THE LION THAT DIDN’T ROAR: CAN REGULATORY THEORY SAVE THE KIMBERLEY PROCESS?

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DECLARATION

The thesis “The Lion that Didn’t Roar: Can Regulatory Theory Save the Kimberley Process?”, submitted for examination towards the degree of Doctor of Juridical Science at the Australian National University on 4 August 2011, is my own work except where acknowledged, including minor modifications made subsequent to the external examination.

Nigel Joseph Davidson

9 May 2012
Arusha, Tanzania
Survivors of the Sierra Leone civil war:
three year old Memuna Mansary with her brother Ibrahim.¹

¹ See n 2 below.
ABSTRACT

Diamonds are a symbol of love, purchased to celebrate marriage in many parts of the world. It is, therefore, a dark irony that the diamond trade has become linked with both warfare and human rights violations committed in African producer countries such as Sierra Leone and Angola. Graphic accounts of murder and mayhem, fuelled by the diamond black market, continue to emerge from the Democratic Republic of Congo, Cote d’Ivoire, Zimbabwe, and Angola, posing an existential threat to the multi-billion dollar industry. These human rights violations fall under the legal categories of war crimes, crimes against humanity and genocide, the most serious crimes under international law. In response to the grim reality of the blood diamonds trade, De Beers and other major corporate players joined with non-governmental organisations and national governments to create the Kimberley Process Certification Scheme in 2002. The objective of the Kimberley Process is to distinguish the legitimate rough diamond trade from the trade in diamonds linked to serious human rights abuses, known as ‘conflict diamonds’ or ‘blood diamonds’. It involves a system of export and import certificates attesting to the ‘clean’ character of the rough diamonds traded, and is backed up by a peer review system to monitor compliance. The Kimberley Process has been supported through the regulatory action of national governments at the domestic level, as well as the United Nations Security Council and the International Criminal Court internationally.

The first research question considered by this thesis is: (1) to what extent has the conflict diamonds governance system achieved its objectives? In response, it can be said that the conflict diamonds governance system has made significant progress in its core mandate. The quantity and value of the international legitimate diamond industry, once the very paradigm of secrecy, has become more transparent through publicly available Kimberley Process statistics. Based on these statistics, the Kimberley Process estimates that the blood diamond trade now constitutes less than one per cent of the world’s rough diamond trade. However, it has not always been smooth sailing for the Kimberley Process, which has recently arrived in particularly stormy waters. The integrity of the system has been endangered by the seeming inability of the Kimberley Process to take appropriate action in the face of serious non-compliance by three important national government stakeholders, Venezuela, Zimbabwe and Angola. In short, commentators are asking whether the Kimberley Process ‘lion’ has forgotten how to ‘roar’.

The second research question is: (2) does an application of the networked pyramid regulatory model to the system provide descriptive or normative insights into its effectiveness? In
considering both the relative success, and the current challenges facing the conflict diamonds governance system, important insights may be gained by looking at the system with reference to the networked pyramid regulatory model. Before applying the model the thesis suggests a modification, dubbed the ‘dual networked pyramid model’, whereby the micro-regulatory system at the national level is seen as a networked pyramid within the greater networked pyramid of the international system. The relative success of Kimberley to date, when analysed against this theoretical hybrid of network and pyramid models, is largely linked to its self-conscious incorporation of insights from network theory. At the international level, the Kimberley Process can be seen as the central node, or command-centre, in which information is gathered, and regulatory action coordinated, from networks of corporations, national governments and non-government organisations. Its relative success to date can largely be attributed to a process of socialisation whereby big business as well as most national governments have become its key supporters.

It is, however, in the theoretical domain of the regulatory pyramid that the Kimberley Process might find a way out of its current deadlock. Pyramid theory recognises the primacy of soft power, such as dialogue and socialisation, but demands escalation to more coercive measures where regulated parties are unresponsive or recalcitrant. It is suggested that improved procedures for managing ‘serious non-compliance’, combined with an agreed pathway to expulsion from the Kimberley Process in such cases, would bring the KP into better alignment with the pyramid model and help it to move out of the log jam in which it currently finds itself. Furthermore, a more defined pathway of escalation to the United Nations Security Council and the International Criminal Court would bolster the ongoing efficacy of the conflict diamonds governance system. A recommended mechanism for doing this would be to amend the Statute of the International Criminal Court to include a crime of trafficking in conflict diamonds, to be defined in terms of contravening a UNSC diamond embargo.

Beyond breaking the current deadlock, the KP has an opportunity to reinvent itself by embracing the concept of ‘development diamonds’. First suggested by NGOs, this label might be applied to diamonds from the informal sector which are not merely free from the taint of international crime, but also comply with other human rights standards, most notably freedom from child labour. A further modification to the ‘dual networked pyramid model’, assisted by insights from the ‘pyramid of rewards’ theoretical model, reveals that the KP has the chance to systematically ratchet up human rights, health, safety and environmental standards in the artisanal sector, thereby buttressing the industry against the return of blood diamonds.
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DECLARATION

This thesis is my own work except where acknowledged.

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It is my hope that this thesis will contribute to the global debate about the conflict diamonds problem, and will help to stimulate renewed interest in safeguarding and improving the lives of the many people affected. To do so, I believe we must look beyond simply economic value to the intrinsic value of human life and dignity, which is synonymous with a spiritual perspective:

*It is said that in South Africa, a diamond mine is discovered. Although this mine is most valuable, yet after all it is stone. Perchance, God willing, the mine of humanity may be discovered and the brilliant pearls of the Kingdom be found.*

- Abdu’l-Baha (1844-1921)
The shallow tunnel where my colleagues were working collapsed and trapped them inside. There was nothing I could do to save them; I had to run for my own life. On that night, three people were shot by police and died on the field. The following morning, police ordered us to bury the three bodies in one of the pits on the field. When I asked to dig out my four colleagues, a police officer told me, “Consider them already buried”.

Artisanal miner in Marange, Zimbabwe³

³ See n 4 below.
1 INTRODUCTION: SHOWDOWN AT KINSHASA

1.1 RESEARCH QUESTIONS AND MAIN ARGUMENT

1.2 ROAD MAP

1.3 THE CONFLICT DIAMONDS PROBLEM

1.4 THE CONFLICT DIAMONDS GOVERNANCE SYSTEM

1.5 THE NETWORKED PYRAMID REGULATORY MODEL

1.6 ADAPTION & APPLICATION OF THE NETWORKED PYRAMID

1.7 CONCLUDING REMARKS
On 23 June 2011, at Kinshasa in the Democratic Republic of Congo, civil society delegates staged a dramatic walk-out from a meeting of the Kimberley Process. At the meeting, the KP chairperson had acted to endorse the sale of controversial Zimbabwean “blood diamonds” despite a lack of consensus by KP participants. In a statement issued after the walkout, the civil society coalition, representing a range of non-governmental organisations, stated that:

The agreement between the Kimberley Process and Zimbabwe being discussed this week falls far short of what is acceptable to maintain the credibility of the Kimberley Process, protect civilians and civil society members living and working in Marange or prevent substantive quantities of illicit diamonds from infecting the global diamond supply chain.

To better understand why the NGOs walked out of the meeting on that day, it is necessary to understand the nature of the Kimberley Process, an organisation which was established to tackle the issue of conflict diamonds, also known as blood diamonds. Blood diamonds constitute a segment of the rough diamond trade which is linked to egregious human rights violations in a number of African diamond mining countries. These diamonds are known as blood diamonds because of their connection with groups that have used enforced labour, recruited and deployed children as soldiers, murdered and raped civilians, amputated the limbs of their victims, and terrorised civilian populations, often as part of the waging of civil war. Although diamond-fuelled violence has diminished with the emergence of peace in Angola and Sierra Leone, there are ongoing concerns relating to the war-torn Democratic Republic of Congo and the Ivory Coast, as well as ongoing reports of systematic rape and violence in the Angolan diamond fields.

What has garnered recent international attention more than any other blood diamond issue, is the violence associated with the discovery of diamonds in the Marange region of Zimbabwe.

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With civilian casualties in the hundreds, the brutality of the “management” of the Marange diamond fields by Zimbabwe’s police and armed forces has become well known to the international community. What would appear to be a clear violation of the KP’s mandate, which is to prevent such “blood diamonds” being traded on the international market, instead attracted a different response from the KP. Rather than the exclusion of these diamonds from the international market, and the expulsion of Zimbabwe from the KP, the KP chair controversially acted to mandate the sale of several shipments of these diamonds, despite a lack of consensus within the organisation. Concerned that the core mandate of the KP was being contravened, the NGOs stormed out of the Kinshasa meeting, although they have said that they will remain within the organisation, at least for the moment. To put it metaphorically, NGOs were wondering whether the KP “lion” had lost its “roar”.

The so-called “showdown at Kinshasa” provides a useful point of reference in seeking to analyse and assess the relative strengths and weaknesses of the Kimberley Process, at this moment of institutional crisis. The Kimberley Process Certification Scheme was established in 2002 as the international community’s primary response to the blood diamond problem. It has mobilised the energies of civil society, the major corporate players in the rough diamond trade and national governments. The Kimberley Process is a chain of custody arrangement, which aims to provide a warranty as to the origin of each diamond from the point of mining, through to export and polishing, to incorporation in jewellery and final sale to a consumer in a retail context. The primary mechanism for this guarantee about the origin of the diamonds is the export certificate, which guarantees that a package of rough diamonds is conflict free when it leaves the original producer country. Compliance with Kimberley requirements is monitored through review visits by delegations involving representatives of civil society, industry and government. In cases of serious non-compliance, the Kimberley Process has the ability to suspend or expel a government member, meaning that they are excluded from the legitimate rough diamond trade.

The UN Security Council and the international criminal tribunals are the other major players in the conflict diamonds governance system. The Security Council has played an important

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monitoring role through its Expert Committee Reports, and has imposed legally binding sanctions on diamonds from problem countries in a number of instances. It is, furthermore, arguable that the Security Council was the midwife of the Kimberley Process, facilitating its birth. The international criminal tribunals, namely the Special Court for Sierra Leone and the International Criminal Court, provide a further level of conflict diamonds governance. A growing number of international prosecutions by these bodies, most notably the Charles Taylor case, have shone a spotlight on the role played by conflict diamonds in the perpetration of crimes against humanity and war crimes.

1.1 RESEARCH QUESTIONS AND MAIN ARGUMENT

The walk-out at Kinshasa highlights the current state of crisis that the KP finds itself in, almost nine years after its creation in November 2002. Since the creation of the KP, a significant body of articles and reports has been written by academics and NGO activists, which has largely focussed on the blood diamonds problem, the wider context of the 'resources and conflict' linkage, and practical evaluations of the KP. Only two monographs have been published about the KP to date, the insider/expert perspective of Ian Smillie in his work Blood on the Stone, and the doctoral dissertation in book format of Franziska Bieri entitled From Blood Diamonds to the Kimberley Process: How NGOs Cleaned up the Global Diamond Industry. The work by Bieri includes a wealth of interview material, and focuses on the role of NGOs in identifying the issue of blood diamonds, campaigning on the issue and ultimately providing a guiding role in the creation of the tripartite KP. The first research question that this thesis posits is in the tradition of these generalist works, asking (1) to what extent has the conflict diamonds governance system achieved its objectives? In considering this question, the thesis is more in the tradition of Smillie's book than Bieri's, as it discusses not only the Kimberley Process but also other international institutions which have played a central role in conflict diamonds governance: in particular the UN Security Council and the International Criminal Court (including its sister tribunals). It seeks to be, arguably, the first large-scale work to not only describe the role that each of these bodies has played in relation to conflict diamonds governance, but the way in which they have interacted, and how these interactions could be improved.

In considering the interactions between the major institutional players in the conflict diamonds governance system, the thesis seeks, furthermore, to be the first work to apply a theoretical, regulatory, model to that system, with a view to understanding it better. As such,
the thesis involves consideration of a further research question: (2) does an application of the networked pyramid regulatory model to the conflict diamonds governance system provide descriptive or normative insights into its effectiveness? The networked pyramid model suggests that the most successful regulatory approaches extend beyond governmental action alone, to embrace non-government actors such as civil society organisations and business entities. Furthermore, it argues that the most significant regulatory gains are made through the ‘horizontal’ techniques of dialogue, persuasion and socialisation. Nevertheless, the model recognises that the deployment of ‘vertical’ coercive interventions may be necessary in appropriate circumstances.

Despite the intuitive applicability of the networked pyramid model, it is arguable that modifications to the model may be desirable before it can usefully be applied to the conflict diamonds governance system. The thesis suggests two significant modifications to the model which result in a so-called “dual networked pyramid model”. It is “dual” in two senses: firstly, it incorporates regulatory systems at both the national and international levels, creating a “pyramid inside the pyramid” which models national governments as both regulators and the subjects of regulation. Secondly, by incorporating insights from the “pyramid of rewards”, it models both rewards and sanctions in a single model. For these reasons, it can be argued that the dual model is well placed to generate theoretical insights into a range of complex international systems, such as the global intellectual property standards system, beyond the application which is the subject of this thesis.

In relating this model to the conflict diamonds system, the second research question considers whether the dual networked pyramid model provides descriptive or normative insights into the operation of the conflict diamonds governance system. In particular, it explores whether the reasons for the successes or failures of the system can be linked to the way in which it incorporates and implements features of the dual networked pyramid model.

Returning to the first research question, the thesis, which considers developments up to 1 July 2011, argues that a significant degree of achievement can be attributed to the conflict diamonds governance system. It is argued that the governance system has contributed to the diminution of the conflict diamond trade from estimates as high as fifteen percent in the 1990s, when the Sierra Leone and Angolan conflicts were active, to less than one percent of
the world’s rough diamond trade in recent years. When considering the role of the Kimberley Process, this relative achievement is due in large measure to its ability to enlist the support of the major diamond mining players, the vast majority of national governments involved in rough diamond production, trading and polishing, as well as committed international non-governmental organisations. Kimberley has not been an unqualified success, however. The fact that Angolan and Zimbabwean conflict diamonds have not been effectively filtered out of the legitimate trading system, as well as the opening of a smuggling gateway created by Venezuela’s active opposition, show that serious challenges remain for the conflict diamonds governance system. These problems have arisen through the inability of the KP to expel member governments in situations of serious non-compliance. It is arguable that they can only be effectively addressed through appropriate application of ‘vertical’ coercive interventions, as suggested by the pyramid features of the networked pyramid regulatory model. As such, the thesis recommends that Kimberley Process procedures be reformed so as to enable timely and definitive expulsion of recalcitrant governments. Furthermore, the thesis recommends that a new, specific, crime of trafficking in conflict diamonds be created in the provisions of the Rome Statute of the International Criminal Court. Such a crime should be defined in terms of contravening a UN Security Council ban on diamond trading and would, it is argued, strengthen the conflict diamonds governance system at all levels.

Beyond resolving the initial crisis that the KP finds itself in, it arguably would benefit from a renewed mandate, focussing on the concept of “development diamonds”. The thesis explores these possibilities, with reference to not only regulatory pyramid insights, but also insights from the incentive-based “pyramid of rewards”.

1.2 Road Map

This introduction, Chapter 1, has set out the two research questions to be explored by the thesis, namely (1) to what extent has the conflict diamonds governance system achieved its objectives? and (2) does an application of the networked pyramid regulatory model to the system provide descriptive or normative insights into its effectiveness? This chapter, furthermore, advances the argument that the conflict diamonds governance system has made modest gains, but has failed in its efforts to address situations of serious non-compliance by member governments. Furthermore, in accordance with insights from the networked pyramid

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8 See, further, discussion in “estimate of the conflict diamond trade” section in Chapter 2, below.
model, the thesis argues that procedures for expulsion in such cases must be clearly defined and implemented, and that pathways of escalation to the UN Security Council and the international criminal tribunals should be strengthened through the creation of a new international crime of trafficking in conflict diamonds. Chapter 1 also sets out a road map by summarising in brief the contribution of each chapter towards responding to the research questions, and advancing the main argument of the thesis. It also provides a more detailed introduction into the substantive chapters of the thesis.

Chapter 2 briefly outlines the history and features of the legitimate diamond trade, before turning to the problem of conflict diamonds. It discusses the definition of conflict diamonds, also known as blood diamonds, before detailing the connection of this trade to human rights violations, and armed conflict, in Angola, Sierra Leone, the Democratic Republic of Congo and Cote d’Ivoire.

Chapter 3, which discusses the Kimberley Process, is the first of three chapters dealing with the conflict diamonds governance system. It discusses the operation of the Kimberley Process at the international level, including its procedures for accepting new members, monitoring through peer review, and dealing with situations of serious non-compliance. It also considers the particular roles played by NGOs and industry. Chapter 4 is concerned with the implementation of Kimberley responsibilities domestically by national governments.

The UN Security Council and international criminal tribunals, the other components of the conflict diamonds governance system, are discussed in Chapter 5. The monitoring role of the UN Security Council expert committees is discussed, as is its ability to take enforcement action through the imposition of diamond trading sanctions. The track record of the Sierra Leone Special Court and the International Criminal Court in prosecuting conflict diamonds cases is then discussed. The thesis notes that conflict diamonds were discussed in three ways in the emerging jurisprudence: as context for the commission of crimes, as being connected to crimes in the process of mining, and as providing a mechanism of indirect liability between high leadership and direct perpetrators on the ground.

The networked pyramid regulatory model is the subject of Chapter 6, which discusses the utility of using a regulatory approach, before discussing the features of network models and pyramid models. The networked pyramid hybrid model is then discussed, combining as it does the dialogic and socialisation elements of network models with the ability to ratchet up
to more coercive interventions in appropriate circumstances.

Before applying the networked pyramid model, Chapter 7 suggests two major modifications so as to optimise its utility in relation to the conflict diamonds governance system. The first modification, depicting regulation at the national level as a pyramid within the greater international pyramid, attempts to capture the complexity of a regulatory system that operates simultaneously at national and international levels, and in which national governments are both regulators as well as the subjects of regulation. A further modification, showing incentives and sanctions as part of a single model, allows interactions between the two, regulatory ratchets, to be more clearly observed.

The dual networked pyramid model is applied to the conflict diamond governance system in Chapter 8. In this chapter, the two central research questions are discussed in depth and responded to. It is argued that the conflict diamonds governance system has made progress towards its goals, noting that the conflict diamonds trade has reduced to less than one percent of the international diamond trade, and that peace has emerged in Angola and Sierra Leone, both countries which were previously affected by the problem. The contribution of the United Nations Security Council and the international criminal tribunals is also noted. The chapter notes, however, the failure of the Kimberley Process to respond to serious non-compliance by three of its government members, Zimbabwe, Angola and Venezuela, and pyramid theory is recommended as a way forward in these cases. If the KP can extricate itself from its current crises, a further horizon beckons, in which a potential extended mandate might focus on the concept of "development diamonds" which are free not only of the taint of conflict and international crime, but a further range of human rights ills. Diamonds mined and polished without the use of child labour, for example, might qualify for voluntary certification, thereby opening a door to fair trade markets in the developed world. Chapter 9, the final chapter, gives a recapitulation of the thesis, lays out a range of recommendations for possible adoption by parties involved in the conflict diamonds governance system, and, lastly, suggests areas for further research.

1.3 THE CONFLICT DIAMONDS PROBLEM

In the period following the end of the cold war it has become commonplace to observe that the nature of warfare has changed from being predominantly international in character to intranational. The two world wars, paradigms of clashes between nation states, have given
way to conflicts between component populations of nations, such as occurred in the early 1990s with the collapse of the Former Yugoslavia and the resurgence of ethnically-based conflict in Rwanda. Concomitant with these conflicts has been the perpetration of human rights violations of sufficient scale and severity to merit the use of the terminology of international criminal law, namely war crimes, crimes against humanity and genocide. Another feature of modern conflict has more recently come to the attention of academics and the international community more broadly. This feature is the connection between natural resources and conflict, which has been dubbed the "resource curse".

Whether one considers the connection between the oil trade and conflict in Sudan and Iraq, or the association between illegal drugs and warfare in Colombia and Afghanistan, the resource curse has been blamed for the instigation and perpetuation of conflict and gross human rights abuses. Of primary concern has been the fact that belligerent parties, often insurgent groups, have had their armaments funded through proceeds from these commodities. In the context of the African continent, the resource curse has manifested itself through the trade in rough diamonds. Diamonds used to fund the perpetration of warfare and human rights violations by insurgents are now known as conflict diamonds or blood diamonds.

African conflict diamonds were brought to the attention of the international community as a result of the war in Angola which commenced with independence from Portugal in 1975 and continued until 2002. During the course of the conflict, the rebel group National Union for the Total Independence of Angola (UNITA) took control over all of the major diamond-producing areas of the country. The ceasefire of 1991-1992 provided UNITA with the

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opportunity to sell much of its large harvest of rough diamonds on international markets, using the proceeds to purchase armaments in anticipation of a resumption of the conflict. The non-governmental organisation Global Witness at this time was monitoring the situation and, in particular, the annual reports of the South Africa-based diamond mining giant De Beers Corporation. It was well-known that De Beers had a standing policy of “buying out” as much of the global diamond production as it could manage, and the period 1991-1992 was no exception. The logical conclusion, which was not denied by De Beers, was that diamond sales during the period were going directly or indirectly into the coffers of UNITA, providing funds for the purchase of armaments. By the close of the war in 2002, the conflict had resulted in the loss of up to one million lives.

In 1992, when, for much of the time, the majority of the diamond areas were controlled by UNITA, De Beers stated:

That we should have been able to buy some two thirds of the increased supply from Angola is testimony not only to our financial strength but to the infrastructure and experienced personnel we have in place.

Significantly, De Beers confirmed the nature of its Angolan business practices in written testimony to a hearing on conflict diamonds held before the United States Congress in May 2000:

De Beers believes that to regard as “conflict diamonds” all diamonds emanating from areas of Angola which were from time to [time] under UNITA control during this period [the Angolan civil war] muddles history to make a dubious point. De Beers makes no secret of the fact that during this period it purchased Angolan diamonds on the outside market, although it never at any stage bought diamonds from UNITA itself these purchases were made in good faith and under normal and customary market terms.

Diamonds became associated not only with conflict but also the perpetration of egregious

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14 Price, above n 13, 8-11.
human rights violations in the context of the Sierra Leonean civil war of 1991-2002. The Revolutionary United Front (RUF) based away from the coast, in the Kono district, was notorious for the practice of amputating the hands and feet of civilians as a technique of intimidating the local population. The RUF was allegedly supported by the government of neighbouring Liberia, and had its activities funded through the exploitation of Sierra Leone’s alluvial diamond fields. Large-scale media campaigns organised by groups such as Global Witness highlighted the connection between diamonds sold to consumers in New York and London and the arming of militia in Sierra Leone, leading to consumer boycotts and ultimately to legal action at national and international levels. Particularly noteworthy have been the passage of a series of United Nations Security Council resolutions imposing diamond trading prohibitions on Angola, Sierra Leone and Liberia. A related development was the creation of the Kimberley Process, an effort by government, business and non-governmental organisations to provide a system of import/export licences so as to distinguish the legitimate trade in diamonds from the illegal trade.

The conflict diamonds problem is not only of historical interest but presents an ongoing and pressing contemporary challenge. The current civil wars in the Democratic Republic of Congo (DRC) and Cote d’Ivoire have both been exacerbated by the trade in conflict diamonds. These challenges have proven to be something of a litmus test as to the effectiveness of the new legal mechanisms for the control of conflict diamonds. The Ivory Coast has been the site of a conflict bearing a striking resemblance to the Sierra Leone/Angolan precedents, in that insurgent groups have largely captured the northern diamond-rich sector of the country. Diamonds in the Democratic Republic of Congo have proven to be one of a number of resources which have extended conflict by rebels and national governments in that country, particularly in its north-eastern provinces. Unfortunately, human rights abuses have characterised both conflicts to date. Nevertheless, it has been possible to see that the international system in both cases has assisted in denying access to international markets for diamonds originating from these rebel-held regions.

18 Price, above n 13, 13-16.
19 Ibid 13; Kaplan, above n 13, 568-570.
20 Price, above n 13, 30-36.
1.4 **THE CONFLICT DIAMONDS GOVERNANCE SYSTEM**

An understanding of the nature of governance responses to the conflict diamonds problem also requires an understanding of the nature of the international diamond trade itself. At the exploration stage, diamond deposits themselves are normally described as being either alluvial or kimberlite in nature. Alluvial diamond deposits are those which, by virtue of an existing or historical river system, have become scattered through the topsoil over a given area and are accessible without the need for expensive or sophisticated diamond mining equipment. By contrast, kimberlite deposits are buried deep below the surface of the earth, are concentrated deposits, and require the use of expensive, sophisticated mining equipment, making it a capital-intensive industry and less intrinsically vulnerable to the efforts of technologically unsophisticated insurgents. There are four main types of countries which are component parts of the international diamond trade: producer countries involved in mining rough diamonds; rough diamond wholesale trading centres such as the UK and Belgium; polishing/cutting countries which prepare rough diamonds for sale; and market countries where diamond products, such as jewellery, are sold to consumers. It is clear that the diamond industry is highly internationalised and reliant on numerous international trade connections to be effective.23

The principal response to the problem of conflict diamonds has been the Kimberley Process. This system emerged through tripartite cooperation between business, government and non-governmental organisations with a view to distinguishing the legitimate diamond trade from the conflict diamond trade. Naturally, when divorced from conflict situations, the diamond industry has the potential to be a powerful driver of economic and social development on the African continent. The Kimberley Process focuses on a system of export certificates, through which participant governments certify the legitimacy of the diamonds at the point of export. Importing governments are mandated to seize unlawful imports and take other action, including domestic prosecution, against non-compliant traders. Certification also allows for statistics to be kept regarding the quantity of rough diamonds traded between countries, therefore allowing estimates of the annual diamond trade.24

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The Kimberley Process also establishes a system for ensuring that governments take their obligations under the process seriously. In particular, the Process includes a Participation Committee and a Monitoring Committee. The Monitoring Committee is mandated to consider annual reports by member nations, as well as organising Review Visits to nations to assess their compliance with the international system. The Participation Committee is charged with considering applications by countries wishing to join the Process, as well as taking punitive action against States in the event of serious non-compliance, where this is evident pursuant to the investigations made by the Monitoring Committee.25

Beyond the sphere of the Kimberley Process, and predating its formation, the United Nations Security Council has played a pivotal role in combating the trade in conflict diamonds. In response to the role of conflict diamonds in the Angolan conflict, the United Nations Security Council passed Resolution 1173 of 1998, which was the first international trade ban on the diamond trade, in response to the link of that trade with conflict. The UNSC further intervened to impose trade bans on both Sierra Leone and Liberia, the latter when it came to light that it was being used as a conduit country for smuggling diamonds of Sierra Leonean provenance. The UNSC has also passed resolutions concerning conflict diamonds in response to the situation in the Democratic Republic of Congo, and, significantly, demonstrated its capacity to respond in a collaborative fashion by imposing sanctions in 2005 after the Kimberley Process itself had imposed a trade ban on Cote d’Ivoire diamonds.26

A final response to the problem of conflict diamonds has come from the emergent institutions of international criminal justice. The earliest precedents of financial contribution to the perpetration of international crimes goes back to the Nazi war crimes cases of Flick, Farben and Krupp at Nuremberg in the aftermath of World War Two.27 The jurisprudence of “joint criminal enterprise” developed by the Yugoslavia and Rwanda Tribunals since the mid-1990s now provides a coherent legal framework for bringing such individuals to account.28 While

25 Ibid.
28 The Prosecutor v Dusko Tadic (Appeal Judgement) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-A, 15 July 1999) 227-228; The Prosecutor v Brdjanin (Appeal Judgement) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-99-36-
the International Criminal Court, established under the 1998 Rome Statute, has alluded to the possibility of persons complicit in the conflict diamonds trade being brought to account, the most important breakthrough has been made by the Special Court for Sierra Leone which has put on trial the former President of Liberia, Charles Taylor, for his role in the conflict diamonds trade as it related to the Revolutionary United Front.29

1.5 THE NETWORKED PYRAMID REGULATORY MODEL

Concurrent with the recognition of the challenge posed by the conflict diamonds trade, trends within academia have developed models for evaluating the effectiveness of legal systems for responding to such challenges. Such approaches often go beyond a purely legal analysis into the area of regulatory theory. Regulatory theory is distinguished from legal analysis by assessing whether legal systems actually achieve desired social outcomes, and involves the development of models which, when applied, can increase the ability of systems to achieve their desired outcomes.30

Two models from the field of regulatory theory, the network model and the pyramid model, stand out for their potential application in relation to the conflict diamonds governance system. Network models, such as the regulatory web or the horizontal government network, emphasise regulatory techniques based on persuasion, dialogue and socialisation. These models provide for dynamic interaction with non-governmental participants such as business organisations and civil society organisations, and encompass organisations such as the International Labour Organisation, which has formalised, but largely private, processes of 'naming and shaming', which create a socialisation pressure tending towards normative compliance.31

Another model, the regulatory pyramid, was first developed by Ayres and Braithwaite to explain the ways in which regulatory standards for a particular industry may best be enforced

A, 3 April 2007) ('Bralianin') 110-141.
30 International Criminal Court, Office of the Prosecutor, The Prosecutor on the Co-operation with Congo and other States Regarding the Situation in Ituri, DRC (26 September 2003) <http://www.ice-cpi.int/press/pressreleases/12.html>; 'Prosecution's Second Amended Indictment', The Prosecutor v Charles Taylor (Special Court for Sierra Leone, Case No SCSL-03-01-PT, 29 May 2007); Transcript of Proceedings, 'Evidence of Expert Witness Ian Smillie', The Prosecutor v Charles Taylor (Trial), (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-03-01-PT, 7 January 2008).
31 Anne-Marie Slaughter, A New World Order (Princeton University Press, 2004) 11, 14, 19, 21, 24, 56, 147, 156, 261, 262.
when considered within a particular national jurisdiction. The model is useful in that it does not take an either-or approach to the two conflicting schools of regulatory thought: namely industry self-regulation and command-and-control regulation. The industry self-regulation school seeks to use soft compliance options involving the engagement of industry to promote best practice outcomes. Rather than imposing a regime from an external source on a particular industry, such approaches seek to empower the industry itself to recognise its own interest in complying with particular regulatory goals. By contrast, so-called command-and-control systems are imposed from government entities beyond the industry itself, using instruments such as criminal prosecution to forcefully bring industry players to account against government legal standards. The regulatory pyramid model seeks to marry these two seemingly disparate systems by suggesting that industry self-regulation approaches should be implemented as far as practicable in the absence of command-and-control. As long as this approach based on soft regulation is successful, there is no imperative to change the regulatory dynamic. However, the sensible external regulator will be engaged in careful monitoring of the system for signs of disrepair, at which point sanctions can be ratcheted up and command-and-control can take over as the central regulatory approach. Assuming heavier sanctions such as civil sanctions or fines are successful, and new signs of responsiveness are observed within the industry, sanctions might be ratcheted back down to the status of self-regulation. In the event that compliance is still not forthcoming, more severe strategies might be resorted to, such as criminal sanctions or the dissolution of the corporation. The keystone of the pyramid is that its strategy is to be contingently punitive or forgiving.32

More recent thinking in regulatory theory has sought to bring together the salient features of both network and pyramid models to create so-called networked pyramid hybrid models. The networked pyramid hybrid combines network features, such as expanding beyond simply government players and the focus on techniques of dialogue, persuasion and socialisation, with pyramid features, which allow for escalation to more coercive interventions where dialogue has proven ineffective. Such modelling has been applied to international regulatory systems, such as the ‘regulatory export’ of intellectual property standards from the US to other national governments, the field of ‘traditional knowledge’ as well as the development of the threat of collective debt default by developing countries as a regulatory ‘weapon of the weak’.33

32 Ian Ayres and John Braithwaite, Responsive Regulation: Transcending the Deregulation Debate (Oxford University Press, 1992) 20-51
33 See generally Chapter 6 below.
1.6 Adaptation and Application of the Networked Pyramid

Before applying the networked pyramid model to the conflict diamonds governance system, the thesis suggests that it might be modified in a number of ways for optimal effect. Firstly, a complex system such as this would benefit from a model which could simultaneously describe regulatory action at both international and national levels, where national governments are both regulators as well as being regulated. As such, a diagram involving a smaller series of national pyramids at the base of a larger international pyramid is suggested. Furthermore, it is suggested that a regulatory model could benefit from the combination of incentives and sanctions in a single diagram, particularly with reference to the interaction between both sets of interventions. In summary, the revised model is a dual networked pyramid, with the ‘duality’ being found both in the fact that there is a pyramid within the pyramid, and the combination of both sanctions and incentives.

Applying the networked pyramid model to the conflict diamonds governance system provides insights both into the analytical power of the model, as well as the areas of potential improvement which might be made to the conflict diamonds system itself. It is useful, in the first instance, to consider whether the conflict diamonds governance system corresponds descriptively with either or both of the two component models – that is, the degree to which it already embodies the features of a regulatory pyramid or a network. In the event that the legal system is not a perfect fit on the descriptive level, the question to be considered is what changes would need to be made to the system to make a better correspondence with the theoretical model. In the event that these changes would appear to make the conflict diamonds system a more effective system, the models might be considered to be normatively powerful.

The models may be of particular utility in refining the relationship between regulatory actors in the conflict diamonds system, where there is little or no formal institutional linkage, for example between the Kimberley Process, the UN Security Council and the International Criminal Court. However, one of the particular challenges in considering the conflict diamonds legal system is that it operates both at the national or domestic level, where the apex of the system is the national government, and at the international level, where the principal regulators are other national governments and international agencies. As such, it may be that a particular model being considered may be a good fit at the domestic level but not at the international level.
While being based primarily on an analysis of existing literature in the fields of conflict diamonds and regulatory theory, the thesis has also involved a limited exercise in the gathering of primary data. A representative from the business community, a government representative and a non-governmental organisation representative were all interviewed in relation to their own views on the effectiveness of the conflict diamonds legal system at tackling the illicit diamonds trade. The interviews were carried out according to standard university ethical procedures, and the qualitative results from the interviews have been incorporated into the body of the thesis.

1.7 CONCLUDING REMARKS

This chapter has sought to introduce the dissertation and provide an overview of it. After some preliminary remarks, the two thesis research questions were set out, namely (1) to what extent has the conflict diamonds governance system achieved its objectives? and (2) does an application of the networked pyramid regulatory model to the system provide descriptive or normative insights into its effectiveness? The chapter also set out the central argument of the thesis, that the conflict diamonds governance system has been largely successful, but has failed in its efforts to address situations of serious non-compliance by member governments. Furthermore, in accordance with insights from the networked pyramid model, the thesis argues that procedures for expulsion in such cases must be clearly defined and implemented, and that pathways of escalation to the UN Security Council and the international criminal tribunals should be strengthened through the creation of a new international crime of trafficking in conflict diamonds. The chapter also delineated a road map for the thesis, summarising in brief the contribution of each chapter towards responding to the research questions, and advancing the main argument of the thesis. It also provided a more detailed introduction into the substantive chapters of the thesis.
There were more than thirty boys there, two of whom, Sheku and Josiah, were seven and eleven years old... "It seems that all of you have two things in common", the soldier said after he had finished testing all of us. "You are afraid of looking a man in the eye and afraid of holding a gun".

Ishmael Beah, former child soldier with the RUF\textsuperscript{34}

\textsuperscript{34} See n 35 below.
2 ARE CONFLICT DIAMONDS FOREVER?
BACKGROUND TO THE PROBLEM

2.1 CHAPTER OVERVIEW

2.2 THE MAINSTREAM DIAMOND TRADE

2.3 CONFLICT DIAMONDS

2.4 A COUNTRY BY COUNTRY APPROACH

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2.5 CONCLUDING REMARKS

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2.1 CHAPTER OVERVIEW

This chapter discusses the nature and parameters of the international legitimate diamond trade, before distinguishing it from the conflict diamonds trade. The definition of conflict diamonds, also known as blood diamonds, is discussed. The chapter discusses the role of conflict diamonds in exacerbating armed conflict, and human rights violations, in Angola, Sierra Leone, the Democratic Republic of Congo and Côte d’Ivoire, before giving brief concluding remarks. A strong understanding of the nature of the conflict diamonds problem is essential to any meaningful attempt to respond to the two thesis research questions, which seek to evaluate the effectiveness of the global response to the problem, and how this response might be improved, with reference to the networked pyramid regulatory model.

2.2 THE MAINSTREAM DIAMOND TRADE

The mainstream trade in rough or unprocessed diamonds is a multinational, multibillion dollar industry which, until very recently, has resisted modern trends towards transparency in its dealings. Diamond production in the legal industry during 2006 was valued at US$11.5 billion, representing 176.7 million carats, where each carat is 0.2 grams in weight. Global diamond imports were valued at US$37.7 billion, representing 500.5 million carats, and exports were valued at US$38.4 billion, representing 514.2 million carats.

The diamond industry has been dominated by the De Beers corporation for more than 100 years. De Beers produces about half the world’s rough diamonds calculated by value and regulates world prices for unprocessed stones by purchasing and stockpiling up to eighty percent of the world’s rough diamond output. Diamonds are sorted in London into approximately 5,000 categories by size and quality. Most diamonds are then distributed to dealers in Antwerp, where the majority of rough diamond trading occurs. Other major centres are London, Lucerne, New York, Tel Aviv, Johannesburg, Bombay and Dubai. The cutting and polishing of diamonds occurs in approximately thirty countries including India, South Africa, Botswana, Russia, China, Sri Lanka, Thailand, Vietnam, and Mauritius. A diamond

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would already have been traded several times before arriving at one of the major jewellery-making centres located in Israel, Belgium, India and New York.  

Connected to the virtual monopoly exercised by De Beers, diamond transactions have neither been subject to the rigour of tough competition, nor strictly regulated by governments. Reliable statistics regarding the quantity and value of the rough diamond trade in recent decades are hard to come by. In 1998, for example, the Government of Sierra Leone recorded that 8,500 carats of diamonds were exported to Belgium, whereas records in Belgium indicated that 770,000 carats were imported that year from Sierra Leone. The discrepancy may be attributed to a combination of diamonds being exported without the knowledge of Sierra Leone, and also a tendency in Belgium not to rigorously investigate information provided to it regarding the country of export. To take another example, a United Nations Security Council investigation found that the addresses of Liberian companies appearing on Liberian export invoices in Antwerp, when investigated in Liberia, did not house actual company offices. In the case that postal mail was directed to the company, courier companies had been instructed to redirect the mail to the Liberian International Shipping and Corporate Registry.

Identifying a country of origin for particular diamonds was made harder by the fact that the Antwerp record-keeping system, as well as other systems, identified only the country of last export, rather than the country of origin of the diamonds, thereby obscuring attempts to discriminate between the legitimate and black-market trades. The initial reluctance to confront the conflict diamonds problem by industry players can largely be attributed to this lack of transparency, and consequent reluctance to share information freely. It might be noted that the illegal trade in diamonds includes not only the conflict diamonds trade, but also other forms of smuggling aimed at tax avoidance or money laundering.

The success of the diamond industry has largely ridden on its advertising approaches. Diamonds have become the most legitimate and acceptable symbol of marital engagement. De Beers in the 1930s promulgated this image to recover dwindling sales in the Great

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39 Transcript of Proceedings, ‘Evidence of Expert Witness Ian Smillie’, The Prosecutor v Charles Taylor (Trial), (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-03-01-PT, 7 January 2008) 543-544.
40 Smillie, Giberie and Hazleton, above n 2, 6.
Depression. Eighty percent of engagements in the United States were consecrated with diamond rings by 1950, after the Diamonds Are Forever campaign. The United States and Europe are the largest consumer markets for diamond jewellery, representing about 65% of the global market, while the demand from the Chinese market is rapidly expanding.\(^{42}\)

A product built on positive publicity can, however, fall by negative publicity focussed on the association of diamonds with conflict and human rights violations. In 1998, Global Witness thrust the conflict diamonds problem into the public arena by highlighting its connection with the Angolan conflict. Protests in New York outside Tiffany & Co. jewellers lead to publicity in the New York Times. Aware of the effect of negative publicity in debilitating the fur coat trade, media coverage given to the conflict diamonds issue has been an important force in galvanising the diamond industry to take the issue seriously. It has also been argued that the existing diamond industry, which is still largely dominated by De Beers, has a strong interest in enforcing the Kimberley Process as it is a further means of shoring up a virtual monopoly over the international diamond trade.\(^{43}\)

In 2002, business, non-governmental organisations and governments combined to create the Kimberley Process Certification Scheme, aimed at tackling the problem of conflict diamonds. The thrust of the Kimberley Process, discussed further in Chapter 4, is to create a paper trail between diamond miners at the beginning of the diamond pipeline, and end consumers of diamond products at the other end, so as to distinguish between the legal diamond trade and the illegal trade, thereby preventing the sale of conflict diamonds. Such a system is necessary to identify the country of origin of diamonds, as there is currently no available technology which can accurately identify the country of origin of a diamond simply through analysis of the stone. At most, generalisations based on the value of the stone might be made, noting for example that Sierra Leone typically produces stones valued at about US$200 per carat, as compared to Canadian diamonds valued at about US$100 per carat, or Congolese diamonds valued at about US$25 per carat. Diamond value is assessed based on the qualities of clarity, colour, carats and cut.\(^{44}\)

\(^{41}\) Saunders, above n 12, [1414].
\(^{44}\) Transcript of Proceedings, 'Evidence of Expert Witness Ian Smillie', The Prosecutor v Charles Taylor (Trial), (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-03-01-PT, 7 January 2008) 518, 534.
Naturally, the legitimate diamond trade holds great potential for the economic and social development of African producer nations, as is implied in the term “development diamonds”.\textsuperscript{45} If diamond revenues were to benefit the country’s population, and where an appropriate amount is paid as taxation revenue, the industry could become a constructive force. Unlike other trades, such as the trade in heroine, cocaine and other debilitating drugs, it is hard to argue that there is anything intrinsically unethical about trading in diamonds. It is simply their connection with human rights abuses and conflict which makes black market trading a pariah. An interesting parallel can be made between the trade in certified diamonds and the trade in antique ivory products under the \textit{Convention on the International Trade in Endangered Species}. In certain circumstances, the ivory trade is undesirable, namely where the trade in fresh ivory, or products made from it, is allowed. Naturally, this trade encourages the killing of elephants, an endangered species under the Convention. The sale of antique items made using existing stocks of ivory, however, is arguably a distinct market, which does not require the continued killing of elephants.\textsuperscript{46}

\subsection{Conflict Diamonds}

The definition of conflict diamonds used in the context of international law is the one found in the Kimberley Process core document, which is itself based on Resolution 55/56 of the United Nations General Assembly, and relevant United Nations Security Council resolutions:

Conflict diamonds [mean] rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments

While it is important to find a workable definition for conflict diamonds, the definition which was arrived at in these early resolutions, and which found its way into the Kimberley Process core document, is open to some criticism. The definition aims to capture part of the concept of conflict diamonds, namely the role that the black market in diamonds plays in fuelling warfare. However, in focusing solely on the element of warfare, the definition fails to identify the important link to the separate concept that the black market in these circumstances also fuels serious human rights violations. It is a premise of international humanitarian law, the human rights conventions which apply during times of conflict, that

\textsuperscript{45} See discussion about “development diamonds” in Chapter 3.
\textsuperscript{46} For a useful discussion of the Convention on the International Trade in Endangered Species, see: United Kingdom Wildlife Licensing and Registration Service, \textit{Guidance for Antique Dealers on the Control of Trade in
warfare is not intrinsically illegal. Warfare only becomes illegal when fundamental principles are violated, such as the ‘principle of distinction’, which distinguishes between military personnel, who may be legitimately attacked, and others, including civilians and wounded soldiers, who may not be attacked. 47 Perhaps the key element in harnessing world opinion against the trade in conflict diamonds has been its connection with serious violations of human rights, including the ‘principle of distinction’. The wars in Sierra Leone and Angola, for example, have both been characterised by the targeting and killing of civilians.

A further difficulty with the international definition of conflict diamonds is its differentiation between ‘rebel movements’ and ‘legitimate governments’. One of the defining features of the development of international law during the past few decades has been a formal recognition that parties in a non-international conflict (i.e. rebel movements) are bound by the same laws of warfare as parties to the more established category of conflict between national armies. 48 The terminology used in this context also suggests that recourse to warfare by ‘rebel movements’ is always in contravention of international law. International law, however, recognises that recourse to warfare may be justified in certain circumstances including a war of self-defence, and wars against a colonising power.

