



Applying the Precautionary Principle to the Trade of Conflict Minerals

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The Global Trade in Conflict Minerals

The global trade in illicit minerals, such as diamonds, tin, tantalum, tungsten, and gold has caused widespread devastation to populations in regions where they are extracted. In parts of Africa resources in conflict zones have been, and continue to be, part of the cause and funding of violence and human rights abuses. (World Bank 2011: 54, Zulu and Wilson 2012: 1105) Seemingly different conflicts are often interrelated, sometimes directly involving the same actors, but always fuelled by global demand and weak institutions on the ground. (Prenkert and Shackelford 2014: 470, World Bank 2011: 54)

Humanitarian abuse is shockingly common in many of these regions, including forced child labour. (Prendergast and Lezhnev 2014: 2, International Labour Organization 2006) In sub-Saharan Africa the International Labour Organization estimates that, in the 5-17 age range, 59 million children—or one in every five—engages in some form of child labour. (International Labour Organization 2013: 4)

Rape, including “gang rape, abduction for purposes of sexual slavery, forced participation of family members in rape, and mutilation of women’s genitalia with knives and guns” is used as a “systematic tactic of war.” (Peterman, Tia Palermo and Bredenkamp 2011: 1060) In a study, approximately 1.69 to 1.80 million women reported having been raped in their lifetime in the Democratic Republic of Congo alone. (Peterman, Tia Palermo and Bredenkamp 2011: 1060)

Death and displacement is also widespread in these regions. For example, during the civil war in Sierra Leone between 1991 and 2002, in part fuelled by conflict minerals, over 50,000 were killed and more than 2 million displaced. And, in the eastern Democratic Republic of the Congo, up to 6 million have been killed and over 2 million displaced since the late 1990s. (Seay 2012: 6, Enough Project 2014)

The argument of this paper is that the trade and use of conflict minerals must be stopped and that current efforts are not enough. Conflict minerals are a scourge on the global economy. Their trade and use contribute to unimaginable horrors. The firms who purchase them, use them in their products, and the consumers who buy items that contain them, are all complicit in the violence used to secure these minerals.

The trade and use of conflict minerals is not a problem that has gone unnoticed. Efforts have been made to regulate and curtail the trade in minerals coming out of conflict-ridden regions in order to address the appalling conditions there and to cut the flow of funding to groups who commit these abuses. This paper examines some of the most prominent efforts to date and recommends a new method, the precautionary principle, which both complements and goes further than existing efforts.

This paper is organized as follows. First, it will examine some of the policies that have been implemented to stem the flow of conflict minerals and the gaps in these approaches. Second, it will offer a new policy approach: the precautionary principle. It will provide an overview of the precautionary principle, its main criticisms and offer guidance as to how to operationalize the concept in the context of conflict minerals.

Kimberley Process Certification Scheme

Among the first international attempts to stem the flow of conflict minerals is the Kimberley Process Certification Scheme, which focuses on the trade in diamonds. Brought about by NGO pressure in the late 1990s and entered into force in 2003, the Kimberley Process currently has 54 participants and observers (although two are currently suspended) which represent 81 countries. (Haufler 2010: 405, The Kimberley Process 2014) Membership is fairly

inclusive, involving those across the commodity chain, from extraction and export to import and sales, including Sierra Leone, Liberia, the Democratic Republic of the Congo, Canada, the United States, and the European Union, among others.

Participants in the process adhere to a set of guidelines that encourage them to enact legislation to certify and monitor their diamond commodity chain. The main responsibility of exporting participants is to develop a set of protocols that make it easier to identify where their diamonds come from and how they were extracted. These protocols include: 1) formalizing mining activities; 2) developing and maintaining a database of extraction statistics; 3) using these improved monitoring techniques to certify diamonds that are conflict-free; and, 4) to relay this information in a consistent and timely fashion to those importing the diamonds. (The Kimberley Process Core Document 2014)

In turn, importers are to be vigilant about the diamonds they import. They must verify, as best they can, that the diamonds are properly certified and only accept those that meet the prescribed qualifications. Participation is open to any party willing to follow the guidelines, but members are to refrain from trading with non-participants. (The Kimberley Process Core Document 2014)

The Kimberley Process has several flaws that critics claim have limited its effectiveness. First, it is voluntary for a party to join and the only form of punishment is expulsion. This means that the Kimberley Process can only ever be partially successful if a country involved in the diamond trade chooses not to join, as is currently the case with Venezuela. Venezuela voluntarily suspended itself in 2008 after almost three years of minimal communication with the Kimberley Process and has continued to export diamonds. (Smillie 2010: 8)

Second, the structure and internal workings of the Kimberley Process are ineffective. There is very little accountability at the top as the Chair has limited responsibility and decisions are made by consensus, meaning any one participant can block a decision or action. (Partnership Africa Canada, 2012, Smillie 2011: 3)

