZSHCKE"].

[88] UN Convention on the International Sale of Goods, 1980,

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."[89] 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; MPA, 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.[90] 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 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."[91]

The 2008 Final Report of the UN'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 CNDP [*Congres national pour la defense du people*,

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89 2009 Global Witness Report, at p. 59.

90 2009 Global Witness Report, pp. 59-69.

91 *See* Brian Ashby, *From Congo to Chicago: Understanding the Life-Cycles of Metal Commodities in the Global Economy*, June 22-25, 2009 powerpoint presentation *available at* http://internationalstudies.uchicago.edu/.../cis_sti2009_lessons_cell-phone_5.ppt- (last visited 10 January 2010).

a "political movement with a military wing called the Congolese National Army]."[92] In the same Report, the Group of Experts found evidence that "Rwandan authorities have been complicit in the recruitment of soldiers, including children";[93] and that virtually all armed groups (primarily the CNDP and the PARECO, or Coalition of Congolese Patriotic Resistance) have conducted "large-scale child recruitment" and "re-recruitment" of former child soldiers.[94] 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."[95] 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 such as minerals and commodities. This recommendation was based on an entirely different direction from that of civil society groups' advocacy of corporate social responsibility (CSR) within the domestic jurisdictional frameworks of States,[96] 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 landmark, since what it implied was 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 should also not be classed with 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

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92 Final Report of the Group of Experts on the Democratic Republic of Congo, S/2008/773, 12 December 2008, at paras. 19 and 32. [hereafter, "2008 Group of Experts Final Report"]

93 2008 Group of Experts Final Report, para.61.,

94 2008 Group of Experts Final Report, paras. 167 to 185.

95 2008 Group of Experts Final Report, Recommendations para. 14, at p. 50.

96 *See for example* Olefumi O. Amao, *Corporate Social Responsibility, Multinational Corporations and the Law in Nigeria: Controlling Multinationals in Host States*, 52 Journal of African Law 1 (2008), 89-113.

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.[97] 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 Kimberley 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."[98] 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";[99] 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

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97 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 (Fall 2008), at 360.

98 "Kimberley Process", Global Policy Forum, *available at* http://www.globalpolicy.org/component/content/article/182/33876.html (last visited 10 January 2010).

99 Art. 33, Convention on the Rights of the Child.

physical, mental, spiritual, moral or social development";[100] 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."[101] Imposing quantitative restrictions in armed 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 State 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";[102] 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."[103] 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" 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 --- [104] attests to the necessary corollary that States also possess 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

100 Arts. 32(1) and (2), Convention on the Rights of the Child.

101 Art. 38, Convention on the Rights of the Child.

102 Art. 6(1), Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.

103 Art. 4(2), Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.

104 UN SC resolution 1261, S/RES/1261 (1999), paras. 3 and 10; UN SC resolution 1314, S/RES1314 (2000), paras. 2, 16(c); UN SC resolution 1379, S/RES/1379, (2001), paras. 9(a),(b), (c), and (d); UN SC resolution 1460, S/RES/1460, (2003), paras. 3 and 7; UN SC resolution 1539, S/RES/1539 (2004), paras. 3 and 4; UN SC resolution 1612, S/RES/1612 (2005), paras. 14, 15, and 16.

distinctions in the institutional enforcement of international prohibitions 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 labour 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-labour 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 II**, 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 internationalized framework of cooperation of States on prohibited substances appears more conducive for States to obtain timely and updated information on armed groups' trafficking of prohibited substances. 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 with respect to such activities. The discovery of the "blood diamond" trade as a source of armed groups' financing, itself came midstream into armed conflicts, sometimes decades after these conflicts began as in the case of Sierra Leone, Angola, and the DRC: "[t]he 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 UN Security Council Expert Panel dealing with Angola. Nevertheless, the term 'blood diamonds' did not appear in any official UN document; instead it was a media creation that

successfully and succinctly communicated the horror of the conflict."[105] While the United Nations has facilitated dialogue and investigations in the past decade on 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 goods. The length of years intervening between the release of the reports of the UN Group of Experts 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, 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 trading rules and obligations in the GATT, and provoking retaliatory measures from fellow States affected by the restrictions.

As a consequence of the asymmetry in 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 innocuously done with the complicity of fronting corporations or individuals that 'legitimize' trade on their behalf with international counterpart entities. 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

[105] Iryna Marchuk, *Confonting Blood Diamonds in Sierra Leone: The Trial of Charles Taylor*, 4 Yale J. Int'l Affairs 2 (Spring-Summer 2009), 87-99, at 88.