The distinction made between rebel movements and legitimate governments also suggests that governments may legally fund their wars through the diamond trade, and more problematically, the implication that government forces by their very nature do not commit human rights abuses. Although it may be difficult to outlaw the manner in which the diamond trade finances wars fought by national governments, it is particularly problematic to suggest that government armies do not commit human rights violations. In all of the conflicts discussed in this section: Angola, Sierra Leone, the Democratic Republic of Congo, Côte d’Ivoire, and Zimbabwe, reports of serious human rights violations have been made not only in relation to rebel movements but government armies as well. Furthermore, during the conflict in the DRC, according to a key report by the United Nations Security Council Expert Committee, the armies of Uganda, Rwanda and Zimbabwe were all mining Congolese natural resources, including diamonds, to further their war efforts. The issue has also been a thorn of

47 For a useful discussion on the principle of distinction, see: International Committee of the Red Cross, Rule 1. The Principle of Distinction between Civilians and Combatants, http://www.icrc.org/customary-ihl/eng/docs/v1_ru_rule1
contention in relation to Zimbabwean rough diamonds originating from the Marange diamond fields. It entails alleged human rights abuses committed by Zimbabwean authorities against alluvial miners at Marange. As such, it does not involve either a civil war or an international conflict, and would not, on its face, fall within the conflict diamonds definition as it appears in the Kimberley core document.\footnote{See in depth discussion of the blood diamonds in the DRC and Zimbabwe in the relevant dedicated sections of this Chapter, below.}

The connection between the trade in black market diamonds and human rights violations is perhaps better expressed by the term ‘blood diamonds’ than ‘conflict diamonds’. Although the terms are used interchangeably, the connection with blood arguably connotes the violence directed against civilians better than the more prevalent term ‘conflict diamonds’. Perhaps the most infamous example of the connection between this trade and gross human rights violations, is the recent civil war in Sierra Leone. The Revolutionary United Front militia have been documented as committing crimes of terror to subdue civilian populations, including the amputation of hands and limbs. Weapons and other resources which supported these activities were largely funded through the occupation of diamond mining areas by the RUF, allegedly assisted by the Liberian government.\footnote{Saunders, above n 12, [1402]–[1428]; Tailby, above n 12, 1–6.}

Considering the challenges with the definition of conflict diamonds, the non-legal status of the Kimberley Process may again prove to be a benefit. Such an issue is more problematic in legal status documents which are subject to established norms of interpretation. In the absence of a legally binding approach, the Kimberley Process has been able to take a broader interpretation of the definition to encompass rough diamonds originating from Zimbabwe’s Marange Field. Influential commentators, such as Ian Smillie, have argued for a ‘purposive’ interpretation of the Kimberley conflict diamonds definition.\footnote{Ian Smillie, ‘Paddles for Kimberley: An Agenda for Reform’ (Report, Partnership Africa Canada, June 2010) 15–16.} In particular, he points to the human rights reference in the perambulatory passages of the Kimberley core document:

Recognising the devastating impact of conflicts fuelled by the trade in conflict diamonds on the peace, safety and security of people in affected countries and the systematic and gross human rights violations that have been perpetrated in such conflicts.\footnote{Kimberley Process, The Kimberley Process Certification Scheme (Core Document, 2002) 1.}
With reference to this statement, he argues that the Kimberley Process has always been concerned “about the appalling human rights abuses committed in the course” of conflicts. A purposive interpretation is even available with reference to ‘black letter’ international law. The Vienna Convention on the Law of Treaties, article 31, states that:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 53

Furthermore, if customary international law is to be invoked, evidence of ‘state practice’ must refer to the fact that the United Nations General Assembly accepted Marange diamonds as conflict diamonds in a number of their resolutions.

Recognising the political importance, if not the legal necessity, of reinforcing the broader definition of conflict diamonds, Smillie recommends an amendment to the Kimberley core document. He suggests that the following wording be added:

The Kimberley Process promotes respect for human rights as described in the Universal Declaration of Human Rights, and it requires their effective recognition and observance, as part of KPCS minimum standards, in the diamond industries of participating countries, and among the peoples, institutions and territories under their jurisdiction. 54

It might be argued, however, that a more explicit amendment to the definition of conflict diamonds would be better in the interests of promoting certainty. Rather than adding a general reference above to the recognition of human rights, it might be advisable to clarify the definition of conflict diamonds, perhaps in terms such as these:

Conflict diamonds are rough diamonds, the production of which is associated with, or the sale of which finances, the commission of international crimes, including war crimes, genocide and crimes against humanity.

The cause of the Kimberley Process would be politically and legally reinforced if the clarified definition was endorsed by resolutions of the United Nations General Assembly and the United Nations Security Council.

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54 Smillie, ‘Paddles for Kimberley’, above n 51, 16.
It would appear, however, that clarifications to the KP mandate have already met with political opposition within the KP Plenary itself. At the 2010 KPCS Plenary, the KP Civil Society Coalition introduced, for the fourth straight meeting, language seeking to clarify the relationship between the KPCS and human rights. The language stated that KP Participants should respect international human rights law when providing security in their diamond sectors. Civil Society, supported by the World Diamond Council and a majority of governments, argued that the credibility of the KPCS would be seriously undermined if it was not seen to be actively engaged in preventing and responding to human rights violations in the diamond sector by state agents. Despite this support, consensus was blocked by India, China, Russia and the DRC. Botswana and Namibia reserved judgment saying they needed more time to study the initiative. \(^{55}\)

While the Sierra Leone and Angolan wars fuelled by diamonds have now ended, diamonds still fuel conflict in the north-eastern Ituri region of the Democratic Republic of Congo, as well as Cote d'Ivoire. The world's three largest UN peacekeeping forces are in Sierra Leone, Liberia and the DRC consisting of 35,000 troops, with combined budgets of $1.8 billion. \(^{56}\) There is also a documented link between conflict diamonds and international terrorist groups such as Al Qaeda. Furthermore, grave human rights violations which, on their face, constitute international crimes, continue to be committed on the artisanal diamond fields of Zimbabwe and Angola by government forces. \(^{57}\)

Diamonds possess qualities which lend themselves to the exacerbation of conflict. They are easy to mine without complex equipment, particularly where there is an abundance of manual labour, which makes the miners an easy target for militia groups. Alluvial diamonds are the most vulnerable, being diamonds distributed close to the surface of the earth as a result of being moved by existing or historical river systems. Miners of alluvial diamonds are often called artisanal miners, because they are able to do the mining using only a shovel and a sieve. Artisanal miners also take advantage of tailings, such as those found in Sierra Leone, which are deposits of diamondiferous gravel which have been abandoned in the wake of large-scale industrial mining. Alluvial diamonds can be contrasted with kimberlite diamond deposits,

\(^{55}\) Partnership Africa Canada, *Other Faces: News and Views on the International Effort to End Conflict Diamonds*, No. 34, Partnership Africa Canada: February 2011, p. 4


which are concentrated deposits embedded deeply beneath the earth's surface, normally accessible only with the use of sophisticated mining equipment.\textsuperscript{58}

Gem-quality diamonds have historically held their value well, which makes them a good investment and useful as a form of hard currency to launder money, purchase weapons or stockpile for later use. They are the world’s most concentrated form of wealth, being very small and of high value, which makes them easy to transport or smuggle. They do not show up on a standard metal detector, although they would be detectable by an x-ray machine. The unregulated nature of the diamond industry has, until recently, contributed to the problem as there have been few trading restrictions and the legal industry has traditionally not been transparent in its dealings. Multiple transactions, international transfers and the practice of mixing diamonds from different sources obscure the origin of diamonds, thereby facilitating smuggling and illegal behaviour.\textsuperscript{59}

Beyond the connection between rough diamonds and international human rights crimes lies a further range of issues which problematise the diamond industry. International crimes are those human rights violations which are considered the most serious under international law, with the technical description of ‘war crimes’, ‘crimes against humanity’ and ‘genocide’, which fall within the subject-matter jurisdiction of international criminal tribunals such as the International Criminal Court. Human rights violations such as murder, rape, the recruitment and use of child soldiers or forced labour, where carried out on a widespread or systematic basis against civilians, are examples of such crimes. Other human rights violations, while still considered serious, are not classified as international crimes under international law. This second category includes child labour, such as parents including their children in artisanal mining activities, and violations of International Labour Organisation conventions such as those relating to health and safety, and minimum levels of remuneration for labour.

Lower level human rights violations do not fall within the current mandate of the Kimberley Process, however there is a clear connection between these problems and the risk of escalation to the commission of international crimes. Put differently, well regulated, healthy and safe artisanal mining communities are less likely to be attracted or coopted to sell their proceeds

\textsuperscript{58} Transcript of Proceedings, 'Evidence of Expert Witness Ian Smillie', \textit{The Prosecutor v Charles Taylor (Trial)}, (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-03-01-PT, 7 January 2008) 517-520, 524-525, 530-531; Global Witness and Partnership Africa Canada, ‘Rich Man, Poor Man’, above n 56, 3.

\textsuperscript{59} Transcript of Proceedings, 'Evidence of Expert Witness Ian Smillie', \textit{The Prosecutor v Charles Taylor (Trial)}, (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-03-01-PT, 7 January 2008) 522-523; Global
on the black market to the benefit of rebel militias. As a result, these lower level issues are
discussed in the country-by-country section. Chapter 6, in fact, suggests a framework for
extending the Kimberley Process mandate to encompass these lower level violations. One of
the countries discussed, India, does not have an international crime level issue, but has other
human rights issues associated with its diamond cutting and polishing centres, particularly the
use of child labour. This information is included with the view in mind that the Kimberley
Process mandate might at some stage take into account this broader range of human rights
issues.

2.3.1 Estimating the Size of the Conflict Diamond Trade

Although the period prior to the establishment of the Kimberley Process was characterised by
secrecy and a lack of transparency, particularly in the area of statistics, nevertheless, attempts
were made by several organisations to assess the overall size of the rough diamond trade, and
the percentage of that trade represented by the trade in conflict diamonds. On the conservative
side, De Beers estimated that, in 1999, conflict diamonds represented 3.7% of the world rough
diamond trade. The source countries for conflict diamonds in that year, according to De
Beers, were Angola, Sierra Leone and the DRC. It might be noted, however, that De Beers
was adhering to the so-called “narrow” definition of conflict diamonds, namely, that they had
to be fuelling rebel militias against “legitimate governments”. It was presumably on this basis
that the entirety of Angola’s rough diamond production was not included in the statistic, so as
to exclude Angolan government rough diamonds from the conflict diamonds equation.
According to the “broad” reading of the conflict diamonds definition, all Angolan diamonds
that year should have been classified as conflict diamonds, given the fact that both parties to
the civil war committed international human rights crimes.60

In its Three Year Review, the Kimberley Process estimated that the percentage of conflict
diamonds trade was thought to have been in the range of four to 15 percent between the mid-
1990s and the beginning of the 2000s.61

Turning to the estimates of what the conflict diamonds trade may amount to right now, it is a

Witness, ‘For a Few Dollars More’, above n 57, 8-9; Tailby, above n 12, 1-3.
60 De Beers, Written Testimony Before the United States Congress House Committee on international Relations
Subcommittee on Africa Hearings Into the Issue of “Conflict Diamonds”,
http://www.diamonds.net/fairtrade/Article.aspx?ArticleID=4046
61 Kimberley Process, The Kimberley Process Certification Scheme: Third Year Review, Kimberley Process,
particularly contested issue in light of the fact that participants within the Kimberley Process have split over the definition of conflict diamonds. As some national governments have preferred the “narrow definition”, which confines conflict diamonds to a connection with civil war rather than international human rights crimes, rough diamonds originating from the Marange artisanal fields of Zimbabwe and the artisanal fields of northern Angola have not been classified as conflict diamonds. By contrast with this definition, others consider that the definition of conflict diamonds incorporates a connection between the mining and trade of rough diamonds with the commission of international human rights crimes. Under this “broad definition”, the association of Zimbabwean and Angolan rough diamonds with international human rights crimes means that these diamonds must be classified as conflict diamonds.

The three year review of the Kimberley Process estimated that conflict diamonds represented about 0.2 percent of the world’s rough diamond trade in 2004. The estimate was based around conflict diamond production from Cote d’Ivoire and UNSC embargoed diamonds from Liberia, although the figure did not take into account the ongoing fighting centred on diamond mines in the DRC. While the official Kimberley Process organs continue to refer to this figure, those who take the “broader definition” of conflict diamonds recognise that this figure was calculated without reference to Angolan or Zimbabwean conflict diamonds and is likely, therefore, to contain further inaccuracies.62

2.4 A COUNTRY BY COUNTRY APPROACH

2.4.1 ANGOLA

The Angola conflict was the first to bring international attention to the problem of conflict diamonds. The conflict had its genesis when Angola was granted independence from its former colonial master, Portugal, in 1975. While the Popular Movement for the Liberation of Angola (MPLA) was recognised as the first independent Angolan government, it was resisted throughout the 1980s and 1990s by the National Union for the Total Independence of Angola (UNITA) and its ally the National Liberation Front of Angola (FNLA).63 There were reports of gross human rights violations on both sides, including the indiscriminate shelling of

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civilians. The war resulted in the loss of up to a million lives with 1.4 million in need of food aid, 500,000 in critical danger of starvation and the country burdened with four to five million land mines, killing or injuring 700 Angolans per year.

There was a resurgence of the conflict following UN monitored elections in 1992 which confirmed the legitimacy of the MPLA government. UNITA, led by Jonas Savimbi, refused to accept the result and instead returned to civil war, focussing on control of the diamond-producing areas of Angola. Diamonds were needed to fund the conflict, given that the end of the cold war had resulted in the loss of financial backing from the United States and South Africa. UNITA either directly exploited diamond mining areas, or used systems of taxation and licensing to extract commission from the labour of others. Proceeds from diamond sales were then used to purchase weapons. Diamonds were also an important component of UNITA’s strategy for acquiring friends and maintaining external support. UNITA gained particular support from the Mobutu government in what was then Zaire. Finally, rough diamond caches rather than cash or bank deposits constituted the primary and the preferred means of stockpiling wealth for UNITA. This provided a mechanism for avoiding the effects of international financial sanctions, such as confiscation of bank accounts, and also provided a way of sustaining income expenditure over a long period.

In response to the renewed violence, the Security Council imposed a mandatory embargo on the sale or supply of weapons or petroleum products to UNITA forces in September 1993. The Security Council also established a sanctions committee to monitor and report on the implementation of the mandatory measures. Despite the agreement of both parties to the Lusaka Peace Accord in November 1994, three years later it was clear that UNITA had used the peace period to make extensive military preparations funded by its diamond mining activities. In 1997 there was a global diamond recession, which further affected the nature of

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64 Price, above n 13, 8-11; Global Witness, 'A Rough Trade', above n 15, 7.
65 Price, above n 13, 11.
67 Price, above n 13, 9-10.
the Angolan conflict. At this time, UNITA withdrew from Cuango Valley mines, cutting back supplies in an overstocked industry. UNITA also attempted to close down Angola’s official diamond industry by attacking government mining projects. As a result, it was difficult for the government to gain any profit from diamond resources. The Security Council responded again with increased pressure on senior UNITA leaders and their immediate families, prohibiting their access to transportation or transit through the territory of other countries.

UNITA have been key players in Angolan diamond production and hence in the international diamond business, since the late 1980s. They have retained a predominant but shifting control over many of the major diamond areas, such as the Cuango river valley and the Lundas, both important areas of production. Between 1992 and 1994 UNITA controlled 90% of Angolan diamond exports. In 1995 UNITA lost control of many areas and its percentage of exports changed. During 1996 and 1997 UNITA was producing about two-thirds of all diamonds mined in Angola. During 1998 the return of former UNITA areas to State Administration took place, a condition of the 1994 Lusaka Protocol. UNITA’s withdrawal from key areas such as the lower Cuango Valley has had a major impact on its level of production, with revenue estimated to be US$200 million for 1998; a major decline from previous years.

Between 1992 and 1998 UNITA obtained an estimated minimum revenue of US$3.72 billion in diamond sales. This amount did not include revenue from other sources, nor interest generated in overseas bank accounts. By this time, the international community had begun to recognise the critical link between the international diamond trade and UNITA’s financial viability. In particular, De Beers was embarrassed by a Global Witness campaign, which focussed on De Beers’ own annual reporting in relation to their Angolan trading policies. De Beers’ annual reports indicated that its policy of buying out most of the rough diamonds on the market had continued, even when it was clear that Angolan diamonds in the 1990s were mined almost entirely by UNITA. It should be noted that in the wake of media criticism, De Beers announced an embargo on the purchase of all diamonds originating from Angola in October 1999 and went on to be a key supporter of the Kimberley Process Certification Scheme.

August 1997); Price, above n 13, 10.

74 Global Witness, ‘A Rough Trade’, above n 15, 1, 7, 12; Maggi, above n 63, 525.
75 SC Res 1127, 3814th mtg, UN Doc S/RES/1127 (28 August 1997) (Angola); Price, above n 13, 8-11; Kaplan, above n 13, 574-575.
77 Ibid, 4.
78 Ibid, 6-8; Koyame, above n 42, 85.
Further pressure was applied by the United Nations Security Council, which adopted Resolutions 1173 and 1176 in 1998, prohibiting the direct or indirect export of unofficial Angolan diamonds, meaning those not accompanied by a government-issued certificate of origin.\textsuperscript{79} However, United Nations reports allege that a number of countries acted as intermediaries between UNITA and Antwerp-based diamond traders, including Burkina Faso, Namibia, South Africa and Zambia, and that Antwerp largely turned a blind eye to the conflict diamonds traffic passing through its diamond market.\textsuperscript{80} For example, the government of Belgium reported that Zambian diamond exports to Belgium between February and May 2001 totalled 35,614.14 carats with an estimated value of $13.3 million, which is twenty times the officially recorded Zambian diamond exports between 1995 to 1998 at $564,272. In addition, diamonds exported by Zambia between 1998 and 2001 had an average carat value of $373.45 indicating that they were more likely to be high-quality gems of Angolan origin than Zambian diamonds.\textsuperscript{81}

In 1999, the government captured the crucial UNITA strongholds of Andulo and Bailundo and forced Savimbi into exile. The offensive cost UNITA its diamond-mining areas, although UNITA profited for some time from stockpiles it had already created. UNITA remained connected to the international diamond markets by air shipping through third countries such as Zambia. In 2002 Savimbi was killed, the Angolan Government and UNITA called a ceasefire, and UNITA became a political party under new leader Samakuva.\textsuperscript{82}

Since the establishment of the Kimberley Process in 2002, Angola has played an active part, particularly in the Working Group on Artisanal Mining. It is ironic, in the light of its KP participation, that, unfortunately, the human rights situation in Angola’s artisanal fields, which border the DRC, deteriorated dramatically in 2003. In 2003, Angola began a policy of expelling Congolese artisanal miners from Angolan diamond fields. In 2003 and 2004, tens of thousands of Congolese miners were expelled by the Angolan military, creating a refugee crisis in the neighbouring DRC. The first major waves of some 25,000 illegal Congolese miners were expelled in 2003, followed by another 10,000 in February 2004. In April, the UN Office of Coordination of Humanitarian Affairs (OCHA) reported the arrival of 68,000 exhausted Congolese in the DRC border provinces of Bandundu, Kasai Occidentale, Kasai

\textsuperscript{79} Price, above n 13, 8-11.
\textsuperscript{81} Supplementary Report of the Monitoring Mechanism on Sanctions Against UNITA, UN Doc 2001/966 (12 October 2001) 141; Koyame, above n 42, 85-86.
Orientale and Katanga. Estimates suggest that approximately 100,000 illicit miners had been expelled from Angola by mid 2004, about a third of the estimated number of miners in Angola.\(^3\)

While the expulsions were occurring, UN agencies, Human Rights Watch and Medicins sans Frontières publicised concerns about abuses reported by returning miners, including rape, body cavity searches of both sexes for hidden diamonds, and general brutality. A human rights group, Voix des Sans Voix, reported that Angolan troops and civilians had subjected many of the Congolese to beatings and death threats.\(^4\)

Protests from the government of the DRC led to an agreement between the two countries that expulsions would be handled in a more co-ordinated and less repressive manner. Although the government of Angola made it plain that the expulsions would continue, Angola acknowledged the military brutality. "These excesses provoked harmful repercussions, which we regret, and for which we offer a public apology" said Angola's Interior Minister Osvaldo Serra Van-Dunem. One of the repercussions was a desperate food shortage among returning Angolan refugees in Malanje Province, unable to access markets just across the border in the DRC. In June 2004, the World Food Programme (WFP) said the Angolan government’s forced repatriation of Congolese nationals had caused hostility towards Angolans who depended on neighbouring Congolese markets to purchase food and other necessary items. An estimated 17,000 Angolans were affected.\(^5\)

Unfortunately, in subsequent years, cross-border expulsions by Angola, and attendant human rights abuses, continued. As recently as November 2010, UNICEF reported that more than 650 women and girls had been raped during mass expulsions. Approximately 6,621 Congolese returnees arrived in the Western Kasai province in the DRC in two waves in September and October 2010. The reports of sexual violence are based on evidence collected by NGO welcome committees in the region. Many of the victims reported being locked up in derelict buildings, gang-raped and tortured by Angolan security forces and then forced to walk several days back across the border into the DRC.\(^6\)

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\(^2\) Kaplan, above n 13, 573-578.
\(^4\) Ibid, 8-9.
\(^5\) Ibid, 8-9.
The scale of the mass deportations, involving systematic rape and abuse, suggest that they meet the indicia of crimes against humanity attracting the jurisdiction of the International Criminal Court. Unfortunately, the issue has not apparently attracted significant attention by either the ICC or the Kimberley Process itself. Unlike the situation in Zimbabwe, there has been relatively less media discussion of the Angola deportations. It would appear, on its face, that the connection between artisanal mining in Angola and the commission of these international crimes would qualify Angolan diamonds as being conflict diamonds.

A case study, based on an interview with 28-year-old Dallas Kabungo, is illustrative of the experience of many thousands of DRC citizens expelled from Angola:

The road north from the Congolese border town of Kamoko barely merits the name; a narrow rutted track, impassable save by toughest 4x4, clogged in early June this year by a tired stream of people flooding north from Angola. It was here that the Annual Review encountered 28-year-old Dallas Kabungo.

He had no money, few clothes, and nothing but flip-flops on his feet. He had no idea where to find his wife and child. He’d been walking that road, and others like it on the Angolan side of the border, for over five days, since the night the Angolan police and army surrounded his encampment at Tchiamba, near the town of Lucapa in Lunda Norte. They began by firing shots in the air. Everyone was rounded up, and those without Angolan papers were searched down to their underwear. Anything of value was confiscated. Kabungo lost his spare clothes, a radio, and US$600. “You came to this country with nothing,” the soldiers told him, “you will leave with nothing.” Those who resisted the search were beaten, or whipped with belts. …

Meanwhile, after waiting a week in the Congolese border town of Kamoko, Dallas Kabungo was finally re-united with his wife, Chantal, and their three year-old daughter. Soldiers had arrived at the house in Lucapa that Kabungo had bought for her with his diamond earnings. They looted the furniture, took her radio and money, and set her on the road north. It had taken her days of walking in the heat
and dust to reach the border.

Their reunion was a bittersweet affair. Kabungo learned that his wife, coming over the border crossing at Myanda, had been raped repeatedly by Angolan border guards. Among his Baluba tribe, he said, it’s believed that if a woman engages in adultery, her children soon fall sick and die. He’s not sure if the curse works when the woman has been raped.\textsuperscript{87}

Grave human rights violations by the Angolan security forces, namely the Angolan military and National Police, have also targeted Angolan citizens engaged in artisanal mining. One documented case, the killing of Belito Mendes, occurred on Saturday 12 May 2007. The victim, 28 year-old Belito Mendes, a veteran of the Angolan army, was beaten to death by members of the Angolan National Police after refusing to hand over the small amount of money he had on his person.\textsuperscript{88}

While the Angolan expulsions have attracted little attention, there have recently been precedent-setting national prosecutions in French courts, in relation to arms trafficking and bribery related to the Angolan civil war of the 1990s. On 28 October 2009, a Paris court convicted 36 people in connection to illegal arms sales to Angola during its civil war, including arms dealers, middlemen and French politicians. Arms trading went hand in hand with diamond and oil trading during the war, as sales of natural resources were used to purchase armaments, which were then turned on the civilian population. Arms dealers Pierre Falcone and Arkadi Gaydamak were sentenced to six years in prison for arms trafficking and other offences. Former French interior minister Charles Pasqua was sentenced to a year in jail for taking bribes from the two men. Amongst others convicted, a son of former President Mitterrand and a banker from BNP Paribas, a top French bank, were given suspended sentences. At the time of reporting, appeals were expected to follow.\textsuperscript{89}

While the problem of international human rights crime is front and centre when considering the rough diamond industry in Angola, lower level human rights issues present further challenges. In particular, the Angolan artisanal industry has a significant child labour

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\textsuperscript{88} Partnership Africa Canada, above, n 87, 13-14.

\textsuperscript{89} Global Witness, \textit{Global Witness welcomes French "Angolagate" verdict as victory for justice} (28 October 2009), http://www.globalwitness.org/fr/node/3876
problem. According to UNICEF, 70 per cent of Angola’s population is under 24, and 30 per cent of children between the ages of 5 and 14 years work. A 2004 case study undertaken by Partnership Africa Canada and Global Witness in the Lunda Norte province showed that family mining groups consist of women and children as well as adult men. Forty six per cent of those interviewed and working were children were in the age group 5-16. Many women worked as well, and differences in gender representation were large in only one age group. Young men dominated the 17-25 age group. The report noted that “In today’s mining areas, fear, insecurity and sexual abuse are constant. Today’s child miners are … a direct result of war, poverty and the absence of education; there are few schools in the diamond regions and even the existing ones were destroyed during the many decades of war.” Yet these families, who worked in unsafe and abusive conditions, derived less than five per cent of their income from mining diamonds, with the largest part derived from agriculture and the rest from business and trading. This was not because diamonds represented less work than agriculture; it was because the diggers were so badly paid for the diamonds they found.\textsuperscript{90}

2.4.2 SIERRA LEONE

The conflict in Sierra Leone saw the problem of conflict diamonds reach a greater level of notoriety, through the activities of the Revolutionary United Front (RUF). It was through the activities of the RUF that the illegal diamonds trade became connected in the eyes of the international community not only with the prolongation of conflict, but also with the perpetration of graphic human rights violations. The terror tactics employed by the RUF to subdue the local civilian population included the amputation of hands, limbs and body parts. The militia also perpetrated unlawful killings, physical and sexual violence against civilians, abductions, looting and destruction of civilian property, forced labour including sexual slavery, and the conscription of boys and girls into the armed forces and their deployment in active fighting. The names of their military operations, “Operation Pay Yourself” and “Operation No Living Thing”, were illustrative of their intentions and encouraged the commission of these crimes.\textsuperscript{91} The conflict resulted in the loss of 75,000 lives, created half a million refugees and internally displaced 2.25 million, while an estimated 12,000 children


were abducted to fight as soldiers. Through the infamous practice of amputation, some 20,000 of the civilian population were left mutilated. Finally, in the quintessential paradox of the resource curse, Sierra Leone was listed at the bottom of the UNDP Human Development Index in 2001, despite its abundance of natural resources.\(^92\)

In 1991, former army corporal Foday Sankoh emerged as the leader of the Revolutionary United Front which attacked Sierra Leonean border towns from Liberia. The attacks were marked by brutality against civilians and children were kidnapped and inducted into the RUF.\(^93\) In 1994, the RUF overran diamond-rich areas, bauxite and titanium mines, thereby bankrupting the economy, but providing themselves with access to an abundance of natural resources. A peace accord was signed in 1996 by newly elected President Kabbah and Foday Sankoh but this was to change when soldiers seized power the following year under the banner of the Armed Forces Ruling Council (AFRC). Major Johnny Paul Koroma became the chairman and invited the RUF to join the government, resulting in systematic human rights abuses and the destruction of the formal economy.\(^94\)

The United Nations Security Council responded by imposing an arms embargo on Sierra Leone in 1997. The United Nations also launched a limited peacekeeping operation, named UNOMISIL, consisting of seventy observers. However, it was the regional peacekeeping force Economic Community of West African States Cease-Fire Monitoring Group (ECOMOG) which made the decisive intervention. In February 1998, 10,000 to 12,000 ECOMOG troops forced the RUF/AFRC out of Freetown and engaged their forces in the countryside, enabling the Kabbah government to be re-established. During the same year, an embargo was imposed which allowed the government to rearm itself, but the embargo on RUF weapons was maintained.\(^95\)

The RUF, however, outmanoeuvred the embargo, and their offensive in January 1999 resulted in the capture of the capital city, Freetown. In a period of only two weeks, Freetown witnessed the torture and murder of cabinet ministers, journalists and civil servants, the deaths of some 6,000 civilians and the disappearance of 2,000 children. The RUF were ultimately pushed out of Freetown by ECOMOG forces. In an effort to protect Freetown, maintain

\(^{92}\) Price, above n 13, 13; Koyame, above n 42, 86.
\(^{93}\) Transcript of Proceedings, 'Opening Statement of the Prosecution', The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao (Trial), (Trial Chamber I, Special Court for Sierra Leone, Case No SCSL-04-15-T, 5 July 2004) 20.
\(^{94}\) Smillie, Gberie and Hazleton, above n 2, 3.
security and train Sierra Leone's army, UN peacekeepers were increased to approximately 13,000 and were augmented by another 750 from the United Kingdom. A serious challenge arose with the capture of 500 UN soldiers by the RUF, who were only released through a combination of UN perseverance and British troops.\footnote{96}

Peace finally became a possibility following the capture of Sankoh in 2000 and the subsequent disarmament of the RUF. In May 2001, the RUF released children who had been abducted and conscripted, aged from ten to fifteen and in January 2002, the UN announced the completion of the disarmament of over 45,000 rebel soldiers. Kabbah was re-elected President in 2002 by seventy percent of the vote in the first peaceful election.\footnote{97} Following certificate of origin initiatives such as the Kimberley Process, the legitimate diamond industry in Sierra Leone has begun to re-emerge. In 2003, Sierra Leone legally exported $76 million of diamonds from alluvial fields, while the 2004 total was estimated as being $120 million.\footnote{98}

During the civil war, the RUF armed itself through the sale of illegal diamonds, earning about $120 million per year from 1991 to 1999.\footnote{99} The alluvial diamond fields in the Kono region and the Tongo Field region were the prize, giving the RUF little reason to engage with the peace process or even to try to win the war. The RUF's mining regime was largely based on forced labour, whereby civilians, including children, were tied up and forced to work twelve hour shifts at gunpoint and forbidden to speak. They were not paid or fed and sustained themselves by eating nearby fruit. New labour was brought in when existing workers became too sick to work or were shot. Shootings were carried out by the RUF Small Boys' Units, staffed by children as young as 11 years old, who were armed with AK-47s.\footnote{100} Expert evidence suggests that the reason that the RUF engaged in amputations and fear tactics was to maintain complete control over the diamond mining fields without interference by the thousands of freelance diggers who would otherwise also mine the area.\footnote{101}

\footnote{95} Ibid, 2-3; Price, above n 13, 14.
\footnote{96} Smillie, Gberie and Hazleton, above n 2, 3; Price, above n 13, 14-16.
\footnote{97} Price, above n 13, 14-16.
\footnote{98} Global Witness and Partnership Africa Canada, 'Rich Man, Poor Man', above n 56, 9.
\footnote{101} Transcript of Proceedings, 'Evidence of Expert Witness Ian Smillie', The Prosecutor v Charles Taylor (Trial), (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-03-01-PT, 7 January 2008) 581-582.
invasion, the diamond fields had been mined by thousands of licensed and unlicensed artisanal diggers and policed by a government force numbering 500 persons with access to helicopters.\(^{102}\)

From the very inception of the civil war, the RUF allegedly received the support of Liberian President Charles Taylor. He encouraged Foday Sankoh to mine diamonds and gold from the Kono district to finance the war, and trade these goods with Burkina Faso and Libya for supplies, ammunition, and weapons.\(^{103}\) In return for diamonds, Taylor allegedly supplied the RUF with consignments of AK-47s, RPGs, Uzis and ammunition and provided military training to the militia.\(^{104}\) A UN Expert Panel collected evidence of cargoes of weapons, in the period 1998 to 1999, being airlifted from the Ukraine and Eastern Europe to Liberia via transit stops in Burkina Faso and Niger. The weapons were then diverted to the RUF, who made use of them in their offensive against Freetown in January 1999 and other operations. It is interesting to note that one of the individuals cited as a key arms trader, Russian national Viktor Bout, was arrested on 7 March 2008 on charges related to illegal arms dealing.\(^{105}\)

Even prior to the imposition of diamond trading sanctions on Sierra Leone, it became apparent that Sierra Leonean diamonds were reaching the international market after first being diverted through other countries including, most notably, Liberia. Liberian annual diamond production capacity is estimated as being 100,000 to 150,000 carats, however rough diamond exports to Antwerp from Liberia were recorded at 31 million carats from 1994 to 1998, an average of 6 million carats per year. Similarly, the Ivory Coast, which had not been mining diamonds since the mid-1980s, registered exports of more than 1.5 million between 1995 and 1997. Guinea also appeared to be a diversion point for Sierra Leonean diamonds.\(^{106}\) In 2000,

\(^{102}\) Kaplan, above n 13, 568-570; Transcript of Proceedings, 'Evidence of Expert Witness Ian Smillie', _The Prosecutor v Charles Taylor (Trial)_ (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-03-01-PT, 7 January 2008) 503-5, 533.

\(^{103}\) Transcript of Proceedings, 'Opening Statement of the Prosecution', _The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao (Trial)_ (Trial Chamber I, Special Court for Sierra Leone, Case No SCSL-04-15-T, 5 July 2004) 21.


\(^{106}\) Kaplan, above n 13, 568-570; Smillie, Gbere and Hazleton, above n 2, 6; Koyame, above n 42, 87; M Cuellar, 'Panel: Combating Diamonds in Sub-Saharan Africa' (2007) 1 _African Journal of Legal Studies_ 80, 447-448. The literature also notes that identifying accurately even the "country of export" was complicated by
following the passing of United Nations Security Council Resolution 1306 banning the sale of diamonds from Sierra Leone, Liberian production increased one hundred and sixty one percent from 1999 production. In response to a UN Panel of Experts report, Security Council Resolution 1343 was passed, prohibiting the export or import of Liberian diamonds, so as to close the Liberian way-station for Sierra Leonian diamonds.107

According to Global Witness, the RUF trade in conflict diamonds also had connections to Al Qaeda and the world of international terrorism. For example, in 1998 an RUF official met with operatives from Al Qaeda to sell diamonds, with the first transaction involving $100,000 in cash for a parcel of diamonds. As further evidence of the connection, Ahmed Khalfan Ghailani, a high level Al Qaeda operative from Tanzania was arrested in 2004, on suspicion of being involved in the trading of conflict diamonds and of running a $20 million financing operation trading illegal conflict diamonds in the Liberian Capital of Monrovia.108

Crimes fuelled by conflict diamonds have now been prosecuted in a number of cases before the international criminal justice system, namely the Special Court for Sierra Leone. After Sankoh was captured in 2000, the Special Court was established to try him and other persons for violations of international law during the conflict. Although Sankoh died before the commencement of his trial in 2004, other members of the RUF leadership, namely Issa Hassan Sesay, Morris Kallon, and Augustine Gbao, were convicted of international crimes on 2 March 2009, with their convictions upheld on appeal on 26 October 2009.109 In June 2003

problems of fraud and corruption within the Antwerp diamond market at the time: Smillie, Gbere and Hazleton, above n 2, 6. It was also noted that Liberia was used as a way-station for other illicit diamonds, for example Russian diamonds: Transcript of Proceedings, 'Evidence of Expert Witness Ian Smillie', The Prosecutor v Charles Taylor (Trial), (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-03-01-PT, 7 January 2008) 565-567.

107 Kaplan, above n 13, 570. Resolutions renewed the sanctions on a regular basis, even following the election of the reformist government of President Sirleaf on 23 November 2005 and the arrest on war-crimes charges of former President Charles Taylor on 29 March 2006. However, trade in diamonds possessing a certificate of origin was permitted: Koyame, above n 13, 7-8. Controversially, the sanctions were entirely removed in 2007 under SC Res 1753 of 27 April 2007, with commentators arguing that Liberia was still not in a position to ensure the conflict-free status of its diamonds: Global Witness, 'Cautiously Optimistic: the Case for Maintaining Sanctions in Liberia' (Report, 2006) 17.


109 Transcript of Proceedings, 'Opening Statement of the Prosecution', The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao (Trial), (Trial Chamber I, Special Court for Sierra Leone, Case No SCSL-04-15-T, 5 July 2004); The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao (Trial
the Sierra Leone Special Court unsealed an indictment against Liberian President Charles Taylor in relation to his alleged involvement in violations of international criminal law during the Sierra Leone conflict. President Taylor subsequently resigned his office and went into hiding in Nigeria in August 2003, until being taken into custody by the Court on 29 March 2006. His trial, which was moved to the Hague, commenced on 7 January 2008, with closing arguments concluding on 11 March 2011. The trial judgement is yet to be rendered.

Pro-government forces, most notably the so-called Civilian Defence Force (CDF) militia, have also been brought to account for human rights abuses allegedly committed during the war. For example, the CDF was known to practice torture, while the Sierra Leone government was also documented as enlisting child soldiers during the military regime of Valentine Strasser during the years 1992 to 1996. Members of the CDF leadership were convicted of international crimes by the Special Court on 2 August 2007, with the convictions upheld on appeal on 28 May 2008.

Since the conclusion of the Sierra Leone civil war, there has thankfully been a decade of peace and development. It should be noted, however, that issues remain, particularly in relation to Sierra Leone’s alluvial diamond mining sector. Of particular concern is the ongoing problem of child labour in the 120,000 person strong artisanal industry.

2.4.3 THE DEMOCRATIC REPUBLIC OF CONGO

The problem of conflict diamonds was central to the outbreak and prolongation of the 1996 to
2002 war in the Democratic Republic of Congo, which has now transformed into the current civil war in the north-east of that country. The Democratic Republic of Congo has suffered from a resource curse relating not only to diamonds, but a range of minerals including copper, cobalt, uranium, tin, zinc and coltan, the latter being a key material in the manufacture of mobile telephones and other electronic equipment. The resource curse is seen as working in two different ways in the DRC conflict. Access to resources acted both as a reason to enter the war for militias and national governments, and a factor for prolonging involvement in the war. The war resulted in the deaths of some three million people, because of fighting, disease and malnutrition, as well as approximately 500,000 refugees and two million internally displaced people, and saw six national armies from neighbouring countries intervene in the conflict. The war also accentuated the poverty of the population, with the DRC ranked at 155th place out of 173 countries on the UNDP Human Development Index, despite its abundance of natural resources.

The war has its genesis in the 1994 genocide in Rwanda, where militias known as Interahamwe backed by the government armed forces, killed some 800,000 ethnic Tutsis and moderate Hutus. In the wake of their defeat by the Tutsi-led rebels, the Interahamwe and other genocidaires fled across the border into the Democratic Republic of Congo, from which they launched attacks on Rwanda and also the longstanding Tutsi population which was resident in eastern Congo. In response to these attacks, and in an attempt to protect the Tutsi population, the Alliance of Democratic Force for the Liberation of Congo (ADFL), led by Laurent Kabila, was formed. The ADFL was backed by the incoming Tutsi-led Rwandan government which, commentators allege, not only supported the ADFL’s wider agenda to topple Congolese President Mobuto Sese Seko, but also had designs on the mineral wealth of the eastern Congolese provinces. In 1997, Kabila’s forces entered the capital Kinshasa and toppled Mobutu’s government. The 1996 to 1997 phase of the conflict is often termed the First Congolese War.

The support of Rwanda and allied Uganda for the new Kabila government proved to be short-lived. Speculation regarding the change in Rwandan policy ranges from Kabila no longer

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being interested in protecting Congolese Tutsi, to wider rumours about Kabila reneging on important promises made to large mining corporations.\textsuperscript{118} In August 1998 the Congolese Rally for Democracy (RCD) emerged, supported by Rwanda, and intent on enforcing a second regime change in Kinshasa.\textsuperscript{119} The forward offensive was blocked, however, by troops from Angola, Zimbabwe and Namibia, and a four-year stand-off ensued in what is sometimes called the Second Congolese War.\textsuperscript{120}

Although Kabila’s government survived the invasion, Kabila himself was not so fortunate, and died to an assassin’s bullet in 2001. It was left to his son and successor, Joseph Kabila, to become a party to the September 2002 Luanda Agreement. The Agreement saw the commencement of a gradual withdrawal of foreign armies, although conflict has continued through rebel groups operating particularly in the north-eastern Ituri and Kivu regions.\textsuperscript{121}

A United Nations Security Council Expert Committee has argued that the involvement of foreign governments and militias in the conflict was influenced by a desire to reap the benefits of the extensive mineral wealth, including diamonds, of the Democratic Republic of Congo. The Panel further argued that the main beneficiaries from the conflict have been individuals in the military and political leadership of the intervening nations, rather than those nations themselves.\textsuperscript{122}

As evidence of how Rwandan diamond enterprises supported Kabila’s ADFL in the First Congolese War, the report detailed a financial transaction where a US$3.5 million payment was made from a diamond company named MIBA to COMIEX, a company owned by Kabila. The payment was from an account held with the Rwandan government’s financial institution \textit{Banque de Commerce du Development et d’Industrie} (BCDI). The Report also stated that cargo flights carrying military equipment to airstrips in eastern DRC would return with loads of gold and coffee, as well as businessmen with stolen diamonds for sale.\textsuperscript{123}


\textsuperscript{118} Juma, ‘The War in Congo’, above n 69, 144-148.

\textsuperscript{119} Ibid, 145-147.

\textsuperscript{120} BBC, ‘Q&A: DR Congo Conflict’, above n 116.


During the Second Congolese War, a major diamond and gold dealer named Ali Hussein was reported to have met many times with Rwandan government officials. \(^{124}\) Rwanda was estimated to have earned some US$4 million from 1998 to 2000 as a result of diamond licensing revenues, although it later shared the income with the RCD-Goma regional administration. \(^{125}\) Statistics from the Antwerp Diamond High Council show that Rwanda, which has no diamond resources of its own, exported US$720,000 worth of diamonds in 1997, diamonds worth US$17,000 in 1998, diamonds worth US$439,000 in 1999 and diamonds worth US$1.8 million in 2000. \(^{126}\) These statistics were largely corroborated by World Trade Organisation records. \(^{127}\)

The Ugandan government funded its presence in the DRC through the re-exportation economy, repackaging and exporting natural resources from the DRC as Ugandan natural resources. According to the Antwerp Diamond High Council, Uganda, which was never previously a diamond exporter, exported $1.5 million dollars worth of diamonds in 1998, $1.8 million in 1999 and $1.3 million in 2000. \(^{128}\) Statistics from the World Trade Organisation corroborated the fact that Uganda, without diamond resources of its own, exported diamonds between 1998 and 2001. \(^{129}\)

Zimbabwe was also benefiting from Congolese diamonds, particularly in the diamond-rich Mbuji-Mayi area. There were notably 2500 to 3000 Zimbabwean troops in the area even after most other foreign armies had withdrawn from the DRC in 2002. \(^{130}\) The region had previously been the site of a major battle between Rwandan-backed forces and DRC forces in 2001. \(^{131}\) Burundi also caused Kabila consternation when its military venture into South Kivu province appeared to threaten the Congolese diamond reserves in nearby Katanga. \(^{132}\) World Trade Organisation statistics showed that Burundi, without any diamond extraction industries


\(^{126}\) Ibid, 25.

\(^{127}\) Ibid, [21]-[30]; Fonseca, above n 116, 54.


\(^{129}\) Ibid, [21]-[30]; Fonseca, above n 116, 54.


of its own, exported sizeable quantities of diamonds in the period 1997 to 2000. In an interesting twist, commentators suggest that Angola’s involvement was largely concerned with the disruption of the conflict diamonds trade rather than its perpetuation, considering that Kabila was opposed to UNITA forces trading their diamonds on Congolese territory.

Mineral resources were also a goal for a variety of militia groups, some of which were allegedly proxies for foreign governments. As a result, diamond-rich areas became the focus of fighting during the conflict. The diamond-rich town of Kisangani was the site in August 1999 of a major battle following the split of the main rebel group, which was fuelled by the desire to control local natural resources. The Congolese Rally for Democracy (RCD), split into two parts, namely the RCD-ML, supported by Uganda, and the RCD-Goma, supported by Rwanda. The battle, which also involved direct fighting between Ugandan and Rwandan troops, killed some 400 soldiers and 200 civilians. On 18 November 2000, RCD-Goma and its Rwandan allied troops stationed in Kisangani attacked and took control of positions belonging to Ugandan-supported forces in Bengamisa, 50 km north-west of Kisangani, an area with an abundance of diamonds. Late in December 2000, the RCD-Goma launched attacks against two other diamond-rich areas, in Kandole and Lakutu. Control over diamond resources caused a further schism when the RCD-National (RCD-N) formed with the objective of controlling north-eastern diamond resources in the Ituri region.