Third, the cost and logistics of monitoring and reporting rests largely with the countries that extract and export the diamonds. These countries often have extremely weak governance to begin with and have difficulty maintaining effective monitoring systems even in regions where there is limited violence. While the Kimberley Process does carry out its own “peer review” monitoring at times, these only have to be conducted once every three years and even then are often tertiary and ineffective. (Partnership Africa Canada 2012, Smillie 2010: 9-11)

Fourth, its main form of punishment, expulsion, has not been applied consistently. There has been some success. After a 2003 coup, the Central African Republic was suspended from the Process. This led to an independent review which found that its monitoring processes were adequate and led the country to be readmitted. The Republic of Congo was suspended in 2004 due to questionable data. In time an independent third party audited its data and monitoring practices. Finding them effective, the country was readmitted in 2007. (Smillie, 2010: 7-8)

However, there have also been clear failures. For example, in 2008 a series of events occurred in Zimbabwe, including human rights abuses and violence committed by armed forces in the Marange diamond fields region. Despite continuing evidence of abuse, and several investigations by the Kimberley Process itself, Zimbabwe has retained its membership. (Partnership Africa Canada 2012, Human Rights Watch 2009: 32).

There are mixed reviews on how the Kimberley Process has affected the diamond trade in conflict zones in Africa. It has had some measure of success. It has choked rebel movements in

Angola and Sierra Leone and generated the most comprehensive diamond trade database in the world. (Global Witness 2011, Smillie, 2011: 1)

In February 2014 the United Nations reaffirmed the “successful role that the Kimberley Process has played in stemming the flow of conflict diamonds in the past decade of its existence.” However, it also noted that “the trade in conflict diamonds continues to be a matter of serious international concern, which can be directly linked to the fuelling of armed conflict, the activities of rebel movements aimed at undermining or overthrowing legitimate Governments and the illicit traffic in and proliferation of armaments, especially small arms and light weapons.” (U.N. General Assembly, 68th Session. Resolution 128. 18 December 2013)

And, according to NGOs such as Global Witness, there continues to be significant global trade in illicit diamonds. (Global Witness 2008, Zulu and Wilson 2009) They argue that the percentage of conflict diamonds in the global trade has been reduced from 15% in 1990 to 4% in 2013, not the less than 1% as claimed by the Kimberley Process. (The Kimberley Process 2014)

Its failures have led some to leave the Process, including early proponents such as Ian Smillie of Partnership Africa Canada and Global Watch, the NGO which was one of the first to shed light on the plight of diamond miners in conflict zones. (Global Witness 2011)

For its critics, its voluntary nature and its inconsistency has led the Kimberley Process to fail in “its most fundamental promise: a guarantee to consumers that the diamonds they are purchasing are not linked to conflict and human rights abuse.” (Smillie 2010: 1)

Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act

The United States Dodd-Frank Wall Street Reform and Consumer Protection Act, which passed in 2010 has the broad aim:

To promote the financial stability of the United States by improving accountability and transparency in the financial system, to end “too big to fail,” to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes.

— Dodd-Frank Act 2010

Included in Dodd-Frank as a special disclosure provision is Section 1502. This Section mandated the Securities and Exchange Commission (SEC) to develop and implement rules for annual reporting and public disclosure related to conflict minerals. The SEC did so through the addition of Section 13(p) to the Securities Exchange Act of 1934. Companies that are required to file under Section 13(a) or Section 15(d) of the Exchange Act must now:

“...disclose annually whether any conflict minerals that are necessary to the functionality or production of a product of the person, as defined in the provision, originated in the Democratic Republic of the Congo or an adjoining country.” (SEC 2012: 1)

Essentially, foreign and American domestic companies with assets of more than \$10 million that file with the SEC must determine where their minerals are coming from. Those whose products contain conflict minerals sourced from the Democratic Republic of the Congo and adjoining countries (which includes Angola, Burundi, Central African Republic, the Republic of the Congo, Rwanda, South Sudan, Tanzania, Uganda, and Zambia) must file an additional report.

If a company finds that it sources conflict minerals from one of the specified regions it must work with partners in the commodity chain to determine their origin. In addition it has to provide an additional report that shows how it “exercise[d] due diligence on the source and chain of custody of those minerals,” which may need to be accompanied by an independent audit. (SEC 2012: 1)

The goal of Section 1502 of Dodd-Frank, and in turn Section 13(p) of the Securities Exchange Act, is to incite companies who use minerals in their products—defined in this context as tin, tantalum, tungsten and gold—to determine where they came from and to disclose this information publicly. Reporting is not voluntary and a company may be sued under Section 18(a) by any individual who purchases or sells a security whose price was affected by a false statement. (SEC 2012: 117) However, as of yet there is no penalty for a company actually using conflict minerals from the DRC or adjoining countries. So, while it is possible there may be legal repercussions in the future, for now the legislation is based on the notion of socially responsible investment—i.e. that consumers and businesses will not purchase products or minerals from companies that knowingly source from conflict zones. (Drimmer and Phillips 2012: 131) The SEC rules were finalized on August 22, 2012.

