

# What's Wrong with Dodd-Frank 1502?

## Conflict Minerals, Civilian Livelihoods, and the Unintended Consequences of Western Advocacy

**Laura E. Seay**

### Abstract

Although its provisions have yet to be implemented, section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act is already having a profound effect on the Congolese mining sector. Nicknamed “Obama’s Law” by the Congolese, section 1502 has created a de facto ban on Congolese mineral exports, put anywhere from tens of thousands up to 2 million Congolese miners out of work in the eastern Congo, and, despite ending most of the trade in Congolese conflict minerals, done little to improve the security situation or the daily lives of most Congolese. In this report, Laura Seay traces the development of section 1502 with respect to the pursuit of a conflict minerals-based strategy by U.S. advocates, examines the effects of the legislation, and recommends new courses of action to move forward in a way that both promotes accountability and transparency and allows Congolese artisanal miners to earn a living.

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Consequences of Western Advocacy**

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## **Foreword**

Hidden within the 2,300-page Dodd-Frank Wall Street Reform and Consumer Protection Act are two sections (1502 and 1504) aimed not at preventing another financial meltdown but, rather, at fostering transparency about commercial activities in foreign countries. In 2010, CGD awarded its Commitment to Development Award to Publish What You Pay in recognition of the role it played in passing Section 1504 of the bill, which requires companies listed on U.S. stock markets to disclose payments to foreign governments. Section 1504 was hailed as a historic victory for the transparency agenda, and an important tool to help citizens hold their governments accountable. Section 1502, on the other hand, requires publicly traded companies to report to the SEC whether they source conflict minerals from the Democratic Republic of the Congo (DRC) or its neighbors. It is much more controversial.

In this paper commissioned by CGD, Laura Seay, assistant professor of political science at Morehouse College and specialist on the DRC, analyzes 1502 and its effects—even before the rules are implemented. She argues that this well-intentioned but ultimately misguided provision has already had unintended consequences that hurt those it is supposed to help. Aimed at curbing the flow of revenues that fuel conflict, 1502 has led to a de facto boycott on Congolese minerals given uncertainty over regulation and the impossibility of tracing certain minerals such as gold. The result: millions of artisanal miners are out of work, and the livelihood of millions more put at risk without any significant connection to a reduction in the violence.

Seay explores what went wrong and argues that the initiative was based on misperceptions about the relationship between mineral exploitation and conflict in the Congo, the nature of the conflict, and the feasibility of traceability schemes in such an environment. Seay demonstrates the need to reassess this policy with a more careful understanding of the dynamics on the ground. This is especially critical as the SEC determines if the provision is implementable and governments in Europe consider similar legislation.

Todd Moss  
Center for Global Development

## Executive Summary

Although its provisions have yet to be implemented, section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act is already having a profound effect on the Congolese mining sector. Nicknamed “Obama’s Law” by the Congolese, section 1502 has created a *de facto* ban on Congolese mineral exports, put anywhere from tens of thousands up to 2 million Congolese miners out of work in the eastern Congo, and, despite ending most of the trade in Congolese conflict minerals, done little to improve the security situation or the daily lives of most Congolese. In this report, I trace the development of section 1502 with respect to the pursuit of a conflict minerals-based strategy by U.S. advocates, examine the effects of the legislation, and recommend new courses of action to move forward in a way that both promotes accountability and transparency and allows Congolese artisanal miners to earn a living.

## Recommendations

- 1. Implement Dodd-Frank section 1502 in phases with clear annual benchmarks over three years.** In order to eliminate confusion about competing traceability schemes and to allow corporations time to establish realistic, workable procedures, section 1502 should be implemented slowly and in stages. Emphasis should be placed on a consensus-building process and improving buy-in for participation in traceability schemes in Congolese mining communities.
- 2. Provide immediate assistance to affected mining communities.** Humanitarian assistance should immediately be provided to miners and their families who have lost reliable sources of income as a result of the *de facto* ban on the Congolese mineral trade. In particular, donors should assist miners’ families with short-term education and health care expenses.
- 3. Turn traceability into a jobs program.** The international community should work with local actors to improve economic livelihoods opportunities for Congolese miners. Particular efforts should be focused on hiring former miners to work for traceability schemes and on developing alternative livelihood opportunities beyond subsistence agriculture.
- 4. Create formal mechanisms for Congolese leadership in the implementation process.** In order to find practical and realistic ways of combating the conflict minerals problem, a wide spectrum of Congolese civil society leaders should be at the forefront of traceability scheme implementation processes as well as efforts to improve regional security. The international community should create mechanisms by which all voices – including dissenting ones – can be heard and compromises can be reached.

5. **Focus on security sector reform as a distinct issue.** Given the lack of governance and state control in eastern D.R. Congo, as well as armed groups' access to a wide variety of revenue sources, improving mineral traceability in the region is highly unlikely to improve the security situation. Policy makers should focus separately on security sector reform and work to protect civilians independently of the conflict minerals issue.

## List of Acronyms

BGR	German Federal Institute for Geosciences & Natural Resources	
CNDP	Congr�s National pour la D�fense du Peuple	Former DRC rebel group
EICC	Electronic Industry Citizenship Coalition	Industry watchdog coalition
EITI	Extractive Industries Transparency Initiative	Global standard for revenue transparency
FDLR	Forces D�mocratiques de Liberation du Rwanda	DRC rebel group
ITIC	Information Technology Industry Council	Industry lobby organization
ITRI	International Tin Research Institute	Tin industry organization
ICGLR	International Conference of the Great Lakes Region	Regional civil society organization
PROMINES	Mineral Sector Project	World Bank transparency project
OECD	Organization for Economic Co-operation & Development	International organization
RINR	ICGLR Regional Initiative Against the Illegal Exploitation of Natural Resources	
SEC	Securities and Exchange Commission	U.S. government agency

## Introduction

The ongoing crisis in the eastern Democratic Republic of Congo, where up to 6 million excess deaths have been recorded since 1998 and government neither controls nor governs its territory in a meaningful sense, is cause for concern to the international community and the United States government. The D.R. Congo is home to more than 60 million people who have suffered profoundly as a result of their state's collapse and a series of local, national, and international conflicts that began in the early 1990's and some of which continue until today. In the aftermath of the contentious and contested November 2011 elections, DRC's future stability and ability to develop are both in question. In the United States, the issue of conflict minerals has become one of the dominant narratives about the crisis. As Autesserre notes, however, the overwhelming focus on conflict minerals as a cause of conflict in the D.R. Congo has perverse consequences that actually prevent international and local actors from developing a comprehensive solution to the country's conflicts.<sup>1</sup> Moreover, Western advocacy efforts on conflict minerals have thus far made life more difficult for many Congolese while failing to stop the violence they purport to address. Instead, these efforts have thus far increased smuggling,<sup>2</sup> led armed groups to seek other sources of revenue, and left up to 2 million Congolese artisanal miners out of work. As is the case with the Kimberley Process, good intentions and the belief that attacking the perceived economic roots of conflict was a path to peace have largely proved ineffective.

In this paper, I seek to explain why efforts to create a mineral supply chain tracing scheme have thus far failed to improve the D.R. Congo's security situation, and why these efforts are unlikely to lead to peace in the future. I begin by providing brief background on the mineral sector in the D.R. Congo and then turn to a discussion of recent advocacy efforts relating to the region. Following that, I then turn to a discussion of the creation of legislation that became Dodd-Frank Sections 1502 and 1504 and the effects this legislation has had since its passage in July 2010. I debate the decision to pursue "conflict minerals" as a means by which to make progress on improving Congolese security, and criticize advocates for misunderstanding the relationship between conflict and the local economy. Finally, I conclude with a summary of the debate over the Securities and Exchange Commission regulations that are to be issued under section 1502 and make policy recommendations for moving forward in a way that can satisfy the advocacy community, industry, and those who care about responsible supply chain sourcing while allowing Congolese artisanal miners to work and provide for their families and moving toward a more transparent, accountable, and legitimate mining sector in the eastern D.R. Congo.

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<sup>1</sup> Séverine Autesserre, "Dangerous Tales: Dominant Narratives on the Congo and their Unintended Consequences." *African Affairs* (Forthcoming 2012).

<sup>2</sup> Jonny Hogg and Graham Holliday, "Conflict minerals crackdown backfiring in Congo." Reuters (30 December 2011). Available: <http://af.reuters.com/article/drcNews/idAFL6E7NU25720111230?sp=true>

## **Background: The Mineral Trade in the Eastern D.R. Congo**

The Democratic Republic of Congo is one of the richest sources of natural resources on Earth. Contained within the country's borders and territorial waters are oil, gold, rubber, cobalt, copper, uranium, diamonds, tantalum, cassiterite, wolframite, and countless other mineral resources. Abundant natural resources are found throughout Congolese territory, but particular minerals are highly concentrated in certain areas. Katanga province, in southeastern D.R. Congo, is home to high concentrations of cobalt, copper, uranium, and tin, while much of the region's gold is found in the northeastern Orientale province (particularly in Ituri district) and the northern reaches of north Kivu. Diamonds are largely located in the central Kasai provinces, while the eastern North and South Kivu provinces have high concentrations of tin, cassiterite, tungsten, and tantalum.