Special Court for Sierra Leone. An NGO called Partnership Africa Canada first released its report in January 2000 on the financing of armed conflict in Sierra Leone through Taylor's diamond smuggling activities into neighboring Liberia. Two months thereafter, or on March 2000, the Angola Sanctions Committee presented the UN 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 UN sanctions regime.[106] 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 labour for diamond mining and quarrying.[107]

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,[108] and the global timber trade from conflict zones in Africa and Asia.[109] 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 harmonisation of reporting requirements, labelling procedures, 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.[110] Notably, the proposal clarifies that eventual tracking mechanisms must be WTO-compliant, and harmonized with existing international law.

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106 Final Report of the UN Panel of Experts on Violations of UN Security Council Sanctions against UNITA, S/2000/203, 10 March 2000, *available at* http://www.globalpolicy.org/component/content/article/202/41606.html (last visited 10 January 2010).

107 *The Prosecutor against Charles Taylor*, Case No. 03-01-PT, Prosecution Indictment, 7 March 2003.

108 "Cocoa seen funding Ivory Coast conflict," UPI, 8 June 2007; "Report warns of 'conflict cocoa,'" BBC NEWS, 8 June 2007; "Global Witness report calls on chocolate industry to clean up its act," GLOBAL WITNESS, 8 June 2007; "Africa: Ivory Coast: Cocoa Fueled Civil War," THE NEW YORK TIMES, 9 June 2007;

109 Global Witness, "The Logs of War: The Timber Trade and Armed Conflict", *available at* www.globalwitness.org/.../0203_The%20Logs%20of%20War_by%20GW_Fafo.pdf (last visited 10 January 2010).

110 Corene Crossin, Gavin Hayman, and Simon Taylor, *Where Did it Come From? Commodity Tracking Systems*, pp. 97-160 in IAN BANNON AND PAUL COLLIER (EDS.), NATURAL RESOURCES AND VIOLENT CONFLICT: OPTIONS AND ACTIONS (World Bank Publications, 2003).

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."[111] As I show in **Part II**, States need not wait for the international community to reach a definitive consensus on how to fill in 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 suggests, it is possible to track the movement of armed groups' trade in facially-licit goods using States' own customs powers. Applying the UN 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 UN Group of Experts. Finally, where States have reasonable basis to conclude that facially-licit goods produced and/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 II** will show that none of these domestic measures violate specific multilateral trading rules against non-discrimination, prohibition against discriminatory and arbitrary quantitative restrictions, and the most-favoured nation clause, since States could avail of the exceptions clauses under GATT Articles XX and XXI.

II. PROPOSAL: WTO-COMPLIANT STATE REGULATORY MEASURES AGAINST THE FLOW OF CHILD SOLDIER-PRODUCED OR DISTRIBUTED GOODS

Treaties and instruments that provide for tracking, monitoring, and institutional enforcement mechanisms applicable to specific substances, goods, or items predominate in

[111] David M. Malone and Jake Sherman, *Economic Factors in Civil Wars: Policy Considerations*, at pp. 234-255, at 241, in CYNTHIA J. ARNSON AND I. WILLIAM ZARTMAN, RETHINKING THE ECONOMICS OF WAR: THE INTERSECTION OF NEED, CREED, AND GREED (Woodrow Wilson Center Press and John Hopkins University Press, 2005). [hereafter, "ARNSON & ZARTMAN"].

international environmental law, most especially on issues of endangered species,[112] genetically-modified organisms,[113] hazardous wastes[114] and chemicals,[115] and ozone-depleting substances.[116] 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.[117] 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; 2) heightened institutional oversight over financial aid extended by international development agencies; 3) direct distribution of revenue resources to citizens, bypassing government intermediation; 4) strengthening citizen participation in public administrative agencies that exercise oversight over natural resource corporations; and 5) general reforms of corporate practices, as seen in the Global Compact's Ten Principles, the OECD Guidelines for Multinational Enterprises, the Extractive Industries Transparency Initiative Statement of Principles and Agreed Actions, and the UN Subcommission on Human Rights' draft *Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights.*[118] As of this writing, current international initiatives remain at nascent stages, with the previously-discussed non-binding certification process in the KPCS system for conflict diamonds, and the ongoing drafting process for a UN Small Arms Treaty, which regained momentum after the United States reversed its position and declared support for the treaty in

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112 *See* 1973 UN Convention on International Trade in Endangered Species of Fauna and Flora (CITES), *available at* http://www.cites.org/eng/disc/text.shtml (last visited 10 January 2010).

113 *See* 2000 Cartagena Protocol on Biosafety to the 1993 Convention on Biological Diversity, *available at* http://www.cbd.int/biosafety/protocol.shtml (last visited 10 January 2010).

114 *See* 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Waste and their Disposal, *available at* http://www.basel.int/text/con-e-rev.pdf (last visited 10 January 2010).

115 *See* 1998 Rotterdam Convention on the Prior Informed Consent Procedures for Certain Hazardous Chemicals and Pesticides in International Trade, *available at* http://www.pic.int/en/ConventionText/RC%20text_2008_E.pdf (last visited 10 January 2010).