A number of legal challenges to this legislation led the SEC to allow a longer lead time for auditing, two years for large companies and four for smaller ones. As well, companies do not have to specifically declare that their products are “DRC conflict free,” “not been found to be ‘DRC conflict free,’” or “DRC conflict undeterminable.” (SEC 2014) There were only three companies that obtained audits for their Conflict Minerals Reports submitted in 2014: Intel, Kemet Corporation, and Signet Jewellers, Ltd. (Sarfaty forthcoming 2015: 20)

There are four main criticisms of Dodd-Frank Section 1502. The first is that the Securities Exchange Commission has neither the mandate nor the capacity to effectively monitor companies in this context or to interpret whether they have complied with the new law. (Raj 2011: 1003) The SEC was set up to protect “investors, maintain fair, orderly, and efficient markets, and facilitate capital,” and was not meant to be an avenue for introducing social or foreign policy. (SEC 2013)

Second, some have argued that Section 1502 has resulted in a “de facto ban on Congolese mineral exports,” meaning tens of thousands to possibly millions of Congolese miners are out of work for the foreseeable future. (Seay 2012: 4) Not only this but they argue that there has actually been little improvement in the security situation or the daily lives of most Congolese. This is disputed by NGOs like Global Watch which argue that the slow-down was temporary and will pave the way for legitimate mining activities. (Global Witness 2011)

Third, the supply chain itself is too complex to be monitored by individual companies. (Sarfaty forthcoming 2015: 3) It is acknowledged by the SEC that firms reporting to them often have between 160 and 10,000 first-tier suppliers and that companies may find it difficult, anyway, to move beyond this tier. (U.S. GAO 2013: 21, 25)

Fourth, some argue that the high compliance costs and complexities in reporting will make it difficult for firms to comply. (112th Congress, 2nd Session, May 10, 2012) While estimates vary, the SEC believes “the initial cost of compliance to be between US\$3 billion and US\$4 billion, with annual costs thereafter of between US\$207 million and US\$609 million.” (SEC 2014: 246, 303)

Whether these criticism are valid or not, ultimately, what is important is whether Section 1502 met its goals of increasing transparency in the conflict minerals commodity chain and of reducing violence and human rights abuses in the DRC and adjoining countries. There are two ways to measure success and failure here, one relating to firms themselves, the other to what is happening on the ground in the DRC.

Companies submitted their first reports in June 2014. A study by Galit A. Sarfaty, from the faculty of law at the University of British Columbia, found that, due to the complexity of the minerals commodity chain, there was a “compliance gap”—i.e. many companies had struggled

to fully articulate transparency in their commodity chain. (Sarfaty forthcoming 2015: 35) Based on five criteria she found that of the 967 Conflict Mineral Reports filed in June 2014, 47.98% had weak compliance (meaning they fulfilled 0-1 of the criteria), 44.67% had moderate compliance (meaning they fulfilled 2-3 of the criteria), and only 7.34% had strong compliance (meaning they fulfilled 4-5 of her criteria).¹

Why is this so? Galit explains that: 1) companies with strong brands were more concerned with reputation and more likely to file adequately; 2) companies who were involved with other international schemes like the Conflict-Free Smelter Initiative and the Jewelry Council Chain-of-Custody Certification Program were more likely to have the capacity to comply; and 3) larger companies were more likely to have a better score. Essentially, it seems that larger companies who were likely already involved in a scheme were more likely to have the capacity to file. (Sarfaty forthcoming 2015: 27-29)

She also noted that part of the compliance gap may stem from broader factors: 1) supply chain due diligence international norms have not been around for a long time, therefore there is still confusion on how to follow or implement them; 2) adding to this confusion, there are a range of certification standards and initiatives and organizations that offer sourcing services; and, 3) on the ground there is still poor security and wholly inadequate governance, meaning it is very difficult to get proper information. (Sarfaty forthcoming 2015: 30)

¹ 1) Company maintains a system of long-term record keeping on its supply chain; 2) Company incorporates its supply chain policy and due diligence process into present/future contracts or ancillary agreements with suppliers; 3) Company surveyed all of its suppliers of conflict minerals and followed up with non-responsive suppliers or incomplete surveys; 4) Company has a stated policy of working with suppliers to mitigate risk in its supply chain, including the possibility of terminating its relationship with suppliers; and, 5) Company has a policy of directly encouraging smelters/refiners to become certified. See Galit A. Sarfaty (forthcoming 2015) pages 23-25 for more information