The RCD-ML benefited from its control over resources in the Ituri region during the Second Congolese War. For example, RCD-ML received benefits in exchange for granting the Ugandan-Thai company DARA-Forest a licence to harvest diamonds, coltan and timber, after the company had failed to acquire a concession from Kinshasa in March 1998. The Expert Panel identified the retired Ugandan Major General Salim Saleh as benefiting from Congolese diamonds, particularly from the Kisangani region, as well as gold. He allegedly played a major role in Uganda’s operations in north-eastern Congo, cultivating a reciprocal relationship with RCD-ML elites. In essence, he ensured their individual safety in return for

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132 Fonseca, above n 116, 31.
137 Ibid, 37.
138 Fonseca, above n 116, 42.
their looking after his resource extraction schemes. The General also fostered a close relationship with the senior leadership of RCD-N, through which dealings in diamonds and other natural resources were facilitated.\textsuperscript{140}

In the wake of the phased withdrawal of foreign troops following the 2002 Luanda Agreement, the Security Council Expert Panel has commented that governments, including DRC government members, have continued to benefit illicitly from mineral resources. The Panel was critical of the connection between the DRC Government and the Zimbabwean government, including the major mining project in the diamond centre of Mbuji Mayi. Other diamond projects are run as joint ventures involving both DRC and Zimbabwean officials, particularly under the umbrella of the COSLEG stock company. However, the Panel argued that projects are run with the support of individuals from the DRC and Zimbabwean military and political elites, which give little or no revenue to the DRC national treasury, while supporting the individual interests of members of those elites. The Panel also argued that, because of such arrangements, individuals in the Zimbabwean political and military circles will continue to benefit, even though the formal Zimbabwean military presence from the DRC is in a process of withdrawal. The Panel argued that as a result of these transactions, Harare in Zimbabwe became “a significant illicit diamond-trading centre”.\textsuperscript{141}

In the case of Rwanda, it is alleged in the Experts’ Panel report that the regional administration in the Kivu region of the Democratic Republic of Congo has largely been infiltrated by persons loyal to Rwanda, who will continue to support the efforts of that country to exploit the DRC’s mineral wealth, including diamond resources. Profits from resource extraction largely transferred back to the Rwandan Army through its Congo Desk, with only a small amount returning to the coffers of the regional administration.\textsuperscript{142}

Similar to the case of Rwanda, the Panel argued that the formal withdrawal of the Ugandan military apparatus will not prevent continuing economic gain to individuals who are involved in private businesses in the DRC. In particular, the Panel argued that there are a number of rebel groups in Uganda who operate as de facto arms of the Ugandan military, able to

\textsuperscript{142} Ibid, 14-15.
represent the interests of the Ugandan elite on an ongoing basis.\footnote{Ibid, 19-21.}

In response to the conflict diamond problem faced by the DRC, the Security Council recommended a number of measures, including the imposition of a diamond embargo on the DRC and Rwanda, Uganda and Burundi, as well as encouraging the imposition of criminal sanctions against corporations and individuals breaking the embargo. The Security Council also called for an end to trade with certain banks, the seizure of assets of particular individuals, and an arms embargo and suspension of military cooperation with national and rebel military forces operating in the DRC. In contrast to the cases of Sierra Leone, Angola, Cote d’Ivoire and Liberia, however, sanctions were not immediately imposed on the DRC and its forces of occupation.\footnote{Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo, S/2001/357 (12 April 2001) [221]-[225]; Fonseca, above n 116, 68.} A twelve-month arms embargo on the eastern half of the country was eventually mandated in July 2003, which was extended to the whole of the country in May 2005, along with assets of particular individuals being frozen. Sanctions on commodities such as diamonds were not favoured even as recently as 2007 by a U.N. Expert Committee.\footnote{Global Policy Forum, The Democratic Republic of Congo (2006) <http://www.globalpolicy.org/security/issues/kongidx.htm>; Interim Report of the Group of Experts on the Democratic Republic of the Congo, Pursuant to Security Council Resolution 1698 (2006), UN Doc S/2007/40 (31 January 2007) [44]-[45].}

In its subsequent 2002 report, the Expert Panel named not only individuals but a comprehensive list of small enterprises and very large multinational enterprises that were allegedly fuelling the DRC war. The persons and entities named were separated into two categories. The first category, listed in annexes I and II, were targeted for restrictive measures because “[b]y contributing to the revenues of the elite networks, directly or indirectly, those companies and individuals contribute to the ongoing conflict and to human rights abuses”. While noting that those listed would be in violation of the OECD Guidelines for Multinational Enterprises, the individuals and enterprises “involved in criminal and illicit exploitation” were targeted for particular measures, namely: travel bans on selected individuals identified by the Panel; freezing of the personal assets of persons involved in illegal exploitation; barring selected companies and individuals from accessing banking facilities and other financial institutions and from receiving funding or establishing a partnership or other commercial relations with international financial institutions. The Panel recommended, however, that a grace period of four to five months be provided for those corporations identified to prove that
they had ceased their financial activities in the DRC.146

The Panel identified a further list of corporations, many of them large multinationals registered in Europe or the United States, as being presumably less criminally liable in their behaviour, but nevertheless in violation of the OECD Guidelines for Multinational Enterprises. The Expert Panel reminded national governments of their responsibility to ensure that enterprises in their jurisdiction do not abuse principles of conduct they had adopted as a matter of law, with criminal prosecutions under national legislation being one option for consideration by governments. The Panel also recommended that the Security Council establish a monitoring body to oversee action taken by governments in relation to multinational corporations registered in their countries.147

Diamond trading corporations featured prominently in both categories identified by the Expert Panel. In relation to the corporations singled out for direct punitive action were five corporations exclusively identified with the mining or trading in diamonds. The second list, however, was perhaps more startling for its inclusion of diamond mining giant De Beers as well as other high profile corporates such as the mining company Anglo-American and Barclay’s Bank. Altogether twelve exclusively diamond mining/trading enterprises were placed on the category two list.148

The UN Panel report also called for the universal implementation of the Kimberley Process. Interestingly, they called for the establishment of a permanently staffed secretariat at the international level, and identified the necessity of creating a specialized enforcement organization within each member country with the authority, knowledge and specialized training necessary to ensure the effectiveness of the Kimberley Process.149

The withdrawal of Ugandan troops in 2002 sparked further problems, particularly in the Ituri area. Despite the deployment of a UN peacekeeping force, the United Nations Mission in the Democratic Republic of Congo (MONUC), the power vacuum created by the withdrawal of troops has now effectively been replaced by elements who defected from the regular forces of

147 Ibid, [170], [177]-[178].
149 Final Report Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of
the Congolese army, who now operate under the name of Mouvement Revolutionnaire du Congo (MRC). Reports from observers of the situation in 2006 reported that their military activities were supported by the illegal exploitation of natural resources in the region.\textsuperscript{150}

Militia groups operating in the area had a strong incentive to acquire as much gold and diamonds as possible, so as to pre-empt the operation of the Ituri Pacification Committee, whose purpose under the Luanda Agreement is the management of natural resources. As a result, a showdown occurred between Ugandan backed RCD-ML, Front for National Integration (FNI) and Patriotic Force of Resistance in Ituri (FRPI) on the one hand, and the Rwandan-backed Union of Congolese Patriots (UPC), supported by the Congolese Liberation Movement (MLC) and the RCD-N. The Ituri conflict was further complicated by an ethnic dimension, notably that the Ugandan backed militias were composed primarily of people of Lendu ethnic background, while the UPC was primarily composed of persons of Hema ethnicity. The ethnic dimension sparked fears of a possible genocide which fortunately didn’t eventuate.\textsuperscript{151}

Human rights violations in the Ituri region, however, attracted the attention of the international criminal justice system, leading to indictments and the first ever arrests by the newly established International Criminal Court.\textsuperscript{152} Thomas Lubanga Dyilo, leader of the UPC, was arrested on the same day as the issuance of the indictment against him on 17 March 2006, with the assistance of Congolese authorities, French armed forces and MONUC forces.\textsuperscript{153} The Indictment against Lubanga alleges that the UPC, under the leadership of Lubanga, seized control of Bunia and parts of Ituri in Orientale Province in 2002, resulting in the death of more than 8,000 civilians and the displacement of 600,000 others. The Indictment also alleges that the UPC took young children from their families and forced them to join the UPC military forces, which constitutes a crime under Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) Rome Statute.\textsuperscript{154} The International Criminal Court followed up its first arrest with a second on 18 October 2007, also in relation to alleged crimes in the Ituri area. The Prosecutor alleged that


\textsuperscript{151} Fonseca, above n 116, 81-82.

\textsuperscript{152} Ibid, 82.


\textsuperscript{154} ICC, OTP, 'Issuance of a Warrant of Arrest against Thomas Lubanga', above n 153.
Germain Katanga was a senior commander of the FRPI and was responsible for the massacre of hundreds of civilians in the village of Bogoro on 24 February 2004, as well as crimes of sexual violence and enlisting child soldiers.\footnote{International Criminal Court, Office of the Prosecutor, 'Statement by the Office of the Prosecutor in Response to the Apprehension of Alleged DRC War Criminal Germain Katanga' (Press Release, ICC-OTP-20071018-251-En, 18 October 2007) <http://www.icc-cpi.int/press/pressreleases/285.html>.
} The third arrest, also relating to the Ituri situation, occurred on 7 February 2008. Mathieu Ngedjolo Chui had allegedly been the leader of the FNI at the time that the militia, along with the FRPI, attacked the Bogoro village and therefore faces largely parallel charges to Katanga.\footnote{International Criminal Court, Office of the Prosecutor, 'Third detainee for the International Criminal Court: Mathieu Ngudjolo Chui' (Press Release, ICC-CPI-20080207-PR284-ENG, 7 February 2008) <http://www.icc-cpi.int/press/pressreleases/329.html>. Human rights violations and ongoing conflict have also occurred in the Rwandan-influenced regions of North and South Kivu, although a recent peace deal with General Nkunda, leader of a RCD-Goma splinter group, may herald the way to greater stability, see: British Broadcasting Corporation, 'Eastern Congo Peace Deal Signed', \textit{BBC} (online), 23 January 2008 <http://www.globalpolicy.org/security/issues/congo/2008/0123gomadeal1.htm>.}

The invasion of the DRC by its neighbours has also resulted in a number of cases before the International Court of Justice, which adjudicates international legal disputes between nations. In \textit{Armed Activities on the Territory of the Congo}, the DRC claimed that the invasion of Congolese territory by Burundian, Ugandan and Rwandan troops on 2 August 1998 constituted a violation of its sovereignty and its territorial integrity as well as a threat to peace and security in Central Africa. The issue of illegal seizure of assets was also raised by the DRC. The International Court of Justice found that it had jurisdiction to consider issuing preliminary measures against Uganda.\footnote{C Gray, The Use and Abuse of the International Court of Justice: Cases Concerning the Use of Force After Nicaragua (2003) 14 \textit{European Journal of International Law} 867, 878-880.} A further case before the International Court followed from the issuance of an arrest warrant by Belgium on 11 April 2000 against the incumbent DRC foreign minister, Mr Abdulayei Yerodia Ndambasi, alleging his commission of war crimes and crimes against humanity, pursuant to a Belgian criminal statute. The International Court ruled that the customary international rule providing immunity to incumbent foreign ministers against civil and criminal proceedings rendered the Belgian arrest warrant unlawful under international law. The court noted that this rule would not extend to proceedings initiated against former foreign ministers or proceedings before international criminal courts.\footnote{Golden Gate University School of Law, 'Annex: Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium): International Court of Justice 14 February 2002' (2002) 8 \textit{Annual Survey of International}

Recent statistics indicate that the legitimate diamonds trade in the DRC is recovering indicating some degree of success due to the Kimberley Process. In 2005, official exports
were valued at $642 million, constituting a 62.5% increase on the previous year. New and independent valuation was partly responsible for the increase, as well as effective implementation of the Kimberley Process and the expulsion of Congo-Brazzaville from the process in 2004. The reason that the expulsion of Congo-Brazzaville, a neighbour of the DRC, resulted in an increase in the legal trade is that it was recognised that Congo-Brazzaville was being used as a back door to avoid the Kimberley Process certification system. As a result of its expulsion from the system, Kimberley Process members were prohibited from purchasing that country’s diamonds, meaning that much of the diamond trade reverted back to legitimate channels in the DRC. It should be noted, however, that there was still an estimated US$350 million leaving the country illicitly, indicating the scale of work still to be done with the industry.\textsuperscript{159} Given the example of conflicts in other nations, such periods of relative peace carry with them the threat of re-armament through the exploitation of conflict diamonds and other natural resources.\textsuperscript{160}

In the period since 2005, although much of the DRC has enjoyed relative peace, conflict fuelled by natural resources are ongoing features of the disturbed north-eastern provinces. Even though minerals other than diamonds are the focus of reports by the UNSC Expert Committees in 2007 and 2008, it is known that diamond deposits also exist in these conflict areas, so it may be premature to argue that conflict diamonds are no longer a feature of the DRC conflicts. A further development occurred with the release in August 2010 of the DRC “Mapping Exercise” by the UN High Commissioner for Human Rights. The exercise sought to provide preliminary evidence of international crimes committed from 1993 to 2003 in the context of the Congolese war, and the report features a section exploring the connection between resources and conflict, and the role it played during the war. It is possible that a UN International Tribunal may be established to prosecute persons most responsible for committing war crimes, crimes against humanity and genocide during this period.\textsuperscript{161}


2.4.4 COTE D’IVOIRE

The conflict diamonds problem arose dramatically with the outbreak of civil war in Cote d’Ivoire, also known as the Ivory Coast, in September 2002.\textsuperscript{162} The conflict is ongoing as at July 2011. According to a UN Security Council investigation, the Forces Nouvelle militia in the north of that country, who went to war following discontent with a controversial election process, have been largely funded through the illegal diamond trade. The resurgence of the problem, in the era where the Kimberley Process Certification Scheme (KP) is active, has proven a significant test to the resolve of the international community in its efforts to combat the problem.\textsuperscript{163}

Cote d’Ivoire had experienced widespread stability and prosperity for more than three decades after independence under the leadership of its first president, Felix Houphouet-Boigny. It was considered to have the fourth-largest economy in sub-Saharan Africa. However, military rule from 1999 to 2000 under Robert Guei, general political unrest under current President Laurent Gbagbo and the outbreak of civil conflict in 2002 led to widespread atrocities, allegedly by both government and rebel forces, including political killings, massacres, disappearances, and numerous incidents of torture. While a peace agreement was brokered between the two sides in 2003, widespread impunity and a political and social climate fuelled by intolerance and xenophobia have caused fears that the hostilities will resume. UN peacekeepers have patrolled a buffer zone separating the rebel-held north and the government-controlled south, but political efforts to reunite the nation have not been successful to date. In September 2003, Cote d’Ivoire requested that the International Criminal Court accept jurisdiction over crimes committed on its territory since 19 September 2002.\textsuperscript{164}

Like the situation that affected Sierra Leone previously, the establishment by rebel militia of a war economy based on diamonds served to entrench the power of the militia and to delay the satisfactory resolution of the conflict, which centres around ethnic grievances and issues of

\textsuperscript{162} BBC, ‘Ivory Coast’s Crisis’, above n 121.
political representation. A United Nations Security Council Expert Group reported that high levels of funds were reaching the northern-based militia through diamond sales, and that strict measures were required for this to be controlled. The report of the Expert Group resulted in a Security Council ban on imports of rough diamonds from Cote d'Ivoire, pursuant to Resolution 1643 (2005). The Expert Group had conducted its activities through the support of the current peacekeeping mission in Cote d'Ivoire, United Nations Operations in Cote d'Ivoire (UNOCI). The response of the United Nations Security Council, and the Kimberley Process, to this issue is discussed in more detail in Chapters 4 and 5 below.

Cote d'Ivoire is a minor producer of rough diamonds and has been a participant in the Kimberley Process Certification Scheme since its inception. In a letter dated 13 October 2004, the Minister of Mines and Energy of Cote d'Ivoire informed the Chair of the Kimberley Process that all exports of rough diamonds from Cote d'Ivoire were prohibited on the basis of a ministerial order issued on 19 November 2002. As there are no significant diamond deposits in the government-controlled south, this measure seeks to cut off the northern rebels from international diamond markets.

The Group of Experts investigated the production and export of rough diamonds from Seguela, Bobi and Diarabla localities in northern Core d'Ivoire in July 2005 and obtained credible information about diamond production in the region. The Group visited the area and received information that significant artisanal production of rough diamonds was occurring along a number of small streams between the villages, but that semi-industrial or industrial mining techniques were not used. Based on the number of active pits and workers, the Expert Group estimated that production was at a level of 300,000 carats per year, equal to production prior to the conflict. The revenue accrued by the groups controlling the production is many millions of US dollars per year. Rather than mining diamonds themselves, Forces Nouvelles were raising their revenue through systems of taxation. The militia appropriated the local diamond bureaucracy, and so were receiving taxes directly on diamond production.

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165 BBC, 'Ivory Coast’s Crisis', above n 121.
which previously went to the national government. The militia also employed an indirect approach, through imposing a tax on those who purchased automobiles and motorcycles with revenue from diamond mining, or alternatively on persons seeking to access diamond mining areas.\textsuperscript{171}

Like the situation in other affected countries, conflict diamonds have been smuggled out of Côte d’Ivoire through neighbouring states. In this case, the countries in question are apparently Guinea, a Kimberley Process participant and Mali, a Kimberley Process applicant, after which the diamonds have been distributed to international markets, such as Antwerp, Dubai or Tel Aviv. It is interesting to note that, unlike the situation of Republic of Congo, neither Mali nor Guinea was expelled from the Kimberley Process in response to their alleged role.\textsuperscript{172}

According to a UN Expert’s report in 2010, diamonds from the Seguela and Tortiya regions of northern Côte d’Ivoire continue to be smuggled through neighbouring Burkina Faso, Guinea, Liberia and Mali, which are unable or unwilling to enforce the diamond embargo. It is unclear, however, if the trade is connected to the most recent wave of violence in the country, in which outgoing President Laurent Gbagbo chose violent struggle over peaceful transition to the administration of newly elected President Alassane Ouattara. Gbagbo was ultimately arrested for international crimes related to the brief armed struggle occurring from latter part of 2010 to early 2011.\textsuperscript{173}

2.4.5 ZIMBABWE

Alluvial diamonds were discovered in the Chiadzwa district of Marange, eastern Zimbabwe, in June 2006. The diamond fields stretch over 66,000 hectares and, although estimates of the reserves contained in this area vary wildly, some have gone so far as to suggest that it could

be home to one of the world's richest diamond deposits. Illicit production from the region, up to the end of 2008, was valued at approximately US $150 million. Over the past four years, Marange has been plagued by horrific human rights abuses by state security agencies against diamond diggers and local communities, resulting in hundreds of deaths, and many more cases of assault, rape, arbitrary detention and forced labour.\textsuperscript{174}

From early 2007, police officers stationed in the fields began forcing miners to work in syndicates under their control, demanding bribes and beating or killing anyone else they found mining in the area. The violence reached a peak in October 2008 with the arrival of the army, and the launch of Operation 'Hakudzokwi' or 'You will not return'. This operation appeared to have two goals: to ensure control of the diamond deposits for the Zanu PF elite, and to reward the army for its loyalty to this clique. More than 800 soldiers were deployed alongside helicopter gunships, killing over 200 people.\textsuperscript{175}

Following this operation, soldiers took over mining syndicates previously run by the police, and forced local people, including children, to mine for them. The military was also central in facilitating the smuggling of these diamonds out of Zimbabwe to neighbouring countries including Mozambique and South Africa. Once again, civilians found digging for diamonds independently of the syndicates were severely beaten or killed as a warning to others.\textsuperscript{176}

A Kimberley Process Review Mission was eventually sent to the country in June 2009 to investigate the violence and assess compliance with KP standards. The mission found evidence of grave human rights abuses, armed soldiers managing syndicates of miners, and a "smuggling operation that enables rough diamonds to flow from Zimbabwe outside the KPCS [Kimberley Process Certification Scheme] ... largely operated and maintained by official entities". This finding alone – that state agents were running diamond smuggling operations to


\textsuperscript{175} Human Rights Watch, 'Diamonds in the Rough', above n 4, 3-4; Partnership Africa Canada, 'Zimbabwe, Diamonds and the Wrong Side of History, above n 174, 7-8; Partnership Africa Canada, 'Diamonds and Clubs', above n 174, 18; Global Witness, 'Return of the Blood Diamond', above n 4, 6-8. There was an initial KP review visit in May to June 2007, prior to the worst violence. The review focussed on the country's regulatory framework and noted that the contentious fields were under government control. The KP review was criticised for failing to highlight ongoing human rights abuses: Partnership Africa Canada, 'Diamonds and Human Security: Annual Review 2008' (Annual Report, October 2008) 23-24.

\textsuperscript{176} Human Rights Watch, 'Diamonds in the Rough', above n 4, 3-4; Partnership Africa Canada, 'Zimbabwe, Diamonds and the Wrong Side of History, above n 174, 7-8; Partnership Africa Canada, 'Diamonds and Clubs',
Mozambique, a non-KP participant—should be grounds for expulsion from the scheme.\textsuperscript{177}

In conclusion, the team, made up of government, NGO and industry representatives, “identified several areas in which Zimbabwe [is] non-compliant with the minimum requirements of the KPCS” and recommended that the country be suspended from the scheme for at least six months.\textsuperscript{178}

In a press conference held at the end of the visit, the mission’s leader, Liberian Deputy Minister of Mines Kpandel Fayia, made an impassioned plea to the Zimbabwean authorities:

Minister, on the issue of violence against civilians, I need to be clear about this. Our team was able to interview and document the stories of tens of victims, observe their wounds, scars from dog bites and batons, tears, and on-going psychological trauma. I am from Liberia, Sir; I was in Liberia throughout the 15 years of civil war; and I have experienced too much senseless violence in my lifetime, especially connected to diamonds. In speaking with some of these people, Minister; I had to leave the room. This has to be acknowledged and it has to stop.\textsuperscript{179}

The situation in the Marange diamond fields remains critical. The Zimbabwean authorities claim that the joint venture companies they have recently established and given permits to mine in Marange will help regulate the diamond sector and improve standards. However, the fact is that these companies are only operating in around three percent of the diamond fields, with the remaining ninety seven percent under the control of the army.\textsuperscript{180}

The widespread smuggling of Marange diamonds out of Zimbabwe persists, and the army continues to operate syndicates of miners as a means of capturing the proceeds of this illegal trade.\textsuperscript{181}

There have been some cases of enforcement action by national governments in relation to


\textsuperscript{178} Global Witness, 'Return of the Blood Diamond', above n 4, 6-8.

\textsuperscript{179} Ibid, 6-8.

\textsuperscript{180} Ibid, 6-8.

smuggled Zimbabwean diamonds. On 20 September 2008, India's Directorate of Revenue Intelligence (DRI) apprehended two Lebanese nationals, named as Yusuf Oselli and Robar Hussain, from a hotel in Surat, the centre of India's diamond industry. They found rough diamonds weighing 3,600 carats and valued at almost $800,000. The pair said they had brought the diamonds from Zimbabwe, and that they had made several earlier runs. The men, who did not have a Kimberley Process Certificate or any other documentation for the diamonds, told the DRI that they had carried the diamonds through Dubai, landing undetected at Mumbai on September 15.182

In October 2008, Dubai Customs discovered bags of diamonds wrapped around the body of a Zimbabwean woman transiting in Dubai. The diamonds weighed 53,500 carats and were valued at US $ 1.2 million. The information was carried in local and international media, including a photograph which shows that the diamonds resemble those originating from Marange. There is no information on whether the woman was charged, her travel origin or destination, or the disposition of the diamonds.183

Although access to the Marange diamond fields has been severely restricted, testimony gathered from victims by local civil society representatives shows that serious human rights abuses, including assault and rape, are still being committed by the army and the police.184

In March 2010, the Centre for Research and Development, a non-governmental organisation (NGO) based in Mutare, the provincial capital, identified 26 victims of abuse in the diamond fields and the surrounding area, including two cases of rape, and one of a woman being between so severely she was left partially blind. In April, the same NGO recorded 24 cases of assault by the security forces against civilians.185

Some local experts believe that the actual number of assaults is much higher, but that people are too afraid to report abuses for fear of further harassment. The researchers also note that the violence often precedes visits to the area by important government delegations – an apparent attempt to clear the area of miners before the visitors arrive.186

182 Partnership Africa Canada, 'Zimbabwe, Diamonds and the Wrong Side of History', above n 174, 12.
185 Ibid, 6-8.
186 Ibid, 6-8.
Despite the continued violence, Zimbabwe remains a member of the Kimberley Process, the international certification body set up to prevent diamond-fuelled violence and abuses. The failure of KP member states to agree to suspend Zimbabwe has prompted deep concern among some KP participants and observers, who have begun to question the future of the scheme.  

In 2009, a compromise approach to the Zimbabwe issue was agreed to by the KP, whereby the KP sent an official monitor to the Chiadzwa region. Zimbabwe was given six months to fall in line with international trade standards, pursuant to a ‘Joint Work Plan’ which included the demilitarisation of the diamond fields. However, this has not happened and there have been ongoing reports of smuggling and harassment by military officers. Despite this, the KP allowed two auctions of stockpiled diamonds in 2010. The sales were meant to pave the way for full exports to resume, but KP members have not reached the necessary consensus on whether to allow full exports to resume or not. The KP has contradicted claims by the Zimbabwean Mines Minister in January 2011 that it has been given permission to make further official sales.

2.4.6 INDIA

Beyond the current mandate of the Kimberley Process, which focuses on the connection of the diamond trade to human rights violations reaching the level of international crimes, lies the potential for addressing a range of human rights issues which, although serious, do not constitute international crimes. One of these issues is the use of child labour, which is a major problem not only in the artisanal mining sector, but also in the cutting and polishing industry, which is dominated by India.

Skills required for cutting and polishing diamonds are passed down by workers from generation to generation or picked up in the traditional master-apprentice relationship. Of the four Cs – colour, clarity, carat and cut – nature dictates the first three aspects, but the cut, often considered the benchmark by which a diamond’s beauty is judged, is the only factor

187 Ibid, 6-8.
determined by the human hand. It is a practice requiring great expertise. However, behind the glittering world of India’s diamond cutting industry lie practices of exploitation and child labour. India enjoys a near-monopoly in the diamond-cutting industry, but it is the low wages and easy availability of labour that keep the industry profitable. India gets a lot of small diamonds to cut and polish. The detailed nature of the work and the repetitive strain of cutting and polishing these tiny specks of stones make it labour-intensive and often unhealthy. There is a lot of dust from the ground diamonds that doesn’t always get filtered out from the crowded factory rooms and proves harmful for the worker’s health. Furthermore, the small stones often need sharp eyes and deft hands. Thus children are often highly prized in the trade, able to cut even ‘half-pointer’ diamonds, noting that 100 points make a carat which is one-fifth of a gram.189

Child labour is illegal in India but remains widespread. By conservative estimates 13 million children work in India, many in hazardous industries. According to one estimate, up to 100,000 children, in the age group 6-14 years, work in the diamond industry in Surat, cutting and polishing diamond chips.190

Children are engaged as ‘apprentices’, with learning the trade taking from five to seven years. During the first two years children receive little or no remuneration, working for 10 hours a day. After the two years, a child worker is paid about $1.70 per month. Studies by noted academic Neeta Burra revealed that more than 30 percent of the children get tuberculosis due to unhygienic conditions, overcrowding and malnutrition. Major health issues include body aches, and finger tips grazed by the polishing disc. Child labour continues to be a major problem, despite efforts to stop the practice and generally improve working conditions amongst some in the cutting industry.191

2.5 CONCLUDING REMARKS

This thesis considers two main research questions, namely (1) has the conflict diamonds governance system achieved its objectives? and (2) does consideration of the system from the

190 Hussain, above n 189; Ghosh, above n 189; Brilliant Earth, above n 189.
191 Hussain, above n 189; Ghosh, above n 189; Brilliant Earth, above n 189.
perspective of the networked pyramid model provide descriptive or normative insights? Before a fitting response to these questions can be formulated, however, it is necessary to examine carefully the nature of the conflict diamonds problem itself. The conflict diamonds trade stands in contrast to the legitimate diamond trade, with rough diamond production in the legal industry during 2006 valued at US$11.5 billion, and exports valued at $US37.7 billion. Large-scale diamond production in the legitimate trade has, for the past century, been characterised by the monopolistic behaviour of the giant De Beers multinational corporation, as well as a high level of secrecy. At the same time, the low-tech mining of alluvial rough diamond deposits has provided insurgent groups with a commodity which is easy to smuggle, noting the small size but very high value of such diamonds, considered the most concentrated form of wealth in the world. These characteristics have facilitated the emergence of conflict diamonds used to finance grave human rights violations and armed conflict against established governments. The issue was first highlighted by NGOs in the context of the civil war in Angola, where rebel group UNITA was able to fund its military campaign from diamond sales between 1992 and 1998. The diamond trade prolonged the civil war, which resulted in the loss of around one million lives, and reportedly involved the commission of war crimes, such as the indiscriminate shelling of civilians. Around the same time, civil war fuelled by conflict diamonds also emerged in Sierra Leone. The infamous terror tactics of the RUF, which included the amputation of limbs and the conscription of child soldiers, resulted in a renewed focus on the connection between conflict diamonds and egregious human rights violations. More recently, conflict diamonds have fuelled ongoing civil war situations, and human rights violations, in the Democratic Republic of Congo and Cote d'Ivoire. The heavy-handed response of the Zimbabwean government to the management of artisanal diamond mines in the Marange region represents the latest manifestation of the conflict diamonds problem.
In a world of failures, this is a story about NGO campaigning, corporate social responsibility and diplomacy that still has a chance of working, not just to end and prevent conflict, but to turn diamonds with secrets and blood in their pedigree into an engine of development and hope in places where these virtues are in tragically short supply.

Ian Smillie, conflict diamonds expert, about the KP\textsuperscript{192}

\textsuperscript{192} See n 193 below.
3 The Kimberley Process: Did the Lion Roar?

3.1 Chapter Overview

3.2 Overview of the Kimberley Process

3.3 Operation of the Kimberley Process

3.3.1 Accepting New Members

3.3.2 Annual Reporting

3.3.3 Peer Review: General Operation

3.3.4 Peer Review: Cases of Serious Non-Compliance

3.3.5 Peer Review: Evaluation

3.4 Role of Industry

3.4.1 Industry Involvement Through Self-Regulation

3.5 Role of Non-Government Organisations

3.5.1 Role of NGOs External to the Kimberley Process

The Development Diamonds Initiative International

3.6 Concluding Remarks
3.1 Chapter Overview

This chapter discusses the Kimberley Process Certification Scheme which is the centrepiece of the conflict diamonds governance system. The chapter gives an overview of the Kimberley Process, then discusses its operation, including the way it accepts new members, annual reporting, and its distinctive peer review mechanism. In discussing peer review, a particular focus is on the KP’s management of cases of serious non-compliance. The role of industry in the KP is discussed, including self-regulation, as is the role of NGOs, with a particular focus on the continuing role of NGOs beyond the KP, including the Development Diamonds Initiative International. The implementation of KP obligations at the national level the final focus of analysis, including consideration of regulatory options under national legislation in Angola, the DRC, Cote d’Ivoire, Sierra Leone, Australia and the Netherlands.

Figure 2: Kimberley Process: Networked Regulators Operating in Parallel

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3.2 OVERVIEW OF THE KIMBERLEY PROCESS

The Kimberley Process Certification Scheme is the primary response by the international community to overcome the conflict diamonds problem. As discussed in Chapter 2, conflict diamonds are rough diamonds which are associated with conflict and gross human rights violations. The Kimberley Process aims to distinguish the legitimate rough diamond trade from the illegal trade through the use of a system of certification at the point of export. The central obligation of governmental participants in the Kimberley Process is to ensure that all legitimate rough diamond goods are certified at the point of export and, conversely, to ensure that only legally certified rough diamonds are imported into the country.¹⁹⁴

The Kimberley Process was launched in May 2000 in the city of Kimberley, South Africa. It began as a consultative process involving governments, business and non-governmental organisations, later becoming a negotiating process which culminated in the adoption of the Kimberley Process core document at a Ministerial Meeting in Interlaken, Switzerland in November 2002.¹⁹⁵ Participating nations agreed to implement the provisions of that agreement by 1 January 2003. The agreement took just thirty months to negotiate, which has been described as blazing speed by UN standards.¹⁹⁶ The Kimberley Process received the formal endorsement of the UN General Assembly in 2001.¹⁹⁷ There are now forty nine

¹⁹⁴ Kimberley Process, The Kimberley Process Certification Scheme (Core Document, 2002) ss II, III. See also Clive Wright, 'Tackling Conflict Diamonds: the Kimberley Process Certification Scheme' (2004) 11(4) International Peacekeeping 697, 699-700; Fishman, above n 148, 218-219. Although the central objective of the KP is to exclude trading in rough diamonds from non-members, the 2008 Plenary discussed the possibility of a mechanism to provide for trade between Participants and certain authorised non-Participants (in particular, Turkey): Kimberley Process Chair, 'Report on the Intersessional Meeting of the Working Groups of the Kimberley Process Certification Scheme' (New Delhi, India, 19 June 2008).


¹⁹⁶ Wextler, above n 163, 6.

members representing seventy five countries.\textsuperscript{198}

Noting its growing membership, it can be argued that the Kimberley Process has already made significant progress in reducing the trade in conflict diamonds. Furthermore, statistics concerning the now monitored legal diamond trade are also encouraging. One indicator of success is the greater number of legitimate diamond exports, demonstrating how the controls have helped reduce illicit trading and bringing more revenues from the trade into the legitimate market. According to a three year review of the Kimberley Process, the trade in conflict diamonds was less than 0.2\% of the overall diamond trade.\textsuperscript{199} Sierra Leone is cited as an example of a country where controls have helped maintain the fragile peace, and where the legitimate trade has risen exponentially.\textsuperscript{200} In 2008, for example, Sierra Leone exported US$99 million of diamonds, up from $26 million in 2001. Similarly, legitimate rough diamond exports from the Democratic Republic of Congo were valued at US$552 million in 2008.\textsuperscript{201} It should be noted, however, that the black market in diamonds still remains very significant, especially when individual countries are considered. Despite the progress made in Sierra Leone, for example, it has been estimated that between ten and twenty percent of diamonds in that country are still being illegally smuggled, so challenges remain.\textsuperscript{202}

The Kimberley Process is distinctive in that it is not a legally binding treaty. While the Kimberley Process Certification Scheme is set out in the form of an international treaty, the instrument is not a legally binding treaty under international law and is not signed and ratified under standard treaty procedures. However, this less formal structure lends itself to greater

\textsuperscript{198} Kimberley Process, \textit{Participants World Map} (June 2011) \<\texttt{http://www.kimberleyprocess.com/structure/participants_world_map_en.html}>, as at June 2011. The European Union is a member, representing its constituent nations. Mexico joined in 2008, while the Participation Committee has established contact with a number of countries which expressed interest in joining the KP (Algeria, Bahrain, Burkina Faso, Cameroon, Cape Verde, Egypt, Gabon, Kuwait, Mali, Philippines, Qatar and Swaziland); Kimberley Process, \textit{’Kimberley Process Communiqué’} (New Delhi, India, 6 November 2008).


\textsuperscript{200} Global Witness, \textit{’Kimberley Process Certification Scheme Questionnaire for the Review of the Scheme’} (Review Submission, 5 April 2006).

\textsuperscript{201} Kimberley Process Secretariat, \textit{’Annual Global Summary: 2008 Production, Imports, Exports and KPC Couns’} (Annual Report Summary, 7 August 2010); Wexler, above n 163.

\textsuperscript{202} Interview with Global Witness Representative (telephone interview with author, 30 April 2007). The exact date of the review visit was not specified. In order to obtain information on the operation of the Kimberley Process, a number of standardised questions were presented to government, nongovernmental organization and industry participants in the Kimberley Process. The government participant, the Australian Federal Government, provided a written response while the NGO participant, Global Witness, and the industry participant, Rio Tinto, responded to the questions by means of a verbal interview process. The interviews were recorded and a written transcript produced, and are included in Annex III. In relation to all three participants, the ethical requirements set out by the Australian National University concerning such research were complied with and approved by the
flexibility, and wider involvement of non-State actors, which is arguably the strength of the Kimberley Process. Following the informal establishment of the Kimberley Process, commentators such as Global Witness have advocated its being made legally binding through the operation of a UN Security Council resolution, made with reference to Chapter VII of the UN Charter.203

The second distinctive feature of the Kimberley Process is the high level of involvement of businesses and non-governmental organisations in the system.204 Although not possessing formal voting rights as members, business and non-governmental organisation groups may be granted observer status, and play significant roles in the working groups and committees which comprise the de facto secretariat of the Kimberley Process and are discussed in more detail below. For example, in June 2010, the World Diamond Council, the umbrella representative group for the diamond industry, was a member of the monitoring, participation and statistics committees and was the chair of the diamond experts committee. Global Witness, an NGO with longstanding interest in conflict diamonds issues, was a member of the participation, artisanal and alluvial, statistics, and monitoring committees; while the NGO Partnership Africa Canada was a member of the monitoring, statistics, artisanal and alluvial, and participation committees.205

The observer status of industry groups within the Kimberley Process creates direct connections with industry, thereby promoting compliance with the system by the diamond industry, which sees itself as having a stake in the process. The system thus becomes a hybrid of industry self-regulation as well as government regulation. The institutionalised involvement of non-governmental organisations provides a further checks and balances to the system. Non-governmental organisations, possessing independent information and analysis networks and with links to the international media, provide a scrutinising role which is built-

ANU Research Ethics Committee.

203 Kimberley Process, The Kimberley Process Certification Scheme (Core Document, 2002) in the Preamble, where Participants ‘recommend’ particular measures, the absence of standard signature and ratification clauses which are present in treaty status documents, and the definition of ‘Observer’ in s 1, which includes industry and non-governmental organization representatives. Curtis has suggested that the Kimberley Process, while not legally binding under international law, is “authoritative” and is, in fact, a scheme which imposes obligations on its participants: K Curtis, ‘But is It Law? An Analysis on the Legal Nature of the Kimberley Process Certification Scheme on Conflict Diamonds and its Treatment of Non-State Actors’ (Spring 2007) The American University International Law Review, 26-27; Interview between author and Global Witness Representative (Annex III).

204 Wright, above n 194, 702.

in to the Kimberley framework.

Since the emergence of the Kimberley Process, a number of similarly structured organisations have been created, under the general title of “multi-stakeholder initiatives”. Of particular relevance was the Extractive Industries Transparency Initiative (EITI), which emerged as a result of the World Summit on Sustainable Development held in Johannesburg in 2002. Like the Kimberley Process, the EITI brings together large corporations, governments and NGOs to achieve its core objectives. The EITI aims to bring financial transparency to the work of extractive industries such as oil, gas, and mining, by requiring corporations to disclose all payments by corporations to governments, and all revenues made by governments from their involvement with these extractive industries. There are 49 corporations which are involved, including large multinationals such as De Beers, ExxonMobil, Shell and British Petroleum. Also involved with the EITI are nine NGOs, including Global Witness, Oxfam, Transparency International and Publish-What-You-Pay. On the governmental level, the EITI has the provisional or full membership of 35 governments.\(^{206}\)

A preliminary assessment of the EITI suggests that it has made a good start, noting the mild language employed by NGOs, multi-national corporations and governments indicates a significant level of cooperation. One of the insights noted in relation to the EITI was the relative ease by which it was established, with the EITI relying on a consensus building technique to fully engage with the range of stakeholders. However, the noted drawback of this approach has been the relative difficulty of ensuring effective implementation of the system once it has been created. As implementation mechanisms are often difficult to reach agreement upon, as opposed to general objectives, multi-stakeholder initiatives such as the EITI have begun to experience difficulties when they attempt to bring stakeholders to account in relation to the standards they have agreed to. Behaviour modification is more difficult to address where such processes were not clearly envisaged and set out during the initial negotiations.\(^{207}\)

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\(^{207}\) Koechlin and Calland, above n 206.
3.3 OPERATION OF THE KIMBERLEY PROCESS

The Kimberley Process functions at two levels, the first being the national level, or the within-country level, where the primary regulator is the national government. At this level, the national government regulates the national diamond industry by ensuring that all diamond exports, where legitimate in nature, are certified by the means of a Kimberley Process certificate. This level is discussed in more depth under heading 4.5 below.

The Kimberley Process also operates on the international plane, where the primary regulator is the Kimberley Process plenary, and the parties which are regulated are the national governments themselves. Important policy decisions are made at the annual plenary meeting of the Kimberley Process. The mode of decision making is referred to in the core document as being “consensus”:

Participants are to reach decisions by consensus. In the event that consensus proves to be impossible, the Chair is to conduct consultations.\(^{208}\)

The exact meaning of the term has, however, been the subject divergent opinions. In particular, commentator Ian Smillie points out that some, but not all, government members of the Kimberley Process have considered the word to mean “unanimity”. While unanimity is a voting process in which 100% of the group votes the same way, Smillie turned to the Oxford Dictionary as the basis for a different meaning for consensus, namely: “general agreement … majority view, collective opinion”. Although conceding that other international organisations, such as NATO, equate unanimity with consensus, Smillie presented a different, more sophisticated understanding of the term in his recent paper. He highlighted some failures of the consensus approach as currently practised by the Kimberley Process. In particular, failure to reach consensus occurred as a result of minorities blocking forward movement, disruption, time-wasting, appeasement, lowest common denominator decisions, ineffectual facilitation of critical issues and lack of confidence and trust. A further challenge is where persons are not fully empowered by their representative government or organisation to reach particular negotiated settlements.\(^{209}\)


Given the challenges faced by a purely consensus approach, Smillie recommends a change to the decision making procedure to allow voting in the absence of consensus:

Participants are to reach decisions by consensus. In the absence of consensus, decisions will be made by simple majority of all voting Participants present, except for decisions on those matters specified in Annex __ which require a 75% majority of those voting Participants present.\(^{210}\)

The type of suggestion made by Smillie merits consideration. Even if a consensus decision is viewed as incorporating instances where there are one or two dissenting voices, in contrast to a unanimity approach, it appears necessary and desirable to have an alternative available so that issues can be progressed, following consultation, even where a minority is opposed (i.e: by a majority vote). Smillie suggests that the Annex, requiring a seventy five percent majority, be reserved to issues such as additions or deletions from the Participants list (i.e: government membership of the Kimberley Process), suspension of participants and the application of other interim measures relating to non-compliance.\(^{211}\)

Consensus as a decision-making technique has obvious advantages in terms of optimising the participation of governments and industries in the Kimberley Process. However, in common with other multi-stakeholder initiatives such as the Extractive Industries Transparency Initiative, this technique held traps for the future evolution of the organisation, where behaviour modification became more important than standard-setting alone to the future of the organisation. Situations where coercive approaches to behaviour modification are required, by definition, involve departure from unanimity, and put strains on any definition of consensus. In such situations, some type of voting method is preferable.\(^{212}\)

Between plenaries, the chair plays the central executive role. A vice-chair is elected at each plenary, with the understanding that this representative will assist the chair in this capacity before becoming, automatically, the new chair one year later. The chair is also assisted in its executive tasks by a number of committees performing significant regulatory functions. The primary regulatory functions are: annual reporting, peer review, and managing serious non-compliance.\(^{213}\)

\(^{210}\) Ibid, 6.

\(^{211}\) Ibid, 6.

\(^{212}\) Koechlin and Calland, above n 206.