116 *See* 1987 Montreal Protocol on Substances that Deplete the Ozone Layer to the 1985 Vienna Convention for the Protection of the Ozone Layer, *available at* http://www.unep.org/OZONE/pdfs/Montreal-Protocol2000.pdf (last visited 10 January 2010).

117 *See* Natalie Pauwels, *Conflict Commodities: Addressing the Role of Natural Resources in Conflict*, International Security Information Service (Europe) Briefing Paper No. 27, March 2003, *available at* https://www.ciaonet.org/wps/pan01/pan01.pdf (last visited 10 January 2010).

118 Macartan Humphreys, *Natural Resources and Armed Conflicts: Issues and Options*, pp. 25-44, at 28-33, in BALLENTINE & NITZSCHKE.

2009.[119] UN experts have advocated an international agreement on small arms and light weapons to reduce, if not eliminate, the global incidence of child soldiering.[120] These measures are more general in scope and applicability to States, in contrast to the UN Security Council's conflict or region-specific measures.[121]

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 and/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

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119 Bill Varner, "US Backs Arms Trade Treaty at the UN, Abandoning Bush Opposition", Bloomberg, 30 October 2009, *available at* http://www.bloomberg.com/apps/news?pid=20601103&sid=abkyS4.975YM (last visited 10 January 2010).

120 Suzanne Hoeksema, "Arms Treaty Could Be Powerful Tool to Protect Children", IPS, 23 October 2009, *available at* http://ipsnews.net/news.asp?idnews=48970 (last visited 10 January 2010).

121 *See* UN SC resolution 1643, S/RES/1643 (2005), which threatened sanctions against individuals violating the arms embargo or the peace process in Côte d'Ivoire. The resolution broadened the embargo to include diamond exports.;UN SC resolution 1343, S/RES/1343 (2001), which imposed sanctions on Monrovia for aiding the RUF in Sierra Leone; UN SC resolution 1306, S/RES/1306 (2000), which banned diamond trading in Sierra Leone. *See also* 2005 Report of the Panel of Experts on Côte d'Ivoire, 7 November 2005, *available at* http://www.globalpolicy.org/images/pdfs/1107panel.pdf (last visited 10 January 2010); 2002 Report of the Panel of Experts on Liberia, 19 April 2002, *available at* http://www.un.org/Docs/sc/committees/Liberia2/470e.pdf (last visited 10 January 2010); 2001 Report of the Panel of Experts concerning Liberia, 26 October 2001, *available at* http://www.un.org/docs/sc/committees/Liberia2/1015e.pdf (last visited 10 January 2010); 2001 Addendum to the Report of the Panel on the Illegal Exploitation of Natural Resources and other forms of wealth in Liberia, 13 November 2001, *available at* http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/S.2001.1072.En?Opendocument (last visited 10 January 2010); 2001 Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and other forms of wealth in the Democratic Republic of the Congo, 12 April 2001, *available at* http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/S.2001.357.En?Opendocument (last visited 10 January 2010).

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), which are consistent with customs practices of several States throughout the world.[122] Developed in the aftermath of the 9/11 terrorist attacks, the World Customs Organization (WCO) administers UCRs for many customs jurisdictions throughout the world:[123] "A UCR number is the equivalent of a bar code applied as early as possible to track all international movements of goods 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."[124] 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 with pre-screening high-risk containers, and employing advanced detection technology to uncover hidden contraband. CSI-compliance standards have already been successfully adopted in at least 44 of the world's largest seaports,[125] while UCRs have already been tested and successfully deployed in several jurisdictions.[126] Winer observes that 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

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122 Jonathan Winer, *Tracking Conflict Commodities and Financing*, pp. 69-93, at 83 et seq. in BALLENTINE & NITZSCHKE.

123 *See* "WCO Unique Consignment Reference (UCR)", *available at* http://www.wcoomd.org/files/1.%20Public%20files/PDFandDocuments/Procedures%20and%20Facilitation/UCR_new_e.pdf (last visited 10 January 2010).

124 Winer, at 84.

125 *See* Nicolas Hughes Allen, *The Container Security Initiative: Costs, Implications, and Relevance to Developing Countries*, 26 Public Administration and Development 5, at pp. 439-447 (21 November 2006).

126 Juha Hintsa and 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*, pp. 134-137 in ELECTRONIC GOVERNMENT: PROCEEDINGS OF THE THIRD INTERNATIONAL CONFERENCE, EGOV 2004, ZARAGOZA, SPAIN, AUGUST 30-SEPTEMBER 3, 2004 (Lecture Notes in Computer Science, Springer Berlin/Heidelberg, 2004).