What effect has this had on companies' bottom line? Paul Griffin, David Lont and Yuan Sun found that, for firms with conflict minerals disclosures, shareholder value had decreased up to three weeks after this disclosure. In total, they estimate the aggregate shareholder value loss to be between \$6.5 and \$13.1 billion. (Griffin, Lont and Sun 2014)

Most importantly, how has it affected events on the ground in the Democratic Republic of Congo? Initial signs point to a positive effect. Field research by the Enough Project in the eastern Congo, and with participants in the minerals trade and scholars who monitor it, revealed that there had been a major impact on the trade of tin, tungsten and tantalum, but not gold. (Bafilemba, Mueller and Lezhnev 2014: 1) They also found that it has become less profitable for armed groups and members of the Congolese army to extract and export minerals illegally.

Further, the Dodd-Frank act and the subsequent due diligence sourcing process has generated significant transparency. This has led to a "two-tier" market where "credibly conflict-free minerals" are garnering higher prices than those that are not traceable. (Bafilemba, Mueller and Lezhnev 2014: 2) It has led regional governments and other international bodies to speed up reforms, like the Congolese government traceability mechanism, and the following of OECD Due Diligence Guidance.² And, it has cleared the way, in some cases, for legitimate mining operations in these regions. (Bafilemba, Mueller and Lezhnev 2014: 16)

Despite this positive progress, The U.N. Group of Experts on the Democratic Republic of the Congo submitted that in 2013 98% of artisan gold was still illegally smuggled out of the Congo. (U.N. Security Council 2014: Para. 171) Further, the presence of armed groups in regions with

² For more information on the OECD Due Diligence see Annex 1

artisanal miners and the corruption of elites and state agents is still a major problem. (U.N. Security Council 2014: Para. 392)

European Union Proposed Regulation

The European Union stated in March 2014 that it would implement an “integrated EU approach” in an effort to prevent “profits from trading minerals being used to fund armed conflicts.” (European Commission 2014) This approach is outlined in the *setting up a Union system for supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high-risk areas* proposed Regulation (Regulation). It is meant to complement Section 1502 of Dodd-Frank. The Regulation focuses on “upstream users,” i.e. smelters or refiners who import minerals, whereas Section 1502 focuses on “downstream users,” i.e. manufacturers of products containing these minerals.

The Regulation is a voluntary system of identification which focuses on importers of minerals and metals, and is based on commodity chain due diligence, and annual reporting. (European Commission 2014) Importers who submit to the Regulation are then obligated to follow OECD Due Diligence Guidance and various other provisions, including third party audits, generating reports for Member State authorities, and communicating findings with immediate downstream purchasers and to the public “as widely possible.” (European Commission 2014: 9)

If a company has joined but is found not to be in compliance with the Regulation a European Union Member State authority can ask it to take remedial action, and if this is inadequate it can issue a “non-recognition notice for the 'responsible importer' certificate.” (European Commission 2014) The European Commission will also be publishing annually a list

of responsible smelters and refiners based on the information submitted by Member States.

Unlike Dodd-Frank Section 1502, the Regulation is global in scope and does not specify a country or region of origin for these minerals.

With around 25% of the global trade in tin, tantalum, tungsten and 15% in gold, the European Union hopes that the Regulation will curb conflict and human rights abuses without stopping the legitimate trade in minerals, an important income source for individuals in these countries. They also hope that it will assist EU companies to comply with various other due diligence systems. (European Commission 2014) The text of the Regulation is not finalized and will be examined by the European Union Parliament and the European Council, so there is not yet any data on how effective it has been.

There are two broad criticisms. The first, from NGOs such as Global Witness and Amnesty International, is that it is voluntary and because of this likely not to have a significant impact. (Neslen 2014, Caulderwood 2014) The second is that, in targeting only the 400 or so importing smelters and refiners but not consumer goods companies, it is too limited in scope. (Neslen 2014)

The intentions of the Kimberley Process, Dodd-Frank Section 1502 and the EU Regulation are laudable: to stem the flow of conflict diamonds and ultimately to stop the human rights abuses, deaths and displacement of vulnerable individuals in these regions. As well, there has been some success. Due to the Kimberley Process, there has been a reduction in the global trade in conflict diamonds and increased transparency in the commodity chain. Dodd-Frank Section 1502, while still new, seems to have reduced conflict in the Democratic Republic of the Congo, at least in tin, tantalum and tungsten. It is safe to say that these schemes are much better

than doing nothing at all. Again, it is unclear what effect the EU Regulation will have as it has not yet been approved.