The D.R. Congo's natural resources have always been a draw for outsiders looking for wealth in the vast territory. Belgian colonialism was intimately tied to rubber extraction and used brutal methods to force the Congolese to gather it. American scientists used Uranium-235 from Katanga in the atomic bombs dropped on Nagasaki and Hiroshima to end World War II, and Cold War-era policy makers overlooked dictator Mobutu Sese Seko's excesses and corruption to ensure that they could maintain access to uranium and other essential minerals.

Congolese minerals again drew global attention in the late 1990's and early 2000's as world prices for tantalum skyrocketed. Tantalum, a mineral that is a key component in many consumer electronics, was in high demand as consumer demand for mobile phones and gaming systems. Tantalum is found in the D.R. Congo in the form of coltan (columbite-tantalite) and armed groups, including the armies of Rwanda and Uganda, quickly realized that they could profit from the extraction of tantalum and other regional minerals. However, it is important to note that mineral extraction was neither the cause nor root of violence in the Kivu provinces or Ituri. As anthropologist Stephen Jackson noted in 2003, "The present war in the DRC did not begin with explicitly economic objectives. Rather, as the war reached a stalemate nationally, so belligerents turned inwards to the territory they controlled, capitalising – personally as well as collectively – on the rich resources available. Coltan both finances violence and provides an incentive for it."<sup>3</sup>

D.R. Congo's role as a supplier of coltan to international markets has been repeatedly and erroneously overstated, as documented by Michael Nest. A series of incorrect and misinterpreted assertions led to the oft-repeated claim that Congo is home to "80% of the world's coltan reserves," or "supplies," yet there is no basis of truth to either of these claims. As Nest notes, we do not actually know how much tantalum is in the D.R. Congo, but "The most informed estimate is that Central Africa has around 9% per cent of the global reserves.

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<sup>3</sup> Stephen Jackson, "Fortunes of war: the coltan trade in the Kivus" in Sarah Collinson, ed. *Power, Livelihoods, and Conflict: Case Studies in Political Economy Analysis for Humanitarian Action*. Overseas Development Institute Humanitarian Policy Group (2003), 21-36.

The DRC's reserves are the major component of these – perhaps 7 to 8 per cent of global reserves.”<sup>4</sup> Thus the importance of Congolese minerals in global supply chains for coltan is not as large as many have claimed. Its importance to the Congolese economy is still very significant.

There is no question that some Congolese and foreign armed groups fought for control of the mineral trade in eastern D.R. Congo, nor is there a question that some groups engaged in mining also engage in civilian-directed violence. The United Nations Group of Experts on the Democratic Republic of Congo have done excellent work documenting the ways that the mineral trade finances violent armed groups in the eastern Congo.<sup>5</sup> However, not all violence in the eastern D.R. Congo is related to the mineral trade, and not all mines are controlled by violent actors. Moreover, the eastern Congolese economy is largely dependent on mineral trade, whether linked to violence or not. As Jackson notes, “tantalum mining has become a critical mode of survival for many at the grassroots.”<sup>6</sup> In many families, mining activity is generational and represents their only potential economic livelihood.<sup>7</sup>

It is difficult to overstate the importance of the mining sector to the Congolese economy. As Goma's Pole Institute Research Director Aloys Tegera notes, it “accounts for 80% of the exports, 72% of the national budget and 28% of GDP according to the latest available statistics. Its output and sales are of major importance for the economy. Also other economic sectors, for example the agricultural sector, are influenced by the mining sector. Locally, everybody depends on mining!”<sup>8</sup>

## **Congo Advocacy and the Mineral Trade**

Prior to the late 2000's, there was little advocacy attention on the situation in the eastern Congo. During the war, journalists had actively covered the region, but from about 2002 on, most international attention focused on the growing crisis in Darfur. While a few newspaper articles on the Congo situation appeared from time to time and the International Crisis Group and several non-governmental organizations released regular reports on the crisis, there was no grassroots constituency centered around drawing attention to or effecting change in the D.R. Congo.

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<sup>4</sup> Michael Nest, *Coltan* (Cambridge: Polity Press, 2011), 18.

<sup>5</sup> Reports of the Group of Experts Submitted through the Security Council Committee Established Pursuant to Resolution 1533 (2004) Concerning the Democratic Republic of Congo. Available: <http://www.un.org/sc/committees/1533/egroup.shtml>

<sup>6</sup> Stephen Jackson, “Making a Killing: Criminality and Coping in the Kivu War Economy.” *Review of African Political Economy* 93:94 (September 2002), 516-536.

<sup>7</sup> Sara Geenen, “Constraints, opportunities, and hope: which future for gold miners and traders in Kamituga, South Kivu?” in An Ansoms and Stefaan Marysse, eds., *Natural Resources and Local Livelihoods in the Great Lakes Region of Africa* (New York: Palgrave, 2011).

<sup>8</sup> Aloys Tegera. Quoted in “Report of Roundtable on Conflict Minerals Legislation.” makeITfair Campaign (11 July 2011). Available: <http://makeitfair.org/the-facts/reports/roundtable-on-conflict-minerals-legislation>



That changed in 2007 with the launch of the Enough Project, which was created with the primary purpose of developing an American constituency around ending and preventing conflict in Africa. Enough's early advocacy on the D.R. Congo focused on the horrific nature of civilian-directed violence and the need for increased civilian protection efforts. Their 2007 and 2009 reports and activist briefs emphasized the complex nature of the violence there and the need for multi-pronged approaches to crisis resolution.<sup>9</sup> These documents contained little or no mention of the mineral issue. They also did little to build a grassroots constituency engaged on Congo in the United States.

Enough's focus shifted dramatically in April 2009 with the release of their "Can You Hear Congo Now? Cell Phones, Conflict Minerals, and the Worst Sexual Violence in the World" strategy paper in which Enough founder John Prendergast directly linked Western consumers' ownership of electronics like cell phones to sexual and other forms of violence in the eastern D.R. Congo.<sup>10</sup> The paper laid out a strategy for engaging Western consumers on the Congo by pressuring electronics companies and government to avoid using minerals tied to conflict in consumer electronics. It formed the basis for Enough and other advocacy organizations' activities relating for the D.R. Congo from 2009 until today. It is important to understand that the shift to a focus on conflict minerals galvanized grassroots activists on Congo and built a broad constituency around the situation in the eastern Congo. The activists' use of consumer electronics, particularly mobile phones, as a means of tying consumers to the crisis in the Congo was effective in making grassroots activists feel as though they had a connection to the crisis and could make a difference. After the adoption of this strategy, advocacy groups proliferated, news coverage of the D.R. Congo increased dramatically, and donations poured in to organizations working on the region.

Enough also pursued coalition relationships with several leading corporations. The most responsive of these corporations was Hewlett Packard, which wished to be at the forefront of conflict minerals advocacy among multinational corporations.<sup>11</sup> Enough gave high marks to HP, Motorola, Intel, Nokia, Microsoft, and Dell in their November 2010 rankings of companies making progress on conflict minerals. It is safe to assume that most of those companies work closely with Enough on the issue as "Stakeholder Engagement" – defined

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<sup>9</sup> See, for example, "Averting the Nightmare Scenario." Enough Project Activist Brief (10 September 2007). Available: <http://www.enoughproject.org/publications/averting-nightmare-scenario-eastern-congo-activist-brief> and Rebecca Feeley and Colin Thomas-Jensen, "Getting Serious About Ending Conflict and Sexual Violence in Congo." Enough Project Strategy Paper (19 March 2008). Available: <http://www.enoughproject.org/publications/getting-serious-about-ending-conflict-and-sexual-violence-congo>.