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 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."[127]

Patricia Feeney and Tom Kenny theorize the possible application of the OECD Guidelines for Multinational Enterprises[128] to corporate conduct in conflict zones.[129] 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 includes company operations in nonadhering countries, where most of today's conflicts take place."[130] 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 its 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, establishing proper auditing and accountability practices; Chapter III provisions on disclosure regarding enterprises' activities, structure, financial situation and performance; Chapter IV provisions on contributing to the effective abolition of child labour; Chapter V provisions on environmental activities; and most importantly, the Chapter II provision on "respect[ing] the human rights of those affected by their activities consistent with the host government's international obligations and commitments".

Finally, combining the UN 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,

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127 Winer, at 85.

128 OECD Guidelines for Multinational Enterprises, OECD 2008, *available online at* http://www.oecd.org/dataoecd/56/36/1922428.pdf (last visited 20 January 2010).

129 Patricia Feeney and Tom Kenny, *Conflict Management and the OECD Guidelines for Multinational Enterprises*, at pp 345-375 in BALLENTINE & NITZSCHKE.

130 Feeney and Kenny, at 347.

affiliated, or otherwise used to finance armed groups' trade in child soldier-produced or distributed goods. Such a certification system, even if localized for now to particular States that undertake to adopt it, could eventually be developed towards 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.

To date, modern certification systems in some countries such as the United States and EU countries have incrementally expanded beyond conflict diamonds to gemstones, minerals, and other natural resources such as timber.[131] Considering the presence of various regional and bilateral customs cooperation agreements today that tackle related issues of fraud, money laundering, the flow of illegal goods and contraband, it is not too remote to envisage a situation in the future where States internally imposing domestic measures to stop the flow of armed groups' trade in child-soldier produced and/or distributed goods and commodities, could 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 child soldier-produced and/or distributed facially-licit goods and commodities, the State will inevitably have to ensure that this trade restriction does not violate multilateral trading 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 child soldier-produced and/or distributed goods and commodities.

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131 *See* Richard A. Schroeder, *Tanzanite as a conflict gem: Certifying a secure commodity chain in Tanzania*, 41 Critical Review Forum 1, 56-65 (January 2010), *available at* http://www.sciencedirect.com/science?_ob=ArticleURL&_udi=B6V68-4VY16F8-1&_user=483702&_coverDate=01%2F31%2F2010&_rdoc=1&_fmt=high&_orig=search&_sort=d&_docanchor=&view=c&_searchStrId=1190804730&_rerunOrigin=google&_acct=C000022720&_version=1&_urlVersion=0&_userid=483702&md5=272b0d23c69f869eae54c0ff124bb84b#secx5 (last visited 20 January 2010); Philippe Le Billon, *Fatal Transactions: Conflict Diamonds and the (Anti)Terrorist Consumer*, 38 Antipode 4 (2006), at pp. 778-801; Steven Price, Deanna Donovan, and Wil Jong, *Confronting Conflict Timber*, 117-132 in EXTREME CONFLICT AND TROPICAL FORESTS (Springer Netherlands, 2007).

B. State restrictions on child soldier-produced and/or distributed trade and WTO compliance through the GATT Exceptions Clauses

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

1) Article XI:1, which is the cornerstone prohibition against quantitative restrictions (*"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]."*);

2) Article XIII:1, which further qualifies that quantitative restrictions should be non-discriminatorily administered (*"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."*);

3) Article X:3(a), which prohibits the arbitrary application of trade measures (*"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."*);

4) Article 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.")* and Article 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."), which, when read together, stresses the need for uniform and proportional rules on customs formalities and procedures; and most importantly,

5) the Most-Favoured Nation (MFN) clauses of Article I:1 *("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].")* in relation to internal quantitative regulations in Article III:7 *("No internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions shall be applied in such a manner as to allocate any such amount or proportion among external sources of supply.")*

Absent specific details on a State's chosen design for quantitative restrictions for child soldier-produced and/or distributed goods, 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 child soldier-produced and/or distributed goods, States should also be mindful of some WTO decisions on quantitative restrictions that might affect how they ultimately design quantitative measures or restriction on child soldier-produced and/or distributed goods. Some examples might suffice here. In devising customs regulations dependent on certification, States should consider *US – Shrimp*,[132] where a WTO Panel held that the United States violated Article XI:1 when it required all shipments of shrimp and shrimp

[132] *See* Panel Report, *US-Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R, 15 May 1998, at paras. 7.24-7.62. [hereafter, "*US-Shrimp*"]

products to be accompanied by a declaration or certification "attesting that the shrimp or shrimp product in question has been harvested 'either under conditions that do not adversely affect sea turtles...or in waters subject to the jurisdiction of a nation currently certified pursuant to section 609."[133] 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 Art. XI:1 in *India-Quantitative Restrictions.*[134] States that permit private parties or trade associations to participate in the enforcement of customs regulations for child soldier produced and/or distributed goods and commodities should also examine *Argentina – Hides and Leather*.[135] 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)."