The problems, however, with the Kimberley Process and the EU Regulation are that they are voluntary. And, in a voluntary scheme there will always be the outliers who continue business-as-usual. This is clear in the case of Venezuela and Zimbabwe. There must be a more effective way of compelling compliance. The Dodd-Frank Act goes further than either in doing so. However, there is no punishment for those using conflict minerals, except in the court of public opinion. Again, due to the horrific nature of the trade in conflict minerals, more must be done to compel compliance. The precautionary principle, which focuses on avoiding risk in the first place rather than shedding light afterward, is an effective method of doing so.

The Precautionary Principle

The precautionary principle was initially used in the context of marine pollution and at the global level was first implemented through the Montreal Protocol in 1987. Today it is used in many aspects of environmental and human health law. (Bodansky 2004: 383) It is an important concept in the health sciences and in environmental risk policy and can be understood as taking a cautious approach with the intention of averting harm. (Harremoes et al: 2002: 2) There are two widely-cited definitions. The first is from the Wingspread Conference on the Precautionary Principle:

Where an activity raises threats of harm to the environment or human health, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically. In this context the proponent of an activity, rather than the public, bears the burden of proof.

– 1988 Wingspread Conference

The second is from the Rio Declaration on Environment and Development:

Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

—1992 Rio Declaration

Carolyn Raffensperger and Joel Tickner sum it up succinctly: “if there is a potential for harm from an activity and if there is uncertainty about the magnitude of impacts or causality, then anticipatory action should be taken to avoid harm.” (1999: 2) At its core, the precautionary principle implies that there are “some damages [that] cannot be repaired or compensated with money because not everything can be converted into money.” (Costa 2012: 17)

According to Per Sandin (1999) there are four interrelated dimensions of the precautionary principle: 1) the threat dimension—the type and extent of danger; 2) the uncertainty dimension—scientific knowledge of the threat; 3) the action dimension—what to do about it; and 4) the command dimension—the way in which the course of action is laid out. (pp. 890-891) These four dimensions are important when examining the operationalization of the theory. Put another way, Sandin (1999) suggests that the precautionary principle is best expressed as an “if-clause.” “If there is a threat, which is uncertain, then some kind of action is mandatory.” (p. 898)

In this vein, proponents note that following the precautionary principle is much more than taking merely precautionary action. It is, by definition, a principle based upon normative or moral judgements and goes beyond pragmatism. As Nathan Dinneen notes, “Those who invoke the precautionary principle are not opposed to precaution being deemed pragmatic, they nonetheless take the argument for precaution a step further in appealing to its principledness in order to morally or legally ground precautionary measures.” (Dinneen 2012: 2)

Luiz Costa (2012) argues that the ethical foundation of the precautionary principle derives from the concept of prudence – that we have a moral responsibility to prevent harm or damage. (p. 14) *Prima facie* this ethical stance is straightforward. However, the operationalization of the precautionary principle, particularly when using it in the face of human rights violations, is somewhat more problematic. Delineating exactly what the precautionary principle means in practice is difficult and the problem is not simply one of vagueness—of applying an agreed norm in borderline situations. (Bodansky 2004: 381) This is because a policy based upon the precautionary principle must outline how risk is identified and assessed, and both over- and under-protecting can have high costs. (Raffensperger and de Fur 1999: 934)

While aspects of risk assessment can be considered “as much policy and politics as it is science,” Stephen M. Gardiner (2006) argues that “[we should] reject the idea that the precautionary principle is merely political.” (p. 36, 40) And, although in this context Gardiner is speaking about the environment, he is right in the broader sense that the precautionary principle cannot be too vague and must “provide more guidance to decision-makers.” (p. 43)

The argument of this paper is that the precautionary principle can be applied in the context of global governance where an agreement or policy is likely to produce any form of considerable harm to individuals and groups. This approach would mitigate significant harm. Not only this, but it would not be applied in a vacuum. There is already a precedent for its use internationally and in some countries domestically.

Precedents for the Precautionary Principle

According to Owen McIntyre and Thomas Mosedale, the precautionary principle has already become a norm as international customary law—i.e. international duties that are brought about by state custom or practice. (p. 41) Some international agreements have already used the

precautionary principle in their language, including the Montreal Protocol of 1987 and the Rio Declaration of 1992.

In Europe the precautionary principle was first introduced into broader European Community law in the Maastricht Treaty in the context of the environment (Article 130r par 2.). It was delineated further in extensive detail in the 2000 *Communication from the Commission on the precautionary principle*. Domestically in Europe it has been incorporated into law in many countries, including Germany, Belgium and the Nordic countries. (Sirinskiene 2009: 356) And, in February of 2005 the French enshrined their Charter for the Environment, which features the precautionary principle, into their constitution. (Dinneen 2012: 6)

In Canada the precautionary principle was defined in the 1996 Oceans Act of Canada and was added as a supplement in the 1999 Environmental Protection Act of Canada. In Australia it was included in the 1993 Environmental Protection Act and although the United States has not yet formally entrenched the precautionary principle, in aspects of the environment and health sciences it has “fully adopted precautionary approaches.” (Fabry and Garbasso 2014: 2) The precedent for using the precautionary principle in international treaties is already there.