<sup>10</sup> John Prendergast, "Can You Hear Congo Now? Cell Phones, Conflict Minerals, and the Worst Sexual Violence in the World." Enough Project strategy paper (April 2009). Available: <http://www.enoughproject.org/publications/can-you-hear-congo-now-cell-phones-conflict-minerals-and-worst-sexual-violence-world>

<sup>11</sup> Hewlett Packard, *DRAFT (07/23/10) Conflict Minerals Advocacy and 90-Day Action Plan* (Internal document, 2010).

as working with an Enough-led coalition – is one of the indicators used to determine rankings.<sup>12</sup>

## The Road to Dodd-Frank Section 1502

Enough and other activist groups working on D.R. Congo pursued a legislative strategy to pass a law that would require companies to be more transparent and accountable in their mineral sourcing practices. Their efforts centered on House Resolution 4128, the Conflict Minerals Trade Act, the purpose of which was to:

help stop the deadly conflict over minerals in eastern Congo by regulating the importation and trade of tin, tungsten and tantalum – minerals commonly used in cell phones, laptop computers and other popular electronic devices. Under the bill, U.S. Commerce Department-sanctioned auditors would audit mineral mines declaring them conflict free or not. These mines would be mapped to show which ones fund conflict. Furthermore, importers would have to certify whether they were importing conflict minerals – companies that do import conflict minerals will be reported to Congress by the United States Trade Representative.<sup>13</sup>

HR 4128 was submitted by Representative James McDermott, Democrat of Washington State, and supported by the Center for American Progress (Enough’s parent organization), Human Rights Watch, Hewlett Packard, the International Labor Rights Forum, and the Information Technology Industry Council (ITIC, an industry lobby group). Despite gaining broad support from several sectors and getting co-sponsorship from other legislators after pressure from grassroots activists, the bill never moved out of the committees to which it was referred.

In July 2010, two provisions focusing on the D.R. Congo and conflict minerals were added to the Dodd-Frank Wall Street Reform and Consumer Protection Act. Section 1502 requires publicly trading companies to report to the Securities and Exchange Commission (SEC) and on their websites whether they source conflict minerals, defined as “columbite-tantalite (coltan), cassiterite, gold, wolframite, or their derivatives” from the D.R. Congo or its neighbors.<sup>14</sup> It requires further reporting and auditing from companies that use D.R. Congo or neighboring country conflict minerals, and requires the SEC to create specific

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<sup>12</sup> Enough Project, *Getting to Conflict Free: Assessing Corporate Action on Conflict Minerals*. (December 2010). Available: [http://www.enoughproject.org/files/publications/corporate\\_action-1.pdf](http://www.enoughproject.org/files/publications/corporate_action-1.pdf)

<sup>13</sup> OpenCongress Summary, *HR 4128: Conflict Minerals Trade Act*. Submitted to Congress 19 November 2009. Available: <http://www.opencongress.org/bill/111-h4128/show>

<sup>14</sup> Resource Consulting Services has an excellent explanation of the full implications of section 1502. *US Legislation on Conflict Minerals: RCS Private Services Guidance on the Dodd-Frank Act Section 1502* (April 2011). Available:

[http://www.resourceglobal.co.uk/documents/RCS\\_DF\\_ACT\\_GUIDANCE\\_APRIL\\_2011\\_lowres.pdf](http://www.resourceglobal.co.uk/documents/RCS_DF_ACT_GUIDANCE_APRIL_2011_lowres.pdf)

regulations as to how companies will satisfy the legislation's requirements.<sup>15</sup> Section 1504 requires increased transparency from companies registered with the SEC to disclose how much they pay foreign governments for access to minerals, oil, and gas.<sup>16</sup> Section 1504 has been less controversial with respect to the DRC, though there is certainly contention over the measure in other circles.<sup>17,18</sup>

## Consequences of Dodd-Frank

Section 1502, however, has provoked a great deal of controversy as a number of unintended consequences have developed since its passage. While the legislation gave the SEC 270 days to release rules on how companies are to report and audit their activities with respect to conflict minerals, meaning they should have been ready by April 2011, as of early January 2012, the regulations have yet to be released. The U.S. Chamber of Commerce and its member companies are threatening to sue over the legislation because they believe that the SEC has not "show[n] any benefits to investors, increased efficiencies for the marketplace or capital formation."<sup>19</sup> In other words, the Chamber believes that the regulations impose too stiff a burden on commerce without demonstrating market-based reasons for doing so.

As a result of this controversy, the SEC held a roundtable on conflict minerals on October 18, 2011 in which corporations and advocacy community representatives were invited to participate. The meeting was somewhat contentious and featured a lively debate over the challenges corporations face in implementing section 1502's potential rules. Most of the corporations present at the roundtable asked the SEC to delay implementation of the rules due to the complexity and cost of implementation.<sup>20</sup> For example, a representative of Kraft Foods noted at the meeting that verifying responsible sourcing with over 100,000 suppliers

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<sup>15</sup> "The 'Conflict Minerals' Provision in the Dodd-Frank Act Imposes New Disclosure Requirements on Manufacturers." McDermott Newsletters (22 July 2010). Available: [http://www.mwe.com/index.cfm/fuseaction/publications.nldetail/object\\_id/13114620-b2dd-466a-8392-e53e3da0a162.cfm](http://www.mwe.com/index.cfm/fuseaction/publications.nldetail/object_id/13114620-b2dd-466a-8392-e53e3da0a162.cfm)

<sup>16</sup> US PWYP Law 2010 – Sec. 1504 Dodd-Frank Wall Street Reform Act. Revenue Watch Institute. (July 2010) Available: <http://resources.revenuewatch.org/en/official-document/us-pwyp-law-2010-sec-1504-dodd-frank-wall-street-reform-act>

<sup>17</sup> In particular, the petroleum industry. See Ben Gemen, "Oil Industry presses SEC to keep company payment data locked up." The Hill E2 Wire blog. (12 August 2011). Available: <http://thehill.com/blogs/e2-wire/e2-wire/176629-oil-industry-presses-sec-to-keep-company-payment-data-locked-up>

<sup>18</sup> The relative lack of controversy over section 1504 with respect to D.R. Congo seems to have more to do with the overwhelming focus on 1502, which is where some in industry perceive a greater cost to disclosure. Also, D.R. Congo has relatively limited oil reserves, and many objections to 1504 thus far have come from the petroleum sector.

<sup>19</sup> Sarah N. Lynch, "U.S. SEC to hold round-table on conflict minerals." Reuters. (29 September 2011). Available: <http://af.reuters.com/article/idAFS1E78S0R920110929?sp=true>

<sup>20</sup> Emily Chasan, "Companies Urge SEC to Slow Down on Conflict Mineral Rule." *Wall Street Journal* (18 October 2011). Available: <http://blogs.wsj.com/cfo/2011/10/18/companies-urge-sec-to-slow-down-on-conflict-mineral-rule/>

for every product the company produces will be an enormous challenge.<sup>21</sup> When the SEC does release regulations for section 1502, it is unclear both what they will be and whether the Chamber will file suit against the rules, which most observers believe would result in section 1502 being thrown out by the courts. The Western advocacy community has responded to these challenges with an almost universally united argument that section 1502 should be immediately implemented, and a grassroots campaign against the Chamber's potential lawsuit is underway.

The primary industry lobby, the Information Technology Industry Council, argues that while it is committed to improving transparency and accountability in the Congolese mineral sector, ultimately, the solution to Congo's problems will not come from the private sector. Noted ITIC representative Rick Goss:

ITI members are committed to responsible sourcing practices and supported a federal disclosure requirement on minerals obtained from the DRC. Our companies have implemented a conflict-free smelter program and are working with global governments and civil society to jointly develop clean sourcing mechanisms to permit suppliers to remain economically engaged in the region.

Ultimately, however, this terrible conflict is rooted in the wholesale absence of basic governance, security and accountability in the DRC, which allows age-old ethnic tensions and conflicts over land rights to rage unabated. The DRC government and military are, at best, unable to protect their own citizens and, at worst, are reportedly complicit in committing atrocities against them. While the private sector has a clear role to play, only the steadfast and coordinated engagement of global governments can address these primary causes and finally resolve the conflict.<sup>22</sup>

Some involved in this debate believe that section 1502 should be scrapped and replaced with better legislation. This may be unrealistic as getting Congressional attention on the issue a second time will be difficult if not impossible. Others argue that amending 1502 to allow more time to implement SEC regulations and to improve outcomes for Congolese miners would be a more viable solution.

Another problem is the cost of implementation. An independent Tulane University economic impact assessment study commissioned by U.S. Senator Dick Durbin found that the cost of implementing section 1502 will be approximately \$7.93 billion dollars – more than 100 times the SEC's estimated cost of \$71.2 million. The authors of the study note that the discrepancy arises from a problem with the SEC estimate:

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<sup>21</sup> Jesse Hamilton, "Kraft, GE Officials Say Conflict-Mineral Rule will Burden Farms." Bloomberg (18 October 2011). Available: <http://www.businessweek.com/news/2011-10-18/kraft-ge-officials-say-conflict-mineral-rule-will-burden-firms.html>

<sup>22</sup> Email correspondence with author. 13 October 2011.