The ideal design features for a State-imposed domestic measure against child soldier-produced and/or distributed goods, consistent with the latest interpretations of WTO panels on specific GATT principles on quantitative restrictions, could be the subject of an entirely separate study elsewhere. For the limited purposes of this paper, I will narrow the issue to whether or not a general domestic measure against child soldier-produced and/or distributed goods could be justified within the Exceptions clauses of Articles XX and XXI. 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 child soldier-produced and/or distributed facially-licit goods and commodities. As there is, to date, no comparable jurisprudence on armed groups' trade in child soldier-produced and/or distributed facially-licit goods and commodities, these

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133 Panel Report, *US-Shrimp*, WT/DS58/R, 15 May 1998, at paras. 7.5-7.6, and 7.11-7.17.

134 Panel Report, *India-Quantitative Restrictions on Imports of Agricultural, Textile, and Industrial Products*, WT/DS90/R, 22 September 1999, para. 5.130.

135 Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R, 19 December 2000, at para. 11.94.

interpretive arguments might have persuasive value for States considering quantitative restrictions on the trade of such goods and commodities. The following subsections separately sketch interpretive theories under the General Exceptions provision of Article XX from the Security Exceptions provision of Article XXI.

1. General exceptions: Article XX(a) and XX(d)

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.[136]

The WTO Appellate Body also prescribes a "balancing test" in interpreting Article XX, attributable to the unique language used in Article XX. In *US – Gasoline,*[137] the Appellate Body stressed the purposely differentiated wording employed throughout Article XX: "In enumerating the various categories of governmental acts, laws or regulations which WTO Members may carry out or promulgate in pursuit of differing legitimate state policies or interests outside the realm of trade liberalization, Article XX uses different terms in respect of different categories: "necessary" - in paragraphs (a), (b) and (d); "essential" - in paragraph (j); "relating to" - in paragraphs (c), (e) and (g); "for the protection of" - in paragraph (f); "in pursuance of" - in paragraph (h); and "involving" - in paragraph (i). It does not seem reasonable to suppose that the WTO Members intended to require, in respect ofeach and every category, the same kind or degree of connection or relationship between the measure under appraisal and the state interest or

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136 Appellate Body Report, *US-Shrimp*, WT/DS58/AB/R, 12 October 1998, paras. 118-120.

137 Appellate Body Report, *US-Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 29 April 1996. [hereafter, *"US-Gasoline"*]

policy sought to be promoted or realized."[138] The Appellate Body also refers to the treaty context in relation to WTO Members' affirmative commitments located in the rest of the provisions of GATT: "[t]he relationship between the affirmative commitments set out in, *e.g.*, Articles I, III and XI, and the policies and interests embodied in the "General Exceptions" listed in Article XX, can be given meaning within the framework of the *General Agreement* and its object and purpose by a treaty interpreter only on a case-to-case basis, by careful scrutiny of the factual and legal context in a given dispute, without disregarding the words actually used by the WTO Members themselves to express their intent and purpose."[139]

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.[140] 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."[141] 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."[142]

With these methodological interpretations in mind, we can provisionally scrutinize a State's quantitative restriction against child soldier-produced and/or distributed goods at its most

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138 *US-Gasoline*, pp. 17-18.

139 *US-Gasoline*, p. 18.

140 RAJ BHALA, MODERN GATT LAW: A TREATISE ON THE GENERAL AGREEMENTS ON TARIFFS AND TRADE (Sweet & Maxwell, 2005), at pp. 531-533.

141 WTO Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 20 May 1996, DSR 1996:I, 3, at 22. *Full text available at* http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/a1s1p1_e.htm (last visited 10 November 2008).

142 WTO Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 6 November 1998, DSR 1998:VII, 2755, at 156.

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 reserve discussion in **Part III** on potential policy problems arising from identification and attribution of child soldier-produced and/or distributed goods.) I submit that the measure could be embraced under the "public morals" exception in Article XX(a), and also the "customs enforcement" exception in Article XX(d).

1.1. 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,*[143] there was no available jurisprudence interpreting GATT Article XX(a). 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.[144] At best, scholars analogized WTO jurisprudence interpreting 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").* 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 'public morals' denotes standards of right and wrong conduct maintained by or on behalf of a community or nation."[145] *US-Gambling* also laid the balancing test for determining the "necessity" of a measure to the objective of protecting public morals:

> "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

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143 Panel Report, *China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R, 12 August 2009 [hereafter, *China-Publications*].

144 Appellate Body, *Korea- Measures Affecting Imports of Fresh, Chilled, and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, 11 December 2000, at para. 176 [hereafter, *"Korea – Beef"*]; Appellate Body, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, 12 March 2001 [hereafter, *"EC-Asbestos"*], at para. 168.

145 Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, 10 November 2004, at paras. 6.463 and 6.465.

> 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."