Both domestically and internationally the precautionary principle is being used as an approach to mitigate risk. Why has it become so pervasive? Simon Grant and John Quiggin (2013) believe that it has done so because it has strong “intuitive appeal.” They further state that, “in dealing with complex, fragile and poorly understood natural systems, it seems to make sense to ‘err’ on the side of caution.” (p. 30)

Operationalizing the precautionary principle rests on the concepts of harm (what is harmful?), uncertainty (how can we be sure it is harmful?) and the burden of proof (who has to

prove that it is harmful?), which feature prominently in any discussion of preemptory policy-making.

Harm

A clearly defined, moderate form of the precautionary principle must be adopted if the principle is to have any policy relevance. In order for this to be accomplished it is necessary to determine which threats would “trigger the precautionary principle” and what kind or level of precaution must then take place. (Gardiner 2006: 38)

Harm is key to this. According to Andrew Linklater, there is an obligation not to directly, or indirectly, contribute to the harm of others. Harm is a pervasive concept that can hold multiple meanings. However, an obligation not to cause serious bodily or mental injury to individuals or groups is an established legal convention in international relations.

The harm principle is based upon an intrinsic equality. (Vernon 2009: 16) All human beings are tied together by “a shared capacity for pain and suffering,” regardless of political or cultural differences. (Linklater 2001: 265) Our obligation not to kill or maim one another is the very basis of natural law. (Hart 1977: 190) This definition of harm—serious bodily or mental injury—is, at the very least, the foundation of any policy based upon the harm principle.

While there is no agreed upon notion of the good in international relations, Andrew Linklater (2006) posits that prohibitions of harm in international law have brought about an era which promotes humaneness. By deciding to introduce laws with the intention of eradicating particular types of harm, international law has engendered a certain “fundamental welfare interest” for humanity. For Linklater, this is when “one culture, society, or historical era establishes a higher degree of progress than another, if the first shows more sensitivity to (less tolerance of) the pain and suffering of human beings than does the second, as expressed in the

laws, customs, institutions, and practices of the respective societies or eras.” (pp. 329-330) As such, harm in this context, as “a central part of a global ethic” (Linklater 2002: 326) can be the basis of the precautionary principle trigger.

Maiming, raping, enslavement, and the killing of individuals caused or exacerbated by the use of conflict minerals goes against these most basic global ethical norms and should clearly be a trigger for harm. Linklater (2002) also contends that negligence, while different than intentional harm, is also unacceptable. (p. 330) Therefore, contributing to the harm of others through advertently or inadvertently funding those who commit brutal acts should be seen in the same light as carrying out the atrocities oneself. This how harm should be seen when employing the precautionary principle.

Uncertainty

In order to understand the role of uncertainty when employing precautionary principle, the difference between precaution and prevention need to be explained. Precaution and prevention are two similar but different concepts. Both are concerned with anticipating and stopping harm, however prevention implies that the harm is known, whereas precaution is a principle that addresses an unknown level of harm. (Costa 2012: 16)

Just as the precautionary principle is not uniform in its definition, it also has a spectrum of approaches. It is often criticized for its imprecision, leading detractors to argue that it can be employed in any situation where it cannot be proven that there is no harm. However, this is a criticism of the Ultraconservative approach, rather than the precautionary principle in general. On the other end of the spectrum is the Ultraminimal Precautionary Principle. Employing the precautionary principle in this way, action can only be taken when there is 99.9 percent certainty that it will result in the end of the world. (Gardiner 2006: 38) Stephen M. Gardiner (2006)

argues that all reasonable individuals will reject both the Ultraconservative Precautionary Principle and the Ultraminimal Precautionary Principle, instead opting for some form of “intermediate position.” (p. 38)

Related to this is the criticism that the precautionary principle is cost blind. Cass Sunstein (2005) points out that “our resources are limited and that if we spend large amounts of resources on highly speculative harms, we will not be allocating those resources wisely.” (p. 25) But this goes too far. There is a difference between acting before conclusive proof is available versus speculation.

Like harm, uncertainty does not necessarily have to be precise. With precaution there are times when something cannot be absolutely proven or disproven. Knowledge can be incomplete or imperfect. Yet, in some cases where scientific uncertainty exists there can still be confidence in potential or realized harm. (Stirling and Gee 2002: 524) A primary issue with the trade of conflict minerals is that there is incomplete information. When a mineral is known to be from a conflict zone, banning that mineral is straightforward. In reality, due to the understandable lack of ability to obtain on-the-ground information in conflict zones, this is not always possible. But, accepting the existence of the precautionary principle as a norm would mean that states could not use this type of scientific uncertainty to justify inaction. (Bodansky 2004: 388) So, the precautionary principle would be employed when there is the risk that a mineral is from a conflict zone, even if it cannot be confirmed.