Our analysis shows that the published figure of \$71.2 million by the SEC underestimates the implementation cost, in part because it does not take into account the range of actors affected by the statutory law. In light of Section 1502, substantial traceability reforms would need to be implemented throughout the supply chain – from the mine to final product manufacturing – in order for disclosure to work.<sup>23</sup>

Controversy in Washington is one thing. The effect of section 1502 on the Congolese is quite another. Although section 1502 has yet to be implemented, it has already had far-reaching consequences, none of which involve a reduction in violence. In September 2010, Congolese President Joseph Kabila instituted a ban on all mining in the Kivu and Maniema provinces. This ban largely shut down mining activity in the region, but it also led to increased militarization of the mining sector as the Congolese national army, the FARDC, took over many mines that had previously been non-militarized. While Kabila's reasons for implementing the ban are unknown, it is obvious that the ban would not have happened had section 1502 not become law. Mining in the Kivus is an activity from which many leading Congolese politicians financially benefit, as do members of the Congolese armed forces. Some in the advocacy community believe that Kabila instituted the six-month ban in order to make section 1502 fail, but this is an implausible claim in light of available evidence. Kabila faced a tight re-election battle in November 2011 and desperately needed the electoral support of communities most affected by his mining ban. The ban put miners out of work, which is not exactly a promising electoral strategy. The Congolese government claimed when they lifted the ban that it led to the disarmament of several militias.<sup>24</sup> It is likely that this, rather than a conspiracy to undermine section 1502, is what drove Kabila's decision. He saw a ban as a chance to persuade voters that he was engaging in constructive activities to improve the security situation in the east. Also, it is important to remember that access to eastern Congolese minerals is believed by most observers to be a key component in the rapprochement Kabila reached with Rwanda's President Paul Kagame in 2009 to end hostilities between their countries. Kabila's mining ban apparently allowed the FARDC to consolidate control over some previously non-militarized mines (eg, at Kamituga), which may have been another goal – ensuring that his troops, not others, had control over the mines before 1502's rules came into effect would be important if guaranteeing Rwanda access to Congolese minerals is part of maintaining the peace.

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<sup>23</sup> The authors also reject a National Association of Manufacturers estimate of \$9-16 billion as being too high. Chris Bayer and Elke de Buhr, Tulane University Law School Payson Center for International Development. *A Critical Analysis of the SEC and NAM Economic Impact Models and the Proposal of a 3<sup>rd</sup> Model in View of the Implementation of Section 1502 of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act*. (October 2011). Available: [http://www.payson.tulane.edu/assets/files/3rd\\_Economic\\_Impact\\_Model-Conflict\\_Minerals.pdf](http://www.payson.tulane.edu/assets/files/3rd_Economic_Impact_Model-Conflict_Minerals.pdf)

<sup>24</sup> "DR Congo lifts ban on mining gold, tin, and tungsten." BBC News. (10 March 2011). Available: <http://www.bbc.co.uk/news/world-africa-12700898>

Kabila's ban on mining ended in March 2011, but another *de facto* embargo of Congolese minerals soon took its place. As the April 2011 deadline for the implementation of section 1502 regulations approached, the Malaysia Smelting Corporation (MSC) began refusing to buy Congolese tin under pressure from industry watchdog group the Electronics Industry Citizenship Coalition (EICC). The EICC created a tracing scheme for smelters that requires corporations to show their ores to be conflict free, and most companies were to work through a tin industry group called ITRI to ensure their minerals were appropriately tagged as being conflict-free.<sup>25</sup> This tracing scheme went into effect on April 1, 2011. However, MSC could not guarantee that all of its minerals would be ITRI-tagged and so stopped purchasing minerals from D.R. Congo.<sup>26</sup> MSC had previously purchased up to 80% of eastern Congolese tin, so its exit from the market was devastating to local sellers.<sup>27</sup>

The effect of MSC's decision to exit the D.R. Congo mineral trade means that there is now a *de facto* boycott on almost all Congolese tungsten, tantalum, and cassiterite. North Kivu exports of tin, which is derived from cassiterite, have fallen by 90%.<sup>28</sup> Only three of Goma's 25 exporters are operating, and they are selling minerals primarily to the Chinese. These purchases may be illegal under a 2010 UN resolution requiring UN member states to urge their corporations not to purchase minerals that might be financing violence in the region, but this resolution seems to have had little effect.<sup>29</sup>

Section 1502's effect on Congolese artisanal miners and their families, however, has been devastating.<sup>30</sup> Congolese artisanal miners normally work under horrific conditions for little pay,<sup>31</sup> but in most mining communities, it is the only paid employment available. There are no livelihoods alternatives, save subsistence agriculture or joining a militia. Now they are in

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<sup>25</sup> "GeSI and EICC Announce Update to Conflict-Free Smelter Program." Press Release. (22 April 2011). Available:

<http://www.gesi.org/Media/GeSINewsFullStory/tabid/85/smid/503/ArticleID/75/reftab/37/t/GeSI%20and%20EICC%20Announce%20Update%20to%20Conflict-Free%20Smelter%20Program/Default.aspx>

<sup>26</sup> Jon Rosen, "Eastern Congo's Mining at Turning Point." *Global Post*. (4 April 2011). Available: <http://www.globalpost.com/dispatch/news/regions/africa/110325/eastern-congo-mining-gold>; Michael J. Kavanagh, "Congo Tin Sales Tumble 90% as Companies Avoid 'Conflict Minerals.'" *Bloomberg News*. (23 May 2011). Available: <http://www.bloomberg.com/news/2011-05-23/congo-tin-sales-tumble-90-percent-as-companies-avoid-conflict-minerals-.html>.

<sup>27</sup> "Congo in talks with Malaysia Smelting over tin foundry." *Reuters* (3 October 2011). Available: <http://af.reuters.com/article/investingNews/idAFJJOE7920KM20111003>

<sup>28</sup> Michael J. Kavanagh, "Congo Tin Sales Tumble 90% as Companies Avoid 'Conflict Minerals.'" *Bloomberg News*. (23 May 2011). Available: <http://www.bloomberg.com/news/2011-05-23/congo-tin-sales-tumble-90-percent-as-companies-avoid-conflict-minerals-.html>

<sup>29</sup> Jonny Hogg, "U.S. Buyers Shun Conflict Minerals in Congo's East." *Reuters*. (4 October 2011). Available: <http://af.reuters.com/article/drcNews/idAFL5E7L31S720111005?sp=true>

<sup>30</sup> "Digging for Victory." *The Economist* (24 September 2011). Available: <http://www.economist.com/node/21530110> and David Aronson, "How Congress Devastated Congo." *New York Times* (7 August 2011). Available: <http://www.nytimes.com/2011/08/08/opinion/how-congress-devastated-congo.html>

<sup>31</sup> Free the Slaves, *The Congo Report: Slavery in Conflict Minerals* (June 2011). Available: <http://www.freetheslaves.net/Document.Doc?id=243>

trouble; as the World Bank PROMINES head Paul Yenga Mabolia told *Bloomberg Businessweek*, “Almost everything came to a standstill.”<sup>32</sup>

Local civil society activists engaged in the mining sector estimate that 1-2 million Congolese artisanal miners and those who work in other aspects of the mining sector are currently out of work. Multiplied by the 5-6 direct dependents that each miner has, section 1502 has inadvertently and directly negatively affected up to 5-12 million Congolese civilians.<sup>33</sup> Many miners cannot feed their children, their children are not in school this year because they cannot pay tuition fees, and those who are ill cannot afford medical treatment.<sup>34</sup> Many other miners have shifted to work in the gold sector, where smuggling is easy and sales continue.<sup>35</sup>

That miners are out of work reverberates through the entire eastern Congolese economy. This situation was anticipated by Congolese civil society leaders and has been just as devastating as they feared.<sup>36</sup> When miners lack earnings, not only can they not pay their children’s school fees or afford to visit health care professionals, but they do not have money to pay for other goods and services in the local markets, meaning that shopkeepers, hairdressers, seamstresses, and market sellers are also earning significantly less. In many mining areas, economies were based partly on minerals rather than cash; it was possible to buy goods and services by trading a teaspoon of coltan for, say, school tuition. In addition, planes that flew into remote mining areas like Shabunda and Walikale are no longer coming to take the minerals out. Those planes carried in basic necessities like petroleum, salt, and candles to places that are not accessible by road. Today, those communities must do without such necessities; even if one has money to purchase the goods, they are no longer available.

The impact on mining sector livelihoods, while unintended, is a disaster for the already-fragile economy of the eastern D.R. Congo. Miners cannot provide for their families by returning to subsistence agriculture. Policy makers must consider the real and immediate – albeit unintended – impact their actions have had on artisanal mining communities. The potential for a humanitarian crisis is real; USAID and many non-governmental organizations are engaged in assessments in the region to determine how best to aid these miners.