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 labour, such as blood diamonds.[146] I submit that even the WTO Panel's interpretation of Article XX(a) in *China-Publications* would not rule out a ban on child soldier-produced and/or distributed goods.

To recall, in this case 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...imported cultural goods, because they are vectors of different cultural values, may collide with standards of right and wrong conduct."[147] 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."[148] The

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146 PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS (Cambridge University Press, 2008), at p. 640; Stephen J. Powell, *The Place of Human Rights Law in World Trade Organization Rules*, 16 Fla. J. Int'l L. 219 (March 2004), at 223: "Article XX(a) likely in addition 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 which deny freedom of the press, the right to emigrate, or with a consistent pattern of gross violations of human rights. Each of these reasons has been used by the United States to justify trade restrictions." *See also* Sarah Cleveland, *Human Rights Sanctions and International Trade: A Theory of Compatibility,* 5 J. Int'l Econ. L. 133 (2002), at 157; Michael Trebilcock and Robert Howse, *Trade Policy and Labor Standards,* 14 Minn. J. Global Trade 261 (2005), at 290.

147 *China-Publications*, at para. 7.712.

148 *China-Publications,* para. 7.756.

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).[149] 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 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 (e.g. the contribution of the measure to the realization of the ends pursued by it, and second, 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."

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

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[149] *China-Publications*, para. 7.759: "We note that the panel and Appellate Body in *US – Gambling* examined the meaning of the term "public morals" as it is used in Article XIV(a) of the GATS, which is the GATS provision corresponding to Article XX(a). The panel in *US – Gambling*, in an interpretation not questioned by the Appellate Body, found that "the term 'public morals' denotes standards of right and wrong conduct maintained by or on behalf of a community or nation". The panel went on to note that "the content of these concepts for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values." The panel went on to note that Members, in applying this and other similar societal concepts, "should be given some scope to define and apply for themselves the concepts of 'public morals' ... in their respective territories, according to their own systems and scales of values." 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."

manner which achieves the high level of protection China seeks to achieve."[150] After weighing all three factors against the particular design of each measure, and further inquiring if there were any other reasonably-available measures to China, the Panel concluded 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 Art. XX(a). In respect of these provisions, China has either not made a prima facie case that they are 'necessary', or China has not demonstrated that an alternative put forward by the United States is not a genuine alternative or is not reasonably available to China, in the light of the interest being pursued and China's desired level of protection."[151]

Applying the foregoing jurisprudential developments to the interpretation of Article XX(a), a State's ban on child soldier-produced and/or distributed goods could meet both the "public morals" definition 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".[152] A State-imposed ban on child soldier-produced and/or distributed 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 of child soldier-produced and/or distributed goods 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 child

150 *China-Publications*, para.7.791.
151 *China-Publications*, para. 7.911.
152 *See* pp. 2-4 of this article.

soldiers for all activities and operations that sustain their participation in armed conflict. When a State can properly identify the origin of such child soldier- produced and/or distributed goods 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."[153] Finally, it cannot be said that a ban causes unreasonable "restrictions on the right to import", since child soldier-produced and/or distributed goods, 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 in publications and audiovisual goods subject of 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 child soldier-produced and/or distributed goods, GATT Article XX(a) could justify a State-imposed ban.

1.2. The "customs enforcement" exception in Article XX(d)

The Appellate Body also laid out a two-tiered test for applying Article XX(d) in *Korea-Various Measures on Beef:*[154] "[f]irst, 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." A State-imposed ban on child soldier-produced and/or distributed goods 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.[155] 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 by direct effect or legislative transformation, they

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

154 *Korea-Beef*, at para. 157.

155 Art. 4, Optional Protocol; Arts. 6 and 7, ILO Convention No. 182.

could be subsumed within the scope of "laws and regulations" in Article XX(d). In *Mexico-Taxes on Soft Drinks*,[156] the Appellate Body carefully delineated 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 system of a WTO Member. Matters relating to "customs enforcement" would "generally involve rights and obligations that apply to importers or exporters".[157] 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 child soldier-produced and/or distributed goods as part of "customs enforcement" or "laws and regulations" within the meaning of Article XX(d). A ban would "secure compliance" as understood in Article XX(d), because it "enforces compliance"[158] with such domestically-incorporated norms on child soldiering.

Second, a ban is clearly "necessary" to secure compliance with "laws and regulations" or "customs enforcement" matters in relation to child soldier-produced and/or distributed goods. 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:*

> "5.26. 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 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.*"[159]

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156 Appellate Body Report, *Mexico-Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, 6 March 2006, at paras. 68-71. [hereafter, "*Mexico-Taxes on Soft Drinks"*]

157 *Mexico-Taxes on Soft Drinks*, para. 70.

158 *Mexico-Taxes on Soft Drinks*, para. 73.

159 Panel Report, *United States – Section 337 of the Tariff Act of 1930*, L/6439-36S/345, 7 November 1989, at para. 5.26. Italics supplied.