Of course, uncertainty does not mean the precautionary principle should be employed in any situation, regardless of the information. In international trade this level of imprecision might be used to enact protectionist measures as a catch-all principle employed by a state to secure a trade advantage. (Aven 2011: 1523) In order to be a beneficial policy, the precautionary principle

requires a credible threat. (see Wreckert 2012) There must be “reasonable grounds for concern.” (Freestone and Hey 1996: 5) But, again, the precautionary principle should be employed when there is enough evidence to produce a duty to act, despite some uncertainty. A lack of specifics should not be enough to prevent states from taking measures to decrease or eliminate harm. (deFur and Kaszuba 2001: 157) In the context of conflict minerals states should employ bans on the importation, use and sale of minerals *suspected* of coming from conflict zones.

The Burden of Proof

For the precautionary principle approach to be successful in this context the burden of proof must be on the individual or company who extracts or imports the minerals. The onus should be on those who wish to engage in an activity deemed risky to show that their action is not going to produce serious harm—or at least that the harm will be minimized. (Ambrus 2012: 259) In law the precautionary principle is already used as justification for governments to ban certain activities. In trade law it can be similarly used, making it the job of those who claim to be discriminated against to prove why the use of the precautionary principle is unfair. (Ibid. pp. 262-264)

In terms of conflict minerals, the shift in the burden of proof is a method of ensuring that minerals imported or used in consumer products are not a part of funding conflict. Companies who wish to import minerals for refinement would have to show proof that the minerals they are importing are not from conflict zones. This burden of proof should also apply to companies who use conflict minerals in their products.

The cost of this would be minimal for companies who are already complying with the SEC rules. However, the use of the precautionary principle would help to prevent backsliding. Moreover, it would address problems associated with self-regulation. There would be a cost for

companies who claim that their minerals are untraceable. These firms would have to find alternative sources of minerals. However, the risk of severe harm is high enough to justify this level of precaution.

International Law

There is both a precedent in international law for the use of the precautionary principle, and also ways of aligning it with existing trade law. Critics of international trade liberalization, regimes, and agreements often argue that trade rules trump human rights concerns. The World Trade Organization (WTO) often takes the brunt of these criticisms. However, as Gabrielle Marceau (2002) notes, “unless otherwise prescribed, WTO provisions must evolve and be interpreted consistently with international law, including human rights law.” (p. 756) And, as Lisa Forman (2011) argues, the connection between trade and human rights already exists within international law. (p. 155) In the 1969 Vienna Convention on the Law of Treaties—the agreement which defines treaties—Article 53 states that “A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.” (Vienna Convention on the Law of Treaties 1969)

Human rights are one such norm. Gabrielle Marceau (2002) states that “[the] WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgements in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world.” (p.790) Serious human rights abuses would be taken into consideration in dispute settlements. Further, she argues that no interpretation of trade law would ignore violations of *jus cogens*, the concept that “certain norms of international law are so compelling that sovereign immunity falls away.” (Stephan 2011: 1074) Moreover, Lisa Forman (2011) argues that human rights are found in

obligations *ergo omnes* (state duties owed “to all”) and the Charter of the United Nations. (p. 155) It is a legal principle that applies to all states and all institutions. (Marceau 2002: 756)

Institutions like the WTO are not forums for adjudicating human rights violations. WTO Member states are responsible for ensuring that their actions do not violate human rights law. However, states could potentially use human rights violations as a rationale to block the trade of certain goods. Article XX(a) of the General Agreement on Trade and Tariffs (GATT), an agreement which was incorporated into the founding articles of the WTO, allows for member states to refuse imports based upon conflicts with “public morals.” (Marceau 2002: 789)

This clause can be used as a defense by states who wish to ban imports of goods that violate their sense of morality. For example, Berta Hernandez-Truyol and Stephen Powell (2009) argue that the public moral clause can be expanded to include bans on products made by child labour. (p. 145) Following this logic, GATT Article XX(a) could be used to defend a state’s decision to employ the precautionary principle in the context of conflict minerals.

Additionally, there is an established norm of referencing the precautionary principle within the WTO dispute settlement process. Formally, the WTO’s framework has few references to the precautionary principle. However, the spirit of the principle can be found in the WTO’s Sanitary and Phytosanitary Measures (SPS) which is an agreement outlining “how government can apply food safety and animal and plant health measures” in the context of trade. (WTO 1994) Essentially, in some cases, it allows member states to break trading rules if there is a risk of significant harm to health or the environment.