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<sup>32</sup> Mark Drajem, Jesse Hamilton, and Michael Kavanagh, “A Rule Aimed at Warlords Upends African Mines.” *Bloomberg Businessweek* (4 August 2011). Available: <http://www.businessweek.com/magazine/a-rule-aimed-at-warlords-upends-african-mines-08042011.html>

<sup>33</sup> As with most data in the D.R. Congo, these numbers are extremely difficult to verify; however, the numbers listed here are estimates made by reliable civil society actors with long experience in the D.R. Congo mineral sector. There are no polls or surveys showing more reliable figures on how many miners are out-of-work as a result of the *de facto* ban.

<sup>34</sup> Summary of not-for-attribution discussions at the Great Lakes Policy Forum. Washington, DC (October 2011).

<sup>35</sup> United Nations. *Final Report of the UN Group of Experts on the Democratic Republic of Congo* (2011). Available: [http://www.un.org/ga/search/view\\_doc.asp?symbol=S/2011/738](http://www.un.org/ga/search/view_doc.asp?symbol=S/2011/738)

<sup>36</sup> Letter from South Kivu miners’ cooperative GECOMINSKI to Intel included in SEC comments. (8 April 2011). Available: <http://www.sec.gov/comments/s7-40-10/s74010-219.pdf>

Advocates anticipated that artisanal miners would be put out of work by legislation targeting Congolese conflict minerals. HR 4128 contained provisions to provide assistance to mining communities. However, section 1502 provides no such assistance. Advocates have called for legislation to support miner livelihoods, but there is little money available for these programs.<sup>37</sup> In any case, a fund to support miners is not a sustainable solution for their employment problems. Even if \$20 million were available to support miners, such funding is grossly inadequate to help communities faced with the need to rebuild their local economies from scratch. If they are unable to work soon, the suffering of artisanal miners and their families will be compounded.

The real tragedy of this situation is that while 1502 has inadvertently put entire Congolese communities out of work, they still live under the constant threat of violence and intimidation. There has been no reduction in violence in the Kivu provinces as a result of the government-imposed or the international *de facto* bans. Armed groups continue to terrorize local populations and to prey upon communities for food, money, and other resources. Moreover, as the 2011 Final Report of the UN Group of Experts on Congo notes, the *de facto* ban has led to an increase in conflict mineral smuggling via Rwanda and pushed Congolese armed groups to seek alternate sources of revenue, including the timber trade, and, in the case of the FDLR, continuing involvement in trading cannabis and palm oil.<sup>38</sup> Section 1502 has – albeit unintentionally – thus far caused more problems than it has solved.

## **What went wrong? Advocacy misperceptions & the D.R. Congo conflict**

Advocates correctly argue that section 1502 has yet to be implemented, and many seem to believe that this absolves them of responsibility for the consequences described above. This is a disingenuous argument. Neither Kabila's ban or the MSC's decision to stop buying Congolese minerals would have happened had Dodd-Frank not become law. Both the

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<sup>37</sup> An October 2011 Enough paper claims that USAID announced a \$20 million program for miner livelihoods in August 2011 (Aaron Hall and Sasha Lezhnev, *U.S. Congo Policy: Matching Deeds to Words to End the World's Deadliest War*. Enough Project. (October 2011). Available: <http://www.enoughproject.org/files/US-Congo-Policy.pdf>). According to a source at USAID, the Community Recovery and Livelihoods Project was developed prior to the passage of the Dodd-Frank Act. Enough's claim is a mischaracterization of its purpose. However, this does not mean that proposals cannot focus on mining communities, but rather that the program is not in response to Dodd-Frank.

A reading of the program summary shows that the money is intended to assist with livelihoods opportunities for Congolese victims of violence and others in order to alleviate the causes of war. See USAID, "Community Recovery and Livelihoods Project." Grants.gov. (Announcement date: 15 August 2011). Available: <http://www.grants.gov/search/search.do;jsessionid=Gkk9TL4G0MhkkYsjyyXL6QcZjQMTgPq8092GrjbTb00vMJXC2p1q!747832409?oppId=114513&mode=VIEW>

<sup>38</sup> United Nations. *Final Report of the UN Group of Experts on the Democratic Republic of Congo* (2011). Available: [http://www.un.org/ga/search/view\\_doc.asp?symbol=S/2011/738](http://www.un.org/ga/search/view_doc.asp?symbol=S/2011/738)



timing of the actual and *de facto* bans and all rhetoric surrounding them suggests that these were clear responses to the perceived future effects of the legislation. MSC and other international buyers are not purchasing Congolese minerals due to uncertainty about the SEC regulations on Section 1502.<sup>39</sup> That the consequences were unintentional and unanticipated does not mean they were not direct effects of 1502's passage.

While the U.S.-based advocacy community working on D.R. Congo has good intentions with regards to wanting to improve the quality of life for the Congolese, most advocates made several key mistakes in their analysis of the situation. These mistakes were based on misperceptions – most notably about the relationship between mineral exploitation and conflict in the Congo, the drivers of Congolese armed group behavior, and the feasibility of running effective traceability schemes in a failed state. What did the advocates get wrong?

### **Minerals don't *cause* conflict in Congo**

Efforts to pass legislation on conflict minerals in the D.R. Congo were based on the mistaken assumption that because the mineral trade is one dynamic in some of the region's conflicts, this means that minerals cause conflict. This underlying belief can be seen in a number of early advocacy efforts such as Enough's April 2009 strategy paper, "Can You Hear Congo Now?" As criticism of this claim mounted, advocates moderated their language to refer to conflict minerals as a "key driver" of conflict in the eastern D.R. Congo. However, this claim is also misleading. If minerals cause or drive conflict in a failed state, then we would expect to see most, if not all, of the Congolese mineral trade to be militarized and/or the object of competition between armed groups. This is far from true, however. The mines of Kasai and central Katanga are completely free of violence, as are many mines in the heart of the conflict regions in North and South Kivu and Ituri.<sup>40</sup> Another dynamic is at work in the Kivus, and it has very little to do with the mineral trade, but is instead about the state's weakness and local disputes over land and citizenship rights. As analyst Jason Stearns told AlertNet, "There is no doubt that minerals constitute a large part of the conflict economy in the eastern Congo and dealing with the conflict minerals issue is important, ...But minerals were not the origin of the conflict in Congo and solving the conflict minerals issue is not going to bring an end to the conflicts."<sup>41</sup> The militarized mineral trade is much more a symptom of the Congolese state's weakness and inability to govern than it is its cause.

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<sup>39</sup> Jonny Hogg and Graham Holliday, "Conflict minerals crackdown backfiring in Congo." Reuters (30 December 2011). Available: <http://af.reuters.com/article/drcNews/idAFL6E7NU25720111230?sp=true>

<sup>40</sup> One particularly egregious example of misleading claims about the Congolese mineral sector came in a segment of CBS's *60 Minutes*, in which John Prendergast and CBS correspondent Scott Pelley traveled to Ituri's Chudja gold mine for a 2009 segment. Ituri gold mines have been at peace since 2006, but the Chudja mine was presented in the segment as a place in which violence against civilians was actively occurring. See Scott Pelley, "Congo's Gold." *60 Minutes* (29 November 2009). Available: <http://www.cbsnews.com/video/watch/?id=5825990n>

<sup>41</sup> George Fominyen, "Mineral certification? The path to end Congo's violence?" AlertNet. (6 May 2011). Available: <http://m.trust.org/alertnet/news/mineral-certification-the-path-to-end-congos-violence/>

## **Armed groups don't fight *because* they have access to mineral wealth**

The logic behind focusing on the mineral trade as a way to slow violence in the eastern D.R. Congo is as follows:

1. Armed groups maintain control of mines so that they can earn money to fuel their activities.
2. If international and local actors cut off armed groups' access to mineral wealth by implementing traceability schemes and responsible sourcing mechanisms, armed groups will no longer be able to earn as much money.
3. Therefore, the ability of armed groups to fight and/or terrorize Congolese civilians will be diminished.

While this logic sounds good on paper, it is based on a misperception of what motivates Congolese armed groups and what they do with the money they earn from the mines. First, there is little reason to believe that Congolese armed groups use the bulk of the money they earn from the mineral trade to buy weapons and ammunition. The eastern D.R. Congo is saturated with weapons; few soldiers need to buy new ones, and those that are for sale are extremely inexpensive and readily available in local markets.<sup>42</sup>

Instead, most of the money earned by armed groups from the mineral trade is used to pay salaries, buy food, and provide other basic necessities to fighters and their families. This is particularly true in the FARDC, where government salaries are rarely paid and when soldiers do receive money, it is often only a partial salary. Even if soldiers are paid their salary, the amount (approximately \$40-50/month) is far below what is needed to provide for their families. Thus they look to earn revenue via the mineral trade.