\(^{213}\) In its resolution on October 2003, the Kimberley Process Plenary decided to provide a system whereby the vice-chair of the process, elected annually, would automatically become the rotating chair the subsequent year: Kimberley Process, 'Final Communiqué: Kimberley Process Plenary Meeting' (Sun City, South Africa, 29-31
kimberley process governance structures

Figure 3: Kimberley Process Governance Structures

3.3.1 Accepting New Members

Section VI, paragraph 8 of the Kimberley Process core document states that “participation in the Certification Scheme is open on a global non-discriminatory basis to all Applicants willing and able to fulfil the requirements of that Scheme.” Apart from the need for a new applicant to provide the Chair with “its relevant laws, regulations, rules, procedures and practices, and update that information as required”, there were no other stipulations. Despite the simplicity of this requirement, there were initially a number of countries who did not comply. Several had not done so within the first few months of KPCS operations, and matters

2003). Namibia was the Rotating Chair for 2009: Final Message from Rahul Khullar, Kimberley Process Chair to Kimberley Process Members, 31 December 2008. Israel took the Rotating Chair for 2010: Kimberley Process,
had become critical by the end of April 2003 when a special KP Plenary Meeting was held in Johannesburg. It was agreed at that meeting that a “Participation Committee” would be struck to examine the credentials of all existing and prospective KPCS, to determine whether or not they could meet the minimum standards. It was agreed that there would be a ‘tolerance period’ until May 31 2003 during which all participants and prospective participants would submit information relevant to their membership. The tolerance period was extended to June, then to the end of July, and finally, with a ‘Chair’s Notice’ at the end of July, to August 31.\textsuperscript{214}

The Participation Committee included seven governments (Angola, Canada, the European Community as it was called then, Israel, Russian Federation, South Africa and the United States), NGOs (Global Witness and Partnership Africa Canada) and the World Diamond Council. During this period, the Committee examined the legislation, regulations and relevant documentation of every Participant.\textsuperscript{215}

At this time a euphemism for removing a country from the KPCS was developed: it would simply be ‘dropped from the list’. Following the examination of credentials, several countries were dropped from the list: Brazil, Burkina Faso, Cyprus, Gabon, Malta, Mexico, Norway, Philippines and Poland. Three of these countries, Brazil, Mexico and Norway, subsequently applied and rejoined the KPCS.\textsuperscript{216}

Playing a central role in the Kimberley Process international enforcement system is the Participation Committee. The Kimberley core document states that participation in the certification scheme is open on a global, non-discriminatory basis to all applicants willing and able to fulfil the requirements of the scheme. It is significant that only those applicants willing and able to fulfil the requirements of the scheme will be able to join. The work of the Participation Committee is largely concerned with whether prospective members are able to fulfil these requirements, such that they may be admitted to the scheme.\textsuperscript{217}

The Participation Committee Terms of Reference elaborates on the functioning of that committee.\textsuperscript{218} Like other committees, the Participation Committee must include

\textsuperscript{214} 'Kimberley Process Plenary Session Communiqué' (Swakopmund, Namibia, 5 November 2009) 6.
\textsuperscript{215} Smillie, ‘Paddles for Kimberley’, above n 51, 6-7.
\textsuperscript{216} Ibid, 6-7.
\textsuperscript{217} Ibid, 6-7.
\textsuperscript{218} Kimberley Process, The Kimberley Process Certification Scheme (Core Document, 2002) s VI (8).
\textsuperscript{219} Kimberley Process, Administrative Decision: Participation Committee Terms of Reference (Plenary Meeting Decision, Gatineau, Quebec, 29 October 2004).
representatives from non-governmental organisations and industry, as well as governmental representatives. The chair must also ensure an appropriate geographical balance, and that there is appropriate expertise on the committee to perform its functions.

The Participation Committee is tasked with assisting the chair in its role of handling the admission of new applicants to the Kimberley Process, and may enter into a dialogue with the applicant on issues to be addressed.\textsuperscript{219}

### 3.3.2 ANNUAL REPORTING

The Kimberley Process operates internationally to ensure compliance by national governments. Participating governments are required to provide information on an annual basis on the way in which they are implementing the requirements of the Kimberley Process.\textsuperscript{220} Annual reports must include information on the national laws and regulations for the export and import of rough diamonds, internal controls prior to the export of diamonds and after import, penalties for individuals and companies contravening diamond regulations, and the collection of import and export data; whether there is a procedure for issuing Kimberley Process certificates; whether the certificate fulfils security requirements; evidence to be provided by exporter as proof diamonds as not conflict tainted; and the number of Kimberley Process certificates issued and to which participating governments the certificates were sent.\textsuperscript{221}

Also to be included in annual reports is information on the system of internal controls and industry self-regulation which is implemented in the participant state, information about statistical collection, and observations on experiences, problems and solutions which have been noted during the implementation process.

The collection of statistics in an area of economic regulation such as the international diamond trade is naturally a central aspect of effective management. Such data is particularly important for identifying any irregularities or anomalies which could indicate that conflict diamonds are entering the legitimate trade. Kimberley member governments are required to

\textsuperscript{219} Kimberley Process, \textit{The Kimberley Process Certification Scheme} (Core Document, 2002) ss II, V(a), VI(8),(9).

keep quarterly aggregate statistics on rough diamond exports and imports in a standardised format, as well as numbers of certificates validated for export, and imported shipments accompanied by certificates. Annual statistics in the rough diamond trade, listed according to country, are now publicly available through the Kimberley Process website. Statistics on exports and imports must record diamond origin and provenance, carat weight and value. 222

The Working Group on Statistics is mandated to deal with statistical matters pertaining to rough diamonds, particularly in respect to the production and trade in rough diamonds, to ensure the effective implementation of the Kimberley Process. 223 Like the monitoring committee, the statistics committee role includes general policy development in the area of statistics, including the use of common classification systems. Its second role is concerned with statistical collation, analysis and administrative support to the Kimberley Process. Should a member government fail to provide statistics within three months of the close of a quarter, then issue of the continued membership of that government will be forwarded to the Participation Committee for consideration and possible compliance action. 224

In early KP negotiations, statistical data was regarded by some governments as information that could not be shared, either internally among KP participants, or externally. Some countries cited commercial sensitivity as a reason Russia treated diamond production data as a state secret, and said that it would not go along with a certification system that would open this secret to others. 225

By 2003, however, much of the sensitivity on statistics had diminished, and in 2004 even Russia had agreed to submit quarterly trade data and semi-annual production data. The KP Statistics website is today the best source of data on rough diamond production and trade, and is an essential tool in tracking anomalies in the system. 226

For several of its early years, however, the KPCS statistics website was accessible to

221 Administrative Decision on Annual Reporting, Annex I.
participants only. There was very strong resistance to making any of the data public, with governments citing ‘commercial sensitivity’. Nevertheless, in the past two years greater, although not complete, statistical openness has been achieved, without any apparent ill effect. The major advantage appears to be an end to charges that the Kimberley Process was hiding something by refusing to make its statistics public.227

Virtually everything about the Kimberley Process aside from statistics remains secretive. The annual reports of participating governments are not published, and the reports of review visits are posted on the members-only website.228

The Working Group on Monitoring is tasked with reviewing annual reports by member governments and reporting back to the plenary. In doing so, the Working Group must draw on available statistical data, and work cooperatively with the Statistics Working Group and the Participation Committee. Other Kimberley members may also present reports for consideration by the Monitoring Working Group.229

The Participation Committee must also be informed by the Working Group on Monitoring, via the Chair, of government members that have failed to submit an Annual Report from the previous year and also countries that have failed to provide the required statistical data.230

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228 Ibid, 13.
229 The selection of office-holders to chair working groups or ad hoc bodies etc is to be decided by Participants in plenary following consultation by the Chairperson. The terms of reference for the monitoring committee were approved at the 28-30 April 2003 plenary, but then revised at the Gaborone Plenary meeting in November 2006 as a result of the 3-year Review of the KPCS: Kimberley Process, Administrative Decision about the KPCS Peer Review System (Plenary Meeting Decision, Gaborone, Botswana, November 2006).
230 Kimberley Process, The Kimberley Process Certification Scheme (Core Document, 2002) s V. A challenge which has been addressed by the rotating chair relates to the appearance of fraudulent KP certificates in Sierra Leone and Ghana. Following the appearance of such certificates, particular certificates were removed from certification and brought to the attention of other KP participants: Karel Kovanda, Kimberley Process Chair, 'The Appearance of Fraudulent Certificates' (Letter to Kimberley Process Members, 23 March 2007).
3.3.3 **Peer Review: General Operation**

![Diagram of the Kimberley Process Peer Review]

1. review visit by participant countries
2. report delivered by visit delegation
3. non-compliance & best practice identified
4. corrective action taken by country
5. follow-up review visit arranged

**Figure 4: Kimberley Process Peer Review**

In any system dealing with standards and supply chains, monitoring is essential. A number of global commodity governance systems have evolved over time to include rigorous and credible third party verification systems, such as the Forest Stewardship Council, the Fair Labour Association and the Responsible Jewellery Council. From the beginning, monitoring was a highly contentious subject in Kimberley Process negotiations. Diamonds were regarded as a ‘strategic mineral’ in Russia, for example, and data regarding production and trade was classified. In many countries there were commercial sensitivities and security issues. In the initial KPCS agreement, there was provision only for monitoring in cases of ‘significant non compliance’, a term that was never defined.\(^\text{231}\)

It is also arguable that the flexibility of the Kimberley Process, with its focus on diplomacy,

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\(^{231}\) Smillie, ‘Paddles for Kimberley’, above n 51, 9.
consensus and information-sharing, has emphasised the autonomy and sovereign equality of State actors, thus constituting a horizontal approach to regulation, rather than focusing solely on the vertical dimension, involving the cession of authority to a supranational body. The horizontal approach is particularly evident in relation to the system of monitoring through the peer review system. In contrast with other international systems which focus on adversarial dispute resolution before an international tribunal, the focus on peer review is a novel approach. It arguably engages more effectively with government members, by promoting a sense of ownership for the certification system. States must take responsibility for the effective functioning of the system, rather than ceding this role to a supranational entity.\textsuperscript{232}

The monitoring committee is responsible for the implementation of the peer review process within the Kimberley Process. Peer review involves two central tasks of monitoring the implementation of the Kimberley Process by participant countries, through review visits\textsuperscript{233}, and also monitoring situations of serious non-compliance with the Kimberley Process, through review missions.\textsuperscript{234}

Although review missions and visits are conducted with the consent of the government member, a review team must be given the full cooperation of the authorities of the country under review, who should facilitate access to governmental institutions and organisations relevant to the implementation of the Kimberley Process, and solicit the cooperation of industry, consistent with national law and organisational rules and regulations.\textsuperscript{235}

Review missions and visits should generally number five members in total, consisting of three government members, an observer from civil society and an observer from the private sector. The Administrative Decision on Peer Review further provides that, in nominating government member representatives, the Chair would seek to ensure geographical balance and adequate balance between countries that are primarily engaged in production, trading and processing of rough diamonds.\textsuperscript{236} They should last between two and five working days, with dates

\textsuperscript{232} Other international organisations have monitoring mechanisms which function in similar ways to review missions such as, for example, investigative missions for the United Nations High Commissioner for Human Rights. However, these missions are typically carried out at the supranational level, rather than being staffed by representatives of member nations themselves as occurs within the Kimberley Process.

\textsuperscript{233} Kimberley Process, \textit{Administrative Decision: Implementation of Peer Review in the Kimberley Process} (Plenary Meeting Decision, Sun City, South Africa, 30 October 2003); Kimberley Process, \textit{The Kimberley Process Certification Scheme} (Core Document, 2002) s VI.

\textsuperscript{234} Kimberley Process, \textit{Administrative Decision: Implementation of Peer Review in the Kimberley Process} (Plenary Meeting Decision, Sun City, South Africa, 30 October 2003).

\textsuperscript{235} Ibid.

\textsuperscript{236} Ad Hoc Working Group on the Review of the Kimberley Process Certification Scheme, 'Kimberley Process
determined with the consent of the government member being reviewed. The fact that individual members of the review mission must provide their own expenses presents a challenge for civil society representatives, particularly those representing artisanal miners from diamond producing nations. To date there has been some limited sponsorship made available from government members to support the important role of civil society experts in these teams.237

The leader of the review mission or visit must draw up a written draft report giving an account of the activities of the mission and its findings, in particular reflecting the implementation of the Kimberley Process in the country which was reviewed. The draft report must be submitted simultaneously both to the Chair and the reviewed country.

The government under review has a right of reply in relation to the review report, and may send observations to the Chair and members of the review mission or visit within a month of the submission of the draft report. The Chair may then invite the government’s authorities to discuss the observations with the review team members to clarify any misunderstandings. In the event that disagreement persists, the report will be circulated along with the observations of the government member to other countries and observers. The Chair may add its own observations as well.238

Review visit and review mission reports are considered confidential, as between government and non-government members within the Kimberley Process system. The Administrative Decision also provides for follow-up action in relation to a review mission or review visit. Where the review mission deems it necessary and appropriate, the Chair may recommend to the plenary the sending of a follow-up mission or review visit.239

The Sun City Plenary in 2002 provided for a roster of experts to be drawn up by the chair on a recommendation from the Monitoring Committee. Since then a substantial number of government and non-government Kimberley members have nominated experts for inclusion in the roster which, as of July 2006, comprised 97 experts representing government, industry

238 Ibid.
and civil society. On the basis of this very positive response, it was possible in all cases for teams to be appointed corresponding to the required criteria. To date, experts from seventeen different government members, and from all major geographical regions represented in the Kimberley Process, have participated in review visits.\textsuperscript{240}

It was possible for a number of experts from developing, artisanal-alluvial producing countries to participate in review visits and review missions. Participation by such experts is of great importance because of the crucial role of the visits in disseminating best practices among government members and in teaching participating experts. The review recommended that the participation of experts from artisanal-alluvial producing nations in as many review visits as possible should be continued and, if possible, further developed, above all in review visits to artisanal-alluvial producing countries.\textsuperscript{241}

The Participation Committee also has a role in relation to compliance. It considers information submitted to it by the Working Group on Monitoring regarding compliance by a government member, and can determine whether the government is able and willing to meet the minimum common standards of the certification scheme.\textsuperscript{242}

3.3.4 Peer Review: Cases of Serious Non-Compliance

Through the action of the peer review system, in tandem with the working groups on monitoring and participation, the Kimberley Process has responsive yet effective mechanisms for holding member governments to account regarding their obligations under the system. The Kimberley Process commands the threat of a significant sanction, which is the expulsion of members for non-compliance, through which the diamond trade with that member is prohibited to other Kimberley Process participant countries. Through sharing of information and experience, with heavy reliance on consensus and diplomatic pressure, the Kimberley Process offers a novel approach for addressing urgent global issues.\textsuperscript{243} The informality of its

\textsuperscript{241} Ibid, 41.
\textsuperscript{242} Kimberley Process, Administrative Decision: Participation Committee Terms of Reference (Plenary Meeting Decision, Gatineau, Quebec, 29 October 2004) s 4.1; Kimberley Process, The Kimberley Process Certification Scheme (Core Document, 2002) s VI (8).
\textsuperscript{243} Wexler, above n 163, 6.
mode of operation has, arguably, enhanced its ability to respond quickly to crises which have occurred in the system, notably in the Republic of Congo-Brazzaville and Côte d’Ivoire.\textsuperscript{244}

Two straightforward cases of apparently serious non-compliance occurred early in the life of the Kimberley Process. In May 2003, the Central African Republic (CAR) was suspended from the KPCS following a coup in which Francoise Bozize overthrew the government of President Ange-Felix Patasse and suspended the constitution. The CAR was reinstated as a participant after authorities provided assurances they could implement the KP and agreed to let a review mission evaluate the country’s diamond control system. The review found that CAR was managing its internal diamond controls and KPCS standards responsibly.\textsuperscript{245}

Lebanon expressed its eagerness to join the Kimberley Process in early 2003. It submitted all of the required documentation, including legislation that at the end of the tolerance period was simply awaiting Presidential signature. Lebanon was therefore included in the list comprising 39 Countries plus the European Community that was approved with effect from 31 August 2003. However, none months later, the Presidential approval for the country’s KP legislation had not been given and Lebanon was dropped from the list on April 1 2004. In 2005, following enactment of the legislation and two KP Review Missions, Lebanon was readmitted to the Kimberley Process.\textsuperscript{246}

The first major test of the ability of the Kimberley Process to manage serious non-compliance was in relation to the Republic of Congo – Brazzaville (RCB), which neighbours the Democratic Republic of Congo (DRC). It was brought to the attention of the Kimberley Process, following consideration of relevant statistics and reports, that the DRC appeared to be funnelling diamonds mined in the DRC through its borders, thereby bypassing the certification requirements which would otherwise have been implemented in the DRC. The chair of the Kimberley Process took rapid action, firstly securing the agreement of the RCB president that a KP Review was required, and then authorising the deployment of a review mission which verified the problem. The review took place in May 2004, and included an

\textsuperscript{244} Subsequent to the action taken by the Kimberley Process Chair in relation to the Côte d’Ivoire situation, the Kimberley Process Plenary itself issued resolution and follow-up action, including cooperation with the United Nations: Kimberley Process, 'Final Communiqué: Kimberley Process Plenary Meeting' (Moscow, Russia, 15-17 November 2005). Other participants have also been suspended from the Kimberley Process for differing periods of time. Ghana was suspended following an Administrative Decision of the Gaborone Plenary on 9 November 2006, but reinstated by the KP chair on 1 March 2007: Letter from Karel Kovanda, Kimberley Process Chair, to Kimberley Process Members, 1 March 2007.

\textsuperscript{245} Smillie, ‘Paddles for Kimberley’, above n 51, 6-7.

\textsuperscript{246} Ibid, 6-7.
aerial survey of the country’s diamond mining areas. The Review concluded that the RCB’s exports could not be explained by local production or official imports.247

In July, through a Chair’s Notice, RCB was expelled from the Kimberley Process, meaning that other countries no longer traded in any diamonds whatsoever with that country. Conditions for readmission included the requirement for an independent third-party survey of the country’s geological diamond potential. The result of the expulsion was that the legitimate, certified trade through the DRC picked up significantly. Three years later, in November 2007, RCB hosted another KP Review which concluded that it had met all of the Kimberley Process stipulations. The RCB was then readmitted into the Kimberley Process Certification Scheme.248

In some respects, the Cote d’Ivoire situation is a good example of the Kimberley Process acting quickly to respond to a serious respect to its integrity. The Kimberley Process was able to rapidly make a decision to prohibit the trade in diamonds originating from Cote d’Ivoire, thereby providing at least a formal barrier to conflict diamonds. The Kimberley Process, through its Working Group on Monitoring, was apprised of the situation in Cote d’Ivoire in September 2004, following the emergence of indications that diamond production was continuing in Northern, rebel-controlled, Cote d’Ivoire. The Working Group adopted a Recommendation to the Chair on the matter on 24 September 2004, after which the Chair entered into communications with the Cote d’Ivoire authorities, who clarified that an export ban had been imposed on all rough diamond throughout Cote d’Ivoire.249 The Chair of the Kimberley Process issued a request on 23 November 2004 to all Participants not to accept any shipments with Cote d’Ivoire certificates until further notice, and reported on the status of Cote d’Ivoire at the Ottawa Plenary in October 2004.250 It should be noted, however, that UN Security Council Expert Committees have noted that there is ongoing diamond mining in Cote d’Ivoire, despite the country being excluded from the Kimberley Process international diamond trading regime. This observation would indicate that a black market trade route is still in existence, whereby diamonds originating in Cote d’Ivoire can be sold, to the benefit of

248 Global Witness, ‘KPCS Questionnaire’, above n 200; Interview between author and Global Witness Representative (Annex III); Smillie, ‘Paddles for Kimberley’, above n 51, 7-8. However, some commentators have questioned whether expulsion of the Republic of Congo would be sufficient to stop the conflict diamond trade in the neighbouring DRC: Malamut, above n 160, 26, 44-45.
the northern insurgents.\textsuperscript{251}

Other countries in which serious compliance issues have arisen include: Zimbabwe, Ghana, Bangladesh and Venezuela.\textsuperscript{252}

In mid-2005, Venezuela, a KP participant since 2003, ceased issuing Kimberley Certificates, and communications with the KP ceased. Nevertheless, diamonds were being mined and openly, if not legally, exported. The problems were document in a 2006 Partnership Africa Canada report. The KP procrastinated, and it was not until October 2008, following bitter internal debate and widespread calls for Venezuela’s expulsion from the KP, that a KP team visited Venezuela, corroborating many of PAC’s findings. In November 2008, Venezuela announced that it would ‘self-suspend’ from the KP, saying it would halt all diamond production and trade for at least two years while reorganising its diamond sector. The KP concurred with this approach.\textsuperscript{253}

However, in Venezuela little changed. Early in 2009, the mineral leases of five diamond mining cooperatives held by the state-owned mining concern Corporacion Venezolana de Guyana (CVG) were renewed. Diamond mining and exporting, whether legal or illegal, simply continued as before.\textsuperscript{254}

In a March 2009 letter, the KP Chair, Namibia, hailed the arrangement with Venezuela saying that the KP would “assist and support the country in developing appropriate internal controls over its alluvial diamond mining”. The Chair said that this was “yet another example of mutual inclusiveness inherent in the Scheme and is testimony to the willingness of the KP family to stand together, learn from global best practices and proactively provide assistance when required”.\textsuperscript{255}

However, there has been little substantive communication with Venezuela since 2008, and the KP has provided no assistance or support, but rather turned a blind eye to the fact that all of

\textsuperscript{252} Letter Prior to Plenary Meeting in Brussels from Karel Kovanda, Kimberley Process Chair to Kimberley Process Members, 2007.
\textsuperscript{253} Smillie, ‘Paddles for Kimberley’, above n 51, 8.
\textsuperscript{254} Ibid, 8.
\textsuperscript{255} Ibid, 8.
Venezuela’s diamonds are entering world markets illegally.\textsuperscript{256}

In 2008, a number of events occurred suggesting that Zimbabwe was losing its ability to meet KPCS minimum standards. Large volumes of easily identifiable smuggled Zimbabwean diamonds were the subject of arrests in Dubai and India. A diamond rush by illicit diamond diggers in the Marange area was suppressed by well documented extrajudicial killings and widespread human rights abuse by the buying offices in Manica, just across the Zimbabwe border in Mozambique where a flourishing trading in smuggled goods continues today.\textsuperscript{257}

Zimbabwe became the subject of bitter debate within the KP. It took months before a review mission could be undertaken, and the mission itself became the subject of debate and political manipulation. Its findings were clear but its recommendations were vague, and in the end a bitter debate resulted in little more than the appointment of a KP monitor whose terms of reference omitted almost all the topics of controversy. Zimbabwe’s continued presence without censure in the KP has been ensured by strong support from South Africa and other neighbouring countries, although its behaviour continues to be both erratic and controversial, and its ability to meet minimum KP standards cannot be demonstrated.\textsuperscript{258}

The Zimbabwean situation has arguably been the most concerning, with reports of violence and smuggling in the Marange Mining area following the occurrence of a diamond rush there. As a result, the Kimberley Process agreed to send a review visit to the country. Although irregularities were discovered, the Kimberley Process decided against suspending Zimbabwe’s membership in the scheme. However, a Joint Work Plan was agreed between the Kimberley Process and Zimbabwe, involving the appointment of a special Kimberley Monitor to address compliance issues. Furthermore, a “supervised export mechanism” was established for exports of rough diamonds from Marange, under which the Kimberley Monitor must examine potential exports and sign the Kimberley Certificate before they can be considered as legitimate.\textsuperscript{259}

\textsuperscript{256} Ibid, 8.
\textsuperscript{257} Ibid, 8-9.
\textsuperscript{258} Ibid, 8-9.
\textsuperscript{259} Bernhard Esau MP, Kimberley Process Chair, ‘Public Statement on the Situation in the Marange Diamond Fields, Zimbabwe’ (Kimberley Process Secretariat, Windhoek, Namibia, 26 March 2009); Bernhard Esau MP, Kimberley Process Chair, ‘Statement: High Level Envoy Visit to Zimbabwe: Situation in Marange Diamond Fields’ (Kimberley Process Secretariat, Windhoek, Namibia, 16 April 2009); Bernhard Esau MP, Kimberley Process Chair, ‘Risk of Fake KP Certificates’ (Kimberley Process Secretariat, Windhoek, Namibia, June 2009); Kimberley Process Secretariat, ‘Kimberley Process Intersessional Meeting Communiqué’ (Windhoek, Namibia, 25 June 2009); Hon Bernhard Esau, Kimberley Process Chair, ‘Clarification About the Kimberley Process Chair’s Working Visit to Zimbabwe Which Took Place 19th – 21st August 2009’ (Kimberley Process
Review missions have an important role where there are more serious allegations of non-compliance. The case of Brazil is a good example. In 2005, Partnership Africa Canada published a report detailing instances of fraud relating to illicit diamond production and exports within Brazil’s diamond industry. This led Brazil’s Federal Police to launch an investigation into the country’s diamond industry and Brazilian authorities to suspend diamond exports. A previously commissioned Kimberley review visit found a range of shortcomings in the way in which the scheme was implemented in Brazil, ranging from a lack of training and experience among staff and customs officers to flaws in Brazil’s Kimberley Certificate. Brazil handled the revelation of irregularities well. On its own accord, Brazil suspended all diamond exports for 2006 well in advance of the Kimberley review visit. Brazilian authorities were transparent and eager to assist the review team. Brazil invited a follow-up review visit.

3.3.5 Peer Review: Evaluation

In the initial KPCS agreement, there was provision only for monitoring in cases of ‘significant non-compliance’, a term that was never defined. A year after the KPCS came on stream in 2003, the peer review system was agreed to. The entire process was developed after the core document had been finalized, providing a textbook case of how the KPCS can and has evolved in order to achieve the goals that are expected of it.

The peer review mechanism was assessed as part of the November 2006 Review of the Kimberley Process which was conducted by an Ad Hoc Working Group, as envisaged in the Kimberley core document. The Group reported that there was widespread agreement among governments, civil society and non-governmental organisations that the peer review mechanism had been a great success. In particular, the review highlighted the fact that review visits were a crucial ‘confidence-building’ tool allowing the Kimberley Process to be sure its requirements were being met effectively. The review noted that thirty-two participants

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Secretariat, Windhoek, Namibia, 3 September 2009); Boaz Hirsch, Kimberley Process Chair, ‘Appointment of KP Monitor to Zimbabwe’ (Kimberley Process Secretariat, Jerusalem, Israel, 1 March 2010); Boaz Hirsch, Kimberley Process Chair, ‘Re: Trade of Marange Diamonds in Compliance with KPCS Requirements: Vigilance Against the Laundering of Illicit Shipments’ (Letter to Kimberley Process Participants, 6 May 2010).


Ibid, 40.


Kimberley Process, The Kimberley Process Certification Scheme (Core Document, 2002) s 20; Ad Hoc
received review visits prior to the review, and that a further two non-participants, Liberia and Lebanon, had received special expert missions prior to joining the Kimberley Process. Furthermore, two review missions had been carried out: to the Central African Republic and the Republic of Congo. As at 30 October 2006, twelve member governments had not yet received review visits but nine invited review visits. Therefore, overall, 42 of 45, or 93 percent of, Kimberley participants received or invited review visits or missions. All previously conflict-diamond affected countries received review visits and almost all countries reporting diamond production or trade had had review visits.\textsuperscript{264}

The Review, however, also mentioned a number of areas in which the peer review mechanism could be improved. Croatia, Indonesia and Venezuela had not had review visits and had not requested them: the Three Year Review recognised that these three should be encouraged as strongly as possible to invite review visits as soon as possible. The chair of the Monitoring Committee confirmed that these countries had been approached and are all considering inviting a review visit.\textsuperscript{265}

The Three Year Review also recommended a number of modifications to the Monitoring Committee mandate, specifically so that review visit activities could explicitly integrate a regional dimension into their activities, i.e: trading patterns in neighbouring countries. Furthermore, expert missions should be able to be deployed on an ad hoc basis in preparation for determining whether or not to admit a particular applicant into the Kimberley Process.\textsuperscript{266}

The Three Year Review considered the effectiveness of review visits in two ways: by considering whether the system had detected the main implementation problems and whether the peer review system had contributed to bringing about tangible improvements to the problems identified. The Review Working Group concluded that governments who had been reviewed had received the visits with openness and provided access to their documentation and the whole range of activities linked to certification. This made it possible for the review team to identify issues that would not otherwise have been apparent.

\textsuperscript{265} Ibid.
\textsuperscript{266} Ibid, 38.
However, the Three Year Review also noted that some review visits were more sophisticated in comparing the actual mining capacity of a reviewed government to its declared rough diamond exports. The review recommended that each team report on whether it has reviewed internal controls for effective compliance in the countries it has visited. The Three Year Review also suggested that individual countries identify different needs for technical assistance and training in order to help participating governments implement effective internal controls. Examples of constructive interaction, resulting in improved implementation practices, included: the adoption of proper import procedures by some producing governments that did not have import procedures in place; the training of diamond valuators to enable them to carry out a review visit’s recommendation that all imports into a government member be subjected to a regime of physical inspection; and the initiation of an investigation by a government into suspicious trading activities pursuant to the findings of a review visit. One suggestion to improve the capacity of review visits was to increase the length of the average review visit. Given that they are normally only three to five days long, they can take on more of a diplomatic than an investigative character.  

The Review also recommended that the Kimberley Process should seek to further diversify the leadership of review visits to include in particular alluvial-producing countries, as only Sierra Leone in 2006 had taken such a role. It was also suggested that the criteria in the Administrative Decision on Peer Review should be expanded to include a provision that experts are required to be impartial and highly professional and should further require members to disclose any potential conflict of interest.

The Review suggested that the peer review system be maintained, but that the Administrative Decision on Peer Review be amended, specifying that in further review visits, attention should be focused on follow-up to issues identified in the first visit. Furthermore, in the case of repeated review visits, the visiting teams should be flexible in size and duration, to ensure that scarce resources are focused on substantial implementation issues. The Participation Committee should carefully engage with countries which fail to implement the review visit recommendations, with expulsion from the KPCS available as a last resort.

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One of the areas in which the peer review could be strengthened would be to make the receipt of a peer review visit compulsory to all members. The reluctance of some members to receive a peer review visit calls in to question the entire monitoring and enforcement system of the Kimberley Process. If a country is able to deny access to a review team, there is no ability of the Kimberley Process to verify its level of compliance with the process.

In evaluating the Kimberley Process’s response to cases of serious non-compliance, its ability to take executive action between plenary meetings, mediated by the chair, has been very important. In this feature, a year-round operational secretariat, it resembles the success of the equivalent secretariat responsible for managing compliance with the Convention on the Illegal Trade in Endangered Species of Wild Flora and Fauna (CITES). A system has been developed for CITES whereby a decision concerning a serious non-compliance issue can be made during the course of a year, prior to a meeting of the plenary. Action such as a trading ban with the problematic country can be implemented in this interim period.270

Although the office of the Kimberley Process Chair has been highlighted as a strength of the peer review system, it has also been criticised for being overly dependent on the willingness of the incumbent to take decisive action. For example, observers have argued that it was fortunate that the Canadians were chairing the Kimberley Process at the time that the Republic of Congo was expelled, as they were proactive and took the decision to ensure the integrity of the system.271 This example can be contrasted with the situation of Venezuela. Although seen as being in blatant non-compliance with Kimberley requirements, Venezuela was not targeted for expulsion under the mandate of the European Community (2007) or Angola (2008).272 This highlights the need for a formal procedure for dealing with countries which are seriously non-compliant, and also, arguably, in determining the suitability of

269 Ibid, 46; Interview between author and Global Witness Representative (Annex III).
271 Interview between author and Global Witness Representative (Annex III).
272 Ibid; Interview between author and Global Witness Representative (Annex III). Subsequently, an Administrative Decision (AD) on Venezuela’s participation was adopted in the Plenary meeting of the Kimberley Process in Brussels in 2007. Further to this, the KP Chair attempted to organise a review visit in the first quarter of 2008 but this was never acceded to by Venezuela. As a result, the Working Group on Monitoring concluded on 10 June 2008 that, since it could not ensure the implementation of the Administrative Decision, that the matter should be referred to the Participation Committee. Just prior to the Intersessional meeting, the KP Chair received a notification from Venezuela that it intended to “voluntarily separate from the KP for a period of two years and to cease certification for export of its diamonds”: Message regarding Compliance of Venezuela from Kimberley Process Chair Rahul Khullar to Kimberley Process Members, 9 July 2008. The Plenary formally encouraged continued efforts to reintegrate Venezuela into the KP at its meeting in 2009: Kimberley Process, 'Kimberley Process Plenary Session Communiqué' (Swakopmund, Namibia, 5 November 2009).
particular governments to carry out this important function.\textsuperscript{273}

When it works well, the peer review system is adequate, although three-day reviews are not enough in some cases to develop a comprehensive understanding of a country’s diamond industry. In many cases, however, it is far from adequate. Worst case examples include a review of Ghana where the report, a year in production, was superseded by a much tougher UN report revealing the transit through Ghana of conflict diamonds from Cote d’Ivoire (missed entirely by the KP team). An enormous nine-member Guinea review team spent less than two hours outside the capital city and did not complete its report for more than a year. A review of Venezuela was orchestrated entirely by the non-compliant host government. Civil society was prevented from participating in the exercise, and the team was never allowed near diamond mining or trading areas.\textsuperscript{274}

The makeup of review teams is inconsistent. Some KP participants have never taken part in a review, and in recent years several teams have included no industry representatives. Burden sharing has been uneven, with some NGOs footing a larger share of review costs than most governments. This has been alleviated in recent years by contributions from Rio Tinto Diamonds, Norway, Switzerland and the United States to a fund for NGO participation.\textsuperscript{275}

While some reviews have been thorough and have made important recommendations, there has been a chronic lack of follow-up. Review teams have repeatedly stated that some of the countries worst affected by conflict diamonds such as Angola, DRC and Sierra Leone, have extremely weak internal controls. In seven years of KPCS operation, little progress has been made on the issue. Getting a grip on internal controls was, and remains, the single most important issue for the diamond industry and the Kimberley Process.\textsuperscript{276}

Well documented cases of serious non-compliance have been brought to the attention of the Kimberley Process on several occasions, mainly by civil society representative sand the media, but the KP has been either slow to act, or has not acted at all. Smuggling of diamonds from Brazil, Venezuela, Guyana and Zimbabwe have been debated at length, but have elicited weak, slow or no response. The same has been true in cases where gross statistical anomalies suggest the need for urgent action: Guinea and Lebanon are two cases that were ‘pending’

\textsuperscript{273} Interview between author and Global Witness Representative (Annex III).
\textsuperscript{274} Smillie, ‘Paddles for Kimberley’, above n 51, 10.
\textsuperscript{275} Ibid, 10.
throughout 2009, and which remain unresolved.277

‘Technical assistance’ has been used as a catch-all, last-minute answer to many of these problems. Assistance, regardless of how it is described, is not always the solution to problems of compliance, but sometimes it is. The KP approach, however, has been ad hoc and patchy. Guyana and Ghana, among others, are still awaiting technical assistance promised by the Kimberley Process. KP terminology and thinking need to expand beyond the idea of technical assistance as sending experts, to incorporate other ideas, including longer-term inputs and the provision of equipment.278

In sum, the Kimberley Process needs a rigorous, clear and phased compliance enforcement strategy that starts with assistance and internal pressure, moves to public naming and shaming, and then moves to high levels of sanctions, suspension and expulsion.279

Smillie recommends the establishment of independent, third-party monitoring. He suggests that the KP Chair should create a panel of experienced experts to design and propose a range of models for independent, third-party monitoring complemented by rigorous follow-up, credible sanctions in cases of continued non-compliance, and a decision-making process on non-compliance that is not hostage to political interference.280

Smillie also recommends the establishment of a small permanent KP secretariat to manage monitoring and follow-up, providing service to the KP Chair and Working Groups as required. The secretariat would not replace or supplant the WGM; it would handle the organizational and managerial functions that currently fall to a single KP Participant.281

A multi-donor trust fund for timely and appropriate follow-up assistance in helping participants to meet KP minimums standards was also recommended.282

Smillie also notes that the Kimberley Process has repeatedly ignored calls for the inclusion of oversight on the cutting and polishing industry in KPCS minimum standards. This sector
remains vulnerable to, and a convenient laundry for, rough diamonds that have evaded KPCS scrutiny. The volume of illicit goods is growing: a hundred percent of Venezuela’s production; conflict diamonds from Cote d’Ivoire; a large volume of Zimbabwe’s diamonds moving through Mozambique; plus an unknown volume of smuggled and stolen goods from other countries. Major seizures of illicit diamonds in India, Dubai and elsewhere in recent months may be the tip of an iceberg.\textsuperscript{283}

Smillie recommends that companies that cut and polish diamonds document their sources, and that their records be made subject to independent audit as an integral part of KPCS minimum standards. Furthermore, he suggests that the World Diamond Commission should commission an independent evaluation of its system of warranties, to determine how it could improve the performance of industry actors in meeting KPCS challenges.\textsuperscript{284}

Originally, public transparency was a key focus of the Kimberley Process. An early draft of the core document stated in its preamble: "Acknowledging that an international certification scheme for rough diamonds will only be credible if supported by appropriate arrangements to ensure transparency and accountability with respect to its implementation".\textsuperscript{285}

Under the heading ‘cooperation and transparency’, however, the final KP core document lists seven provisions, dealing only with the exchange of information among participants. There is no discussion of public transparency. The KP’s most notable failing in this area is the fact that reports of review visits are kept confidential.

The explanation is that governments would not open themselves to full peer scrutiny if blemishes were to be made public. Most ‘blemishes’ are, however, self-evident to inside observers, and are hardly a public secret. By hiding the reviews and their recommendations, and by failing to follow up on the recommendations, the KP effectively removes a tool that might improve matters without any effort on its part: publicity. Confidentiality, of course, also obscures the KP’s lack of follow-up on its own recommendations. It also prevents concerned citizens from knowing about, and calling for change in their governments’ implementation of KP obligations.\textsuperscript{286}

\textsuperscript{283} Ibid, 12.
\textsuperscript{284} Ibid, 11.
\textsuperscript{286} Smillie, ‘Paddles for Kimberley’, above n 51, 12.
According to Smillie, greater openness in the Kimberley Process might be uncomfortable because it would be easier for the media, civil society and others to hold it more accountable for timely follow-up on reviews, and for action on issues of serious non-compliance. But all of these stories find their way into the media anyway. Greater transparency would help to make the KP the regulatory body it aims to be, and the one the industry and African producer countries so badly require.\textsuperscript{287}

Smillie recommends that all KP annual reports and all reports of KP reviews, as a matter of course, be placed on the open KP website, along with details of follow-up action. A transparency working group should be established to develop criteria on exceptions to the rule, and to deal with special requests for confidentiality.\textsuperscript{288}

Smillie is also critical of what he considers self-censorship by the Kimberley Process of draft resolutions prepared for submission to the General Assembly of the United Nations. He states that, in 2009, Venezuela insisted that all reference to Venezuela be dropped. China insisted that all reference to human rights be dropped. And Zimbabwe insisted that all reference to Zimbabwe be dropped. An anodyne UNGA resolution was passed, as a result, without a single reference to the issues that had most consumed the Kimberley Process over the previous two years. Echoing the growing dissidence from civil society and some industry players, several governments, including Switzerland, Sweden, Canada and the United States challenged the official KP version of events in the UNGA debate.\textsuperscript{289}

According to Smillie, a major concern at the outset of KP negotiations was the potential cost implications of a global regulatory system. It was assumed that the industry would have to bear most of the cost, although as it turned out, most of the financial burden has fallen on governments. In almost all countries, government has taken on most if not all of the cost of implementing the KPCS. The industry created the World Diamond Council to represent its interest in the Kimberley Process, and in some countries a low-cost chain of warranty system has been developed. Industry has participated in review visits and has contributed to the costs of special undertakings such as the 2006 review of Ghanaian diamond exports. All things

\textsuperscript{287} Ibid, 14.
\textsuperscript{288} Ibid, 14.
considered, however, the cost of the KCPS to industry has been small.  

Civil society organizations have participated in all working groups, plenaries and intersessional meetings, and have participated in most review visits and missions. Civil society organization have also undertaken a large number of independent reviews, studies and publications and have, arguably, borne a disproportionate cost of participation – and in holding the Kimberley Process accountable to its mandate.

The major cost implications lie in the adoption of an independent, third party monitoring system, and the establishment of a small secretariat to manage that function, and the required follow-up as an ongoing service to the Chair of the day. The Monitoring Working Group would continue to set the agenda and the policy framework and other working groups would remain unchanged. Smillie estimates the costs of the working group as being US $2.25 million per annum.

3.4 ROLE OF INDUSTRY

Although the primary regulator for the Kimberley Process at the national level is the national government and its agencies, one of the distinctive features of the Kimberley Process is that it can be considered as operating simultaneously as a government-regulated system as well as acting as an exercise in industry self-regulation. The Kimberley Process has, from the outset, been driven by the needs and interests of the diamond industry. The De Beers corporation itself was a significant driving force in the finalisation of the Kimberley Process Core Document, and the industry as a whole has been represented through the World Diamond Council, an umbrella organisation for the large firm commercial diamond sector, at subsequent plenary meetings of the Kimberley Process.

The journey of the high end corporate diamond sector from the targets of bad press to advocates for the continued operation of the Kimberley Process is one of the striking features of the history of the organisation. One commentator has described this transformation as

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291 Ibid, 16-17.
292 Ibid, 17.
293 Commentator C Kantz argues that, while it was NGOs who highlighted the problem of conflict diamonds, the diamond industry became socialised to take responsibility for addressing the issue: C Kantz, ‘The Power of Socialization: Engaging the Diamond Industry in the Kimberley Process’ (2007) 9(3) Business and Politics Art 2, 3.
being a process of "socialisation" from "self-interest" to "enlightened self-interest". The high sensitivity of the industry to its media and public image can be understood in the light of the end products of the industry. Although mining rough diamonds is also undertaken for industrial purposes, such as their use in high powered cutting tools, the bulk of the commercial value in the industry resides in the jewellery retail sector. Fundamentally, the value of a diamond in this context is aesthetic and sentimental, meaning that its value is at risk if it were to become associated with negative sentiment resulting from a link with human rights violations. Given its awareness of the risk, the commercial diamond industry has positioned itself as advocates for the Kimberley Process, so as to separate its product from the conflict diamond trade. One of the interesting findings from interviews conducted with Rio Tinto and the Australian Government was that Rio Tinto was a very strong advocate for the continued operation of the Kimberley Process whereas the Australian Government expressed the view that its relevance was diminished given the emergence of peace in Angola and Sierra Leone. The expression of this view by government would appear to be connected to the fact that much of the operating costs of the Kimberley Process comes from government rather than industry. This view, however, appears a little short-sighted given the emergence of new conflict diamonds threats in the DRC, Cote d'Ivoire, and Zimbabwe, in tandem with the importance of the Kimberley Process for the prevention of threats emerging again in Angola and Sierra Leone, or surfacing in another country.

Although the World Diamond Council has only observer status rather than voting status in the Kimberley Process, it can be argued that its representations at this level have a strong influence, whether voiced through the plenary or particular working groups and committees. This influence is particularly strong considering that decisions of the Kimberley Process plenary must be through consensus. This means that, should the World Diamond Council lobby only a single government delegation to support its viewpoint, then it would not be possible for the Kimberley Process Plenary to make a decision regarding which it does not concur.

The involvement of industry representatives and NGOs in the international Kimberley

294 Ibid
295 Interview with Rio Tinto Representative (telephone interview, 30 May 2007); Written Response from Australian Government to Author's Interview Questions, 14 September 2007.
296 Kimberley Process, The Kimberley Process Certification Scheme (Core Document, 2002) s VI (5). Other international regulatory initiatives have sought to directly manage the activities of multinational corporations, including instruments such as the UN Norms of Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, discussed in Sali Tripathi, 'International Regulation of
Process system is perhaps most pronounced through the committee and working group system. All committees have, both in principle and practice, involved industry and NGO representatives. Representatives are also mandated to participate in review visits and review missions as part of the peer review mechanism employed by the Kimberley Process. This level of involvement stands apart from standard expectations of NGOs and civil society, which typically are excluded from direct participation in the execution of treaty body decisions, and do not normally enjoy such a high level of influence in decision-making processes.  

One of the benefits of industry involvement is its ability to provide experts who enhance the system procedurally and practically. Rio Tinto has been asked for advice by other diamond-producing mines regarding Kimberley Process compliance and has happily offered this advice in the knowledge that the company’s reputation is affected if diamond-mining operations by others are not Kimberley-compliant.  

### 3.4.1 Industry Involvement Through Self-Regulation

Given the direct involvement of the major diamond-producing corporations, such as De Beers, through the World Diamond Council, the formal diamond sector has been a strongly integrated into the self-management of conflict diamond prevention standards. As such, De Beers management, for example, has sought to ensure that its component corporate entities are compliant with certification requirements and its other obligations under the Kimberley Process.  

One of the challenges, however, has been the involvement of the informal diamond sector in this process. It is very important to engage the informal sector, predominantly representing alluvial diamond miners, for the reason that it is this sector which has been so directly implicated in producing diamonds for militia groups. As it does not appear that their interests are represented through the World Diamond Council it perhaps will fall to national governments to engage with the informal sector through their own efforts. It is noteworthy that guidelines for such engagement are currently being developed at the international level.