Arguably, a ban is a reasonably available measure to a State to enforce its laws, regulations, and customs enforcement rules in relation to child soldier-produced and/or distributed goods. Assuming that a State has been able to determine the provenance of goods to armed groups' trade in child soldier-produced and/or distributed goods, 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. Child soldier-produced and/or distributed goods, even if facially licit (as in the case of commodities like minerals, natural resources, and agricultural crops), could never be treated as legitimate subjects of international commerce. Taking the plethora of international treaty prohibitions against child soldiering and international duties to prevent child soldiering, alongside Security Council resolutions that mandate States to take measures against the illicit trade and exploitation of natural resources,[160] a State-imposed ban on child soldier-produced and/or distributed goods squarely meets the threshold necessity test as a "reasonably available measure" that is "least inconsistent with GATT 1994."

1.3. The chapeau of GATT Article XX

As the previous analyses have shown, a State-imposed ban on child soldier-produced and/or distributed goods 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 standard that aids in assessing the *application* of a measure invoked under one of the specific exceptions in GATT Article XX, and thereby prevent a State from abusing its right to invoke these exceptions:[161] "[t]he focus of the chapeau, by its express terms, is on the application of a measure

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160 *See* note 104.

161 *See* Appellate Body, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, 3 December 2007, at para. 215.

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 two-fold. 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 others other WTO Members."

The foregoing requirements in the chapeau should be built into the regulatory design of a State's ban on child soldier-produced and/or distributed goods. 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 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 labeling.[162] So long as a State can show that it has impartially 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.

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

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) *("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."*) appears to

[162] For a useful comparative examination of rules of origin across jurisdictions, *see* EDWIN VERMULST, PAUL WAER, AND JACQUES BOURGEOIS, RULES OF ORIGIN IN INTERNATIONAL TRADE: A COMPARATIVE STUDY (University of Michigan Press, 1994).

afford some latitude towards a State's discretionary determination of its essential security interests, it also does not appear to preclude the possibility of judicial review under the WTO dispute settlement system.[163] An author 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."[164] However, this interpretation can be contested, since the few instances where States invoked GATT Article XXI never reached an adjudicated conclusion.[165]

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 of child soldier-produced and/or distributed goods. 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 child soldier-produced and/or distributed facially-licit goods, (such as minerals, natural resources, and other commodities) 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. These justifications should apply with greater force where States are internationally obligated to take all necessary measures to prevent the "worst forms of child labour", such as child soldiering and child labour in the illegal and hazardous exploitation of natural resources. A State can reasonably argue that its essential security interests reasonably necessitate its exercise of control over such trade flows into the State's territory,

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163 *See* Peter Lindsay, *The Ambiguity of GATT Article XXI: Subtle Success or Rampant Failure?,* 52 Duke L.J. 1277 (2003), at 1287-1296.

164 ANTHONY 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 (Martinus Nijhoff Publishers, 2007), at 334.

165 *See* Alan S. Alexandroff and Rajeev Sharma, *The National Security Provision --- GATT Article XXI,* pp. 1572-1578 in PATRICK F.J. MACRORY, ARTHUR E. APPLETON, AND MICHAEL G. PLUMMER, THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS (Springer, 2005); PETROS C. MAVROIDIS, TRADE IN GOODS: THE GATT AND THE OTHER AGREEMENTS REGULATING TRADE IN GOODS (Oxford University Press, 2007), at pp. 322-331.

which ultimately redound to the benefit of armed groups engaged in internal or international armed conflicts.

This **Part II** has shown that there are a variety of quantitatively-restrictive regulatory measures that States can unilaterally adopt to prevent the flow of child soldier-produced and/or distributed 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 fulfil 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 against child soldier-produced and/or distributed goods and commodities. **Part III** responds to these aspects alongside the international methods States have pursued to vindicate their international responsibility to stop and prevent child soldiering.

III. PREVENTING CHILD SOLDIERING AS A MATTER OF STATE RESPONSIBILITY: INTERNATIONAL METHODS AND DOMESTIC INITIATIVES

On August 4, 2009, the UN Security Council unanimously passed Resolution 1882,[166] which reaffirmed previous Council resolutions[167] involving the protection of children in 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");[168] 2) fact-finding, reporting, monitoring, and information exchange;[169] 3) incorporating child protection concerns in UN peacekeeping missions;[170] 4) post-conflict demobilization of child soldiers and facilitating their transition and reintegration into their

166 Security Council resolution 1882, S/RES/1882(2009), *available at* http://www.un.org/children/conflict/_documents/SC-RESOLUTION1882-2009.pdf (last visited 10 January 2010).