Second, even if armed groups do depend on the mineral trade to finance their activities, most can draw upon other reliable sources of revenue. As Vlassenroot and Adam have shown, Congolese civilians face an enormous burden from informal taxation schemes, many of which are carried out by armed groups.<sup>43</sup> Reliance on the mineral trade varies widely among Congolese armed groups, with the FDLR earning as much as 75% of its revenue from the mineral trade (mostly from gold), while others like the CNDP earn significantly

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<sup>42</sup> Author's observations, 2005-07, 2010. A Small Arms Survey report on the illicit weapons trade between southern Sudan and northeastern Congo made clear just how many small arms are in the region. The Small Arms Survey researcher set out to explore the scale of illicit arms trading between the two regions, but found that weapons flows there are limited because civilians in northeast Congo do not perceive a need for arms, the Congolese army rigorously disarms civilians, and southern Sudan was already saturated with arms. See Joshua Marks, *Border in Name Only: Arms Trafficking and Armed Groups at the DRC-Sudan Border*. (Geneva: Small Arms Survey, 2007). Available: <http://www.smallarmssurveysudan.org/pdfs/HSBA-SWP-4-DRC-Sudan.pdf>

<sup>43</sup> Jeroen Adam and Koen Vlassenroot, "La Fiscalité de Poche": The politics of taxation in Eastern DR Congo." Conference Paper. Presented at the annual meeting of the African Studies Association (November 2010).

less.<sup>44</sup> In addition to the mineral trade, Congolese armed groups rely on taxation of citizens under their control, of revenues collected at roadblocks, and on trade in other commodities like charcoal, timber, and bananas. As access to mineral wealth has been limited, Congolese armed groups have turned to other forms of revenue extraction with little effect on their violent behavior.

Third, most Congolese armed groups are not motivated to fight by the mineral trade or for access to the mines; instead, their violent behavior stems from anger over inequality, ideological issues, and/or because there are no constraints on such activities in the eastern D.R. Congo. As Séverine Autesserre notes, despite the international community's overwhelming focus on conflict minerals, only about 8% of Congolese conflicts are over natural resources.<sup>45</sup> Some groups, including many of the Mai Mai militias, fight simply because they can. Others have specific grievances about their ethnic groups' position in society or, in the case of the FDLR, about the Rwandan political leadership. With regard to none of the armed groups of eastern Congo is there any evidence that they will stop fighting simply because they lose a key source of revenue. The loss of revenue is not likely to affect their ability to procure weapons and ammunition, nor is it likely to motivate them to negotiate for peace. Instead, they are likely to prey on civilians to an even greater extent than before the *de facto* mining boycott went into effect.

### **Traceability is very challenging in a fragile state**

The idea of ensuring that Congolese conflict-free minerals can make it to market is an attractive one. Unfortunately, it is based on a poor understanding of how trade and governance works in an extremely weak state. The idea for implementing a traceability scheme with respect to the D.R. Congo was based on the Kimberley Process for ensuring that diamonds sold on international markets would be conflict free. However, advocates failed to take into account that the Kimberley Process only works well in relatively strong states with functioning governing institutions.

The situation in the eastern D.R. Congo could not be further from the norm. It is not an exaggeration to say that it is possible to bribe almost every border guard, customs official, and immigration authority in the region. These officials are not paid regular salaries and are dependent on money they can raise through bribery and the imposition of made-up fees to provide for their livelihoods. This makes smuggling very easy; indeed, it is obvious that a

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<sup>44</sup> Nicholas Garrett and Harrison Mitchell, *Trading Conflict for Development: Utilising the Trade in Minerals from Eastern DR Congo for Development* (April 2009). Available: <http://www.resourceglobal.co.uk/documents/Trading%20Conflict%20for%20Development.pdf>, 6. For more detailed descriptions of the dynamics of the mineral trade in the eastern Congo, see Harrison Mitchell and Nicholas Garrett, *Beyond Conflict: Reconfiguring Approaches to the Regional Trade in Minerals from Eastern DRC. Communities and Small-Scale Mining* (1 September 2009). Available: [http://www.resourceglobal.co.uk/documents/Beyond%20Conflict\\_RCS\\_CASM.pdf](http://www.resourceglobal.co.uk/documents/Beyond%20Conflict_RCS_CASM.pdf)

<sup>45</sup> Séverine Autesserre, "Dangerous Tales: Dominant Narratives on the Congo and their Unintended Consequences." *African Affairs* (Forthcoming 2012), p. 8.

great deal of smuggling is happening even as the *de facto* boycott continues. Border officials intercepted a load of cassiterite in a MONUSCO vehicle in August, but it is likely that the ton they caught there is but a small fraction of what is being smuggled out.<sup>46</sup> Smuggling has greatly increased since the *de facto* boycott went into effect, and it seems likely to continue into the future regardless of whether the SEC adopts rules or not.<sup>47</sup>

It is very difficult to see how any traceability scheme could overcome this situation, for it is not only officials at the borders who will take bribes, but also those at airports and at the mines themselves. An effective traceability scheme would have to involve implementation and monitoring at every step of the process, including transport, by disinterested outside observers who cannot be bought. But even this may be problematic as anyone familiar with the Congolese spirit of innovation and entrepreneurial ingenuity expects that smugglers will find a way to fake certification before too long. Without effective oversight from functioning government institutions, it is unlikely that even the most carefully planned traceability scheme will effectively prevent conflict minerals from being sold on international markets.

### **Traceability schemes were already being developed prior to section 1502's passage**

Many who supported Dodd-Frank section 1502 made it sound as though it would be the first traceability scheme to address the problems in the Congolese mining sector. This is simply untrue. A number of efforts were underway, and many of these were undertaken in consultation with local civil society leaders and Congolese mineral trade exports. In particular, an effort called PROMINES involving the Congolese government, the World Bank, and industry had made great strides towards improving transparency and accountability. This effort was out of the public eye and intentionally low-key and had great potential for success. However, it and other ongoing efforts (most notably the International Conference for the Great Lakes Region's RINR framework<sup>48</sup>) to improve the sector have largely ignored and/or confused with the mess surrounding section 1502. Currently, the ICGLR, the ITRI, the OECD, and the SEC are all pursuing traceability regulations and schemes, sometimes in consultation with one another and sometimes without doing so. Other schemes include MONUSCO's creation of trading centers, an EITI scheme, and the German government's BGR program. The problem is compounded in that traceability is possible with some commodities (eg, diamonds), but extraordinarily difficult with others

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<sup>46</sup> "DR Congo tin 'smuggled by UN man.'" BBC (23 August 2011). Available: <http://www.bbc.co.uk/news/world-africa-14629354>

<sup>47</sup> United Nations. *Final Report of the UN Group of Experts on the Democratic Republic of Congo* (2011). Available: [http://www.un.org/ga/search/view\\_doc.asp?symbol=S/2011/738](http://www.un.org/ga/search/view_doc.asp?symbol=S/2011/738)

<sup>48</sup> "Natural Resources." ICGLR website. Available: <https://icglr.org/spip.php?article94>

(namely, gold). In short, there is a great deal of confusion surrounding the issue and a desperate need for more collaboration.<sup>49</sup>

## **Regional stability and the mineral trade**

The mineral trade in the Congo is a regional issue, not simply a local one.<sup>50</sup> Violence has substantially decreased in the Kivu provinces since early 2009. While the situation in the region is still very volatile in places, the overall situation is vastly improved from what it was during the transition period and in the first years after the 2006 elections. A major reason for this stability is the rapprochement between Congolese President Joseph Kabila and Rwandan President Paul Kagame. In late 2008 and early 2009, CNDP troops (widely believed to be financially backed by the government of Rwanda) were on the brink of taking control of Goma, which could not be held by the limited number of MONUC peacekeepers posted there. However, Rwanda stopped the CNDP, arrested its leader Laurent Nkunda, and within months, Kabila and Kagame reached an agreement. This agreement was negotiated by former Nigerian President Olusegun Obasanjo, acting on behalf of the United Nations. It is an oral agreement and its specific contents are only fully known to the two heads of state. Most observers believe that the agreement contained some kind of provision that guaranteed Rwanda access to Congolese minerals, an important source of revenue for Rwanda.

Rwanda has been careful to voice its support for mineral tracing schemes in the D.R. Congo and recently announced its intention to return 70 tons of smuggled, untagged minerals to the Congolese.<sup>51</sup> However, it is unclear whether Rwanda has been rejecting all smuggled minerals from the D.R. Congo. Rwanda has very limited mineral reserves in its own territory; most minerals sold on world markets as “Rwandan” are actually Congolese.