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Interview between author and Rio Tinto Representative (Annex III).

http://www.debeersgroup.com/
through the Kimberley Process to assist governments. This movement culminated in the attendance of representatives of artisanal miners at the 2007 Kimberley Process plenary in Brussels. Furthermore, the Kimberley Process decided to establish an Artisanal and Alluvial Mining Working Group to especially meet the needs of this central sector.

The ability of the diamond industry to regulate itself in relation to the chain of warranties from import to retail, was, in 2004, the subject of a study of the retail sector. Diamond retailers in the US and the UK were targeted by a survey, coordinated through the efforts of Global Witness and Amnesty International, to determine the effectiveness of diamond industry self-regulation at the retail end of the trading chain. In particular, reference was made to commitments made by the industry in January 2003, to: implement a code of conduct to prevent buying or selling conflict diamonds; implement a system of warranties requiring that all invoices for the sale of diamonds and jewellery containing diamonds must contain a written guarantees that diamonds are conflict free; to keep records of the warranty invoices given and received and for this to be audited and reconciled on an annual basis by the company's own auditors; to inform company employees about the industry's policies and government regulations to combat the trade in conflict diamonds. Unfortunately, the study found that implementation of the system of warranties at the point of retail was inconsistent and not fully functioning. In particular, the study showed that retailers, where they were in fact implementing the voluntary self-regulatory measures, were not taking sufficient precautions to ensure that their suppliers were providing Kimberley compliant diamonds. The study made a number of recommendations with diamond retailers in mind. They recommended that strict criteria should be applied in the selection of suppliers and third-party auditing procedures should be adopted to ensure that policies are working effectively. Furthermore, retailers should provide written assurances to consumers stating that the diamonds they purchase are conflict free so that the system of warranties covers the entire supply chain from point of mine to point of sale to the consumer. Retailers should also carry out education and training on conflict diamonds and the Kimberley Process and require it as a

300 Karel Kovanda, Kimberley Process Chair, 'Valedictory Remarks of Mr Karel Kovanda, Kimberley Process 2007 Chairman' (Intersessional Meeting, Brussels, Belgium, 8 November 2007).
301 Karel Kovanda, Kimberley Process Chair, 'Valedictory Remarks of Mr Karel Kovanda, Kimberley Process 2007 Chairman' (Intersessional Meeting, Brussels, Belgium, 8 November 2007).
condition of employment so that salespeople are fully informed about policies and communicate this to consumers in a transparent manner.\textsuperscript{303}

Both the formal and informal diamond sectors have some ability to enforce standards in a self-regulatory context. For example, internal disciplinary boards can be established to hear complaints about breaches of Kimberley Process standards by diamond industry employees.

### 3.5 ROLE OF NON-GOVERNMENT ORGANISATIONS

Non-governmental organisations such as Global Witness and Partnership Africa Canada were pivotal in bringing the problem of conflict diamonds to the attention of the international community, leading to the establishment of the Kimberley Process. They have subsequently had a vital role within the Process itself, and have been described as representing the “conscience of the Kimberley Process”.\textsuperscript{304}

Non-governmental organisations play a very important role in the monitoring of Kimberley Process obligations both within the system and outside the system. Within the system, as discussed earlier, NGOs are able to bring potential non-compliance issues to the attention of the Kimberley Process and also participate in the peer review mechanism.

NGOs have had a central role in the development of standard-setting within the Kimberley Process, including those standards relevant to regulation at the national level. They have an institutionalised role in relation to the functioning of the Kimberley process, including providing ideas and recommendations as to further developments in the area of standard-setting.

The Kimberley Rules of Procedure clarify that observers may be invited to attend meetings of an ad hoc working group or a subsidiary body, either on a temporary or a permanent basis. The plenary may take a decision to revoke an invitation.\textsuperscript{305}

One of the key successes, and unique features, of the Kimberley Process is its high degree of

\textsuperscript{303} Global Witness, 'Broken Vows: Exposing the Loupe Holes in the Diamond Industry’s Efforts to Prevent the Trade in Conflict Diamonds' (Report, March 2004).

\textsuperscript{304} Karel Kovanda, 'Valedictory Remarks of Mr Karel Kovanda, Kimberley Process 2007 Chairman' (Intersessional Meeting, Brussels, Belgium, 8 November 2007).

\textsuperscript{305} Kimberley Process, *Rules of Procedure of Meetings of the Plenary, and its Ad Hoc Working Groups and
involvement with non-State entities, in particular representatives from the diamond industry and representatives from non-governmental organisations. NGOs play important roles in standard-setting and monitoring within the scheme. As stated in one review submission:

NGOs and experts from throughout the diamond industry have played a vital role and their input is accepted (if not expected) as if they were states.\textsuperscript{306}

NGOs often initiate the incorporation of new standards in the context of Kimberley Process meetings. One example which stands out is the drive for more detailed internal controls to be set out through the Kimberley Process. In the area of monitoring, Global Witness and Partnership Africa Canada have contributed assessments as part of the three year review of the Kimberley Process, also serve on the Working Groups on Monitoring and Participation within the Kimberley Process, and have been involved in several review visits and missions. Rather than preferring simply an adversarial approach to the Kimberley Process, these organisations engage dynamically within the process itself to effect change.\textsuperscript{307}

In their landmark study of the “governance triangle”, assessing a range of tripartite (government, business, NGO) initiatives, Abbott and Snidal interestingly position the Kimberley Process at the centre of their triangle model, indicating their assessment that, as regards the relative influence of the three stakeholders, the KP is perhaps the most evenly balanced of all the assessed initiatives. It is possible to challenge this assessment, however, by observing that only governments are voting members of the KP, despite the significant influence of NGOs and businesses. Given the walk-out at the Kinshasa interplenary meeting, and the subsequent non-attendance by NGOs at the November 2011 plenary, the structural weighting towards governments has more clearly made itself manifest.\textsuperscript{308}

\textit{Subsidiary Bodies (2003).}

\textsuperscript{306} Wexler, above n 163, 6.

\textsuperscript{307} Kimberley Process, \textit{The Kimberley Process Certification Scheme} (Core Document, 2002) ss III, IV. Work has been initiated within the Kimberley Process itself in relation to the effectiveness of such internal controls and of industry self-regulation: Kimberley Process, ‘Final Communiqué: Kimberley Process Plenary Meeting’ (Gatineau, Canada, 29 October 2004). This culminated with the endorsement by the Kimberley Process Plenary of a document called the Brussels Declaration on internal controls of Participants with rough diamond trading and manufacturing. The declaration gives guidance on controls for record keeping, spot checks of trading companies, physical inspections of imports and exports and maintenance of verifiable records of rough diamond inventories: Kimberley Process, ‘2007 Kimberley Process Communiqué’ (Brussels, Belgium, 8 November 2007). A critique of the lack of internal controls in the Kimberley Process is set out in Fishman, above n 148, 237-238; Interview between author and Global Witness Representative (Annex III). The use by NGOs of strategies within and outside formal processes to influence outcomes has been described as “multitrack diplomacy”: Grant and Taylor, above n 297, 386-687.

3.5.1 **ROLE OF NGOs EXTERNAL TO THE KIMBERLEY PROCESS**

Outside the system, NGOs have also been effective in undertaking their own independent monitoring of the effectiveness of the Kimberley Process in particular contexts and countries.\(^{309}\) It was through reports by organisations such as Global Witness and Partnership Africa Canada that world attention was given to the conflict diamonds problem, and Global Witness has continued to provide this external aspect of scrutiny of the Kimberley Process system. NGOs have proven adept at attracting international media attention to the conflict diamonds issue. The 1998 protests organised by Global Witness in front of Tiffany’s jewellery store in New York was a landmark in attracting global attention to the problem.\(^{310}\) Another media event occurred in 2006 with the release of the popular Hollywood movie “Blood Diamond” which brought further public attention to the issue.\(^{311}\) Considering this external aspect of its scrutiny, recent reports by the organisation have considered the ability of the diamond industry to implement its chain of warranties from the point of import to the point of retail. A report dated June 2010 released by Partnership Africa Canada provides an important external and contemporary critique of the operation of the Kimberley Process.\(^{312}\)

Bringing conflict diamonds trading to the attention of the global media, and “naming and shaming” unscrupulous corporate or individual behaviour acts itself as a form of ‘enforcement action’, which is readily available to non-governmental organisations. The term ‘enforcement’ is used here in the regulatory sense, rather than in the normal legal sense which generally connotes action by a central authority.\(^{313}\) ‘Enforcement’ used in this sense indicates the pressure which negative media attention brings to bear on industry, which influences industry to change its behaviour to conform with international regulatory standards. It is noted that the ultimate consumers of diamond products purchase diamond jewellery as much because of its image as because of its intrinsic qualities. Should diamonds develop a bad media image, the value of the industry would rapidly decrease. NGOs may also use the threat of poor media publicity as leverage with industry and governmental groups to seek higher standards under

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\(^{310}\) F. Bieri, *From Blood Diamonds to the Kimberley Process*, 41

\(^{311}\) Ibid 148

\(^{312}\) Smillie, ‘Paddles for Kimberley’, above n 51.

\(^{313}\) As discussed in Chapter Five, regulation is theorised to consist of the processes of standard-setting, monitoring and enforcement.
the Kimberley Process.  

THE DEVELOPMENT DIAMONDS INITIATIVE INTERNATIONAL

The quality of internal control systems varies greatly from one KP participant to another. Implementing effective internal controls is most difficult for countries with alluvial diamond reserves. Alluvial diamonds are found in vast areas, usually along riverbeds, and these areas are often beyond the control of both states and the diamond industry. Alluvial diamonds are most frequently mined by artisanal miners who work with simple tools and often earn less than $1 per day. Kimberlite diamonds, on the other hand, are mined with capital intensive machinery that extracts the diamonds directly from a volcanic pipe. Botswana, the exemplar for positive African development based on diamonds, extracts its gems from kimberlite mines. African countries with large alluvial diamond reserves are Angola, the Central African Republic, Cote d’Ivoire, DRC, Guinea, Ghana, Liberia, Sierra Leone, and others.

Artisans mine between 10 and 20 percent of the diamonds used for jewellery, which makes them an important part of the industry. They have no better employment opportunities and typically hope to make a “big find” in the diamond fields. But the vast majority, despite their back-breaking labour, will never find that large stone. The diamonds they dream of are referred to as “poverty diamonds” but are closely linked to “conflict diamonds”: “The poverty, the hundreds of thousands of willingly exploited adults and children, and the volatility of the diamond fields make for a highly flammable social cocktail, one that has ignited several times in recent years, with tragic results”. The alluvial sector is closely linked to civil wars in those countries and has led to regional and international instability. Rebels continue to control alluvial diamond fields and poor artisanal diamond workers are easily recruited for rebel armies or to sell the diamonds they find to regional warlords. In addition, a whole range of social problems is associated with artisanal mining: child labour, HIV infections, environmental destruction, crime and violence, poverty, unhealthy and dangerous working conditions. Some states have declared the alluvial diamond mining sector

315 Bieri, above n 17, 149.
316 Partnership Africa Canada & Global Witness, Rich Man Poor Man, 6-7
illegal, while most states neglect it altogether, thereby exacerbating the problems. “There are no cases in Africa where artisanal diamond mining has been supported and regulated successfully”.

The conflict diamonds campaign, in particular Global Witness and PAC, did not pay close attention to development issues relating to alluvial miners until late 2004. But local African initiatives appeared as early as the beginning of 2002, as soon as relative stability emerged in the region. Various pilot projects attempted to address the issue. For example, the government of Sierra Leone created a “Diamond Area Community Development Fund”, through which part of the export tax on diamonds is directly returned to the artisanal diamond communities. The DRC created an organization to assist in creating mining cooperatives. The “Campaign for Just Mining” was launched by the Network Movement for Justice and Development (a Sierra Leonean NGO and Southern partner organization of PAC) in January 2000, following the widely-publicised PAC report: “Heart of the Matter” on Sierra Leone. The Campaign for Just Mining’s goals are to “promote sustainable development in Sierra Leone by advocating accountability, transparency and social responsibility within the mining sector”. The campaign is squarely rooted in a human rights frame or as they call it a “rights-based approach to mining” including the right to a sustainable livelihood (i.e: formalising diggers’ employment status), the right to basic services, the right to security, protection of the environment (ensuring long-term human security, including food security and avoiding illnesses such as malaria and the right to participate in various decision-making processes.

Many of these local initiatives were funded through bilateral aid, which was often forthcoming after peace agreements had been reached. The “Peace Diamond Allianze” was launched in December 2002, organising diggers in cooperatives to help them obtain better prices for diamonds. It was funded by USAID and managed by Management Systems International, a Washington-based consulting firm. “It has brought together an eclectic group of local and international NGOs, diamond buyers, mining companies and government officials”. Other pilot projects too were initiated by state donor agencies and NGOs. Bilateral agencies like USAID and some international governmental organisations, notably the World Bank, committed funds and organisational capacity to the issue of artisanal and

317 Partnership Africa Canada & Global Witness, Rich Man Poor Man, 8; F Bieri, From Blood Diamonds, 149-150.
318 Partnership Africa Canada & Global Witness, Rich Man Poor Man, 11
319 Partnership Africa Canada & Global Witness, Rich Man Poor Man, 12; F Bieri, From Blood Diamonds, 149-150.
small scale mining. Many of these initiatives grew out of foreign policy efforts by states, especially the USA and the UK, sometimes in relation to their brokering of peace agreements. For instance, the involvement of the US in Sierra Leone in 1999 brought USAID and other bilaterally-focussed agencies into the region. Moreover, the civil wars in the area, particularly, in Sierra Leone, had become closely associated with diamonds during the course of the conflict diamond campaign and the Kimberley Process. The mining initiatives emerged in the context of bilateral agencies’ attempts to address one of the primary “causes” of the wars.\textsuperscript{321}

These initiatives reveal several important characteristics. First, they frequently were organised in a tripartite fashion. Multi-stakeholder models had been firmly established in the development/aid sector by the late 1990s, usually meaning that national and local civil society partners were involved. In the case of mining and resources, extractions, where state and industry are frequently co-owners, it meant that the industry too was an important partner or stakeholder for small scale mining initiatives.\textsuperscript{322}

Furthermore, the bilateral funds that were disbursed for artisanal diamond mining projects showed that the issue of poverty or development diamonds was already on the agenda of some state donor agencies by 2002/2003. For example the World Bank’s Community and Small Scale Mining initiative, launched in March 2001, had been in the works since September 1999. It focused in large part on artisanal mining in South America as well as Asia. But government donor agencies’ agendas were also affected by the conflict diamond campaign in early 2000. For example, the third annual general meeting of the World Bank’s Community and Small Scale Mining Project in September 2003, was held in Ghana, with diamond mining prominent on the agenda; among other things, PAC gave a presentation on the KP. Also, the aid that followed the peace agreements was intended to address the circumstances causing conflicts. The conflict diamonds campaign had made diamonds appear to be especially important as a source of conflict; the Sierra Leone war, for instance had come to be defined almost entirely as a conflict diamonds issue. Thus, the conflict diamond campaign influenced related aid and development responses in 2002 and helped put artisanal diamond mining on the agenda of some governmental aid agencies.\textsuperscript{323}

Third, the emergence of the development diamond projects also shows that the development

\textsuperscript{320} Partnership Africa Canada & Global Witness, \textit{Rich Man Poor Man}, 11
\textsuperscript{321} F Bieri, \textit{From Blood Diamonds}, 150-151.
\textsuperscript{322} Ibid, 151.
frame was on the agenda of local NGOs in former conflict-diamond areas. For many African NGOs, in fact, these developmental aspects related to artisanal miners were always at the forefront and many African NGOs were eager to shift the focus of the conflict diamond campaign towards underlying issues of development. Prior to 2004, African NGOs were unable to add the development framework to the global public awareness campaign, and the Western NGOs leading these efforts, focusing narrowly on conflict diamonds. However, African NGOs became partners of bilateral aid agencies eager to work with civil society on local development projects on small scale mining. That is how they were able to pursue a broader, more holistic approach to the role of diamonds in conflict regions and to get the Western NGOs to broaden their focus.

The first strategic meeting, leading to the establishment of the Development Diamond Initiative, was called by Global Witness, PAC and De Beers in January 2005 in London. This meeting was chaired by former US Assistant Secretary of State for Africa Walter Kansteiner, and included representatives from states, the EC, the UN, DfID (the British Foreign Aid Agency), USAID, the World Bank, and industry and NGOs.

According to Ian Smillie:

I think we had about 50 or 55 people came to it. We had good representation from industry. In fact a lot of industry people complained that they hadn’t been invited. But of course, a lot of them were concerned that De Beers was up to something, you know, they wanted to know what this was. ‘Is this another sort of De Beers way of getting control over something?’ And the response was, I guess, good enough, that we felt encouraged to go on with it. We did a lot of talking during 2005. We met. We discovered that the World Bank had a thing called the Communities and Small-Sale Mining Initiative, a small secretariat in Washington. They were having their annual meeting in June last year and we went. We all went to that. We expanded the membership to include Rapaport. Rapaport said he wanted to be part of it.

A second meeting took place in Washington DC in June, in conjunction with a Communities and Small Scale Mining (CASM) meeting at the World Bank. Both DDII meetings were devoted to defining the goals and scope of the initiative. The DDII was to address the political, social and economic challenges associated with artisanal diamond mining in Africa.
attempting to bring this large informal sector into the formalized economy. While some industry players remained skeptical, De Beers and Martin Rapaport had already been involved in the Peace Diamond Initiative in Sierra Leone. They had also been important in bringing the conflict diamonds issue to the industry’s attention in early 2000, when the campaign got underway. De Beers’ motives for its proactive involvement on development diamonds were viewed with suspicion by some NGOs and by some in the industry. Smillie responds to those suspicions as follows:\textsuperscript{327}

What is De Beers doing in this? What are they doing? And I always say they’re doing it because they love little children in Africa. What do you think they’re doing? Why do you think they’re in it? I mean this is clearly an issue and they are leaders in the diamond industry and they don’t want to find the wave crashing on their heads. Better to anticipate this one and get with the program. And maybe they want to control it, in a sense of keeping it to a minimum, but so far we haven’t seen that. You know I mean they have been quite enthusiastic about it. So I mean we don’t feel any resistance or pressure to move this way or that way from them. I mean clearly they’ve got corporate interest. Clearly you know they’re in it because they want to make sure this doesn’t turn into a big anti-industry campaign again. Instead of waiting for the campaign, let’s do something about it right away.\textsuperscript{328}

Initiators of the DDII (De Beers, PAC, Global Witness, the Rapaport Group, and Jeffrey Davidson, representing the World Bank’s Communities and Small Scale Mining Secretariat) were joined by the Foundation for Environmental Sustainability and Security and the International Diamond Manufacturer’s Association, and “the DDI has been endorsed by the governments of Sierra Leone, Guinea, the DRC, Namibia and others, and has received start-up project funding from Canada’s Department of Foreign Affairs”.\textsuperscript{329} Overall, alluvial diamond mining countries expressed great interest in the initiative, while other diamond producers were less engaged in the matter.

In terms of government’s involvement, the governments that are of course more interested in DDII are the governments that are concerned like Sierra Leone and the Congo, and there is a lot of enthusiasm there. The Central African Republic, you know, Guinea. Now, the countries that can show leadership like they did in Kimberley Process, South Africa, Botswana and Namibia, they’re kind of keeping themselves away from the initiative, at the moment, at least.\textsuperscript{330}

CASM’s experience in dealing with artisanal mining suggested that getting donors involved

\textsuperscript{327} Ibid, 154.
\textsuperscript{328} Ian Smillie, interview with F Bieri, July 6, 2006 in F Bieri, \textit{From Blood Diamonds}, 155.
\textsuperscript{329} Partnership Africa Canada, \textit{Development Diamonds Initiative International} website, http://www.pacweb.org
in such initiatives was difficult.331

One of the things we heard at the CASM meeting in June last year, they've been working mainly on gold and colored gemstones and a number of other things. Generally there are about 35 million artisanal miners in the world and all have the same kind of problems... They [CASM] hadn't done very much on diamonds. In fact with Kimberley and some of our discussions, we’re way ahead of other artisanal mining groups, so that’s why they were interested in us, but they made the point that getting donors interested in artisanal mining is a big problem generally. It isn't just diamonds. It’s, extractive industries are regarded by some donors as an area that’s too complicated for them to get into. They don’t like mining generally and artisanal mining's particularly problematic.332

Nonetheless, participation in the inaugural DDII meeting held in Accra (Ghana) on October 27-30 was very good. It was limited to 80 representatives from states, industry and civil society. The meeting was financed by registration fees from industry and northern states ($400 each), $30,000 from the World Bank, and $5000 each from Rapaport, De Beers, Global Witness and PAC. Registration for NGOs and Southern states was free. At the Accra meeting, the DDII’s goals were further developed.333

The DDII seeks to integrate artisanal diamond mining initiatives already underway, such as the above mentioned projects – the Peace Diamond Alliance, CAMS, Campaign for Just Mining:

The focus of the DDI will be the creation of a multilateral partnership of governments, NGOs and industry that will allow interested parties to pool their resources, experience and knowledge, and to integrate various initiatives that are being developed in this field.334

The DDII seeks not only to put artisanal diamond mining on the agenda of NGOs and donors working on mining issues (such as the World Bank’s Communities and Small Scale Mining project) but also to create an encompassing approach that is not country – or initiative – specific. It attempts to translate these initiatives into a more cohesive and global frame in which diamonds are a development issue, and to get the big international development organizations aboard. The DDII’s ambitions are high:

330 Dorothee Ngolo Gizenga, interview with F Bieri, July 6 2006 in F Bieri, From Blood Diamonds, 155
331 F Bieri, From Blood Diamonds, 155.
332 Ian Smillie, interview with F Bieri, July 6, 2006, in F Bieri, From Blood Diamonds, 155.
The DDI has huge potential... If it works, if it gets the kind of support it needs, if we can excite the world’s development agencies – USAID, DFID, CIDA and others – this could be one of the biggest development initiatives in Africa.\textsuperscript{335}

In essence, the goal is making the world’s 13 million artisanal diamond miners, most of whom live in total poverty and face multiple health and peace and security challenges, a new focus in development. Artisanal diamond miners tie the conflict and development frames together. The DDII, by consolidating local initiatives, forms a bridge between the conflict frame and the development frame.\textsuperscript{336}

Initially, PAC and Global Witness did not explicitly assign any staff, not even part-time, to the initiative:

We don’t have anybody working on this full time. Everybody has got day jobs, though you know we have conference calls. We talk about things. We are working on things. We’ve widened the group a bit. There’s others involved. But you know we’re all busy and we don’t have, you know we don’t have half a person to devote to this and nobody else does either so there’s a real chicken and egg problem.\textsuperscript{337}

The lack of resources is partially explained by the fact that the KP continues to exhaust NGO’s capacities. Furthermore, it is more difficult to engage other NGOs and donors on the development diamond topic than on conflict diamonds. Dorothee Ngolo Gizenga from PAC explains:\textsuperscript{338}

The biggest difficulty with DDI, and it was shown even during the conference and the first meeting we had in January 2005, is mobilizing the NGO community. For as much as we were successful in mobilizing the NGO community, the world NGO community around the issue of conflict diamonds, we’re having difficulties to really engage and mobilize the NGO community around the Diamond Development Initiative. Is it less sexy than the conflict? Probably. It’s also the issue of mistrust about De Beers’ involvement with us, Partnership Africa Canada. And you know, so not everybody wants to be in the same working group with De Beers and so on. De Beers is having problems with the industry. They are also suspected, “oh why is De Beers in this? What’s in it for them? They must be there for a reason”. So that is a bit of a difficulty. But also the donor community, and if you look at the Canadian International Development Agency, because of their, I would say their priorities. Their priority structuring in terms of issues and priority countries, DDI being an initiative that

\textsuperscript{335} Smillie, quoted in Partnership Africa Canada, Other Facets, Ottawa: October 2006, 1.
\textsuperscript{336} F Bieri, From Blood Diamonds, 156.
\textsuperscript{337} Ian Smillie, interview July 6, 2006 with F Bieri, in F Bieri, From Blood Diamonds, 156
covers several countries, none of them priority countries, you know? We don’t fit into their agenda, yet it is a development, a large development issue, but we don’t fit into their agenda. So it falls off the table at a time where we most need support. I was just talking about the challenges, I talked about mobilization of NGOs; we still haven’t been very good at that, the international NGO community.\textsuperscript{339}

Ngolo Gizenga mentions several hindering factors. First, it is more difficult to garner support from other NGOs because development diamonds do not lend themselves to the same ‘sexy’ consumer campaign as conflict diamonds. Second there was suspicion about working on an initiative jointly with the industry and states. Specifically, PAC was accused of getting into bed with De Beers.

There was an article in the Los Angeles newspaper about De Beers getting bombarded with questions form them. And you know, so we explained ourselves and we said, “but the Kimberley Process is such a success being a tripartite system. Why can’t we try to deal with the development issue on the same level, having had the success of Kimberley?” So we explained ourselves over and over again and then the guy of [name of NGO] actually, you know, said “but you know they’ve done a great work with Kimberley Process. Why can’t we trust them that they’re gonna take the same players from the KP?” And then so this thing dies a little and then [name of NGO] surprised us by doubling, no, actually multiplying by four the amount they had given us before.\textsuperscript{340}

We had established relationships whereby we could instinctively move forward together, with a common belief that solutions could be found through this kind of cooperation.\textsuperscript{341}

Moreover, personal relationships mattered. The same individuals involved in the DDII have sat through countless hours of negotiations in the KP and have also socialized informally at frequent meetings around the world.\textsuperscript{342}

While particular industry players are involved in the DDII, most notably De Beers and the Rapaport group, the World Diamond Council (WDC, the industry NGO created to deal with the conflict diamonds issue) remained uninvolved. While formally welcoming the initiative, the WDC kept its distance, saying that it was created to address only the conflict diamond issue. The CEO of the WDC had the following to say about development diamonds and the

\textsuperscript{338} Ibid, 156.
\textsuperscript{339} Dorothee Ngolo Gizenga, interview with F Bieri, July 6, 2006 in F Bieri, \textit{From Blood Diamonds}, 157
\textsuperscript{341} Andrew Bone, interview with F Bieri, July 7, 2005 in F Bieri, \textit{From Blood Diamonds}, 160
\textsuperscript{342} F Bieri, \textit{From Blood Diamonds}, 160.
DDII: 343

It is an issue that we will discuss and because it is an issue that concerns every human being so I think it should be discussed every place possible and any time there is a diamond get-together I think we would be negligent, we would be remiss, if we don’t discuss those things. I think this is something that should be discussed all the time and all efforts should be made in order to do more in Africa because when I visited there during the Kimberley process preparation throughout the past three, four or five years, I saw in my own eyes the poverty there. Some of those countries have tremendous incomes from oil, from diamonds, from other natural resources and yet their inhabitants live with much poverty so something is screwed up with the system there and they should use their resources more thoughtfully. And if we in the industry are all responsible for people, NGOs, industry and other good governments and well-intending people can come together and do something about it and if they don’t they are negligent. So I think it is an excellent thing what they are doing and I am very supportive of it and the reason that the World Diamond Council didn’t take it head on is because I didn’t want to initially to confuse issues and take away what they are doing and eventually I think that after we finish with this process, you know, that we will have everything in place, that The World Diamond Council can play a role in this too. But right now I am focused on what we have at hand and I want us to complete this mission that we have and let other important industry bodies come together to try and do whatever they can and then we will augment it sometime in the future. But I am very, very happy about this initiative and I think it is very wise, bring and decent. 344

The WDC thus was intent on keeping its focus on the KP. Its distance from the DDII can possibly be explained by the fact that the DDII was an initiative of De Beers, which is both loved and hated for its dominant position in the industry. Also, the DDII leaves out industry members that have little to do with artisanal mining (i.e. industries involved in kimberlite extraction, many traders and retailers) or were already reluctant partners in the KP/WDC. 345

Despite close connection between the DDII and the KP, there was never any intention of incorporating the DDII within the KP. States, the industry and the NGOs agreed that this would have been counter-productive. No one wanted to jeopardise what had so far been achieved in the KP by overburdening it. In addition, the KP would have prevented the DDII from engaging state donor agencies who could help fund the initiative. As explained in the chapter on implementation, the KP is minimally funded, and state officials in the KP are not connected to the state agencies most likely to be potential donors; instead they represent trade

343 Ibid, 160.
345 F Bieri, From Blood Diamonds, 160-161.
departments or mineral extraction ministries. Third, most KP participants are not involved in the DDII. While any diamond trading state must participate in the KPCS to engage in international diamond transactions, most states take no interest in and are skeptical about being asked to engage on issues of diamonds and development.\textsuperscript{346}

NGOs saw the DDII and KPCS connection as follows:

The KPCS has helped to consolidate the peace in several African countries, but it is a regulatory system; it is not a tool for development. In the rush to congratulation, we are in danger of forgetting some of those who suffered most in the diamond wards – the diggers, and their communities.\textsuperscript{347}

The DDII reminded KPCS participants why the certification was initially launched. Important links between the KP and the DDII existed and were nurtured. The KP provided the networks, reputations and know-how, especially for tripartite interaction, which were applied in the DDII.\textsuperscript{348}

The KP also lent the DDII legitimacy by commending its activities, which is itself a sign of the global esteem the KP had achieved by 2005. On several occasions the DDII was given the opportunity to make presentations at formal KP meetings, Ian Smillie presented the DDII to the Moscow plenary in November, 2005. The final communiqué of the KP Moscow plenary concluded: “Liaison between the KP and the DDI was encouraged in order to optimize synergies”.\textsuperscript{349} The DDII thus kept development issues on the agenda of the KP by closely linking development to conflict diamonds and showing that the conflict diamonds problem could not be solved without also addressing development issues related to artisanal miners.\textsuperscript{350}

Most importantly, the DDII addressed one of the KP’s key weaknesses; the lack of internal controls in alluvial diamond states. The KP in essence doesn’t capture much alluvial diamond mining. It is unable to assess with confidence which mine or mining area an alluvial diamond comes from. Concerned about this weakness, the KP established an ad-hoc working group on artisanal mining.

\textsuperscript{346} F Bieri, \textit{From Blood Diamonds}, 161.
\textsuperscript{347} Partnership Africa Canada, \textit{Development Diamonds Initiative International} website, http://www.pacweb.org
\textsuperscript{348} F Bieri, \textit{From Blood Diamonds}, 161.
\textsuperscript{350} F Bieri, \textit{From Blood Diamonds}, 161.
The Diamond Development Initiative emerges from a recognition that the underlying problems of Africa’s alluvial diamond operations and its estimated one million artisanal miners lie beyond the KPCS and have not yet been addressed.\textsuperscript{351}

Thus, for the KP the DDII is an important means of tackling an issue that threatens the effectiveness and legitimacy of the KP. In broader terms, the DDII is important because the KP alone cannot ensure peace in the region.

The peace that the KPCS has helped to bring about is fragile ... and it is supported by large United Nations Peacekeeping operations in Liberia, Cote d’Ivoire and the Congo. These three peacekeeping operations have a combined troop strength of 38,000, with annual budgets to the end of June this year totaling $2.3 billion.\textsuperscript{352}

Current arrangements are unsustainable in the long run, and without the UN peace forces the Kimberley Process cannot effectively ensure that diamonds will not fuel renewed conflicts. This may explain why the DDII received much attention and was positively endorsed by the KP. Furthermore, what facilitated a sound relationship between the KP and the DDII was that the DDII’s goals were defined as complementary and supportive of the KP. The DDII did not undermine the KP for its ineffectiveness with regard to development, which would have delegitimised the process as a whole.\textsuperscript{353}

Overall, the KP served as an important starting point for the DDII but the DDII was built as a separate organizational effort. While relationships developed in the KP were important, not all industry players involved in the KP became involved in the DDII. For instance, the WDC remained focused on the KP while De Beers and Rapaport helped initiate the DDII. States that were crucial in setting up the KP (South Africa, Botswana, Namibia) were not closely involved in the DDII, while alluvial diamond-producing nations and several donor countries became active in the DDII. Canada, Britain, and the United States were involved in both, though for Britain and the United States different state agencies dealt with the KP and development diamond issues (the US Trade Department and the EC in the KP, USAID and DFID in DDII), while for Canada the Department of Foreign Affairs was the central agency for both initiatives. In 2008, funding for the DDII was provided by the government of

\textsuperscript{352} I Smillie, quoted in Partnership Africa Canada, \textit{Other Facets}, Ottawa: October 2006, 1
\textsuperscript{353} Ibid, 162.
Sweden, Tiffany & Co. Foundation, PAC and the JSCK Industry Fund, totaling a total of $287,580 for their annual budget.\textsuperscript{354}

In the end, the NGOs did not press for the DDII agenda to become incorporated into the operations of the KP. Whilst some view this separation as desirable, it is arguable that the KP would be enhanced and revitalised by adopting a broader mandate, as exemplified by the DDII. This matter is discussed in more depth below. See in particular the discussion in Chapter 7 and Chapter 8.\textsuperscript{355}

DDII’s first operational year, 2008, saw important progress made. The DDII produced several “Standards and Guidelines” material offering various stakeholders important information on artisanal mining in specific countries. The DDII engaged in a pilot study on Guyana’s registration system of alluvial miners and its internal diamond production tracking mechanisms. This study now serves workshops and training sessions in Africa to implement similar systems there.\textsuperscript{356}

\section{3.6 Concluding Remarks}

This chapter has provided an overview of the Kimberley Process, including the main ways in which it operates. It discussed procedures for membership, annual reporting and the peer review mechanism, including the manner in which the Kimberley Process has dealt with cases of serious non-compliance. The chapter has also considered the role of industry in the Kimberley Process, including self-regulation, as well as the role of non-governmental organisations, including the role of NGOs external to the KP, with a particular focus on the Development Diamonds Initiative International. The chapter has also provided an evaluation of the effectiveness of the KP overall. The KP has been successful in creating a unique regulatory organisation harnessing the unique contributions of governments (legitimacy, capacity for national enforcement), industry (technical knowledge and self-regulation) and NGOs (widespread, objective networks for monitoring and behaviour modification). Its success in enlisting the support of major industry groups, in particular cartel-leader De Beers, is particularly notable. On the issue, De Beers has done a 180 degree turn from opposition to

\textsuperscript{355} F Bieri, \textit{From Blood Diamonds}, 162.
“ferocious agreement” with NGO players, perhaps aware of focusing attention away from the potential criminal liability of its officers for complicity in human rights abuses which occurred in Angola and the DRC during the 1990s. With De Beers and peak group World Diamond Council taking ownership of the issue, a large piece of the solution falls into place simply by having these major players not engaged in the purchasing of conflict diamonds.

The KP has created unprecedented transparency in the diamond industry, particularly in the provision of statistics, which are more comprehensive, reliable and accessible than before. With reference to these statistics, it is possible to estimate that conflict diamonds have fallen, as a percentage of the international trade, to less than one percent. While the reduction in conflict diamonds is largely attributable to the emergence of peace in countries such as Sierra Leone and Liberia, the KP has arguably contributed to the tackling of the conflict diamonds problem, and contributed to creating these conditions of peace as well.

Despite the level of success it has achieved, the KP has struggled recently in the face of serious non-compliance by some of its government members. Despite acting decisively to protect the integrity of the KP when faced by large-scale illicit trade being funneled through the RCB in 2004, the KP did not act in this way when Venezuela behaved in a similar fashion in 2006. Most disturbing, however, are the large-scale killings and rapes which have occurred in Angolan and Zimbabwean artisanal fields, without eliciting suspension or expulsion from the KP. Diamonds emerging from these environments must be classified as conflict diamonds, and the continuing failure to act by the KP is a potential threat to its long-term viability.
The people back home wouldn't buy a ring if they knew it cost someone else their hand.

- From the movie Blood Diamond

357 See below n 358.
4 Kimberley at the National Level: Fancy Footwork?

4.1 Introduction

4.2 Implementation at the National Level

4.2.1 Regulatory Options Under National Legislation

Angolan National Legislation

Congolese National Legislation

Cote d’Ivoire National Legislation

Sierra Leone National Legislation

Australian National Legislation

Dutch National Legislation & the Kouwenhoven Case

4.3 Concluding Remarks
4.1 INTRODUCTION

National governments, particularly those of diamond producing nations, are the front-line defences against conflict diamonds. At the heart of the KP is the initial certification by the country of first export that the diamonds are, in fact, free from association with international human rights crimes. For this certification to be meaningful, an effective system of internal controls from the diamond mining site to customs at the place of international export is required. This chapter focuses on those internal controls as well as, to some extent, the internal controls required by cutting and polishing nations and those nations which are primarily involved in the retail of diamond jewellery. In doing so, the chapter makes an important contribution towards answering the first research question, namely, to what extent has the conflict diamonds governance system achieved its objectives? The chapter considers in detail the manner in which several African diamond producing nations, Angola, the DRC, Cote d’Ivoire, and Sierra Leone have incorporated internal controls into domestic legislation. By way of contrast with a developed country, the implementation of KP obligations by Australia is also discussed. Finally, legal developments in the Netherlands are considered, most notably the efforts of that government to hold accountable one of its nationals, Gus Kouwenhoven, before its national court system, in relation to resource-based crimes under international law. The chapter closes following concluding remarks.
4.2 **Implementation at the National Level**

The Kimberley Process is premised on the idea of a chain of warranties which verifies the origin of rough diamonds from the point of mining to the point at which the diamonds are purchased by consumers at the retail outlets. The primary obligations under the Kimberley Process relate to the regulation of the import and export of all conflict diamonds. Each country participant, on export, is required to ensure that each shipment of rough diamonds is accompanied by a duly validated Certificate. On import, each participant must require a duly validated certificate to be presented by the importer, who must then send confirmation of receipt to the exporting authority. Governments must ensure that no shipment of rough diamonds is imported or exported without such certification, thereby excluding non-participating countries from the rough-diamond trade. Transit countries, however, are not

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required to verify or issue certificates, providing that parcels are not tampered with in transit.

Even where countries have implemented these obligations into their domestic laws, such regulation will only apply to the process of exporting or importing diamonds. The Kimberley Process provides that regulation of the initial half of the trade in diamonds, from the point of mining to the point of export, must be guaranteed by States themselves, though little detail of how such internal controls are to be implemented is provided in the international instrument itself. Consequently, this matter has been left to individual states to devise, with varying degrees of success. Similarly, states are responsible for ensuring that rough diamonds which are imported are Kimberley-compliant.

Spearheaded by NGOs, there has been significant pressure for the Kimberley Process Plenary to finalise an Administrative Decision which sets down particular requirements for internal controls in rough diamond producing nations. For example, there are currently no specific requirements regarding the licensing of diamond mining and trading activities, or requirements that customs officials have the power to monitor the industry through ‘spot-checks’, or even requirements that fines and criminal penalties attach to trafficking black market diamonds. There should also be minimum training standards for diamond valuers and customs officials, and requirements regarding how they report back about diamond exports. In the absence of such specifications, it is difficult to ensure that effective internal controls are in place. Furthermore, the task of review teams sent through the peer review system is made more difficult as there are no established requirements to look for in assessing the ‘internal controls’ of countries being investigated.

360 The Australian Government made the point that the Kimberley Process border control measures must be implemented under the domestic laws or regulations of each participating country: Written Response from Australian Government to Author’s Interview Questions, 14 September 2007.

361 It is noted that work was initiated within the Kimberley Process itself regarding the effectiveness of internal controls and industry self-regulation: Kimberley Process, ‘Final Communiqué: Kimberley Process Plenary Meeting’ (Gatineau, Canada, 29 October 2004). This culminated with the endorsement by the Kimberley Process Plenary of a document called the Brussels Declaration on internal controls of Participants with rough diamond trading and manufacturing. The declaration gives guidance on requirements for record keeping, spot checks of trading companies, physical inspections of imports and exports and maintenance of verifiable records of rough diamond inventories: Kimberley Process, ‘2007 Kimberley Process Communiqué’ (Brussels, Belgium, 8 November 2007). A critique of the lack of internal controls in the Kimberley Process is set out in Fishman, above n 148, 237-238. See also Global Witness and Partnerships Africa Canada, ‘The Key to the Kimberley: Internal Diamond Controls: Seven Case Studies’ (Report, 2004).

362 Kimberley Process, The Kimberley Process Certification Scheme (Core Document, 2002) ss III, IV. Work has been initiated within the Kimberley Process itself in relation to the effectiveness of such internal controls and of industry self-regulation: Kimberley Process, ‘Final Communiqué: Kimberley Process Plenary Meeting’ (Gatineau, Canada, 29 October 2004). This culminated with the endorsement by the Kimberley Process Plenary of a document called the Brussels Declaration on Internal Controls of Participants with Rough Diamond Trading and Manufacturing. The declaration gives guidance on controls for record keeping, spot checks of trading companies, physical inspections of imports and exports and maintenance of verifiable records of rough diamond
For example, at mining centres government monitoring officers are not able to monitor effectively on the ground. The overall governance of the system is hindered by lack of implementation capacity and corruption.

One dimension of the problem is that a lot of diamond miners are working in dangerous conditions for very little remuneration, which is an example of the many labour, social and environmental issues underpinning the conflict diamonds problem. Many of these diggers are unregistered and unlicensed by the national government.\(^{363}\)

Similar comments, but with a different emphasis, on the issue of internal controls were made by the representative from Rio Tinto in his interview response. The representative stated that regulation by national governments probably varies quite a lot and can be improved. However, he also stated that this was not a fundamental issue from an industry perspective. He suggested that less than one percent of traded diamonds are linked to human rights violations. The representative also stated that further improvements were possible in relation to the Kimberley Process.\(^{364}\)

In order to improve the Kimberley Process, Global Witness and other organisations have urged that the Process make explicit the internal controls that are required for different categories of countries. In particular, artisanal diamond producing and trading countries all need separate systems of controls, as do countries with cutting and polishing centres. The creation of the artisanal mining working group represents an important step in this direction.\(^{365}\)

According to Global Witness, problems also exist at the point of retail, in relation to countries such as the United States. Global Witness argues that there is insufficient checking of shipments, because it is a low priority for business and government. Furthermore, in its interview response, Global Witness highlighted the issue of the ongoing sustainability of the inventories: Kimberley Process, '2007 Kimberley Process Communiqué' (Brussels, Belgium, 8 November 2007). A critique of the lack of internal controls in the Kimberley Process is set out in Fishman, above n 148, 237-8; Interview between author and Global Witness Representative (Annex III).
364 Interview between author and Global Witness Representative (Annex III).
Kimberley Process. With not as many diamonds fuelling conflict, the concern raised was that governments will give up on the Process, thereby undermining its power as a preventative measure. As a result, there is the risk of renewed instability in artisanal diamond areas potentially leading to the outbreak of conflict.\textsuperscript{366}

A further important mechanism of regulation is through the making of contracts and their enforcement. Requirements regarding Kimberley Process obligations could be built into any potential contracts negotiated between government and business. For example, a government contract with a business enabling the mining of a concession could stipulate that the business guarantee that no revenue should go to persons linked to human rights violations. Failure to ensure this stipulation could lead to the termination of the contract. Furthermore, corporations entering into contracts with subsidiaries or other independent businesses could put guarantees of Kimberley Process compliance into their contracts. For example, a diamond retailer might put a guarantee that diamonds being purchased are conflict-free into their purchase contract from a diamond cutter/polisher. Failure to adhere to the obligation would constitute breach of the contract. It would, furthermore, be open to national governments to require that retailers or other businesses in the diamond supply chain include such provisions in their contracts.\textsuperscript{367}

### 4.2.1 Regulatory Options Under National Legislation

Of importance and interest to any system of regulation is the ability of regulators to enforce their rules. The Kimberley Process core document is not silent simply on the issue of internal controls for governments, but also on the matter of how the import/export certification regime is to be enforced. National governments have an array of enforcement mechanisms available to them to ensure that national industry is compliant with the Kimberley Process. They are able to engage in negotiation and discussion with industry in order to promote compliance with the Kimberley Process. Their ability to engage in negotiation is backed up by the ability to impose sanctions for various types for noncompliance. Naturally, the first of such sanctions is the refusal to grant an export certificate, under Kimberley Process procedures. Beyond this, national governments might impose financial penalties or even undertake criminal prosecutions for serious offences.

\textsuperscript{366} Interview between Global Witness Representative and author (see Annex III).