167 Security Council resolutions 1261(25 August 1999), 1314 (11 August 2000), 1379 (20 November 2001), 1460 (30 January 2003), 1539 (22 April 2004), 1612 (26 July 2005) and Statements of the President of the UN Security Council on 24 July 2006 (S/PRST/2006/33), 28 November 2006 (S/PRST/2006/48), 12 February 2008 (S/PRST/2008/6), 17 July 2008 (S/PRST/2008/28), and 29 April 2009 (S/PRST/2009/9).

168 Id. at para. 1.

169 Id. at paras. 2, 3, 4, 8, 9, 10, 17, 19

170 Id. at paras. 11-12.

respective civil communities;[171] 5) criminal prosecution of individuals that commit the international crime of child soldier enlistment;[172] and 6) calling for implementation of individual States' time-bound action plans to halt the recruitment and use of children in armed conflict situations.[173] 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 UN Security Council in particular situations of armed conflict; and an array of fact-finding and monitoring functions simultaneously discharged by UN 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 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 soldier enlistment as a matter for individual criminal responsibility, the child soldier 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 labour 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.

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171 Id. at paras. 13-15.
172 Id. at para. 16.
173 Id. at para. 5.

This *preventive* duty in relation to child soldiering can also be situated within the broader consensus of States on an international "responsibility to protect" (R2P). While R2P doctrine has been often critically parsed in relation to one of its aspects on the use of force,[174] its less controversial terminology in the 2005 World Summit Outcome document[175] emphasizes the notion of States' individual and collective responsibilities to *prevent* war crimes and other serious violations of human rights. If the unanimous endorsement of the UN General Assembly of R2P 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 child soldier-produced and/or distributed goods, pending institutional modes of cooperation similar to the international anti-drug trafficking system.

Certainly, unilateral bans on child soldier-produced and/or distributed goods will not be without its attendant policy complications. For one, we can anticipate that most States will have

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174 *See* Nicholas J. Wheeler, *Operationalising the Responsibility to Protect: The Continuing Debate over Where Authority Should be Located for the Use of Force*, NUPI Report, Norwegian Institute of International Affairs, 2008, *available at* http://cadair.aber.ac.uk/dspace/bitstream/2160/1969/1/R2P-3-Wheeler%5b1%5d.pdf (last visited 10 January 2010).

175 2005 World Outcome Summit Document, at paras. 138-139, *available at* http://www.who.int/hiv/universalaccess2010/worldsummit.pdf (last visited 10 January 2010):

> " 138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.
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> 139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out."

the primary difficulty of identifying and attributing goods as originating from the labour 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 expectedly 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 child soldier-produced and/or distributed goods. These technologies and mechanisms are no more invasive or costly than what States already implement for anti-terrorism customs inspection and enforcement.

Moreover, States might have less reason to be apprehensive about information asymmetry when they unilaterally ban child soldier-produced and/or distributed goods. The mass of publicly available reports from the UN Security Council, the UN specialized agencies, and international NGOs in the past decade, (such as the annual detailed Child Soldiers Global Report issued by the Coalition to Stop the Use of Child Soldiers, the country reports submitted to the UN Security Council, and the UN Group of Experts' and Secretary-General's reports on children and armed conflict) regularly identify and narrow down 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 that could be attributable to child soldier-produced and/or distributed goods. 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.

Secondly, States would also have to consider private remedial procedures when they design domestic measures banning or restricting the flow of child soldier-produced and/or distributed goods. 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 labour 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 international financial regulatory initiatives that enable States to trace proceeds from illicit activities, such as those implemented and supervised by the Financial Action Task Force,[176] the World Bank, the International Monetary Fund, the Basel Group of Bank Supervisors, the International Organization of Securities Commissions, the Offshore Group of Bank Supervisors, among others.[177] All of these initiatives could be considered in complementing a State's chosen administrative procedural design for implementing its ban on child soldier-produced and/or distributed goods.

Finally, a State that proactively uses international economic law norms to implement a ban on child soldier-produced and/or distributed 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 on 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

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176 *See* http://www.fatf-gafi.org/pages/0,2987,en_32250379_32235720_1_1_1_1_1,00.html (last visited 20 January 2010).

177 Winer, at p. 75. *See also* Phil Williams and John T. Picarelli, *Combating Organized Crime in Armed Conflict*, pp. 123-152 in BALLENTINE & NITZSCHKE; Cynthia McClintock, *The Evolution of Internal War in Peru: The Conjunction of Need, Creed, and Organizational Finance*, pp. 52-83 in ARNSON & ZARTMAN.

inertia of awaiting international consensus to stop the flow of child soldier-produced and/or distributed goods.

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 labour, 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.[178] 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 child soldier-produced and/or distributed 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,[179] 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 child soldier-produced and/or distributed goods, 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 towards the world's children.

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[178] *See* DAVID ROSEN, ARMIES OF THE YOUNG: CHILD SOLDIERS IN WAR AND TERRORISM, (Rutgers University Press, 2005).

[179] Id. at notes 36 to 38.