Rwanda is very careful to maintain its public image as an international good citizen and so the government is unlikely to protest the implementation of section 1502 or other legislation. However, it is important that Rwanda be able to maintain access to Congolese minerals in the interest of regional stability. It does not seem feasible that Rwanda would re-invade Congo to gain access to minerals, but it is within the realm of possibility that Rwanda would turn to secretly back a local militia if it felt its economic interests would be best served by doing so.

Why did advocates fall prey to these misperceptions? While it is impossible to know for certain, it is clear that many of those who conceived the strategy for dealing with conflict minerals either had direct experience working to put together the Kimberley Process or were

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<sup>49</sup> For a comprehensive list of traceability scheme efforts, see *Conflict Minerals and the Democratic Republic of Congo: Responsible Action in Supply Chains, Government Engagement and Capacity Building*. BSR (May 2010).

<sup>50</sup> Jeroen Cuvelier, “Introduction” in Jeroen Cuvelier, ed., *The Complexity of Resource Governance in a Context of State Fragility: the Case of Eastern DRC*. International Alert (2010), 9.

<sup>51</sup> “Rwanda: Country to Send Minerals Back to DRC.” *The New Times* (13 October 2011). Available: <http://allafrica.com/stories/201110130016.html>.

inspired by its efforts. This is particularly true with respect to advocates from British organization Global Witness, which focuses on minerals in conflict and played a major role in developing the Kimberley Process.

The Enough Project took matters a step further as they repeatedly cited the efforts leading to the creation of Kimberley Process as instrumental in ending conflicts in countries that house significant diamond reserves.<sup>52</sup> For example, Enough's John Prendergast and Aaron Hall argued in a February 2011 op-ed that, "The global blood diamonds movement helped to end these wars, and the resulting Kimberley Process, although far from perfect, has helped to consolidate peace in those areas, playing a significant role in ending conflict in Sierra Leone, Liberia, and Angola."<sup>53</sup>

It is true that the Kimberley Process was created largely in response to the conflicts in Sierra Leone, Liberia, and Angola, where the sale of "blood diamonds" were a major revenue source for the countries' armed factions. However, it is empirically false to say that the Sierra Leonean, Liberian, and Angolan wars ended due to the Kimberley Process and its potential effect on mineral revenue for armed groups. The Sierra Leone conflict ended after a stalemate developed between the RUF and government forces.<sup>54</sup> As J. Peter Pham notes, "the brutal tactics employed by the rebels as well as their lack of a coherent political program other than to overthrow the national government in Freetown rendered it difficult for them to rally Sierra Leoneans to their cause." Peace was restored in 2001-02 through a security-restoration process in which the UN peacekeeping mission UNAMSIL's force strength grew to 17,500 and was mandated to support government efforts to disarm combatants and restore order.<sup>55</sup>

Likewise, the Angola conflict ended not because the Kimberley Process cut off revenues to rebel fighters, but rather because UNITA rebel leader Jonas Savimbi was killed in combat in 2002 and his successors agreed to a ceasefire less than two months later. The ceasefire led to

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<sup>52</sup> See, for example, John Prendergast, "60 Minutes Spotlights Gold, Conflict Minerals Fueling Congo's War." Enough Project blog post (30 November 2009). Available: <http://www.enoughproject.org/blogs/60-minutes-spotlights-gold-conflict-minerals-fueling-congos-war>; John Prendergast, "Can You Hear Congo Now? Cell Phones, Conflict Minerals, and the Worst Sexual Violence in the World." Enough Project strategy paper (April 2009). Available: <http://www.enoughproject.org/publications/can-you-hear-congo-now-cell-phones-conflict-minerals-and-worst-sexual-violence-world>; Raise Hope for Congo: An Enough Campaign, "Conflict Free Campus Initiative Toolkit." Available: <http://www.raisehopeforcongo.org/sites/default/files/Enough%20Conflict-Free%20Campus%20Toolkit.pdf>.

<sup>53</sup> John Prendergast and Aaron Hall, "Certifying Congo's Deadly Conflict Minerals." Enough Project (1 February 2011). Available: <http://www.enoughproject.org/blogs/certifying-congos-deadly-conflict-minerals>

<sup>54</sup> A contentious scholarly debate exists over whether the RUF were motivated to fight by the presence of diamonds or whether the war was fought mainly over agrarian grievances. Evidence for both claims is inconclusive, but recent findings suggest that agrarian grievances were a key driver of conflict in the Sierra Leone war. See Esther Mokuwa, Maarten Voors, Erwin Bulte, and Paul Richards, "Peasant Grievance and Insurgency in Sierra Leone: Judicial serfdom as a driver of conflict." *African Affairs* 110:440 (May 2011), 339-366.

<sup>55</sup> J. Peter Pham, "Democracy by Force? Lessons from the Restoration of the State in Sierra Leone." *The Whitehead Journal of Diplomacy and International Relations* 129:6 (Winter/Spring 2005), 129-147.

a political process by which UNITA soldiers disarmed and the movement became a political party.<sup>56</sup> In Liberia, the country's second civil war ended in 2003 because the LURD rebel movement attained a series of battlefield victories over Charles Taylor, the primary beneficiary of the Sierra Leonean diamond trade, and declared a ceasefire in the face of international diplomatic pressure that led Taylor to resign.

With the exception of Liberia, none of the wars cited by advocates as support for the idea that creating a mineral supply chain traceability scheme will reduce conflict had ended by the time the Kimberley Process came into effect. There is no evidence that suggests fighters in any of these conflicts were primarily – or at all – motivated to lay down their arms due to the fear that they might lose sources of revenue from the diamond trade. Instead, decisive battlefield victories, external pressure, and negotiated political solutions were what ended each conflict.

## **Creating an International Norm**

That the Kimberley Process did not end the wars in Sierra Leone or Angola is not in and of itself a reason not to pursue traceability schemes and responsible sourcing for other mineral resources in conflict areas. If implemented well, they can theoretically build more accountable and transparent economies in countries that need them. For some advocates who supported Dodd-Frank sections 1502 and 1504, the creation of such an international norm is by far the most important aspect of the legislation, arguably more so than whether the law will lead to greater peace and stability in the eastern Congo. These advocates see the potential failure of the law as disastrous for their goal of building international norms to hold corporations responsible for where and how they source materials for their products.

While there is no question that all D.R. Congo stakeholders want to see less violence and more peace and prosperity in the conflict regions, the overarching focus on the creation of a norm with respect to conflict minerals is problematic. Advocates used the horrific nature of the violence in the D.R. Congo to draw attention to the crisis and leveraged emotional language, images, and testimony about rape in the Congo to promote the need for legislation on conflict minerals while promising that the violence would abate if the legislation were passed. However, many overstated the potential that a traceability and transparency scheme would have for alleviating some of that violence. Meanwhile, the unintended effects of the passage of section 1502 have put millions of Congolese artisanal miners out of work, and the violence has not abated despite the fact that few armed groups are making money from the nearly-halted mineral trade. Many policy makers and legislators feel as though they have been deceived as to what consequences – positive and negative – section 1502 would produce, particularly with respect to preventing civilian-directed violence.

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<sup>56</sup> Polity IV Project, *Polity IV Country Report 2008: Angola* (2008). Available: <http://www.systemicpeace.org/polity/Angola2008.pdf> p. 3.

As noted above, the notion that governments and consumers should hold corporations accountable for responsibly sourcing materials and labor used to build their products should not be controversial. Many consumers have shown that they prefer to pay higher prices for fair trade and ethically-produced goods. However, we need to decouple the value of creating a norm about supply chain tracing from the notion that doing so will end violence against Congolese civilians. There is no evidence that supply chain tracing schemes end conflict or prevent violence, and however Dodd-Frank section 1502 is implemented, it is unlikely that this law will do so in the D.R. Congo. Violence in the Congo is rooted in political disputes and requires a political solution, not an economic one. Stakeholders could have a more productive and honest debate by delinking these issues and focusing on finding appropriate solutions to distinct problems.

## **Recommendations**

What can be done to improve the plight of Congolese artisanal miners while simultaneously promoting a more transparent and legitimate mining sector? The following recommendations seek to address the problem by slowing down the implementation process, focusing on miner livelihoods, and incorporating local solutions.