It would seem logical, in the implementation of the Kimberley Process on the national level, to provide for criminal sanctions for individuals who trade in diamonds in the absence of appropriate certification. This is the simplest method of providing a criminal sanction for violation of the Kimberley Process provisions, as all that must be proven is an absence of a valid Kimberley Process certificate: the sanction should have confiscation of the diamonds and some type of fine as a minimum penalty, with the option of terms of imprisonment where appropriate mens rea is present, including situations of repeat offenders. Where there is evidence that a person has actually been engaged in the conflict diamonds trade, as opposed to simply trading without a certificate, there are further options for national criminal prosecution. This might be considered a more serious offence, as it shows that the attempt to export the diamonds was made in the knowledge that the trade, at some point, benefits militia groups involved in human rights abuses. Of arguably greater seriousness is the crime of contravening United Nations sanctions, where such sanctions have been imposed.  

One of the strengths of prosecutions for trafficking in conflict diamonds, or contravening United Nations sanctions, is the comparative simplicity of making out a case. Rather than requiring the judicial process to consider the intricacies of international crimes prosecutions, it is simpler for a court to consider evidence that an individual has been trading in conflict diamonds which are not correctly certified, and that the person possesses the requisite mens rea. Sanctions under national laws could also be applied to corporations themselves, an option not currently available under international criminal law.

Moving squarely into the province of serious international crimes is the prospect of prosecution domestically for conduct amounting to the war crime of pillage, as incorporated into domestic legislation by parties to the Rome Statute of the International Criminal Court 1998. Essentially, this crime involves the removal of resources and property without the consent of the legitimate government.

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368 For example, see discussion of the Kouwenhoven case below, which involved a prosecution under Dutch laws which criminalised the infringement of United Nations sanctions.

369 Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 8(2)(b)(xvi) (prohibition of pillage in international conflicts), art 8(2)(e)(v) (for non-international conflicts). A further possibility is taking proceedings, based on state responsibility rather than individual criminal responsibility, before the International Court of Justice. Uganda was found to be in breach of its international obligation to prevent plunder by the International Court in the Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda) (Judgement) (1995) ICJ Rep 90 [213]-[214], [242]-[251]. The relevant obligation which had been breached was the rule concerning pillage in Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, opened for signature 18 October 1907, (entered into force 26 January 1910) art 43.
A final option is prosecution for trading in conflict diamonds, by relying on indirect liability for the perpetration of war crimes and crimes against humanity such as murder and torture. Such an approach focuses on human rights violations committed by ‘direct perpetrators’, but attributes individual criminal responsibility to those whose role was financing the perpetrators through illegal diamond trading. Any country which is a party to the Rome Statute is obliged to legislate domestically for international crimes such as torture and murder. This possibility is the national analogue of an international prosecution before the Court itself, and is discussed in the context of the Kouwenhoven case further below.

Beyond an in-principle consideration of domestic legislative approaches, the actual legislative framework from a number of diamond producing countries in managing diamond mining and export, including provisions specifically directed against conflict diamonds, are discussed below. Most of the legislation considered relates to African diamond-producing nations. However, the legislative approach of a developed diamond-producing country, Australia, is also considered, by way of comparison. Finally, a domestic prosecution initiated by Dutch authorities in an analogous field to conflict diamonds, the Kouwenhoven case concerning so-called “conflict timber”, is discussed.

**ANGOLAN NATIONAL LEGISLATION**

Angola has created a legal regime under its domestic legislation to manage diamond mining activities. The legislation employs two main approaches to the regulation of the mining industry, namely zoning and licensing.\(^{370}\) Zoning involves the designation of certain areas as diamond production zones.\(^{371}\) Public access to such areas is prohibited or restricted, and taking up residence in the area is regulated, as is the carrying on of certain economic activities there, and bringing particular goods into and out of the zone.\(^{372}\) Criminal offences for contravention of these requirements are created.\(^{373}\)

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\(^{370}\) However, other regulatory approaches are also provided for. For example, an income tax regime for diamond mining is established under the *Regulamento do Regime Fiscal para a Indústria Mineira* 1996 [Regulation of the Fiscal Regime for the Mining Industry] (Angola) Decree-Law No 4-B/96, 31 May 1996.


Under licensing laws, persons are authorised to carry out particular activities in relation to diamond mining activity, such as prospecting, exploration, extraction, trading and, importantly, export of diamonds. The government has the ability to inspect and audit all mining activities and suspend or revoke mining licences if required. Criminal offences exist for persons carrying out such activities in the absence of a licence. Artisanal mining is specifically regulated through the use of particular zoning and licensing requirements.

Angolan legislation provides, in particular, that diamond exporters must have an export licence, and sets out relevant customs procedures for exporters. Classification and valuation of diamonds prior to export is regulated by the national diamond mining agency: Empresa Nacional de Diamantes (ENDIAMA). Unauthorised importation of diamonds into the country is criminalised as is unauthorised trading in diamonds.

CONGOLESE NATIONAL LEGISLATION

The Democratic Republic of Congo also employs the tools of zoning and licensing to regulate its mining industry under its national legislative regime. By the use of a zoning mechanism, the government may prohibit mining activity in particular areas. When properly licensed, a natural person, public entity or corporation, whether foreign or Congolese, may carry out diamond mining on a large-scale basis. Such activities include prospecting, exploration, extraction, trading and export of diamonds. Mining licence applications can be refused or

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374 *Lei das Actividades Geológicas e Mineiras* 1992 [Law on Geological and Mining Activities] (Angola) Law No 1/92, 17 January 1992 arts 6-7. Articles 10-13 allow for the granting of exploration rights, a process of determining whether traces of a material are commercially exploitable. The legislation also provides for the licensing of extraction activities.


376 Ibid, arts 17, 22.


378 Ibid, arts 31-36 creates specific licensing and zone regulations for artisanal miners.


381 Ibid, arts 36, 38; *Regime Aduanheiro Aplicável ao Sector Mineiro* 1996 [Customs Regime Applicable to the Mining Sector] (Angola) Decree-Law No 12-B/96, 31 May 1996 arts 9, 10.


383 Ibid, arts 6, 8.

384 Ibid, art 5. Under this article, the applicant must specify the type of mineral which will be mined (e.g. diamonds).

385 Ibid, arts 18-21 (prospecting), ch 1 (exploration), arts 63-66, 69, 73, 80 (exploitation, which includes extraction and sale of extracted minerals), art 85 (separate authorisation is required to export ‘untreated ores’,
revoked by the government.\footnote{Fines apply to persons undertaking unauthorised mining activities, with minerals being subject to confiscation.}\footnote{Also criminalised are theft, possession of stolen minerals, unauthorised trading in minerals, and unauthorised transportation of minerals.}\footnote{Fraudulent exports are also subject to criminal sanctions.} A separate regime applies to artisanal miners. Such activities may be restricted to particular artisanal mining zones and may only be carried out by Congolese natural persons who are licensed for artisanal diamond mining.\footnote{Only authorised artisanal diamond traders may purchase diamonds from miners and sell them on the domestic market.} Only diamond trading houses, and their agents, may export artisanally mined diamonds.

\section*{COTE D’IVOIRE NATIONAL LEGISLATION}

The Côte d’Ivoire legislative framework provides for protected zones where mining is not permitted, as well as zones where entry is not permitted without authorisation and zones for artisanal mining.\footnote{The legislation sets up licensing systems for mineral prospecting, exploration and exploitation, as well as artisanal mining.} Furthermore, the legislation establishes criminal offences to enforce the licensing system, which are punishable by fines, imprisonment or both. Such offences include: exploitation, possession, trade and transportation of minerals without authorisation as well as fraud in relation to these activities.

\footnote{Although it is unclear whether this applies to rough diamonds. Article 266 states that a licence holder can export and sell its production to international markets.) Articles 23 and 25 require that, apart from prospecting, foreign corporations must act through a mining agent in the county. The government requires 5 \% of the shares of the registered capital of mining corporations who have an exploitation licence. Chapter III of the Mining Code provides that an exploitation licence may apply to artificial mineral deposits known as ‘tailings’.} \footnote{Ibid, arts 27, 73, 80. Government officials are not permitted to be artisanal or large-scale miners or traders.} \footnote{Ibid, art 299.} \footnote{Ibid, arts 300-302.} \footnote{Ibid, art 234 which refers to sanctions located in customs legislation.} \footnote{Ibid, arts 5, 26-27, 109-118. A further category called ‘small-scale mining’ also exists under Chapter 5 of the Mining Code, which is larger than artisanal mining, but smaller than large-scale mining.} \footnote{Ibid, arts 27, 118-119.} Articulating with them are the provisions of the trading houses and their agents.}
SIERRA LEONE NATIONAL LEGISLATION

The Sierra Leone legislative framework also provides for zoning in relation to artisanal mining activities. Artisanal miners, traders and exporters must also be licensed, and artisanal diamonds are only allowed to be traded between such persons, unless exported under a valid export licence. Large-scale mining activities, including prospecting, exploration, exploitation and export are also subject to a licensing regime. Fines and terms of imprisonment may be imposed if a criminal offence is successfully prosecuted. Offences include mining, possession, sale or export of minerals without authorisation.

AUSTRALIAN NATIONAL LEGISLATION

The Kimberley requirements for the export of rough diamonds were implemented under Australian domestic law under Regulation 9AA of the Customs (Prohibited Exports) Regulations 1958. Under this regulation the responsible Minister may, on application, grant permission for the exportation of rough diamonds to a country by issuing a Certificate. The regulation prohibits the export of rough diamonds unless the exporter holds a Kimberley Process Certificate, the original is produced to Customs at or before the time of exportation and the rough diamonds are exported in a tamper-resistant container.

Australia has a two-tier system of managing export certification. “Occasional Exporters” are required to apply to the Department of Industry, Tourism and Resources (DITR) in writing for each shipment and provide documentary evidence of the origin of rough diamonds they wish to export. Applicants are required to complete a criminal history check through the Australian Federal Police. Packages of rough diamonds to be exported must be declared to Customs on departure and the certificate presented.

Businesses wishing to regularly export shipments of rough diamonds may apply for a ‘frequent exporter’ licence. Successful applicants are pre-issued with sequentially numbered stocks of partially completed Kimberley Process Certificates. Using database applications

397 Ibid, ss 76, 79-81, 118.
398 Ibid, ss 1, 49, 54-55, 61, 67, 118.
399 Ibid, ss 117-118. The legislation also provides for a number of revenue-raising mechanisms for the Government (Part XIII).
400 Written Response from Australian Government to Author’s Interview Questions, 14 September 2007 (see Annex III)
supplied by DITR, the companies are able to complete the details of the goods for shipment and the importing business and then finalise the validation of the Kimberley Process Certificate. Details of each Kimberley Process Certificate are transmitted to DITR and incorporated into the Export Authority’s database records. Under this decentralised system, Frequent Exporters work closely with Australian Kimberley Process Authorities to manage certification procedures. Customs verifies the shipment satisfies the requirements of regulations at export.402

Under import regulation, Regulation 4MA of the Customs (Prohibited Imports) Regulations 1956, the import of rough diamonds is prohibited unless the diamonds are accompanied by a Kimberley Process Certificate, they are imported in a tamper-resistant container and the diamonds are imported from a country that is a participant in the Kimberley Process.403

The Customs Act 1901 (C’th) provides Customs with the appropriate powers to enforce compliance with the regulations and take appropriate action. Shipments not meeting the requirements of import or export controls may be detained or seized by Customs. Customs undertakes checks to verify compliance in an environment that is largely self-regulated. Customs intervenes in transactions proportionate to the perceived level of risk.404

The intervention of Customs is generally aimed at encouraging compliance and is appropriate to the assessed level of risk. Customs compliance programs focus on assisting clients who are willing and capable of complying with the legislation but there is scope to impose sanctions on entities where appropriate.405 Cooperation with industry, facilitated by the relatively concentrated nature of diamond mining industry in Australia has been one of the major strengths of Australia’s implementation of the Kimberley Process.406

For exports of diamonds from Australia, DITR may decline to grant a Kimberley Process Certificate where the circumstances warrant such action. Import or export of prohibited diamonds is an offence under the Customs Act 1901. Regulation 9AA of the Export Regulations makes it an offence to export rough diamonds from Australia without a Kimberley Process Certificate. Regulation 4MA of the Customs Import Regulations makes it

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401 Ibid.
402 Ibid.
403 Ibid.
404 Ibid.
405 Ibid.
an offence to import rough diamonds into Australia without a Kimberley Process Certificate.

Regulation 4N of the Import Regulations and Regulation 8A of the Charter of the United Nations (Sanctions – Cote d’Ivoire) make it an offence to import rough diamonds into Australia from Cote d’Ivoire (whether or not the rough diamonds originated in Cote d’Ivoire) or of Cote d’Ivoire origin from a third country.

In all cases, offences only apply where rough diamonds are exported from or imported into Australia. There is no specific offence under Australian law of trading in rough diamonds where the trade does not involve Australian territory. The penalty on conviction is not greater than three times the value of the goods or 110,000 AUD whichever is greater.

According to the Global Witness interview comments, Australia has not had a review visit and there has been no independent verification of its Kimberley Process controls. However, Australia has submitted annual reports every year and appears to comply with minimum requirements. Global Witness noted that there is generally not very much of an issue with conflict diamonds in the large-scale industrial mining sector which is present in Australia. However, the respondent stated that Australia appeared to have hands-off regulation much like the US system and there was a question as to what checks are going on and whether there is sufficient government oversight.407

DUTCH NATIONAL LEGISLATION & THE KOUWENHOVEN CASE

As discussed above, the utilisation of national war crimes legislation represents a possible avenue for national governments to bring to account those engaged in the conflict diamonds trade. The Netherlands utilised its national war crimes legislation to initiate a prosecution about the related issue of so-called ‘conflict timber’. Although not a conflict diamonds prosecution as such, the war crimes legislation was used to prosecute timber trader and Dutch national, Gus Kouwenhoven. Reminiscent of the conflict diamonds problem, Kouwenhoven allegedly provided financial assistance through his logging activities to human rights violators.408 Kouwenhoven was charged with war crimes for his role in the conflict in Liberia.
as well as breaching United Nations sanctions.

The indictment alleged that in at least four locations, Kouwenhoven committed, directly or indirectly, the war crimes of killing, inhuman treatment, looting, rape, severe bodily harm, and offences against dead, sick or wounded persons.\textsuperscript{409} Machine guns and rocket propelled grenades were used in an attack, which made no distinction between active combatants and civilians.\textsuperscript{410} In addition, a house was set fire to, resulting in the deaths of civilians and inactive soldiers.\textsuperscript{411} Such persons were also killed in buildings through the use of grenades.\textsuperscript{412} Furthermore, civilians and inactive soldiers had their hands amputated and babies were also injured.\textsuperscript{413} Women and children were raped and the possessions of civilians and inactive soldiers were plundered.\textsuperscript{414}

Kouwenhoven’s alleged role in these crimes was through selling or supplying weapons, vehicles and equipment such as machine guns, rocket propelled grenades, helicopters and trucks to Charles Taylor and his armed forces, and placing staff members with timber companies, under threat of dismissal from employment, at the disposal of the armed conflict. He was also charged with supplying or giving money, cigarettes and marijuana to members of the armed forces of Charles Taylor, the Liberian government, and timber company employees assisting the conflict. Furthermore, he allegedly gave instructions regarding the use of weapons, including heavy weapons and battle methods to the armed forces of Charles Taylor, the government of Liberia and staff members assisting the conflict, telling them that all should be killed without distinction and that looting was accepted.

In two further counts, Kouwenhoven was charged with contravening United Nations sanctions.

\textsuperscript{409} Gius Kouwenhoven, Rechtbank 's-Gravenhage [District Court of the Hague], Case No AY5160, 7 June 2006, 3. The four locations were Gueckedou in Guinea, Voinjama in Lofa County. The international criminal law provisions allegedly contravened were the international customary law prohibition on indiscriminate attacks, as well as contraventions of \textit{Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention III)}, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) art 130 and common article 3 of the Geneva Conventions. The latter two provisions prohibit torture, inhuman treatment, rape, looting and acts of violence against inactive soldiers and civilians respectively. The modes of individual criminal responsibility with which Kouwenhoven was charged were direct commission, aiding and abetting and superior responsibility.

\textsuperscript{410} Ibid, 4.

\textsuperscript{411} Ibid, 4.

\textsuperscript{412} Ibid, 4.

\textsuperscript{413} Ibid, 4.

\textsuperscript{414} Ibid, 4.
on Liberia, criminalised under domestic Dutch legislation. In particular, Kouwenhoven was charged with supplying Taylor’s forces with machine guns, grenade launchers and mortars.\textsuperscript{415}

The decision of the District Court of the Hague in the Kouwenhoven case was delivered on 7 June 2006.\textsuperscript{416} The Court found that these basic crimes were committed. However, concerning the role of the accused, the Court did not find that Kouwenhoven was individually criminally responsible. In particular, the Court found there was insufficient evidence to prove that the defendant had knowledge of the alleged criminal activities of his subordinates. Most of the time the security employees were former fighters of the Charles Taylor’s armed forces and so it could not be concluded that the security employees participated in these acts by order of or with the consent or knowledge of the defendant. The Court found it proven that the defendant, together and in conjunction with another supplied weapons to Charles Taylor, but found that this was not itself sufficient evidence that he directly participated in committing the offences charged under the three counts. The Court noted that weapons could have been used for legal acts.

The Court, however, found Kouwenhoven guilty of charges 4 and 5, relating to the contravention of United Nations sanctions. Based on evidence adduced in Court, the Court found that there was a close financial relationship between the defendant and Taylor. Furthermore, there were also personal ties between Kouwenhoven’s timber company staff and Liberian government members. The Court found it established that Kouwenhoven played an important role in supplying weapons to Taylor and Liberia. In reaching this conclusion, the Court relied in particular on the fact that Kouwenhoven was the owner of a ship called the Antarctic Mariner, which had been used to import weapons for the benefit of Taylor and his regime. From this, the Court concluded that in 2000, Kouwenhoven was involved in the contravention of UN sanctions. The Court rejected a defence to weapons importation on the grounds that the weapons were needed as legitimate self-defence by Liberia. Instead, the Court found that the Security Council had already pronounced that Liberia was acting illegally through supporting the Revolutionary United Front rebels based in Sierra Leone.\textsuperscript{417}

The conviction of Kouwenhoven at first instance was overturned on appeal on 10 March

\textsuperscript{415} Ibid.
\textsuperscript{416} Ibid.
\textsuperscript{417} Ibid.
2008. According to the Court of Appeal, the written testimony of a number of witnesses was not considered sufficiently reliable to ground a finding connecting Kouwenhoven with the transport of weapons.

Although there was no conviction recorded against Kouwenhoven as a result of insufficient evidence, the case is an important precedent for war crimes prosecutions where an individual has allegedly assisted the crime financially rather than being a direct perpetrator. The Court was clearly quite prepared to consider the allegations that Kouwenhoven contributed to the commission of the crimes through such indirect means as providing financial assistance, weapons, training, and enforced enlistment of employees to fight in the conflict. If these modes of involvement are recognised as being sufficient in principle to bring about a war crimes conviction, then it would appear that trading in conflict diamonds, to the benefit of human rights violators, and with the appropriate mens rea, may also be sufficient to lead to a guilty verdict in a domestic war crimes case.

A further development occurred in 2010, when the Dutch Supreme Court overturned the acquittal by the Appeal Court. The trial re-opened in December 2010, and Kouwenhoven still faces charges of war crimes and illegal arms trading.

4.3 CONCLUDING REMARKS

The chapter discussed the implementation of the KP at the national level, including regulatory options under national legislation in Angola, the DRC, Cote d'Ivoire, Sierra Leone, Australia and the Netherlands. A review of legislation, and regulatory action, at the national level is necessary in terms of responding to the first research question: to what extent has the conflict diamonds governance system achieved its objectives? Legislation in African diamond producing states focuses on zoning and licensing systems. Zoning is a method of distinguishing kimberlite, industrial areas of mining from artisanal, alluvial mining areas, and is furthermore used to designate areas for diamond mining exploration. Licensing denotes systems of authorizing persons to carry out particular diamond-mining related activities, such as prospecting, exploration, kimberlite mining or artisanal mining. Both zoning and licensing

are potentially useful regulatory techniques with the caveat that implementation of the law is carried out within the bounds of international human rights law. Zoning areas for artisanal mining potentially allows for these miners to carry on a livelihood, while protecting the interests of large-scale industry which are focused more on kimberlite deposits. However, enforcement of zoning, namely moving artisanal miners from kimberlite areas, or unauthorized artisanal miners, has become a justification for government security forces to carry out serious human rights abuses such as rape and murder in countries such as the DRC, Zimbabwe and Angola. Similarly, the use of licensing, particularly for artisanal miners, as well as diamond traders and exporters, if effectively monitored and enforced, would represent an effective ‘internal control’ set to ensure that all diamonds being mined and exported are legitimate rather than funding rebel militias or the commission of international crime. The challenge with licensing is both in terms of excessive enforcement or inadequate enforcement. Both Angola and Zimbabwe have seen the excessive use of force, resulting in murder, beatings and rape, in the name of ‘enforcement’ of rights to mine in artisanal mining areas. At the other end of the spectrum are artisanal areas where there are inadequate bureaucratic resources to manage licensing systems correctly, or in which corruption means that the licensing system will not work properly.

The Australian example shows that Kimberley Process Certification requirements, for both import and export, have been implemented into domestic legislation. The challenge of applying the Australian legislative provisions to those of the African producer states is that diamond mining in these African countries is largely artisanal, whereas diamond mining in Australia is solely of industrial, kimberlite deposits: with the Rio Tinto operation located in Western Australia. A further difference is that Australian diamonds are predominantly “industrial grade”, meaning they are used as drill bits, rather than jewellery pieces. The Australian approach could therefore be used in relation to large-scale kimberlite mining, for example, in Angola, which has both kimberlite and artisanal sites, but is of little value to the informal artisanal sector. For example, Australia gives blanket approval and Kimberley Process certification in advance to the Rio Tinto operation, although it provides for inspections of the Rio Tinto operation to ensure that domestic regulatory requirements are being adhered to. It is possible to argue that this approach is appropriate to a large scale operation in a country not experiencing civil war, and where there are no known international crimes being committed in connection with the mine. Australia takes a different approach for small packets of diamonds which are being exported: the Kimberley Process Certificate
would only be available by application to the Department. Naturally, rough diamond imports require Kimberley Process Certificates before importation is accepted.

The Australian experience, on reflection, may not be a good model even in relation to Kimberlite diamond mining in African producer countries. This is because countries such as Angola are only just emerging from situations of civil war, and so a more careful approach to issuing Kimberley Process certificates is warranted. This is particularly the case where, as in Angola, the military and police forces have been implicated in gross human rights abuses since the end of the civil war period. As such, allowing corporations to “self-administer” KP certificates, even in the presence of regular inspections, would not be a sensible way forward. Furthermore, the Australian experience does not throw light onto the administration of KP internal controls in the artisanal industry. As previously discussed, a system of licensing in principle would be effective, but would require efficient implementation by a bureaucracy which is free from corruption.

The chapter has also considered the landmark Kouwenhoven case, prosecuted in the Netherlands court system. Although it was not a conflict diamonds case, it was a case concerning the interaction between resources, in this case the timber industry, and international human rights crimes committed during the course of the Liberian civil war. An interesting side-issue is that this case concerns the relationship of Kouwenhoven to the Liberian regime of Charles Taylor, who was a key player in conflict diamonds trafficking. However, the central value of the case lies in the fact that it largely parallels the type of prosecution which could be initiated in relation to conflict diamonds trading. Instead of trading in diamonds, thereby funding the purchase of weapons and the commission of human rights abuses, Kouwenhoven was accused of misusing his management of the timber industry to assist Charles Taylor’s army to carry out gross human rights violations. His timber corporation was allegedly used as a means of purchasing armaments which were later deployed by Taylor’s forces. Furthermore, Kouwenhoven allegedly directed his timber corporation employees to join Taylor’s forces, which then carried out human rights violations, including the murder of civilians. The case is yet to be finally resolved by the Dutch court system as the acquittal was overturned in 2010, and the case reopened to hear new prosecution evidence from December of that year.

What is perhaps most interesting about the Kouwenhoven case is that there was no debate, as a matter of law, as to Kouwenhoven’s criminal liability, with the multiple appeals turning on
whether the evidence was credible and able to sustain the conviction. This means that, regardless of the final outcome of the case, the Dutch court system has accepted that, should it be proved that a person, for example, forced their employees to join an armed force which went on to commit international crimes, that person could be found to be legally responsible for the crimes committed. In this way, the case shows that business leaders can be convicted for their role in the commission of international crimes. It is furthermore possible to imagine that some of the ways that Kouwenhoven was involved in the commission of crimes, through his connection with a timber corporation, might be applied to a different business leader who is involved in the traffic of rough diamonds rather than timber.
What had meaning in this conflict were diamonds. Between 1998 and 2000, diamonds mined by forced labour were first taken to the headquarters in Buedu and from there to the accused [Charles Taylor] in Liberia. In return... arms were then distributed to the AFRC/RUF forces...

Prosecutor’s opening statement, Taylor case\textsuperscript{420}

\textsuperscript{420} See n 421 below.
5 GROWING TEETH: THE UN SECURITY COUNCIL & INTERNATIONAL TRIBUNALS

5.1 CHAPTER OVERVIEW

5.2 UNITED NATIONS GENERAL ASSEMBLY

5.3 UNITED NATIONS SECURITY COUNCIL

5.4 INTERNATIONAL CRIMINAL TRIBUNALS

5.4.1 INTRODUCTION

5.4.2 CONFLICT DIAMONDS: USE AS CONTEXT

5.4.3 CONFLICT DIAMONDS: SUBSTANTIVE CRIMES

5.4.4 CONFLICT DIAMONDS: INDIRECT LIABILITY

5.5 CONCLUDING REMARKS
5.1 CHAPTER OVERVIEW

This chapter looks beyond the Kimberley Process to the other international organisations that contribute to the conflict diamonds governance system. After considering briefly the role of the United Nations General Assembly, the role of the UN Security Council in creating the KP, as well as enhancing it through its monitoring and enforcement activities, is considered. Finally, the chapter considers the jurisprudence emerging from the Special Court for Sierra Leone and the International Criminal Court about conflict diamonds in the context of the commission of international human rights crimes. The jurisprudence uses conflict diamonds in three major ways in its jurisprudence: as the context in which international crimes are committed, as a direct aspect of an international crime, and as indirectly imposing liability for the international crimes committed by others. The chapter’s concluding remarks highlight the important relationship between international human rights crimes, the KP, and the concept of conflict diamonds.\[^{421}\]

\[^{421}\] Quotation and photograph (n 420 above): Quotation from Transcript of Proceedings, The Prosecutor v Charles Taylor (Trial), (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-03-01-PT, 4 June 2007) 59. Photograph is of the panel of four judges of the Special Court for Sierra Leone (back row) sitting in the Charles Taylor case in the Hague, Netherlands, taken on 4 June 2007: Getty Images, Charles Taylor: Photos (4 June 2007) daylife <http://www.daylife.com/photo/08ECafbd1Mdh8?q=Charles+Taylor>. 
5.2 United Nations General Assembly

The United Nations General Assembly has played a significant role both in the establishment of the Kimberley Process and then in providing it with ongoing political support. The Kimberley Process was initially called for under UNGA Resolution 55/56. The legitimacy and authority of the Process has subsequently been reinforced on an annual basis by General Assembly and Security Council resolutions. It has been noted, however, that, unlike a formal mandate under the coercive powers of the Security Council, General Assembly resolutions are not legally binding. The Third Year Review of the KPCS called for the UN Secretariat to be regularly invited to KPCS Plenary meetings and kept informed of KP decisions. It is interesting to note that although the KPCS exists as a non-legally binding, informal institution, it is largely a product of the UN system, which continues to monitor its activities, provide political support and, in the case of the UNSC discussed below, also intervene in
5.3 UNITED NATIONS SECURITY COUNCIL

Prior to the establishment of the Kimberley Process, the Security Council played a key role in bringing to international attention the problem of conflict diamonds. In 1998, it adopted Resolutions 1173 and 1176, prohibiting the direct or indirect export of unofficial Angolan diamonds. In 1999, the UNSC passed a resolution prohibiting the trading in diamonds originating from conflict-ridden Sierra Leone.

In regulatory terms, the resolutions are important examples of the standard-setting and enforcement roles of the Security Council. The legally binding nature of these resolutions means that the rulings must be complied with by all nations. Furthermore, the imposition of diamond trading bans represents an important mechanism for breaking the link between the illegal diamond trade and the commission of serious human rights violations.


The Security Council has engaged with the issue of conflict diamonds over a number of years, and has intervened decisively with resolutions concerning Angola, Sierra Leone, Liberia, the Democratic Republic of Congo and Cote d'Ivoire. At these times, the Security Council has mandated trading bans with these countries concerning the rough diamond trade.\textsuperscript{425}

The main mechanism which the Security Council has made use of in terms of monitoring has been its Panel of Experts. The Panel of Experts mechanism is an important one as it provides vital on-the-ground fact-finding which can be used to assess the requirements for further international action, including the relative success of already existing mechanisms. In reports as early as 1997, such Expert panels have assessed the impact of the diamond trade in conflict zones, as well as the efficacy of diamond trade prohibitions and other economic sanctions.\textsuperscript{426}

Since the establishment of the Kimberley Process, the Security Council has operated more closely with this new international agency. A particularly noteworthy example relates to the situation of the Ivory Coast. It came to the attention of the Kimberley Process in 2006 that conflict diamonds were propping up the rebel held north of Cote d'Ivoire. Following an inspection by a KP monitoring team, the KP took action to expel Cote d'Ivoire from the KPCS. Shortly after, the matter was considered by the UN Security Council, which imposed a

\textsuperscript{424} SC Res 1306, UN SCOR, 4168th mtg, S/RES/1306 (5 July 2000) (Sierra Leone).


diamond ban on trading in diamonds with that country. Furthermore, the report on developments in Cote d'Ivoire which was referred to under Resolution 1572 was a joint mission undertaken in April 2006.

There was also close cooperation with the UN Group of Experts appointed to report on developments in Liberia under UNSC resolution 1521. By 2007, Liberia had notably made a transition out of its situation of conflict, had held internationally recognised elections, and elected a new President, Joan Sirleaf. In March of that year, a Kimberley Process review mission led by the European Community concluded that Liberia had designed effective controls in line with KP requirements. Although there were reservations from the NGO participants that Liberia would benefit from more time to ensure its resilience against the return of conflict diamonds, the KP presented its findings to the UNSC. The UNSC decided to lift its diamond embargo on Liberia on 27 April 2007 and Liberia was admitted to the KP on 4 May 2007.

One of the important strengths of the Security Council resolutions is the legitimating role it plays at the apex of the United Nations security system. For example, the Security Council resolutions have enhanced the support base for the Kimberley Process, with significant momentum being gained for US national implementation legislation as a result of Security Council backing. Further, the resolutions to an extent are self-contained mechanisms, as national governments are legally obliged to take action to implement them, even in the absence of national implementing legislation or involvement in a scheme such as the Kimberley Process.

Security Council Expert Panel reports have themselves acted as a type of enforcement mechanism, in the sense of naming and shaming particular individuals and corporations who have allegedly been involved in the conflict diamonds trade. Following its 2002 report on the Democratic Republic of Congo, the Expert Panel engaged in a negotiated process by which corporate and individual names could be removed from the black list following evidence of significant compliance with United Nations resolutions. The Expert Panel also reported a number of corporations to the OECD under the OECD multinational code of conduct for

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427 See also Interview between Global Witness Representative and Author (Annex III), with the representative commenting favourably on this coordination, although she noted that the action of the Security Council should have occurred more rapidly.
428 Written Response from Australian Government to Author's Interview Questions, 14 September 2007.
429 Ibid; Interview between author and Global Witness Representative (Annex III)
further action. Under this code, multinationals are required to account for their conduct before a committee. The OECD process, has, however, been criticised as lacking in significant punitive powers in the event that breaches are found to have occurred. One approach which wasn’t apparently considered, but was open to the Security Council, was the referral of individuals, including corporate directors, for prosecution by the International Criminal Court. This contingency is discussed in more depth below.\(^{430}\)

The consciousness-raising and information sharing role of the Security Council has continued in more recent times. On 25 June 2007 there was a thematic debate at the UNSC following a proposal by the Belgian Mission on the theme “Natural Resources and Armed Conflict”, involving amongst other themes the illicit trade in diamonds. The Council adopted a presidential statement on natural resources and armed conflict which underlined the importance of taking this dimension into account, where appropriate in the mandates of UN and regional peacekeeping operations, within their capabilities.\(^{431}\)

The Security Council stated that natural resources are a crucial factor in contributing to long-term economic growth and sustainable development, while noting that in armed conflict situations the exploitation of them has played a role in the outbreak, escalation or continuation of the conflict. The Council emphasised the contribution of monitoring schemes such as the KP.\(^{432}\)

The response to the crisis in the Cote d’Ivoire also illustrates the high level of coordination between the Kimberley Process and the United Nations Security Council. The Working Group on Monitoring monitored the situation as regards illicit mining in Cote d’Ivoire throughout 2005, drawing on a variety of reliable sources, and cooperated closely with the UN Panel of Experts on Cote d’Ivoire which was convened by the Security Council. The Kimberley Process Secretariat then made a formal submission to the UN Panel in June 2005, while a Special Envoy to the Chair visited Abidjan in April 2005 to clarify Cote d’Ivoire’s status in the Kimberley Process.\(^{433}\) A special Working Group to deal with conflict diamonds from Cote d’Ivoire was established by the Kimberley Process at the 15-17 November plenary


\(^{431}\) Written Response from Australian Government to Author’s Interview Questions, 14 September 2007.

\(^{432}\) Ibid.

meeting. On the basis of a presentation by the Working Group of the evidence available regarding production in Cote d'Ivoire, the Moscow Plenary meeting of November 2005 adopted a comprehensive package of measures to tackle the outflow of conflict diamonds from Cote d'Ivoire. Implementation of these measures is proceeding under the responsibility of the Chair assisted by the Working Group on Monitoring. Despite the rapid response of the Working Group to the crisis, and its cooperation as reflected in UN Security Council Resolution 1643 (2005), the Working Group recognised that the Kimberley Process's action has not by itself put an end to the illicit trade in Cote d'Ivoire conflict diamonds, and that further action is required.

5.4 INTERNATIONAL CRIMINAL TRIBUNALS

5.4.1 INTRODUCTION

Holding individuals criminally liable for particular conduct is not only a serious sanction for that person, but is also a strong message to the international community. The liability of those involved in industry for international crimes was recognised at the Nuremberg trials of Farben, Flick and Krupp following World War Two. Recently established international courts and tribunals now provide the legal mechanisms for prosecuting modern industrial crimes, with a number of current conflict diamonds cases setting important international precedents.

Internationally, the United Nations Security Council has acted as a mediator between regulatory bodies such as the Kimberley Process and international criminal processes. One option which it has exercised has been the creation of ad-hoc international criminal tribunals, such as the Sierra Leone Special Court, for the prosecution of international crimes which

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involve a conflict diamonds dimension. The Court, which is a hybrid institution jointly established by the United Nations and the Sierra Leone Government, was established to prosecute international crimes committed in the territory of Sierra Leone since 1996. Due to the conflict diamonds dimension of the Sierra Leone conflict, the Special Court is uniquely placed amongst the ad-hoc international criminal tribunals to carry out international conflict diamonds prosecutions.438

Sankoh, leader of the RUF, was arrested in 2000, and was to have been put on trial as part of the first case before the Special Court. Although Sankoh died before the commencement of his trial in 2004, proceedings commenced against other high level members of the RUF, namely Issa Hassan Sesay, Morris Kallon, and Augustine Gbao.439 The Trial Chamber delivered its judgment, convicting all three, in this combined case on 2 March 2009, and the Appeals Chamber confirmed the convictions on 26 October 2009.

In June 2003 the Sierra Leone Special Court unsealed an indictment against Liberian President Charles Taylor in relation to his alleged involvement in violations of international criminal law during the Sierra Leone conflict. President Taylor subsequently resigned his office and went into hiding in Nigeria in August 2003, until being taken into custody by the Court on 29 March 2006.440 His trial, which was moved to the Hague, commenced in early 2008 and a verdict has not yet been delivered.441

Pro-government forces, most notably the so-called Civilian Defence Force (CDF) militia, also known as the "Kamajors", have also been brought to account for human rights abuses allegedly committed during the war. The Trial Chamber delivered its judgment in that case on 2 August 2007, convicting all accused, and the Appeals Chamber confirmed the convictions in its judgment of 28 May 2008.442

Another forum for international conflict diamonds prosecutions is the treaty-based permanent

438 www.sc-sl.org (website of the Special Court for Sierra Leone).
439 Transcript of Proceedings, 'Opening Statement of the Prosecution', The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao (Trial), (Trial Chamber I, Special Court for Sierra Leone, Case No SCSL-04-15-T, 5 July 2004); Jalloh, above n 109, 164-207. See also Schocken, above n 109.
440 Brockman, above n 108, 738-739; Special Court for Sierra Leone, 'Chief Prosecutor Announces the Arrival of Charles Taylor at the Special Court' (Press Release, 29 March 2006) <http://www.sc-sl.org/LinkClick.aspx?fileticket=hWEjA9QZglo%3d&tabid=196>.
441 Transcript of Proceedings, 'Evidence of Expert Witness Ian Smillie', The Prosecutor v Charles Taylor (Trial), (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-03-01-PT, 7 January 2008).
442 CDF Trial (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-14-T, 2 August 2007).
International Criminal Court. The ICC possesses territorial and nationality jurisdiction for States Parties for crimes committed since 2002, and prosecutions in relation to such States Parties may be initiated through referral by the particular State Party, under Article 13(a), or by the Prosecutor acting on its own initiative, under Article 13(c). Along with Sierra Leone, the Democratic Republic of Congo is perhaps the most important state to have ratified the ICC Statute from the perspective of conflict diamonds prosecutions. It should be noted that the Court may also exercise jurisdiction over situations in states which are not parties to the Statute under limited circumstances. A non-party state may give the Court jurisdiction in relation to a “crime in question”, pursuant to Article 12(3), and the Court may similarly exercise jurisdiction over a non-party State in the event of a referral from the United Nations Security Council, under Article 13(b). The mechanism of a non-party State giving jurisdiction to the Court was utilised by Côte d’Ivoire in September 2003, when it requested that the International Criminal Court accept jurisdiction over crimes committed on its territory since the events of 19 September 2002 and, additionally, “for an unspecified period of time”. The grant of jurisdiction was confirmed by the government of Côte d’Ivoire in documents dated 14 December 2010 and 3 May 2011. In a decision of Pre-Trial Chamber III of the ICC dated 3 October 2011, the grant of jurisdiction was used as a foundation to approve investigations by the Prosecutor into crimes allegedly committed by former Côte d’Ivoire President Laurent Gbagbo.

Human rights violations in the diamond-rich Ituri region of the DRC have already attracted the attention of the International Criminal Court, leading to indictments and the first ever arrests by the newly established Court. Thomas Lubanga Dyilo, the alleged leader of the military wing of the Union des Patriotes Congolais (UPC), was arrested on the same day as the issuance of the indictment against him on 17 March 2006, with the assistance of

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445 Fonseca, above n 116, 82.
Congoese authorities, French armed forces and MONUC forces. The International Criminal Court followed up its first arrest with the arrest of Germain Katanga, the alleged military leader of the Force de Resistance Patriotique en Ituri (FRPI), on 18 October 2007, also in relation to alleged crimes in the Ituri area. Mathieu Ngedjolo Chui, allegedly the military leader of the Front des Nationalistes et Integrationnistes (FNI) was the third person arrested, on 7 February 2008, in relation to the conflict in this area.

5.4.2 **CONFLICT DIAMONDS: USE AS CONTEXT**

Prosecutions by the international criminal justice system can take into account the significance of the conflict diamond trade in several ways. The first is primarily contextual, that control over diamond mining and diamond trading becomes a military objective within a conflict. The Sierra Leone cases have highlighted the fact that Kono, Kenema and Kailahun districts were targeted for combat operations as a result of their being rich areas for diamond mining. The diamond-mining areas changed hands several time, between AFRC, RUF and the CDF forces. Context has also been given through setting out, in both RUF and AFRC

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448 International Criminal Court, 'Third detainee for the International Criminal Court: Mathieu Ngedjolo Chui' (Press Release, ICC-CPI-20080207-PR284-ENG, 7 February 2008) <http://www.icc-cpi.int/press/pressreleases/329.html>. Human rights violations and ongoing conflict have also occurred in the Rwandan-influenced regions of North and South Kivu, although a recent peace deal with General Nkunda, leader of a RCD-Goma splinter group, may herald the way to greater stability: see BBC, 'Eastern Congo Peace Deal Signed, above n 156. An arrest warrant was also issued for Bosco Ntaganda, who has not as yet been arrested: 'Warrant of Arrest', The Prosecutor v Bosco Ntaganda (International Criminal Court, Case No ICC-01/04-02/06, 7 August 2006); The Prosecutor v Bosco Ntaganda (Decision on Prosecutor's Application for Warrants of Arrest, Article 58) (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-02/06, 10 February 2006).

449 The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao (Trial Judgement) (Special Court for Sierra Leone, Trial Chamber I, Case No SCSC-04-15-T, 2 March 2009) (RUF Trial) 3, 8, 10, 184, 186, 239, 25, 348-349 (strategic importance of Kono diamonds fields), 355 (confiscation of diamonds from civilians); The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao (Appeal Judgement) (Special Court for Sierra Leone, Appeals Chamber, 29 October 2009) (RUF Appeal) 4, 365-367 (regarding findings on Kailahun as a diamond mining site).

450 Transcript of Proceedings, The Prosecutor v Charles Taylor (Trial), (Special Court for Sierra Leone, Trial Chamber II, Case No SCSC-03-01-Pt, 4 June 2007) 59-60; 65; The Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borrbor Kanu (Trial Judgement) (Special Court for Sierra Leone, Trial Chamber II, Case No SCSC-04-16-T, 20 June 2007) (AFRC Trial) [336]; Transcript of Proceedings, 'Opening Statement of the Prosecution', The Prosecutor v Moinina Fofana and Alieu Konfwala (Trial), (Special Court for Sierra Leone, Trial Chamber I, Case No SCSC-04-14-T, 3 June 2003) 10, 11, 20, 28; CDF Trial (Special Court for Sierra Leone, Trial Chamber I, Case No SCSC-04-14-T, 2 August 2007) [374], [381], [384], [389]-[405]; RUF Trial (Special Court for Sierra Leone, Trial Chamber I, Case No SCSC-04-15-T, 2 March 2009) 612, 614 (concerns the rift between AFRC and RUF which occurred in April 1998).
Indictments, the capture of diamond-rich areas as an objective AFRC/RUF, involving the commission of international crimes as a means to achieving this objective.\(^{451}\)

When used contextually, the role of conflict diamonds is not articulated as criminal in itself, but rather shows the significance of the trade in exacerbating the conflict and increasing the likelihood that international crimes will themselves be committed. Areas of economic significance may be considered legitimate military targets. International crimes only become involved when, for example, civilians are targeted as part of the military operation, when child soldiers are employed as part of the operation, or when slave labour is used to mine diamonds in the area.

The Charles Taylor case also used the trade in conflict diamonds to provide a context for the commission of international crimes. The Indictment focussed on six fields controlled at different times by the RUF. In Kono, there were diamond fields in Koidu, Tombodu and Yengema. In Kenema, there were the Tongo fields, including the so-called “Cyborg Pit”.\(^{452}\) In its opening statement against Taylor, the Prosecution argued that Taylor conducted his diamond transactions through Eddie Kanneh, a Sierra Leonean and former SLA officer who joined the RUF in 1998.\(^{453}\) The statement alleged that in 2000 there were regular shipments of arms, in exchange for diamonds, from Taylor to the RUF in Sierra Leone and Taylor’s men

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\(^{451}\) 'Corrected Amended Consolidated Indictment', *The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (Special Court for Sierra Leone, Case No SCSL-2004-15-PT, 2 August 2006) [36]-[39], [71] cited in *RUF Appeal* (Special Court for Sierra Leone, Appeals Chamber, 29 October 2009) 6, 28; see also the identical wording in 'Further Amended Consolidated Indictment', *The Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu* (Special Court for Sierra Leone, Case No SCSL-2004-16-PT, 18 February 2005) [33] cited in *The Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu (Appeal Judgement)* (Special Court for Sierra Leone, Appeals Chamber, Case No SCSL-2004-16-A, 22 February 2008) ('AFRC Appeal') 81. The Prosecution in the RUF Indictment sought to modify the purpose to be the “pillage the resources in Sierra Leone, particular diamonds [sic], and to control forcibly the population and territory of Sierra Leone”. However, this modification was rejected by the Trial Chamber in its judgment: *RUF Trial* (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-15-T, 2 March 2009) 115, 118, 127-128. Nevertheless, the Chamber held that it did not materially prejudice the Defence case. It is also apparent (see p 128) that the confirmation of the original formulation by the Chamber did not have an adverse effect on the prosecution. The Trial Chambers’ approach was upheld on appeal: *RUF Appeal* (Special Court for Sierra Leone, Appeals Chamber, 29 October 2009) 35-38. The Appeals Chamber, furthermore, confirmed the Trial Chamber’s finding that a common purpose can be constituted by a non-criminal objective (i.e.: diamond mining), where the intended means to achieve that objective are criminal (i.e: enslavement, terror etc.): *RUF Appeal* (Special Court for Sierra Leone, Appeals Chamber, 29 October 2009) 107, see also 120-121, 127-128, 130-135.