Article 5.2 of the SPS sets out the rules of risk assessment and, while appearing fairly stringent, has been interpreted more loosely in WTO case law. (Wagner 2012: 741) In the 1998

WTO case *EC Measures Concerning Meat and Meat Products (Hormones)* the Appellate Body explained its reasoning for looser standards:

It is essential to bear in mind that the risk that is to be evaluated in a risk assessment under Article 5.1 is not only risk ascertainable in a science laboratory operating under strictly controlled conditions, but also risk in human societies as they actually exist, in other words, the actual potential for adverse effects on human health in the real world where people live and work and die.

– *EC-Hormones* case, Appellate Body Report 1998, para 187

Further, Article 3.3 of the SPS allows for member-states to employ “higher standards” than set out in the agreement if based upon “international standards.” (Wagner 2012: 739-743) Finally, Article 5.7 of the SPS allows member-states to take provisional measures in situations where “relevant scientific evidence is insufficient... on the basis of available pertinent information” (WTO 1994)

So, not only is there precedent in international law, but there is also precedent in trade law. The WTO dispute settlement has mechanisms to take serious harm and precautionary action into consideration when evaluating regulatory measures. The precautionary principle sits well in this context.

Discussion and Conclusion

The trade in conflict minerals has had harrowing consequences for its victims and has enriched a small elite who continue these practices, despite them being extensively detailed at least since the late 1990s. Efforts like the Kimberley Process, Section 1502 of Dodd-Frank and the EU Regulation are laudable and those already implemented have certainly made an impact. However, due to the horrendous nature of the trade in illicit minerals more must be done. The major failings in some of the current agreements is their voluntary nature and lack of consequences for violators.

The precautionary principle approach would complement these agreements by closing the regulatory gap related to voluntary membership and punishing violators. The triggers of the precautionary principle require clear harm and some level of certainty. In the case of conflict minerals these conditions are met. Not only this, but the spirit of the precautionary principle has precedents and sits well with current international agreements, including the WTO.

The precautionary principle approach is a two-step process. First, those found mining, exporting/importing or using minerals in their products that are associated with conflict regions would be instructed to exercise due diligence, meaning providing a valid commodity-chain report detailing how they were *not* using minerals from conflict-affected mines. Companies could fulfil this burden of proof obligation in part by following the OECD due diligence guidance, something some are already doing under Dodd-Frank Section 1502. However, in cases where minerals have a high likelihood of being associated with conflict there would be an additional obligation to show that the extraction of the minerals did not contribute to conflict and/or human rights abuses.

If found to be sourcing from conflict zones, companies would have to find alternative mineral sources. The company would not be banned from mining in an entire region or country, rather they would be able to mine anywhere they could prove that the source was legitimate. Firms who were unable to trace the minerals would also be obligated to find alternative sources. If they did not find an alternative source they would be fined and their products banned. The key point is that the burden of proof would be with the firm itself to prove that their minerals were conflict-free or face fines and bans on the importation and sale of their products.

This paper has provided an overview of current agreements related to the trade in illicit minerals mined in conflict zones. It has addressed their flaws through the application of the

precautionary principle and how it could be operationalized to address human rights violations in the global economy. Essentially, once the *potential* for serious harm or injury has been identified, as in the case of conflict minerals, the onus would be on the firm itself to show how they were conducting their operations responsibly or to find alternative sources.

Annex 1

The Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (OECD Due Diligence)

The OECD Due Diligence guidelines were developed in 2011 “through a multi-stakeholder process,” including significant involvement from OECD countries, the United Nations Group of Experts on the Democratic Republic of Congo, and members of the International Conference on the Great Lakes Region, including Angola, Burundi, Central African Republic, Republic of Congo, Democratic Republic of Congo, Kenya, Rwanda, Sudan, Tanzania, Uganda and Zambia. (OECD 2013: 3)

The objective of the Due Diligence guidelines is to “help companies respect human rights and avoid contributing to conflict through their mineral sourcing practices.” (OECD 2013: 3) Globally it is the most widely adopted framework for conflict minerals sourcing. For the purposes of this paper it is important to note that the SEC recognized the Due Diligence guidelines as the appropriate international framework for companies filing under Section 1502 and that the EU proposed Regulation obliges its participants to follow them.

The guidelines set out a five step framework “for responsible global supply chain management of tin, tantalum, tungsten, their ores and mineral derivatives, and gold” (OECD 2013: 12):

- 1) Establish strong company management systems
- 2) Identify and assess risk in the supply chain
- 3) Design and implement a strategy to respond to identified risks
- 4) Carry out independent third-party audit of supply chain due diligence at identified points in the supply chain
- 5) Report on supply chain due diligence (OECD 2013: 17-19)

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