### **1. Implement Dodd-Frank section 1502 in phases with clear annual benchmarks over three years.**

The U.S. advocacy community strongly believes that section 1502 should be immediately implemented and that the SEC should issue rules on the Congo mining sector without further delay.<sup>57</sup> Enough has created a Step Up for 1502 campaign through which its grassroots activists are pressuring the U.S. Chamber of Commerce to back down from their plans for a lawsuit and through which they are urging the SEC to act immediately.<sup>58</sup>

Congolese civil society leaders and mining sector officials, however, believe that by slowing down the implementation of section 1502 it will be possible to integrate the many existing schemes for improving transparency and accountability in the Congo mining sector. They are correct; as the SEC regulations are one set among many, the differences in traceability schemes has produced mass confusion while creating no as-yet-viable process for tagging and tracing Congolese minerals. By slowing the timeline on implementation of the SEC rules and allowing for a three year transitional period, more time will be available for a consultative process that integrates the interests of Congolese miners along with industry and advocacy interests. It also makes the success of a traceability scheme more likely; with buy-in from local actors, the likelihood of smuggling will significantly decrease.

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<sup>57</sup> Email to Chair and Commissioners of the Securities and Exchange Commission from 12 advocacy organizations. Provided to author. (29 July 2011).

<sup>58</sup> Kathryn Havranek, "Step Up for 1502 and Congo." Enough Project blog. (11 October 2011). Available: <http://www.enoughproject.org/blogs/step-1502-and-congo>



The SEC should develop a series of clear benchmarks for each year of the transitional implementation process for section 1502. It is unrealistic to assume that effective and transparent traceability schemes can be implemented in D.R. Congo overnight. Benchmarks should be progressively stronger and should be realistic. They should also take into account local civil society actors' views on what is and is not feasible, and should be centered on building community consensus about the regulations and the need for a traceability scheme. Furthermore, the goals should work to integrate and unite the many existing traceability schemes into one workable system. Goals for the first year should be primarily focused on public education and the creation of basic infrastructure for the system. Over the second and third years, rules should require progressively higher standards for conflict-free purchases. The SEC should reasonably expect that companies can report that about 25% of their mineral exports from D.R. Congo are conflict-free at the end of year one, with that number rising to 50% by the end of year two and 100% by the end of year three. Regulations regarding reporting and auditing of non-conflict-free minerals should not fully go into effect until after the end of the third year.

## **2. Provide immediate assistance to affected mining communities.**

Congolese miners affected by the *de facto* ban on mineral exports need immediate, short-term assistance for basic necessities, school fees, and health care. This assistance need not be terribly costly; allocating approximately \$50-\$150 per family dependent on family size would help to alleviate their most pressing problems. Foremost among these concerns are the ability to purchase food and to pay school fees. For basic needs, families need food aid. However, given that section 1502 has shut down much of the economy in mining regions, aid agencies should consider disbursing aid in the form of direct cash transfers to affected families. This would allow them to buy food from local providers, thereby helping the Kivutian economy to recover. Assistance should also be provided to the already-stretched health care system. If miners are not given direct cash transfers to pay for health care on their own, then donors and aid agencies should temporarily subsidize the full cost of health care. Out-of-pocket health care expenses in the region range from about \$1 to \$5 for most visits and overnight hospital stays, so the cost of temporarily fully subsidizing health care would not be extraordinarily high.

The Congolese school year operates on a trimester system and began in early September, but most miners were unable to pay their children's tuition, which ranges from \$5/trimester for primary school to \$15-30/trimester for secondary school. Aid agencies normally do not pay school fees, but in this case, an exception should be made. Payments for miners' children's tuition should be made directly to education providers, which in most cases are religious institutions managing the public schools on behalf of the state. Doing so would allow school officials to pay teachers' and administrator's salaries, thereby further helping to jumpstart the local economy and support those who are indirectly affected by the *de facto* embargo.

### **3. Turn traceability into a jobs program.**

There is a small chance that delaying the implementation of section 1502 would allow Congolese artisanal miners to get back to work while traceability schemes are developed in a more collaborative process. Industry watchdog groups and industrial coalitions should consider allowing corporations to buy Congolese minerals while meeting yearly benchmarks to show improvement. This would help the people of the eastern Congo immeasurably while still showing a commitment to transparency and accountability in the mineral sector. As benchmarks are achieved over time, it could also create better working conditions and improve quality of life for miners.

However, the professionalization of the mining sector is likely to put many artisanal miners out of work, and it is not clear that industry watchdogs would allow companies to buy Congolese minerals under transitional conditions. The traceability scheme that is ultimately developed should include job creation efforts as part of its structure; there is no reason that former miners should not be hired as taggers or hold other positions to ensure that minerals are certified as conflict-free.

The international community should increase its emphasis on job creation schemes in the Congolese mining regions as well by implementing microcredit programs, investing in rebuilding infrastructure, and through other job-creation efforts. Mining jobs should be one economic opportunity among many.

### **4. Create formal mechanisms for Congolese leadership in the implementation process.**

A major problem with U.S.-based advocacy efforts on the Congo is that their major strategy was conceived in Washington with little to no reference to Congolese actors and their concerns. Local actors that were drawn into the process in its later stages tended to be hand-picked supporters of the process, while dissenting voices were left out. As it stands now, many Congolese experts on the mining sector are marginalized in the debate and have little incentive to work with advocates and policy makers who previously ignored them. Many of the problems with section 1502 and its unintended consequences were anticipated by Congolese civil society leaders and scholars and could have been avoided had their perspectives been integrated in the advocacy process before strategies were released and advocacy activities had already been determined. Allowing Congolese leaders to have a formal role in the implementation process, as well as listening to local leaders on what needs to be done to combat regional violence will increase buy-in for traceability schemes, thus contributing to a decline in smuggling and public support for the new rules.

Any such mechanism should include a wide spectrum of Congolese civil society actors, not just those known to support 1502 or those selected only by Western advocacy coalitions.<sup>59</sup> Doing so will ensure that effective compromises reflecting the reality of state fragility and the practicality of implementation schemes on the ground in eastern D.R. Congo.

## **5. Focus on security sector reform as a distinct issue.**

The D.R. Congo advocacy community has increased its focus on security sector reform in recent months.<sup>60</sup> This is a welcome development and one that should continue. As the militarized mineral trade in D.R. Congo is a symptom rather than a cause of violence, policy makers, advocates, and commentators should make an effort to discuss security sector reform as a distinct issue from the mineral trade. Improving transparency and accountability in the mineral trade should be understood as an economic solution to an economic problem. Doing so will help to clarify solutions in the mineral sector – particularly with respect to what to do about the gold trade<sup>61</sup> – while allowing for a more clearheaded discussion of the difficult tasks that lie ahead. These tasks include training and professionalizing the FARDC, restoring territorial authority, and disarming rebel factions. The U.S. government should expand its efforts via AFRICOM, particularly with respect to FARDC training and professionalization programs.

## **Conclusion**

While the debate over Dodd-Frank section 1502 is contentious, all stakeholders share the goal of improving the quality of life and security situation of the Congolese people, particularly miners and their families. With this common basis of concern, stakeholders can and must find ways to work together to implement traceability and accountability schemes. However, these schemes must be realistic and based on a factual understanding of how the mineral trade in eastern Congo actually works as well as the limits imposed by an extremely weak state and the ease of smuggling under such conditions. In particular, advocates and legislators must understand that cleaning up the mineral trade in eastern Congo – while necessary and important – is unlikely to alleviate violence there. Only political solutions and

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<sup>59</sup> One useful resource for finding such leaders is the excellent USAID/Eastern Congo Initiative *Landscape Analysis of Community-Based Organizations* (May 2011), which provides information on the activities of 292 community-based organizations in 63 locations in four eastern Congolese provinces.

<sup>60</sup> See, for example, Aaron Hall and Sasha Lezhnev, *U.S. Congo Policy: Matching Deeds to Words to End the World's Deadliest War*. Enough Project. (October 2011). Available: <http://www.enoughproject.org/files/US-Congo-Policy.pdf>

<sup>61</sup> The gold trade is a key source of revenue for some Congolese armed groups, particularly the FDLR. Traceability schemes for gold are currently virtually impossible to implement due to technical issues. It is beyond the scope of this report to cover in detail what would need to happen to get the gold trade under control, but, as with the rest of Congo's mineral sector, doing so will require political solutions rather than economic ones. For more information on the Congolese gold sector, see Jeroen Cuvelier, ed. *The Complexity of Resource Governance in a Context of State Fragility: the Case of Eastern DRC*. International Alert (November 2011). Available: <http://www.egmontinstitute.be/papers/11/afr/201011ResourceGovEasternDRC.pdf>

a strong commitment to security sector reform will produce a lasting peace that enables the Congolese to benefit from their country's rich natural resources.

It is not too late to correct some of the unintended consequences of Dodd-Frank section 1502. By slowing the implementation process and allowing Congolese civil society voices to lead, the SEC can allow time to develop more realistic and feasible solutions to the problem. At the international level, the OECD and other groups developing similar regulations can learn from the mistakes of 1502 while pushing for political solutions to D.R. Congo's political violence.