\(^{452}\) Transcript of Proceedings, *The Prosecutor v Charles Taylor (Trial)*, (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-03-01-PT, 4 June 2007) 33. See also Transcript of Proceedings, 'Opening Statement of the Prosecution', *The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao (Trial)*, (Trial Chamber I, Special Court for Sierra Leone, Case No SCSL-04-15-T, 5 July 2004) 48; *RUF Trial* (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-15-T, 2 March 2009) 323-324, 439-440.

\(^{453}\) Transcript of Proceedings, *The Prosecutor v Charles Taylor (Trial)*, (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-03-01-PT, 4 June 2007) 40, 42, 45, 49-51.
visited the RUF-held territories and reported to Taylor on economic and military developments. Similarly, the CDF Case describes military operations to wrest control of the Congo diamond fields from the RUF and AFRC as the context for crimes which were committed by the “Civilian Defence Forces” or “Kamajors” at those locations.

The conflict diamond cases before the International Criminal Court also refer to the contextual role of diamonds as military targets in the war in the Democratic Republic of Congo. The Charging Document for the Katanga and Ngudjolo cases refers in the background section on the “Region of Ituri” to the significance of natural resources, including diamonds, in exacerbating the conflict in the region. It states that the desire to control Ituri’s natural resources has been integral in promoting conflict in the region. The Charging Document states that the natural wealth in Ituri includes gold, diamonds, Colombo tantalite (coltan), timber and oil. Mongbwalu, located northwest of Bunia in Djugu territory, is known as an important gold mine. In the context of the Katanga and Ngudjolo cases, the connection between the NFI and FRPI groups to Ugandan and DRC governments are stated to have been political and military in nature although it is known from UN reports that the relationship also involved trading in diamonds and other natural resources.

The Lubanga arrest warrant does not directly refer to conflict diamonds other than in a contextual sense. In terms of substantive crimes, Lubanga is charged with the enlistment, conscription and use of child soldiers in the conflict in Ituri in the North-East of the Democratic Republic of Congo. However, the diamond trade is referred to in the Prosecutor’s Opening Statement, as part of the factual context in which the child soldiers were recruited and deployed.

455 CDF Trial (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-14-T, 2 August 2007) [375]; The Prosecutor v Moinina Fofana and Allieu Konjeh (Appeal Judgement) (Special Court for Sierra Leone, Appeals Chamber, Case No SCSL-04-14-A, 28 May 2008) (CDF Appeal) 16, 80; AFRC Trial (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-04-16-T, 20 June 2007) [327]-[332].
458 ‘Warrant of Arrest’, The Prosecutor v Thomas Lubanga Dyilo (International Criminal Court, Case No ICC-01/04-01/06, 10 February 2006) 1-5; International Criminal Court, ‘Issuance of a Warrant of Arrest against
5.4.3 CONFLICT DIAMONDS: SUBSTANTIVE CRIMES

One way in which conflict diamonds situations may accrue international criminal liability is when the mining itself involves criminal conduct. Key examples of this are when the RUF and the AFRC conducted mining operations using abducted civilians as slaves, which was itself enforced through the use of child soldiers operating as enforcers of the slave labour system. Small mining communities were called “zoo bushes”. Conditions for the miners were harsh, with there often being little or no food available for their sustenance, and miners were sometimes forced to wear only their underwear in an effort by the RUF to exert authority over them. Furthermore, civilians were killed or beaten at mines such as the Cyborg Pit, some because they were suspected of stealing diamonds, and others because their deaths created a climate of terror to deter escape.

A significant, if controversial, finding of the RUF Trial Chamber was that it determined that the forced labour which occurred at the Kenema District mining sites, especially the Cyborg Pit, constituted the war crime of terror whereas, by contrast, in the Kono District it was determined that, although enslavement had been made out, terror did not occur. The Trial


459 'Corrected Amended Consolidated Indictment', The Prosecutor v Issa Hassan Sesay (Special Court for Sierra Leone, Case No SCSL-2004-15-PT, 2 August 2006) 8-22, especially [70]-[71]; RUF Trial (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-15-T, 2 March 2009) 298, 334-338 (describing the use of the “Small Boys Unit” to kill and terrorise civilians used to forcibly mine at the Cyborg Pit mine and the Tonga Field mine. It also discusses forced mining in Kono district), 340-341, 343-344 (use of forced mining labour as ‘enslavement’), 346-347(discusses killings at pit as ‘terror’), 348 (killings at Cyborg Pit not considered ‘collective punishment’), 375-382, 398-399, 423, 429-430, 443 (forced mining as ‘enslavement’ in Kailahun District), 497-498 (use of child soldiers in Tonga Field, Kenema, to guard diamond mining operations: they committed most of the documented killings there), 511-514, 584, 635; Transcript of Proceedings, 'Opening Statement of the Prosecution', The Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu (Trial), (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-2004-16-T, 7 March 2005) 24, 25, 30, 35, 36; Transcript of Proceedings, The Prosecutor v Charles Taylor (Trial), (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-03-01-PT, 4 June 2007) 54, 65-67; Further Amended Consolidated Indictment', The Prosecutor v Alex Tamba Brima (Special Court for Sierra Leone, Case No SCSL-2004-16-PT, 18 February 2005) 67-68.

460 RUF Trial (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-15-T, 2 March 2009) 423.

Transcript of Proceedings, The Prosecutor v Charles Taylor (Trial), (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-03-01-PT, 4 June 2007) 64; RUF Trial (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-15-T, 2 March 2009) 334-338, 340-341, 343-344, 346-348, 375-382, 398-399.

Transcript of Proceedings, The Prosecutor v Charles Taylor (Trial), (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-03-01-PT, 4 June 2007) 54, 62, 65-67; Further Amended Consolidated Indictment', The Prosecutor v Alex Tamba Brima (Special Court for Sierra Leone, Case No SCSL-2004-16-PT, 18 February 2005) [67]-[68]; RUF Trial (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-15-T, 2 March 2009) 334-338, 340-341, 343-344, 346-348, 356-357, 372, 375-382, 398-399.
Chamber drew a distinction between the severity of the enslavement in Kenema and Kono. Whereas the former was characterised by ‘severe mistreatment and killings, the latter was considered less severe. These factual findings played in the Trial Chamber’s mind when it was called upon to make its legal finding as to whether the actions of the AFRC/RUF showed a specific intent to cause terror. Due to the difference in severity, the Chamber found that there was no specific intent to cause terror in Kono, terror being a ‘side-effect’ of the enslavement, although it was present in Kenema. This distinction, however, appears a little artificial. It is recalled that what must be proved is the ‘specific intent to cause terror’. When it is clear that the consequence of large-scale abduction and enslavement is the creation of terror in a civilian population, it is difficult to argue that terror was not also intended when the campaign of enslavement was implemented.

This discussion on the nature of the specific intent to cause terror is similar to the legal argument that if there is a clear objective in mind underlying a crime such as the killing of civilians, such as the obtaining of a military objective, then it is not possible to determine that the action was carried out with the specific intent to cause terror. This reasoning, however, was overruled by the Appeals Chamber which concluded that the specific intent to cause terror can exist side-by-side with other objectives.

The mining of diamonds may also be considered a crime in itself if it is categorized as the plunder of the natural resources of the State concerned. Jurisprudence on the war crime of plunder and pillage articulates that it is not simply private property which might be open to being plundered, but also public or State-controlled property. Pursuant to domestic legislation, natural resources are typically considered to be owned by the State rather than being private property, subject to licensing out to individuals for commercial exploitation purposes. Therefore, the ransacking of a diamond mine or unauthorised exploitation of an alluvial diamond field might be considered an act of plunder against the State as well as or instead of the theft of private property.

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463 RUF Trial (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-15-T, 2 March 2009) 407.
464 Ibid, [1348]; RUF Appeal (Special Court for Sierra Leone, Appeals Chamber, 29 October 2009) 240-242, 318-319.
466 RUF Trial (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-15-T, 2 March 2009) 399, discussion of the crime of ‘pillage’. The Chamber did not consider pillage in the context of looting State
An opportunity was missed to test the parameters of the war crime of pillage in the context of the work of the Sierra Leone Special Court. Unfortunately, Count 14 of the Indictment charged pillage of ‘civilian property’ in the Kono district and did not refer to the diamond resources of Sierra Leone. Even though the Prosecution made submissions on this charge in its Prosecution Final Trial Brief, the Chamber refused to consider them due to the lack of particularisation in the Indictment.\textsuperscript{467} At the trial level, the Chamber found that this type of pillaging did not constitute an act of terrorism as it lacked, in their opinion, the specific intent to spread terror. The Chamber found that, as the name of the military operation “Operation Pay Yourself” suggests, the AFRC/RUF rebels appropriated civilian property for their personal gain.\textsuperscript{468} This finding, however, is open to the criticism that, although one of the objectives of Operation Pay Yourself was personal gain, it appears clear that terror is a consequence of such behaviour. Therefore, it is possible to consider that a charge of terrorism should have also been made out in relation to this behaviour.

Interestingly, the Chamber had to determine whether armed conduct by child soldiers against civilians at diamond mines could be considered to be ‘active participation’ in hostilities as is required for the crime of using child soldiers. Naturally, such attacks contravene the international law prohibition on the targeting of civilians, and so a question arises whether such attacks can be included in the concept of active hostilities. Significantly, the Chamber did not say that, in doing so, the civilians were legitimate military targets, but simply that there were strategic outcomes in military terms which accrued to the RUF through deploying the child soldiers in this manner.\textsuperscript{469}

\subsection*{5.4.4 Conflict Diamonds: Indirect Liability}

Another way in which conflict diamond prosecutions can be employed is in establishing individual criminal responsibility for other international crimes. For example, Charles Taylor is alleged to have assisted the Revolutionary United Front by accepting diamonds in exchange for providing weapons and ammunition.\textsuperscript{470} Diamond transactions, taking place in the

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\textsuperscript{467} Ibid, 400-401.
\textsuperscript{468} Ibid, 408.
\textsuperscript{469} Ibid, 511-513.
\textsuperscript{470} Transcript of Proceedings, \textit{The Prosecutor v Charles Taylor (Trial)}, (Special Court for Sierra Leone, Trial
knowledge that the transaction will assist the RUF to continue to commit international crimes, connect the individual indirectly to the crimes ultimately committed by the RUF, such as the unlawful killing of civilians, causing bodily harm to civilians, the use of child soldiers or sexual offences. A supplementary question is how far down the line might it be possible to prosecute an individual for indirectly assisting the commission of international crimes in this way.

Both the ICC Statute and the Statute of the Sierra Leone Special Court support the application of the recently developed doctrine of joint criminal enterprise. This doctrine has arisen from the recent jurisprudence of the Yugoslav Tribunal and the Rwanda Tribunal and is a doctrine of individual criminal responsibility which would be of great utility in pursuing a prosecution in relation to the conflict diamonds problem. A person may be guilty by supporting a criminal project, for example through the provision of the economic resources needed to sustain the project, even if the person does not directly carry out the crime.

The international criminal law requirements for joint criminal enterprise liability were recently set out in a case before the ICTY Appeals Chamber. Regardless of the category at issue, or of the charge under consideration, a conviction requires a finding that the accused participated in a joint criminal enterprise. There are three requirements for such a finding. First is a plurality of persons. Second is the existence of a common purpose (or plan) which amounts to or involves the commission of a crime provided for in the Statute. Third is the participation of the accused in this common purpose, characterised as the accused making a ‘significant contribution’ to the common purpose. The mens rea required for a finding of guilt differs according to the category of joint criminal enterprise liability under consideration. Where convictions under the first category of JCE are concerned, the accused must both intend the commission of the crime and intend to participate in a common plan aimed at its commission.

Chamber II, Case No SCSL-03-01-PT, 4 June 2007) 30-31, 41, 74-78. See also RUF Trial (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-15-T, 2 March 2009) 259-260, 264, 266, 595-596, regarding the RUF/AFRC trade in diamonds.


473 Brdjanin (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-99-36-A, 3 April 2007) [364]-[365]. See also (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-A, 15 July 1999) [227]-[228].
The indictments for both the RUF and AFRC cases refer to the role of the diamond trade as being a goal of the “joint criminal enterprise” in Sierra Leone:

The RUF... shared a common plan ... which was to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas. The natural resources of Sierra Leone, in particular the diamonds, were to be provided to persons outside Sierra Leone in return for assistance in carrying out the joint criminal enterprise.474

It is interesting to note that, in the AFRC case, the reference to conflict diamonds as part of the JCE was challenged on the grounds of being irrelevant to the crimes pleaded in the document. It was argued that the objectives of the common plan must themselves be crimes. This argument was upheld by the Trial Chamber, but the Appeals Chamber overturned it, arguing instead that, while the common plan of a joint criminal enterprise must involve the commission of international crimes, there may be other elements involved in the JCE which are not intrinsically criminal.475 By contrast, the CDF Indictment does not refer to diamonds, although it mentions the objective of gaining and exercising control over the territory of Sierra Leone.476

April 1998 was a central moment in the conflict as it was the time that the coalition between the RUF and the AFRC ended. In the light of the split between the two factions, the Trial Chamber considered that this was the time that the ‘joint criminal enterprise’ between the two

474 'Corrected Amended Consolidated Indictment', The Prosecutor v Issa Hassan Sesa (Special Court for Sierra Leone, Case No SCSL-2004-15-PT, 2 August 2006) [36]-[39], [71] cited in RUF Appeal (Special Court for Sierra Leone, Appeals Chamber, 29 October 2009) 6, 28. See also the identical wording in ‘Further Amended Consolidated Indictment’, The Prosecutor v Alex Tamba Brima (Special Court for Sierra Leone, Case No SCSL-2004-16-PT, 18 February 2005) [33] cited in AFRC Appeal (Special Court for Sierra Leone, Appeals Chamber, Case No SCSL-2004-16-A, 22 February 2008) [81]. The Prosecution in the RUF Indictment sought to modify the purpose to be the “pillage the resources in Sierra Leone, particular diamonds [sic], and to control forcibly the population and territory of Sierra Leone”. However, this modification was rejected by the Trial Chamber in its judgment: RUF Trial (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-15-T, 2 March 2009) 115, 118, 127-128. Nevertheless, the Chamber held that it did not materially prejudice the Defence case. It is also apparent (see p 128) that the confirmation of the original formulation by the Chamber did not have an adverse effect on the prosecution. The Trial Chambers’ approach was upheld on appeal: RUF Appeal (Special Court for Sierra Leone, Appeals Chamber, 29 October 2009) 35-38. The Appeals Chamber, furthermore, confirmed the Trial Chamber’s finding that a common purpose can be constituted by a non-criminal objective (i.e: diamond mining), where the intended means to achieve that objective are criminal (i.e: enslavement, terror etc.): RUF Appeal (Special Court for Sierra Leone, Appeals Chamber, 29 October 2009) 107, see also 120-121, 127-128, 130-135.

475 'Further Amended Consolidated Indictment', The Prosecutor v Alex Tamba Brima (Special Court for Sierra Leone, Case No SCSL-2004-16-PT, 18 February 2005) [32]-[33], [74]-[76]; AFRC Appeal (Special Court for Sierra Leone, Appeals Chamber, Case No SCSL-2004-16-A, 22 February 2008) [188].

476 'Indictment', The Prosecutor v Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa (Special Court
factions ceased to exist. As a result, different modes of individual liability needed to be pleaded in relation to crimes committed after this date.\textsuperscript{477}

In the RUF Case, the Chamber made findings not only that the control of the diamond mining in Sierra Leone was a part of the common purpose of the joint criminal enterprise, but also that management of the diamond mining by the accused Sesay represented his significant contribution to that joint criminal enterprise. The Chamber noted that Sesay planned the enslavement of civilian miners and the use of child soldiers to guard mining sites and force the miners to work at Tongo Field. It is notable that some of these indicia of ‘significant contribution’ relate to direct contribution to the joint criminal enterprise rather than this mode of liability representing solely an indirect mode of responsibility.

In making this finding, the Chamber noted that forced mining in Tongo Field provided an important source of revenue for the Junta regime and that this topic was discussed in the AFRC Supreme Council meetings when Sesay was present. Furthermore, the sheer scale of the enslavement in Kenema District demonstrated that the forced mining was a planned and a systematic policy of the regime devised at the highest level. The Chamber inferred from Sesay’s membership of the Supreme Council that he was involved in the planning and organisation of the forced mining in Kenema. The Chamber also found that he, along with Bockarie, received diamonds at the AFRC Secretariat originating from Tongo Field. In addition, Sesay was personally engaged in mining for his personal benefit in Tongo Field.\textsuperscript{478}

The Chamber also found that Sesay was involved in mining activities in Kono district and made a significant contribution to the joint criminal enterprise activities there. He visited the mines to collect diamonds, signed off on the mining log-books and transported diamonds to Bockarie and also took them to Liberia. The Chamber held that Sesay, therefore, participated in the forced labour in diamond mines in Kono District between 14 February and May 1998 in order to further the common purpose.\textsuperscript{479}

The Chamber also found that Kallon made a significant contribution to the joint criminal enterprise through assisting the diamond mining operations. Firstly, it found that, as a member of the AFRC Supreme Council, Kallon was involved in decision-making processes which

\textsuperscript{477} RUF Trial Judgment pp. 614-618.
\textsuperscript{478} RUF Trial (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-15-T, 2 March 2009) 588-589, 604-605, 611.
\textsuperscript{479} Ibid, 618-619.
included the orchestration of the widespread forced labour in the Kenema District. The Chamber also found that Kallon used his bodyguards to force civilians to mine diamonds at Tongo Field, a practice which was prevalent among senior RUF and AFRC commanders. Furthermore, the Chamber found that on two occasions, Kallon was present at the mining pits in Tongo Field when Small Boys Units and other rebels shot into the pits, killing unarmed enslaved civilian miners.\(^{480}\)

In relation to the Kono district, the Chamber also found that Kallon made a significant contribution to the joint criminal enterprise through his activities in engaging his bodyguards to supervise on his behalf the private mining by enslaved civilians. Kallon also visited mining sites in Kono District during the period February/March 1998. He also received regular communications about the activities of the joint forces in Kono. As a result, the Chamber found that Kallon actively participated in the JCE in Kono.\(^{481}\)

In relation to the period from December 1998 to January 2000, the Chamber found that Bockarie appointed MS Kennedy as the Overall Mining Commander in Kono District. In 2000, it was Sesay who appointed Kennedy’s replacement. The Overall Mining Commander reported to Sesay. Throughout 1999 and 2000, Sesay visited Kono District and collected diamonds. Sesay maintained a house in Koidu Town where he received mining Commanders for this purpose. He also visited the mines and ordered that civilians be captured from other Districts. He arranged for transportation of the captured civilians to the mines. The Chamber found that the nature and magnitude of the forced mining in Kono District required extensive planning on an ongoing basis. It was provided by the detailed administrative and archiving records maintained to compute the size, grade, origin and value of the diamonds found. The mining system in Kono District was designed and supervised by Sesay who operated at the highest levels. His conduct was a significant contributory factor to the perpetration of enslavement and he intended the commission of the crimes.\(^{482}\) On appeal, these findings were challenged on the basis that the Chamber relied on ‘planning’ as the mode of individual criminal liability for Sesay. The Appeal Chamber found that the Trial Chamber did rely on planning, but that the legal test for ‘planning’ was correctly identified as a ‘substantial’

\(^{480}\) Ibid, 590-591, 604-605, 611. See also RUF Appeal (Special Court for Sierra Leone, Appeals Chamber, 29 October 2009) 279, 452-453, 458-459.

\(^{481}\) RUF Trial (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-15-T, 2 March 2009) 621. See also RUF Appeal (Special Court for Sierra Leone, Appeals Chamber, 29 October 2009) 279, 452-453, 458-459.

\(^{482}\) RUF Trial (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-15-T, 2 March 2009) 624. See also general conclusion regarding the JCE at 639.
contribution rather than a ‘significant’ contribution.\textsuperscript{483}

An alternate mode of liability is aiding and abetting, which requires that the acts in question must be specifically directed to assist the crime and must make a substantial contribution to the commission of the crime. This mode of liability was used in a civil action taken pursuant to the US Alien Torts Claims Act, in relation to the alleged involvement of a multinational corporation in human rights abuses by government forces providing security services.\textsuperscript{484}

Neither the ICC Statute nor the Special Court Statute provide for the prosecution of corporations as legal persons but allow for the prosecution of individuals who may be the directors of such corporations. This is arguably a weakness in the utilisation of criminal sanctions to stop the conflict diamonds trade, although the possibility of individual prosecution is arguably a stronger deterrent for the corporate leadership. A case scenario considered in the literature was a hypothetical prosecution for De Beers for their involvement with Angolan conflict diamonds under the US Alien Torts Law. The case study found that this would be unlikely to succeed, however, based on a number of issues specific to US domestic law.\textsuperscript{485} It is interesting to note that, in relation to the conflict situation in the Congo, the United Nations Security Council Expert report highlighted poor behaviour not only by individuals but corporations as well. There remains an option for the directors of such corporations, if not the corporations themselves, to face criminal charges before the International Criminal Court.\textsuperscript{486}

5.5 CONCLUDING REMARKS

This chapter has considered the organisations above and beyond the Kimberley Process that make a significant contribution to the conflict diamonds governance system. While the UNGA provides important political support and lends legitimacy to the KP, it is perhaps the UNSC that is more central to its operation. The UN Security Council was alert to the issue of conflict diamonds before the KP was established and, in some respects, acted as the mid-wife to the KP, through its resolutions. The UN Security Council has lent significant resources to the task of monitoring through its expert committees on the various African conflict situations, as well as enforcement, in particular, through the imposition of diamond trading

\textsuperscript{483} RUF Appeal (Special Court for Sierra Leone, Appeals Chamber, 29 October 2009) 245, 248, 350-251.
\textsuperscript{484} Doe I v Unocal Corp, 248 F 3d 915, (9th Cir, 2001).
\textsuperscript{485} Saunders, above n 12.
embargoes. The ultimate ratchet in the international pyramid of sanctions is a prosecution before an international criminal tribunal. This ratchet has been applied in the four cases heard by the Special Court for Sierra Leone, as well as preliminary proceedings in a number of cases before the International Criminal Court. Conflict diamonds have been referred to so as to provide the context in which crimes were committed (diamond areas as military targets), as an integral part of the direct commission of crimes (such as the use of child soldiers to enforce diamond mining) and so as to prove indirect liability for the commission of crimes by others (diamond sales to purchase weapons used to commit crimes).

The UNSC and the International Criminal Court can be viewed as part of a single conflict diamonds governance system which reinforces the activities of the Kimberley Process. A conflict diamond is conceptualised with reference to the connection between the mining of the stone and grave human rights abuses amounting to international crimes. As such, conflict diamonds inherently attract the jurisdiction of international criminal tribunals. This represents a “big stick” which, according to pyramid theory, reinforces ability of the Kimberley Process to operate through less coercive means such as negotiation or informal naming and shaming.
A fly should not be hit with a sledgehammer, nor a raging bull with a flyswatter.

I. Ayres & J. Braithwaite, regulatory theorists\textsuperscript{487}

\textsuperscript{487} See n 488 below.
6 RAGING BULLS & FLYSWATTERS:
THE NETWORKED PYRAMID MODEL

6.1 CHAPTER OVERVIEW

6.2 WHY USE A REGULATORY APPROACH?

6.3 THE NETWORK MODEL

6.3.1 WEBS OF DIALOGUE

6.3.2 HORIZONTAL GOVERNMENT NETWORKS

6.4 THE PYRAMID MODEL

6.4.1 THE TIT-FOR-TAT STRATEGY

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6.4.4 PYRAMIDS WITH MULTIPLE REGULATORS IN PARALLEL

6.4.5 PYRAMIDS WITH MULTIPLE REGULATORS IN SEQUENCE

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6.6 CONCLUDING REMARKS
6.1 Chapter Overview

This chapter sets out the theoretical framework which is employed, in later chapters, to analyse the effectiveness of the conflict diamonds governance system, thereby responding to the second of two main research questions being considered in this dissertation.\(^{488}\) The chapter begins by discussing the value of using a regulatory approach in this type of context as opposed to, for example, a strictly legal analysis. Finally, a number of sophisticated regulatory models are explored in more detail, namely the network model, the pyramid model and, an approach which combines the two, the networked pyramid hybrid model.

6.2 Why Use a Regulatory Approach?

There are a number of different ways in which a governance system, such as the conflict diamonds governance system, can be analysed. Naturally, the starting point for those with legal training is to identify sources of law, such as treaties, legislation and jurisprudence, from which rights and obligations might be identified. By contrast, a regulatory approach provides a significantly different perspective. Julia Black’s definition of regulation is illuminating in this regard:

Regulation is the sustained and focussed attempt to alter the behaviour of others according to defined standards or purposes, with the intention of producing a broadly identified outcome or outcomes, which may involve mechanisms of standard-setting, information-gathering and behaviour modification.\(^{489}\)

Consideration of this definition is of assistance in articulating the value of using a regulatory lens to analyse a legal system, whether a national legal system or an international legal system. Of central interest is that regulation has defined standards or purposes which it seeks to achieve. Whereas a lawyer may be content with considering the question “What is the law?”, a regulatory approach will critically analyse the current law in terms of whether or not it is achieving a particular purpose and, if it is not achieving that purpose, suggest ways in which it might be improved to better achieve the

\(^{488}\) Quotation and photograph (n 487 above): Quotation is from Ayres and Braithwaite, above n 32, 49; Artwork is by Anthony Davis, from http://www.google.com.au/imgs?imgurl=http://anthonydavisart.com/imagess/etc/ragingbull.jpg&imgrefurl=http://anthonydavisart.com/etc&usg=__GDJVE4d2hz2frwZBt_OlzzLNcnl=&h=490&w=816&sz=332&hl=en&start=217&sig2=tyOpmNG3TnC6jg8RdbxyTg&zoom=1&itbs=1&iwidth=864&itbsmode=1&iact=3&fbid=1&fbar=0&medium=0&search%3Fq%3Draging%2Bbull%26start%3D210%26hl%3Den%26sa%3DN%26biw%3D1579%26bih%3D1024%26gbv%3D2%26ndsp%3D21%26bm%3Disch&ei=iEkaTdpDzEs_tmAOrMAu.

\(^{489}\) Black, above n 30, 20.
purpose. In addition, regulation extends beyond law itself, to encompass a variety of means by which its purpose might be achieved. For example, a lawyer might question whether an industry code of conduct is legally binding. However, if it has the effect of achieving a particular purpose in that industry, then it may still qualify as effective regulation.490

A related consideration is that legal scholars are concerned, to a significant degree, in maintaining the internal consistency and integrity of the rules system. This objective seems to be of comparatively less importance from the regulatory perspective, which is less concerned with whether law is correct in seeing itself as characterised by unity, coherence or particular modes of reasoning. Rather, it is the outcomes of the legal system or regulatory system that are paramount, such as social justice, or economic efficiency.491

Regulatory theory not only seeks to analyse a system in terms of its ability to achieve a particular purpose, but also involves a generally agreed set of functional criteria as to whether or not that system will be successful. In developing these criteria, regulatory theory has borrowed from the study of artificial intelligence, or cybernetics. These criteria can be listed as mechanisms of standard-setting, information gathering (or monitoring) and behaviour modification. These criteria themselves, it is argued, provide for the means of control whereby a system, whether artificial or natural, is kept within a preferred subset of all possible states. In the absence of any one of these elements, there is not control in a cybernetic sense.492

Further to the discussion in earlier chapters of this thesis, the conflict diamonds governance system is defined to include those persons, corporations and organisations involved in addressing the conflict diamonds issue through their regulatory behaviour. The main players in the system are national governments, the Kimberley Process Certification Scheme (including the non-governmental organisations, corporations and national governments therein represented), the United Nations Security Council and the International Criminal Court. In considering the utility of applying a regulatory approach to a system such as the conflict diamonds governance system, the regulatory approach will not simply provide insight into what the rights and obligations are which comprise that system, but will also assess the system in terms of whether it is achieving a particular purpose, or set of purposes. In relation to the conflict diamonds governance system, the central issue is

491 Black, above n 30, 22-26; Parker et al, above n 490, 3-4.
492 Black, above n 30, 17.
whether the system is actually preventing the illegal diamonds trade from providing financial support to human rights abusers.

A regulatory approach also contemplates approaches which are not strictly legal in character, as long as they contribute to the achievement of the overall objective in question. 493 This approach is well suited to an analysis of the conflict diamonds governance system, which features strong elements of industry self-regulation, and also reflects the important role of non-governmental organisations and the media in managing the conflict diamonds problem. This reflects the trend towards ‘new governance’ and ‘fragmentation’, through which governments are recognised as only one of a number of regulatory agents. 494 Furthermore, the organisation most central to the world’s response to conflict diamonds, namely the Kimberley Process Certification Scheme, does not possess formal legal status or impose obligations under the international laws relating to treaties.

Finally, regulatory theory provides insight into criteria which are essential in establishing an effective system in promoting the desired outcomes: namely the elements of standard-setting, monitoring and behaviour modification. Through the articulation of particular regulatory approaches and models, regulatory theory provides a further level of sophistication to assist in designing a system which will achieve the outcomes which are desired. 495

In terms of regulatory approaches, the two approaches at the opposite ends of the behaviour modification spectrum are command-and-control, and goal-orientated regulation. Command and control regulation focuses on punitive action by a central regulator, such as a government agency, which rigorously polices a given industry, and applies punitive measures against those who are non-compliant. By contrast, goal-orientated regulation moves the locus of regulation from the regulator to industry participants themselves, relying on internalised motivations to promote whole-hearted and creative engagement rather than begrudging compliance. 496

More complex regulatory models combine both command-and-control and goal-orientated approaches. They articulate particular systems of standard-setting, monitoring and behaviour modification which are designed to maximise the ability of a given regulator to achieve the desired

493 Parker et al, above n 490, 1-3.
495 Black, above n 30, 17.
regulatory outcomes. The models presented in this chapter are network models, pyramid models and hybrid models combining features of both networks and pyramids. These models stand out as being useful in their application to the conflict diamonds governance system, for reasons discussed in greater detail below. Of greatest interest is the hybrid networked pyramid model, as it combines the insights and approaches of both network and pyramid models.

6.3 THE NETWORK MODEL

There is an increasing and diverse literature based around the way in which networks of people, businesses, organisations and governments act together in a regulatory capacity. Networks contribute expertise and information which assists in the carrying out of regulatory functions. Furthermore, they may contribute a range of regulatory interventions to a given system. They typically deploy techniques which are based on dialogue rather than coercion, and are “horizontal” in the sense that they operate in a non-hierarchical manner. Beyond general principles, more sophisticated models for the regulatory functioning of networks have been developed. Two of these models, discussed below, are the “web of dialogue” and “horizontal government network” models.

Close attention to network models and the way they contribute to hybrid networked pyramid models is merited in relation to the conflict diamonds issue. This is because the Kimberley Process self-consciously incorporates important features of network governance. Its tripartite structure of government, industry and non-governmental organisations brings together three different networks, each with a particular interest in the resolution of the conflict diamonds problem. Furthermore, its informal manner of functioning, including the monitoring technique it has labelled as “peer review” reflect the benefits of networks in creating a regulatory process of “socialisation” and “peer pressure”. The manner in which network regulatory models generate insights into the descriptive

and normative operation of the conflict diamonds governance system is discussed in depth in Chapter 7 of this thesis.

6.3.1 WEBS OF DIALOGUE

The "web of dialogue" model was proposed by Braithwaite and Drahos in the context of systems of business regulation at the international level. Given the focus of the Kimberley Process on the regulation of the international trade in rough diamonds, the model has a clear applicability at face value. Apparent in the label, web of dialogue, is the idea of a network of different persons and organisations which act on each other using techniques of dialogue to achieve a regulatory purpose. These webs, which often link industry, government and civil society participants, are identified as the principal means by which regulatory systems are developed and exported across the globe. A web of dialogue may refer to the operations of an intergovernmental organisation, a multinational corporation, or an industry or professional association. The term "dialogue" refers to a range of non-coercive interactions between actors in a regulatory setting, ranging from discussions in intergovernmental organisations, to mutual auditing between subsidiaries of a multinational corporation, and even naming and shaming of irresponsible corporate practices by non-governmental organisations.499

In their study, Braithwaite and Drahos concluded that the regulatory technique of dialogue was more prevalent and significant than techniques of coercion and reward.500 An earlier study of over a hundred multilateral treaties to which the US was a party, encompassing both national security and business regulatory matters, found very little resort to sanctions. Indeed, few treaty texts even included a formal enforcement mechanism.501 Beyond their empirical observation that webs of dialogue are successful in achieving regulatory outcomes, Braithwaite and Drahos attempt to explain why this is the case. They suggest the answer lies in a number of factors which they describe as complex interdependency, normative commitment, modelling and habits of

499 Braithwaite and Drahos, above n 497, 553-554; Slaughter, above n 31, 19-20.
499 Braithwaite and Drahos, above n 497, 553. There is some debate in the literature about whether naming and shaming is a non-coercive technique deserving the title of 'dialogue' or if it is more coercive than this. Elsewhere, it is suggested that naming and shaming of corporate practices may be more a technique of coercion than dialogue: Ayres and Braithwaite, above n 32, 22-24. The context of the naming and shaming may be important to take into account. For example, shame or praise in a largely private context of an organisational meeting may be considered less coercive than an aggressive media campaign targeting a particular corporation.
500 Braithwaite and Drahos, above n 497, 557.
compliance.\textsuperscript{502}

The initial process of problem definition can be crucial to the success of a web of dialogue. During this process, actors are persuaded to take ownership of a global problem by identifying their own interests in its resolution. An interesting example of this is the manner in which different groups, particularly in the United States, rallied together to address the problem of the depletion of ozone gas in the earth’s atmosphere. Naturally enough, environmental groups were involved in raising awareness of the issue, noting the increase in harmful radiation as a result of the loss of significant ozone levels. The conservative US government was not initially in favour of the international process which led to the Montreal Protocol, but was persuaded to come on side as a result of the intervention of a major US manufacturer, Du Pont. Du Pont led research and development towards replacement products for the harmful chlorofluorocarbons (CFCs) responsible for the damage to the ozone layer. As a result, it had a keen economic interest in the international prohibition on CFCs, as it was then in a position to become a global market leader. In this manner, the US government intervened decisively in favour of the Montreal Protocol, which was finalised in 1989. The level of cohesion created in the ozone-implementation network was described clearly in the words of scientist-diplomat Mostafa Tolba: “What they would implement, and how, has been based on a circle of friends, an ever-growing circle of friends, that has worked tirelessly under conditions of personal trust.” The subsequent success in replacing CFCs with innocuous HFCs (hydrofluorocarbons) has resulted in the global success story of the ozone problem. Today, levels of atmospheric ozone have returned to acceptable levels.\textsuperscript{503}

In the example discussed above, civil society, industry and government found common cause to establish and implement an international regulatory regime. Braithwaite and Drahos provide an explanation for the cooperative behaviour of disparate groups even in the absence of easily identified self-interest. The explanation, labelled “complex interdependency”, is that actors seeking to find a solution to a regulatory issue are often engaged with each other in other forums in relation to different issues. As a result, there is an over-arching reason to cooperate, even in the absence of clearly identified self-interest which relates to that specific issue or problem. For example, a national government may be persuaded to cooperate in a global environmental regime through the

\textsuperscript{502} Braithwaite and Drahos, above n 497, 553-554.
\textsuperscript{503} Ibid, 264-267. Quote is cited in P. Canan & N. Reichman, \textit{Ozone Connections: Expert Networks in Global Environment Governance} (Greenleaf Publishing Limited: Sheffield, 2002), pp. 60-61, which deploys a network model to explain the success of that system (see generally pp. 61-100).
realisation that it wishes to make headway in upcoming trade negotiations with those same countries involved in the environmental negotiation. This approach can develop into a ‘habit of compliance’, whereby parties to a regulatory negotiation will favour compliance as their default position.  

Braithwaite and Drahos highlight a number of other factors as supporting the efficacy of dialogue as a regulatory technique. For example, parties may be persuaded as to the normative value of a course of action, and can be convinced by the modelling and compliance of actors they consider as their equals. When a number of national governments agree to a new regulatory standard, a type of peer pressure comes into play, influencing representatives of other national governments to give serious consideration to joining the regulatory regime. This type of peer pressure can be reinforced through reporting obligations, which institutionalise praise and shame for parties to a regime. An example of this is where labour ministries appear before the Freedom of Association Committee or the Committee of Experts of the International Labour Organisation (ILO) to account for their efforts implementing ILO agreements. According to Braithwaite and Drahos, a sense of professional pride and honour is created which motivates representatives to complete with each other in relation to their level of regulatory compliance. 

Another important feature of webs of dialogue is the ability to share information. By meeting the informational needs of potential participants in such a network, the costs and benefits of compliance are more easily understood, thereby facilitating decision-making. Furthermore, networks are able to provide technical expertise on aspects of the regulatory system to those parties who may have such a need. 

### 6.3.2 Horizontal Government Networks

In her work *A New World Order*, Slaughter also suggests a network model for international regulation. Her model is proposed both on a descriptive level, as being something which is already occurring in the international environment, but also on the normative level, as a constructive approach which entails significant benefits for effective international regulation. Her model is informed by a re-definition of the meaning of sovereignty for a modern nation-state. In

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504 Ibid, 550-562;  
505 Ibid, 555-556.  
conceptualising and identifying global networks which influence the decisions of national governments, she posits that the modern concept of national sovereignty is more concerned with a state's ability to influence these global networks, rather than that state's ability to exclude the network from having an influence in its national jurisdiction. Government networks are loosely defined by Slaughter to be a pattern of regular and purposive relations among like government units from different nations working together. Slaughter recognises that civil society and industry groups participate in discussions hosted by government networks, but suggests that privileging of government representatives is appropriate for reasons of democratic legitimacy.\footnote{Slaughter, above n 31, 11, 14, 56, 261-262; Chayes and Chayes cited in Slaughter, above n 31, 267. There is a small volume of literature discussing Slaughter's model, although much of it is a discussion of issues of the political legitimacy of the actors involved in government networks, such as R H owe, 'Book Review: A New World Order. By Anne-Marie Slaughter. Princeton, NJ: Princeton University Press, 2004' (2007) 101 American Journal of International Law 231. See also C Chung, 'International Law and the Extraordinary Interaction Between the People's Republic of China and the Republic of China on Taiwan' (2009) 19 Indiana International and Comparative Law Review 233; K Anderson, 'Squaring the Circle? Reconciling Sovereignty and Global Governance Through Global Government Networks' (2005) 118 Harvard Law Review 1255; E Antal, 'Lessons from NAFTA: the Role of the North American Commission for Environmental Cooperation in Conciliating Trade and Environment' (2005) 14 Michigan State University College of Law 167; A Lang and J Scott, 'The Hidden World of WTO Governance' (2009) 20 European Journal of International Law 575.}

Slaughter suggests the notion of horizontal government networks to explain the cooperation between national agencies from different countries aimed at resolving international concerns. She identifies three broad types of networks within the range of horizontal networks. These types are: information networks, enforcement networks and harmonization networks. Information networks bring together regulators, judges or legislators to exchange information and collect best practice. An example is the environmental exchange between the Environmental Protection Agency (EPA) of the USA and Mexico's equivalent, PROFEPA, on monetary penalties in enforcement cases, administrative enforcement procedure and the development of programs for criminal environmental enforcement.\footnote{Slaughter, above n 31, 14, 56, 264.}

Enforcement networks are motivated by the need of government officials to cooperate with other countries to enforce their own laws. Cooperation involves information exchange and assistance programmes. Perhaps the best known enforcement network is Interpol, which is composed of 179 police services internationally but has no constituent treaty to constitute itself on a formal basis. Criminal intelligence, including arrest warrants, is shared between member nation police forces through Interpol. Other examples include the European Union's criminal enforcement network known as Trevi. Enforcement networks may also include the provision of capacity building, or
technical assistance. For example, technical assistance from the US Securities and Equities Commission, US Environment Protection Agency, Justice Department and Treasury Department is a significant contribution to capacity building in the areas of competition, environmental and other forms of regulation globally.  

Harmonisation networks generally rely on a treaty or executive agreement, and bring regulators together to ensure that rules in a particular area conform to a common regulatory standard. Harmonisation networks have come under particular criticism as undemocratic, because the technical process of harmonising laws generally bypasses the public, and ignores domestic winners and losers from the process. Harmonisation is often linked to trade agreements such as the World Trade Organisation agreements or the North American Free Trade Area agreement, but can also be bilateral.

Slaughter suggests a number of features possessed by horizontal government networks: they are a flexible and fast way to conduct the business of global governance; they are able to coordinate and harmonise national government action; they can initiate and monitor different solutions to global problems; they are decentralized and dispersed, so cannot exercise centralised coercive authority; they are government actors, and so are responsible to constituencies which will hold them accountable in the same manner as purely domestic activity, even though they may interact with NGOs of civic and corporate nature.

At the normative level, Slaughter identifies a number of advantages to such arrangements, which benefit in particular weak, poor and transitional countries, including: the exchange of information; the development of collective standards; the provision of training and technical assistance; ongoing monitoring and support; and active engagement in enforcement cooperation. Counterparts in more powerful countries are able to reach beyond their borders to try to address problems impacting within those borders.

According to Slaughter, networks create a system of socialisation which develops and enforces standards of honesty, integrity, competence and independence in performing regulatory functions.

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509 Ibid, 56.
510 Ibid, 19.
511 Ibid, 11.
512 Ibid, 265-266.
The prestige of membership in a network is often enough to give government officials who want to adhere to high professional standards ammunition against countervailing domestic forces.\textsuperscript{513}
6.4 THE PYRAMID MODEL

The regulatory pyramid approach, first articulated by Ayres and Braithwaite in 1992, seeks to combine a number of regulatory approaches into a dynamic synthesis. Its initial formulation concerned regulation at the national level. The pyramid model combines elements of both the deterrence or command-and-control approaches, which argue that law must be tailored towards ill-intentioned people who seek to unscrupulously pursue their interests, as well as elements of the compliance and goal-oriented models, which argue that gentle persuasion is the best approach to securing business compliance. Put another way, it combines rational choice thinking, which argues that business always looks to economic self-interest, along with sociological approaches which also give credit to the law-abiding and socially responsible instincts of business. Ayres and Braithwaite argue that it is a false dichotomy to have to choose between punishing and persuading, but rather regulators need both approaches in their regulatory armoury. It is a “vertical” approach in that the model also provides for coercive interventions which may imposed by a regulator acting from a hierarchically privileged position. The privilege may relate to superior legal authority or simply greater power or influence.\footnote{Ayres and Braithwaite, above 32, 20-21.}

Braithwaite argues that an optimally functioning enforcement pyramid strategy will involve the following elements: a tit-for-tat strategy; access to a hierarchical range of sanctions and interventions, which can be set out in the form of a pyramid diagram; and the availability of a highly coercive sanction at the apex of the pyramid diagram.\footnote{Ibid, 40-44.} The model lends itself intuitively to the study of the conflict diamonds governance system as it allows for the type of dialogic interaction, and socialisation, which occurs within the Kimberley Process, but also goes further to provide for more coercive approaches in appropriate cases. Exclusion from the Kimberley Process, or referral to either the United Nations Security Council or the International Criminal Court, represent escalations which are available within the system.
6.4.1 The Tit-for-tat Strategy

![Diagram: Regulatory Pyramid: Escalating Approaches According to Actor]

One of the key processes for the functioning of the regulatory pyramid is labelled tit-for-tat enforcement, which can be described as being contingently provokable and forgiving. The fundamental principle of the tit-for-tat approach, which is synonymous with ratcheting up and down the enforcement pyramid, is that it rewards like with like. That is, it starts off with a posture that the regulated entity will be compliant with the regulations. This gives it the advantage of preserving the trust, goodwill and cooperation of businesses which are seeking to comply with the regulations. A regulator may also employ the technique of positive attribution which encourages long-term compliance, for example labelling a regulated business as helpful may encourage the directorship of that business to act in a helpful manner. However, in the event that it finds that the business is non-compliant, and unresponsive to an approach based on dialogue and persuasion, the regulator gives like in return for like, and escalates one stage up the enforcement pyramid, thereby demonstrating that negative consequences arise from unprincipled business behaviour.\textsuperscript{516} The

\textsuperscript{516} Ibid, 21-7.
decision by the regulator to start from a position of trust, however, means that the threat of sanctions has low salience for actors who are intrinsically motivated but can be made salient for those with no intrinsic motivation.\textsuperscript{517}

It is important, however, that the minimal sufficiency principle be applied in the deployment of an appropriate sanction to the noncompliant business. A fly should not be hit with a sledgehammer, nor a raging bull with a flyswatter, to use the colourful imagery of Braithwaite. By using the minimum sanction necessary to trigger compliance, long term damage to the relationship between regulator and the regulated business is avoided. When the business returns to a compliant posture of conscientious cooperation, a promptly forgiving posture by the regulator rewards this move, and quickly consolidates the desire to return to resource-conserving dialogue and persuasion. It should be noted in this regard that persuasion is cheap, while punishment is expensive, whether in terms of financial or political capital. Further, a strategy based on punishment alone fosters organised subcultures of resistance, involving regulatory cat-and-mouse, loophole games and rule proliferation. Punishment also damages the capacity of the business to adopt a goal-oriented approach of internalised cooperation.\textsuperscript{518}

\textsuperscript{517} Ibid, 49-51.
\textsuperscript{518} Ibid, 49-51.
6.4.2 A HIERARCHICAL RANGE OF SANCTIONS

Figure 8: Regulatory Pyramid: Escalating Sanctions

Braithwaite argues that businesses will more readily defect from cooperation where a regulator has only one deterrence option, even if that option is cataclysmic. Such a super-punishment is unlikely to be used for political, moral or legal reasons if it is disproportionate to the seriousness of the crime.\(^{519}\) For example, prosecutions for criminal offences involving long periods of imprisonment are unlikely to be initiated for relatively minor business transgressions, such creating a low level of pollution.

An example of a regulatory pyramid of sanctions is: persuasion – warning letter – monetary penalties – criminal prosecution – temporary suspension of licence – permanent revocation of licence.\(^{520}\) A discussion of the powers of the Australian Securities and Investments Commission by Assaf, provides a real-life example.\(^{521}\) ASIC has at its disposal powerful strategies with respect to

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\(^{519}\) Ibid, 49-51.
\(^{520}\) Ibid, 35.
corporate regulation, ranging from administrative and civil to criminal options. Powers possessed by the regulator include freezing assets and criminal prosecutions can be commenced by ASIC for illegal corporate activity. The ultimate sanction is, arguably, the de-registration of the corporation.

A more general approach to the regulatory pyramid is to describe general tools pitched at the entire industry. An example of a pyramid of broad strategies might be: self-regulation — enforced self-regulation — command regulation with discretionary punishment — command regulation with nondiscretionary punishment.522 A central advantage of this broad strategies approach is that it provides for industry self-regulation as part of the regulatory pyramid, with industry peak bodies effectively acting as an intermediate regulator. In some respects industry associations can be more important regulatory players than single firms. For example, individual firms will often follow the advice of the industry association to cooperate or face a more interventionist regulatory regime. Peer regulation may also have greater salience to an individual business, as its reputation in the eyes of fellow businesses may be considered more important than its reputation in the eyes of an external regulator.

522 Ayres and Braithwaite, above n 32, 39.
Figure 9: Regulatory Pyramid: Escalating Systems

One of the interesting observations from empirical work in this area, is that businesses are intrinsically concerned with adverse publicity, above and beyond simple loss of profits. It has been observed that personal reputation and corporate reputation of businesses are considered as priceless assets. It follows that a powerful punishment for a business, which can be used in the sanctions armoury of the regulatory pyramid, is adverse publicity.523

In a more recent discussion of the tit-for-tat strategy, Braithwaite has warned against a rigid doctrinal use of the pyramid approach. He reinforced the concept that there is a presumption for use of the least coercive technique, but that this is a presumption only. The regulatory interventions he styles as a tools in a tool-box and it is important to differentiate these tools from the work of the regulator. That is, the work, or goals, must be in the forefront of the thinking of the regulator. As such, there may be situations where, despite the presumption of starting at the foot of the regulatory pyramid, it is necessary to commence a regulatory intervention part-way up the pyramid, or even at

its apex. Furthermore, Braithwaite discusses the possibility that occasionally it is necessary to have a radical escalation or even a radical de-escalation. As an example of a radical de-escalation, he discusses the situation where police confront an armed individual in a siege situation. In such a stand-off, he suggests that a radical de-escalation may involve bringing in the spouse, mother, or other loved-one of the armed person, who may be able to persuade that person to surrender. Furthermore, when discussing interventions by police and other forces in East Timor, he noted that a Catholic nun had intervened to diffuse stand-offs between violent youth gangs.524

6.4.3 Availability of Highly Punitive Punishments

Ayres and Braithwaite describe the most effective regulatory players as benign big guns. Such a player, they argue, speaks softly while carrying a very big stick. An example they give is the operation of the Reserve Bank of Australia, which has extensive powers to take over banks, seize gold, and increase reserve deposit rations. However, it is argued that the Reserve Bank hardly ever uses its powers, but instead relies on persuasion525, which becomes a highly effective tool to such an extent that it could be dubbed regulation by raised eyebrows. It is argued that the greater the heights of punitiveness to which an agency can escalate, the greater its capacity to push regulation down to the cooperative base of the pyramid. The availability of highly punitive responses helps regulators to cultivate an image of invincibility, so that it is believed that the regulator is good to the loyal, but invincible when they decide to impose sanctions on the disloyal.526 If the regulator is viewed as being invincible, there is little point in the regulated entity moving for a direct challenge, and cooperation is seen as the only viable approach.

It might also be said that strategic punishment can underwrite regulatory persuasion. In the event of the failure of persuasion, a punitive stance with a recalcitrant company can underwrite the authority of the regulator, who is seen as being fair in the eyes of responsible companies which do not cheat. If the regulatory agency is patient and fair in the escalation, giving warning of the inevitability of the escalation, it enhances even further its reputation for justice as well as strength against recalcitrance.527 As argued by the Australian Law Reform Commission, effective regulation requires that rules must be implemented in a predictable and consistent manner.528

524 John Braithwaite, Regulatory Capitalism (Edward Elgar, 2008) 97-104.
525 Ayres and Braithwaite, above n 32, 40.
526 Ibid, 44-47.
527 Ibid, 42-3.
528 Australian Law Reform Commission, ‘Penalties: Policy, Principles and Practice in Government Regulation’
Tit-for-tat maximizes the difference between the punishment payoff and the cooperation payoff. Cooperation is the economically rational response, and where punishment is perceived as a fair response, the intrinsic motivation of the actor continues to be supported.\textsuperscript{529} Effective escalation is characterised by a short stick period of discomfort followed by a longer carrot period of reintegration where the punished party is induced to cooperate with its punishers during the stick period. By inducing cooperation in the stick period, agencies reduce the costs of punishment, and self-punishment moves more quickly onto the carrot phase. In plea bargaining, for example, the threat of stick and stick makes stick and carrot seem the much preferred option.\textsuperscript{530}

The regulatory pyramid must also have the ability to manage a further category of regulated entities, namely those who act in an irrational rather than self-interested manner. For example, non-compliance may be the result of negligent management of a business rather than wilful pursuit of greater profits. Although mid-level sanctions may assist negligent management to raise its standards, for example by compulsorily seeking a business consultancy report, the ability to incapacitate a business, for example by the revocation of its licence to do business, should also be available.\textsuperscript{531}

\textsuperscript{529} Ayres and Braithwaite, above n 32, 49-51.
\textsuperscript{530} Ibid, 43.
\textsuperscript{531} Ibid, 30.
6.4.4 Pyramids with Multiple Regulators in Parallel

![Diagram of regulatory pyramid: multiple regulators](image)

**Figure 10: Regulatory Pyramid: Multiple Regulators in Parallel**

Since the original formulation of the regulatory pyramid model in 1992, there has been a significant literature dedicated to testing the theory in numerous empirical settings. This literature has resulted in a number of critiques, and re-modelling, of the regulatory pyramid approach. One of the significant critiques of the theory is that it underestimates the ability of industry self-regulation and third party regulation to impose coercive measures on recalcitrant businesses. For example, in the diagram showing the pyramid of strategies, self-regulation is considered to be at the base of the pyramid, on the basis that it is the most persuasive and least coercive general strategy for business regulation. This was criticised as not being reflective of the potential coercive measures available

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through self-regulation. For example, the ability of medical practitioner boards to revoke a medical practitioner’s ability to practice is the equivalent of the business incapacitation of that individual and a severe penalty for medical malpractice. Similarly, the NSW legal practitioners’ board was recently empowered to suspend the practicing certificates of barristers who went bankrupt as a method for avoiding tax responsibilities.

A further critique of the regulatory pyramid was that it did not account for the action of third-party regulators, who are neither governments nor industry self-regulatory mechanisms. Although the original model contemplated action by way of adverse publicity, it did not specifically identify non-governmental or third-party operators as the regulators using this regulatory tool. By contrast, subsequent literature highlighted the ability of such operators to wield powerful coercive tools appropriately located in the upper part of a regulatory pyramid. Examples include the ability of a bank to bankrupt a business in the event of consistent default and the ability of non-governmental organisations to use the media for the purpose of naming and shaming.

In an effort to re-imagine the regulatory pyramid so as to address these limitations, Grabosky proposed a three dimensional pyramid model, set out below, which has three distinct faces. As with the original model, the vertical dimension represents the range of interventions available to a particular regulator, with the most coercive at the apex of the pyramid. Each of the faces of the pyramid represents the efforts of a different regulatory actor: government, industry self-regulation or third-party regulation. The advantage of the pyramid in three dimensions is that it gives a visual representation of the action of three different regulators, potentially all acting simultaneously, in a single model. Each type of regulator is represented as having a full range of possible interventions available in their ‘tool-kit’, including highly coercive ones.

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533 Grabosky, above n 532, 197-199.
534 Ibid, 199.
536 Grabosky, above n 532, 199; Scott, above n 497. In Braithwaite, Regulatory Capitalism, above n 524, 87-88, he notes that his earlier work discussed ‘tripartism’, but the role of third party regulators was not worked seamlessly at that time into the regulatory pyramid model.
537 Grabosky, above n 532, 200.
6.4.5 **Pyramids with Multiple Regulators in Sequence**

![Pyramid Diagram]

Regulatory pyramid using networked forces for policing in Timor Leste

**Figure 11: Regulatory Pyramid: Multiple Regulators in Sequence**

While different regulators may act simultaneously, or in parallel, on a particular regulated group, other systems involve a sequence of independently acting regulators. One such sequence was represented in a regulatory pyramid depicting police action to manage gang-led unrest in East Timor in 2006. At the base of the pyramid were community policing and problem solving efforts by the Australian Federal Police operating in Dili and other parts of East Timor under international arrangements. Where such efforts were unsuccessful, and the police were confronted with organised hostility by gangs, the AFP would pass the baton to the Portuguese elite force called the Guarda Nacional Republicana. The GNR were armed with heavy firearms and had a range of more coercive strategies available to them, including the use of rubber bullets and pushing gangs apart with shields. The apex of the pyramid involved a third group, namely the joint Australian and
New Zealand armed forces, who were able to initiate full-scale military operations as a last resort.\textsuperscript{540}

6.4.6 \textbf{THE STRENGTHS-BASED PYRAMID}

A complementary partner to the regulatory pyramid, the strengths-based pyramid, has been proposed in recent regulatory literature. This model, which might also be usefully termed the “pyramid of rewards”, focuses on rewarding admirable behaviour rather than imposing sanctions on unsatisfactory behaviour. It is the “carrot” to the regulatory pyramid’s “stick”. A table set out below contrasts the two approaches. While the regulatory pyramid deters through “fear” and involves “risk assessments” of regulated parties, the pyramid of rewards creates incentives through “hope”, and encourages regulators to make “opportunities assessments” in relation to regulated parties.\textsuperscript{541}

\begin{table}[h]
\centering
\begin{tabular}{|l|l|}
\hline
\textbf{Regulatory Pyramid} & \textbf{Strengths-Based Pyramid} \\
\hline
Risk assessment & Opportunities assessment \\
\hline
Fear & Hope \\
\hline
Prompt response before problem escalates & Wait patiently to support strengths that bubble up from below \\
\hline
Pushing standards above a floor & Pulling standards through a ceiling \\
\hline
\end{tabular}
\caption{Comparison of Regulatory Pyramid and Strengths-Based Pyramid}
\end{table}

Further elaboration of the pyramid of rewards is made easier with reference to the diagram set out below. Each sanctions escalation up the regulatory pyramid is mirrored by an escalation of rewards on the strengths-based pyramid. For example, at the base of both pyramids is education and persuasion, although the focus of such discussion in the regulatory pyramid concerns a problem to be avoided (at pains of possible sanctions) whereas the education in its complementary pyramid is in relation to a strength which is being encouraged. The well-known practice of “naming and shaming” in the regulatory pyramid is paralleled by “naming and faming”, through which positive behaviour is praised to encourage the regulated party, as well as bringing the behaviour to the attention of others as a model worthy of emulation.\textsuperscript{542}

\begin{flushleft}
\textsuperscript{540} Braithwaite, \textit{Regulatory Capitalism}, above n 524, 100-104
\textsuperscript{541} Braithwaite, \textit{Regulatory Capitalism}, above n 524, 115-126
\textsuperscript{542} Braithwaite, \textit{Regulatory Capitalism}, above n 524, 115-126
\end{flushleft}
Ratcheting up the regulatory pyramid are sanctions imposed for failure to meet a standard, so as to deter both the regulated party and others from violating that standard. At the equivalent place in the pyramid of rewards is a “prize or grant” through which financial reward is added to prestige and praise for achievement and commitment to exceeding minimum standards. Escalated sanctions in the regulatory pyramid lead ultimately to what Braithwaite terms “capital punishment”, which may also be read, in the business world, as revoking a corporation’s right to operate. While it is unlikely that Braithwaite is championing the death penalty for natural persons, his general point is that there should be a serious consequence to either natural persons or business entities which can be deployed in the most extreme cases of non-compliance with regulatory standards. In the parallel world of the pyramid of rewards, the apex might be a highly prestigious and/or financially rewarding prize such as the academy awards which are given annually in the motion picture industry. While the apex for either punishment or reward is infrequently bestowed, the possibility of its imposition serves to either deter or inspire, as the case may be, greater action.\footnote{Braithwaite, Regulatory Capitalism, above n 524, 115-126.}

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\textbf{Figure 13: Diagram of Regulatory Pyramid and Strengths-Based Pyramid}

\footnote{\textit{Braithwaite, Regulatory Capitalism, above n 524, 115-126.}}
6.5 THE NETWORKED PYRAMID HYBRID MODEL

Over the last few years there have been attempts to combine the essential features of network models and pyramid models so as to benefit from the insights from both theoretical frameworks. In so doing, these new approaches seek to benefit from both the “horizontal” thinking of the network approaches, as well as the ability to escalate “vertically” to more coercive forms of intervention. In thinking about the simultaneous applicability of two theoretical approaches to a real world issue, it might be recalled that in the field of physics, light, paradoxically, was observed to behave as both a particle and a wave at the same time. 544

6.5.1 VERTICAL NETWORKS

Some of the first thinking about mixed models occurred with the development of network models involving elements of coercion. Braithwaite and Drahos proposed a “web of reward and coercion”. They suggested that reward involves increasing the value of compliance, while coercion is concerned with reducing the value of non-compliance. Techniques of reward include the provision of foreign aid, while coercion can involve economic sanctions or the threat or use of military force. According to the Braithwaite and Drahos study, only a few actors on the international stage had the resources to deploy reward and coercion techniques, notably the US, EU, China and the World Bank. 545

Braithwaite and Drahos argued that webs of reward and coercion were in general less efficient than webs of dialogue. They argued that this was the case because extrinsic pressures overwhelm intrinsic motivation and normative commitment to comply. By contrast, dialogic webs heighten the probability that norms established will be internalized by actors who are part of the web. 546

Slaughter’s vertical government network involved a more sophisticated attempt to bring together network approaches and coercive regulatory interventions. Her “vertical government networks” recognise that nation states will, for specific problems, form genuinely powerful supranational institutions which are able to overcome the collective action problems inherent in formulating and implementing global solutions. Hard power is exercised by the institution, which is not simply the

544 http://en.wikipedia.org/wiki/Light#Wave.E2.80.93particle_duality
545 Braithwaite and Drahos, above n 497, 557-559.
combined membership of the network, such as the ability to make a binding decision in relation to a country, including co-opting domestic government enforcement powers, or excluding a country from membership. This power can be contrasted with the soft power of information, socialisation, persuasion and discussion. However, as they involve national governments as well as supranational entities, they are still considered to be networks.\footnote{547}

The Dispute Resolution Panel of the World Trade Organisation is the supranational organisation exercising hard power over national governments in the WTO vertical government network. The Panel consists of three experts, who make binding decisions based on their understanding of WTO treaty instruments. These decisions affect individual members and the generality of the membership of the government network of WTO members. Other vertical networks are spearheaded by the European Court and the European Commission.\footnote{548}

A significant point to be considered in relation to vertical networks is that supranational organisations are more effective in performing functions which states charge them to perform if they can link directly with national government institutions. Such linkages resolve the traditional problem of the inability to enforce decisions of a world body, such as the International Court of Justice, in the absence of a permanent international police force or other enforcement agency. A practical solution to this dilemma is where the existing national enforcement networks are drawn upon by the supranational body. For example, the European Court of Justice interacts directly with national courts, to ensure that its decisions are reflected in the decision-making of their counterparts at the national level. This is a disaggregated state approach, because courts interact directly with each other without, for example, being mediated by the respective Minister for Foreign Affairs.\footnote{549}

Another example of a vertical network is the complementarity system established by the Rome Statute for the International Criminal Court 1998. Under this system, primary jurisdiction is exercised by national courts over war crimes, crimes against humanity and genocide. It is only where a national court is unable or unwilling to prosecute that the International Criminal Court may claim jurisdiction and take over a prosecution. The possibility of such a jurisdictional takeover occurring is, in principle, a motivating factor for national prosecutors to take their responsibilities in

\footnote{546}{Ibid, 557-559.}
\footnote{547}{Slaughter, above n 31, 13, 269.}
\footnote{548}{Ibid, 13, 269.}
\footnote{549}{Ibid, 20.}
this matter seriously. It should be noted, however, that the international system benefits from this primacy. The international court is unlikely to have the resources to manage all prosecutions which must be followed throughout the world. Therefore, relying on appropriately well-established national systems significantly relieves this case-load, and enables the international court to co-opt the domestic courts to promote its international objectives. National courts, in addition, would increasingly be reliant on precedent-setting cases handed down by the international court, thereby promoting a uniform jurisprudence on international criminal law.\footnote{\textit{Ibid}, 21, 147.}

It might be noted that Slaughter does not include secretariats, commissions and other information agencies under the rubric of vertical government networks, as they are perceived as operating solely though the soft power of information-sharing, dialogue and persuasion only. In this category are placed the technical committee of the International Organisation of Securities Commissioners (IOSCO), the Secretariat of the Convention on the International Trade in Endangered Species (CITES) and the Secretariat of the Commonwealth. As they do not possess the binding, coercive powers of bodies such as the European Court of Justice, they are seen rather as handmaidens to national government officials, providing such officials with information needed to coordinate and enforce national law. Nevertheless, this role represents a real level of power, particularly when it is recognised that the professional reputation of member agencies can be buttressed or damaged as a result of compliance information obtained and transferred by a secretariat body. Such modes of operation are increasingly seen as more flexible, responsible and effective than command-and-control approaches.\footnote{\textit{Ibid}, 156.}
6.5.2 Pyramids Linked with Networks and Nodes

Figure 14: Regulatory Pyramid: Escalating Using Networked Partners

A number of recent developments in regulatory theory have sought to bring together both regulatory pyramid and network models. Some of the concrete examples explored have, furthermore, considered these models in an international context rather than a purely national one. One of the general framework diagrams set out above by Braithwaite shows the ability of a regulator to elicit the support of a new regulator, which is perhaps a network of people, businesses or organisations. The new regulator adds new resources, information, expertise and regulatory intervention tools which may be deployed. As the resources of further regulators/networks are enlisted, an even greater range of resources, information, expertise and tools are made available to the primary regulator.\(^{552}\)

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\(^{552}\) Braithwaite, *Regulatory Capitalism*, above n 524, 94-97.
One of the important developments in network theory over the last few years is the concept of the node. A node is like the command-centre for a network, where resources and expertise are pooled, and key decisions are made. A grass-roots example of a node in relation to a network comes from the movement for peace and security in South African townships. A diverse range of people wanting to promote peace and security through dialogue and discussion at the local level constitutes the network, while the node, where resources are pooled and key decisions made, are the Peace Committees. The literature also states that there are meta-nodes, where a number of different networks are represented in a single decision-making forum. An example of such a meta-node is discussed below in the section about the international intellectual property regime.

A further model (see below), developed by Drahos, seeks to explain some of the interaction between network and pyramid concepts in a hybrid model. His model suggests that the reach of a regulatory pyramid is extended by its connection with a greater number of nodes. This model, like the one developed by Braithwaite above, notes that networks, and their nodal command centres, add resources, information, expertise and tools to a primary regulator. The concept of regulatory reach in the context of Drahos' model includes the ability of a regulatory regime, such as intellectual property protection, to operate in an increasing number of national jurisdictions throughout the globe.

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553 Burris, Drahos and Shearing, above n 497, 2-16, 30-43; Drahos, above n 497, 404-405.
'reach' of pyramid extended into new countries as a result of connecting with node 1

'reach' of pyramid extended into new countries as a result of connecting with node 2

'reach' of pyramid extended into new countries as a result of connecting with node 3

nodes and the reach of an enforcement pyramid

Figure 15: Nodes and the Reach of an Enforcement Pyramid
6.5.3 **Hybrid Models Applied to Different Systems**

**The Intellectual Property Regulatory Pyramid**

![Diagram](image)

**Figure 16: Nodally Coordinated International Enforcement Pyramid for Intellectual Property Rights**

One of the significant examples of the way in which an international pyramid is constructed, and its utilisation of nodes and networks, is set out diagrammatically by Drahos. The example considers the development, and export, of legal standards for intellectual property protection from the United States to other countries in the international community. Drahos discusses how the entire process was initiated, and has subsequently been sustained, by a large number of multinational corporations based in the United States. The corporations come from industries such as pharmaceuticals, software and entertainment, seeking patent and copyright protection for their products. In particular, the corporations seek intellectual property protection in emerging markets so that they can financially benefit from exporting products or operating there in line with the situation they enjoy in
the US domestic market.\textsuperscript{555}

Drahos charts how the corporations enlisted the support of the US government in the 1980s, which then actively pursued the intellectual property agenda through both multilateral treaties such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), and through bilateral negotiations. His regulatory model involves both a pyramid, the apex of which is the key regulator, the US Trade Representative, as well as showing connections to the nodes which play a central role in the regulatory system. The interventions available to the US Trade Representative begin with informal dialogue, up to listing on various types of watch lists, with the ultimate intervention being formal trade sanctions on that country, thereby depriving that country of access to the very large US market for its export goods. The USTR is empowered by interaction with some important nodes, the most significant of which is the Industry Functional Advisory Committee on Intellectual Property Rights for Trade Policy Matters (IFAC-3). This body is a committee which advises the US Congress and President on all matters which relate to intellectual property in prospective trade agreements. It is composed of a number representatives of peak industry groups with an interest in international recognition of intellectual property standards, such as the pharmaceutical, software and entertainment industries. IFAC-3 contributes its expertise, information resources, and political influence towards promoting the goals of US-based multinationals. Besides offering formal advice as to whether an agreement is in the economic interests of the US, the committee from time to time also takes an active role in the finalisation of actual text of intellectual property provisions in agreements. For example, it was a major drafter of the US-Singapore free trade agreement.\textsuperscript{556}

Other nodes which are identified by Drahos as interacting with the US-based intellectual property regulatory pyramid are peak industry bodies: the Biotechnology Industry Organization (BIO), with a membership of more than 1,000 member organizations, the Business Standards Association (BSA), which is concerned with copyright issues, and the International Intellectual Property Alliance (IIPA), with a membership of over 1,100 companies. These are all industry peak bodies which are constituted with the goal of advancing the common goals of its membership with respect to intellectual property. Each is directly represented on IFAC-3, although, as the diagram shows, each may also interact directly with the USTR. Because IFAC-3 harnesses the resources of a

\textsuperscript{555} Ibid, 413-419; see also Burris, Drahos and Shearing, above n 497.

\textsuperscript{556} Drahos, P. “Intellectual Property and Pharmaceutical Markets: A Nodal Governance Approach”, (Summer 2004), 77 Temple Law Review 401, 401-419
number of nodes, it is described by Drahos as a meta-node.\textsuperscript{557}

\textbf{The Traditional Knowledge Pyramid}

![International enforcement pyramid for traditional knowledge (TK)](image)

\textit{Figure 17: International Enforcement Pyramid for Traditional Knowledge}

Drahos gives another example of an international enforcement model, involving pyramids and networks, to represent a potential regulatory model for the regulation of traditional knowledge. Traditional knowledge is the broad range of customary knowledge known by indigenous peoples around the world, including the use of genetic resources from local flora and fauna. Drahos proposes a model where the primary regulator is a potential global bio-collecting society. The GBS, for example, is well-placed to provide resources to indigenous groups seeking to protect a particular patent. Identifying possible patent infringements, by carefully examining patent applications and existing patents, can be an exhaustive process which indigenous groups may not always have the

\textsuperscript{557} Drahos, above n 497, 401-419
resources to undertake. Therefore, the resources of the GBS, plus any other groups they may be able to network with such as business, states or civil society, are vital from the regulatory perspective.\textsuperscript{558}

\textbf{THE THREAT OF COLLECTIVE DEBT DEFAULT}

A further example of an international regulatory pyramid, connected to appropriate networks, has been suggested as a means by which developing countries could leverage their resources internationally around issues of significance to them. The regulatory tool is an example of turning a perceived weakness, namely the massive scale of the debt of developing countries to countries and financial institutions in the developed world, into a strength. It is based on the somewhat ironic notion that a person with an enormous financial debt to a bank has a lot of effective control over that institution. The concept that developing countries might network for the purpose of making a coordinated default on their bank loans has real weight to it, considering that the collective debt has been estimated to be US $2.5 trillion. Braithwaite suggests that such an intervention might represent the apex of a regulatory pyramid, and that the threat of this intervention could be used by developing countries with a view to making gains in other areas of collective interest. These areas might include the lowering of agricultural tariffs which currently exist in some developed countries against exports from developing nations.\textsuperscript{559}

\textbf{REGULATION OF INTERNATIONAL TAX-HAVENS}

The regulation of international tax havens, also known as offshore financial centres, has also been considered in terms of the regulatory pyramid model. The central concern is the behaviour of a number of nation states such as Liechtenstein, Monaco and the Bahamas, which do not impose tax on international persons or businesses, thereby operating as a way for foreign nationals to avoid their tax obligations. The article considered the regulatory efforts of international organisations, including the Organisation of Economic Cooperation and Development, the International Monetary Fund and the European Union. Empowered with significant coercive tools at their disposal, these organisations have attempted to achieve tax law reform in these nations. A further development, however, was the initiation by a number of countries of attempts to foster bilateral tax arrangements known as double tax treaties. Under the provisions of these treaties, the relevant tax haven undertakes obligations to the effect that, where a person or business had affiliations with another

\textsuperscript{558} Ibid, 419-424.
country, it must pay tax either to that country or to the government of the tax haven country. However, according to commentator Rawlings, the effect of negotiating these agreements was to grant recognition and political capital to the tax haven in question. Bolstered by the new political support, it became more difficult for the international organisation at issue to enforce a greater level of cooperation in relation to that country.\textsuperscript{560}

6.6 CONCLUDING REMARKS

This thesis considers two main research questions, namely (1) to what extent has the conflict diamonds governance system achieved its objectives? and (2) does an application of the networked pyramid regulatory model to the system provide descriptive or normative insights into its effectiveness? The role of this chapter was to provide the necessary theoretical underpinning for a sophisticated response to the second question. The second question comes from a regulatory point of departure, rather than a strictly legal one. Rather than a purely legal analysis which identifies sources of law, from which particular rights and obligations are derived and articulated, a regulatory perspective considers whether a legal system has been successful in achieving its core objectives. Furthermore, regulation does not confine itself to strictly legal systems, but includes non-governmental and civil society organisations as protagonists in systems involving standard-setting, monitoring and behaviour modification.

A number of specific models have been developed to explain why some regulatory systems have proven to be effective, and how their efficacy might be further improved. The network model recognises that regulation occurs ‘horizontally’ between governments, corporations and NGOs in webs which promote normative commitment to common goals. The main regulatory techniques involved in such networks are dialogue, persuasion and socialisation. Although the pyramid model allows for techniques of dialogue, persuasion and socialisation, it also suggests that there is an important role to be played by more coercive interventions in appropriate cases. If these ‘vertical’ interventions are employed infrequently and judiciously, then there is an overall reinforcement for the dialogue and socialisation occurring at the base of the pyramid. The networked pyramid hybrid model seeks to combine the key features of both models into a single approach. It recognises, for example, that there may be a network of regulators who operate simultaneously, or who operate in

\textsuperscript{559} Braithwaite, ‘Methods of Power’, above n 532, 311-330.

\textsuperscript{560} Rawlings, above n 532, 51-66.
sequence, by passing the regulatory baton to others in the network. Furthermore, node concept provides a logical connection between network and pyramid models. This concept recognises that networked regulation has a "command centre" or node which, as well as benefitting from the information-gathering nature of the network, is able to deploy an escalating array of interventions, as envisaged by regulators in the pyramid model.

Recalling that the second research question requires the application of the networked pyramid model to the conflict diamonds governance system, a sub-issue relates to the immediate readiness of the existing theoretical model to accommodate such an application. As discussed previously, in Chapters 3 to 5, the conflict diamonds governance system is a complex system involving simultaneous regulatory action at both national and international levels, and in which national governments both regulate and are themselves regulated. A system of this complexity has not previously been adequately modelled using the networked pyramid approach. To accommodate these requirements the model itself needs to be elaborated. It will also be argued that an optimal model should include both incentives and sanctions in a single diagrammatic approach. The construction of a model fulfilling these two objectives is addressed in the next chapter.
Nobel Peace Prize Nomination

International Criminal Prosecution (Stage 1)
International Court of Justice Civil Case (Stages 2 - 4)

UNSC Diamond Embargo (Stage 1)
African Court of Justice Civil Case (Stages 2 - 3)
East African Court of Justice Civil Case (Stage 4)

Expulsion from KP:
Imposes Diamond Embargo

Informal Naming & Shaming

Educate About KP Aspirational Standards

Educate About "Development Diamonds" Label

Stage 1: No Child Labour
Stage 2: Better Working Conditions
Stage 3: Environmental Standards
Stage 4: Even Better Working Conditions

Technical Assistance for Meeting KP Standards

KP Artisanal Mining Sector Grants:
Diamond Forfeitures Provide Funds

Informal Naming & Faming:
Encourage Retailers to Use "Development Diamonds" Label

Option to Certify as "Development Diamonds"

Escalating Rewards
Development Diamonds

National Governments

Escalating Sanctions
Conflict Diamonds

Certification Re: Minimums Mandatory Prior to Export
That which traineth the world is Justice, for it is upheld by two pillars, reward and punishment. These two pillars are the sources of life to the world.

- Baha’u’llah, nineteenth century spiritual teacher

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561 See n 562 below
7 THE DUAL NETWORKED PYRAMID MODEL:
THE PYRAMID INSIDE THE PYRAMID

7.1 INTRODUCTION

7.2 THE PYRAMID INSIDE THE PYRAMID

7.3 INTERACTIVE REWARDS AND SANCTIONS

7.4 CONCLUDING REMARKS
7.1 INTRODUCTION

The second research question being considered by this thesis is the extent to which the networked pyramid model offers descriptive or normative insights into the conflict diamonds governance system. The previous chapter discussed the ‘state of the art’ in terms of the networked pyramid regulatory model. The networked pyramid combines the insights of two models, the network model and the regulatory pyramid or ‘pyramid of sanctions’ model. Network models emphasise the ability of regulators to make significant progress in standard-setting, monitoring and behaviour modification by networking broadly with diverse groups including NGOs, corporations and governments and using the ‘soft power’ of dialogue and persuasion. Beyond this, the regulatory pyramid offers insights into how regulators might respond to unresponsive or antagonistic regulated parties. The pyramid suggests a contingently punitive or forgiving response, in which more coercive interventions are deployed in cases were the ‘soft power’ of dialogue and persuasion has not provided results.

The insights and approaches of the networked pyramid model are intuitively applicable to the conflict diamonds regulatory system. Nevertheless, two particular issues emerge which arguably suggest a number of modifications to make the networked pyramid a more applicable and powerful model for complex international systems such as the conflict diamonds governance system. The first issue is that the networked pyramid model, and particularly the regulatory pyramid sub-model, was developed primarily in the context of regulation in a national, rather than international, setting. Particular challenges arise when the networked pyramid is adapted to an international context. For example, are national governments regulating parties, or regulated parties, or both? Can a pyramidal apex be identified as readily in an international context as it can be in a national context?

In fact these issues arise in any international system involving nation states regulating and being regulated, such as the intellectual property system discussed in the previous chapter. While the intellectual property application effectively demonstrates how nodal coalitions of US-based businesses and US government instrumentalities deploy a regulatory pyramid approach to foster and enforce the uptake of IP norms by other nation states, it does not simultaneously seek to model the manner in which those IP norms are implemented, monitored and enforced within those national jurisdictions. Such shortcomings in theoretical modelling are particularly acute in the conflict

562 Above, n 561: quotation is from Bahá’u’lláh, Tablets of Bahá’u’lláh Revealed After the Kitáb-i-Aqdas, Bahá’í
diamonds governance system because the Kimberley Process explicitly relies on the regulatory role of national governments while they themselves are regulated by the possible sanction of expulsion from the Process as well as other possible sanctions in the event of UN intervention.

The second issue arises in the context of building the "strengths-based pyramid" or "pyramid of rewards" ideas into the networked pyramid model. Typically, this pyramid is modelled separately to the "regulatory pyramid" or "pyramid of sanctions" model. A question arises as to whether it is beneficial to model the operation of both rewards and sanctions, or "carrots and sticks", in a single diagrammatic model and, whether in so doing, dynamic interactions or "ratchets" might become more apparent.

### 7.2 The Pyramid Inside the Pyramid

The networked pyramid model, and particularly the regulatory pyramid sub-model, has its origins in modelling regulation in a national context. As such, one of the key regulators is the national government, which will typically apply much of the regulatory apparatus, as well as the sanctions apex of the pyramid: criminal sanctions for individuals or the de-registration of a corporation. The addition of a networked dimension to this analysis, highlighting self-regulation by corporations and 'naming and shaming' by NGOs, can still be conceptualised at this domestic or national level. The immediate challenge of moving to the international level is distinguishing the regulating parties from the regulated parties, a question which looms particularly large for national governments. Looking at the bigger picture, it would appear that national governments are regulated parties for the purposes of the conflict diamonds governance system. For example, the Kimberley Process acts as a regulator, attempting to make sure that national government participants are complying with their obligations, namely making sure that only conflict-free diamonds are certified for export, and that only certified diamonds are imported. Regulatory techniques, such as informal naming and shaming through the peer review system, are deployed with the intention of regulating national governments, as is the highest level intervention of expulsion from the KP for serious non-compliance.

It might also be argued, however, that national governments are just as much regulators in the KP system as they are the subject of regulation. Governments typically rely on the passage of domestic

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legislation to give them the legal authority to carry out their international obligations under the KP, they therefore are essential in the process of implementing KP requirements. Furthermore, it is the customs apparatus of national governments which must perform the leg-work of actually examining potential rough diamonds exports, and issuing KP certificates for those that are found to be conflict-free. It is national governments that must implement internal controls, such as licensing systems, to ensure that rough diamonds originate from legitimate sources, rather than areas and persons connected with the commission of international human rights crimes. Furthermore, enforcement options such as fines or criminal prosecutions must be administered at the national level.

In the awareness that national governments act as both regulators and regulated parties in the conflict diamonds governance system, it must be considered whether this double-action can be factored into a modified version of the networked pyramid regulatory model. The suggested modification to the networked pyramid model is to embrace the concept of the “pyramid inside the pyramid”, thereby creating the “dual networked pyramid model”. With reference to Figure 18, above, it can be noted that the bottom layer of the larger pyramid is composed of small pyramids. These small pyramids denote national regulatory systems, in particular national governments. The national governments are seen as being a self-contained networked pyramid unto themselves, as is envisaged in the concept that national governments are regulators in relation to their own jurisdictions. As discussed previously, national governments are charged with implementing their international KP obligations by ensuring that the only rough diamonds that are exported are those that have been appropriately certified as being conflict free.

Figure 18, above, also demonstrates that national governments are the subject of regulation within the context of a larger, international networked pyramid. In this context, the Kimberley Process acts to regulate national governments, applying the regulatory techniques of dialogue, persuasion, informal naming and shaming and, potentially, expulsion, so as to promote optimal compliance by national governments. Furthermore, the international pyramid allows for a further range of regulatory interventions in relation to non-compliant national governments. The United Nations Security Council may intervene to impose diamond trading sanctions on the non-compliant national government. Beyond that, individual members of governments implicated in conflict diamond practices may be the subject of international criminal prosecution by the International Criminal Court.
The modified dual networked pyramid model is therefore a clearly recognisable version of the networked pyramid model as discussed in the earlier theoretical literature. However, it is arguably better able to encapsulate a more sophisticated array of regulatory action than previous efforts to model international systems using the networked pyramid model. In particular, it is able to represent simultaneous regulatory action at the international and national levels using the concept of the "pyramid within the pyramid". Such an approach to modelling, beyond application to the conflict diamonds governance system, is of utility to any international system, such as a treaty-based system, where international bodies focus on regulating the implementation of obligations at the international level into the domestic sphere.

7.3 Interactive Rewards and Sanctions

A further modification incorporated into the dual networked pyramid model is the incorporation into the model of the features of the "strengths-based pyramid" which is also known as the "pyramid of rewards". There are, therefore, multiple meanings to the "dual" nature of the model: it is a duality in the sense that it is a "pyramid inside a pyramid" as discussed above, and also in the sense that it combines both rewards and sanctions. The rationale behind incorporating insights from the pyramid of rewards into the model is largely linked to the concept of extending the existing mandate of the KP. While insights from the pyramid of sanctions model may well provide a way forward in relation to the current KP "crisis" of managing serious non-compliance from Zimbabwe and Angola, it is arguable that the KP, and the system more broadly, might find a new lease of life by extending its mandate to incorporate human rights issues which are of a less serious nature than international crimes. Such issues include the prevalence of child labour in the artisanal mining fields, which, even where children are working with their parents, deprives the children of the opportunity to undertake a proper education. As referred to in Chapter 2, child labour is also a major problem in cutting and polishing centres in India, with thousands of children missing out on a proper education due to their induction into this industry, which provides only minimal remuneration. Other issues, particularly associated with the artisanal rough diamond mining industry, are poor health and safety conditions, poor remuneration for work performed (less than a dollar a day), and environmental degradation.

NGOs working on conflict diamonds issues have gradually turned their attention to the broader range of problems in the diamond industry. Furthermore, a particular term "development diamonds"
was coined, to denote diamonds which are not merely free from the taint of conflict and international crime, but promote development because they have tackled a broader human rights agenda, such as child labour, health and safety, and remuneration for work performed. The NGO, Development Diamonds Initiative International (DDII), formed itself around this core concept, and has done important work assessing and comparing the artisanal industries in several countries, and initiating projects to improve conditions on the ground. This thesis suggests that a further step would be beneficial namely, incorporating this important work into the core mandate of the Kimberley Process. There would be many significant benefits which would flow as a result of such a move. First of all, the engagement of the organised elements of the KP, namely national governments, corporations and NGOs, would bring to this important work much needed resources and international attention. It would, furthermore, be of benefit to the existing, original mandate of the KP. This is because healthy industrial practices are less likely to degenerate into places which support the commission of international crimes. For example, if an artisanal diamond miner is receiving a good reward for his or her work, that person is less likely to willingly engage with the black market, including conflict diamonds traders, in the hope of better remuneration. On the flip side, and noting that government military and police have been responsible for murder, rape and beatings in Angola and Zimbabwe, a healthy focus on improving and legitimating the work of artisanal miners would work as something of an antidote to prevailing attitudes that artisanal miners occupy a position very close to the bottom rung on the social spectrum.

A final reason for pursuing the “development diamonds” agenda through the instrumentality of the Kimberley Process is that the concept of development diamonds lends itself naturally to incentive-based regulation, taking its cue from Braithwaite’s “strengths-based pyramid”. The KP is a certification based system, which opens the doors to a new type of certification, beyond simply an accreditation that a batch of diamonds is “conflict free”. While “conflict free” certification is mandatory prior to export, under the terms of the KP certification as a “development diamond” would not be required prior to export, but would be an option open to the rough diamond exporter. If the rough diamond shipment meets the required criterion to be a “development diamond”, which might initially be the requirement that it has been produced without the use of child labour, then the exporter would have the option to have it certified as a “development diamond” at the point of export. The incentive for the exporter to make use of this option is that such certification opens to that person the growing “fair trade” or “ethically produced” consumer market in the developed world. As with other “fair trade” products, there is a market which will pay more for a product with that label, as opposed to a standard product. Ultimately, the intention of the certification is to enable
the original artisanal producer to achieve a greater reward from production of a “development diamond” than a diamond which does not meet development diamond criteria. Thus, an incentive is created which encourages the production of diamonds which are in conformity with the relevant human rights standard, for example, the absence of child labour in relation to the production.

One of the innovations of the dual networked pyramid model is that it brings incentives and sanctions together into a single diagrammatic model, thereby creating a “duality” independent from the idea of the “pyramid inside the pyramid”. Although the model is based upon Braithwaite’s “strengths-based pyramid”, the original theoretical discussion of the model took the shape of two pyramids next to each other (see Figure 13), thereby contrasting the strengths-based or rewards-based approach with the regulatory pyramid or pyramid of sanctions. Although a “compare and contrast” approach has its own virtue, combining carrots and sticks into a single model creates a greater capacity to observe the interactions between incentives and sanctions. In particular, there is a facility to clearly model the operation of a regulatory ratchet, whereby aspirational standards may, over time, be recognised as mandatory standards. For example, in the event that the KP embraced a larger mandate, the first stage of operation might involve the elimination of child labour as an aspirational standard linked to “development diamonds” accreditation, even as freedom from connection to international human rights crimes is required before a shipment may be accredited as being “conflict free” and subsequently exported. After enough time has passed and considerable progress has been made towards the elimination of child labour, the “freedom from child labour” standard might be moved from the “aspirational” to the “mandatory” side of the ledger. This would mean that export of rough diamonds would not be permissible if they were associated with child labour practices, much as export is not permissible under the current mandate where the rough diamonds are associated with international human rights crimes.

There is, moreover, the capacity to ratchet up a further range of human rights standards. These standards would make their first ‘appearance’ as aspirational goals which would qualify associated rough diamond exports with the label “development diamonds”. After significant progress has been made towards these goals through the incentive-based framework, and noting the learning process undertaken by industry and regulators in this context, the particular standard might be ‘ratcheted’ into the ‘mandatory’ column. Mandatory standards, of course, require compliance as a prerequisite to export. In this manner, a dynamic of progress would be created within the artisanal diamond industry.
As well as creating an interactive dynamic and a ‘ratchetting’ effect, incorporating insights from the pyramid of rewards into the dual networked pyramid model allows for easy access to insights from this regulatory model in the context of the conflict diamonds governance system. As provided for in the original “strengths-based” pyramid model, discussed in Chapter 6, the model provides for increasingly substantial rewards in return for outstanding behaviour which surpasses minimum requirements. The various incentives modelled often mirror available sanctioning responses from the regulatory pyramid. For example, while the regulatory pyramid suggests “naming and shaming”, the pyramid of rewards provides for “naming and faming”. This incentive-based process already occurs, to some extent, within the KP as it currently operates. This is because new standards of excellence in implementing KP obligations, including internal controls, are shared with others as a by-product of the peer review mechanism. The dual model, however, pairs incentives with a self-conscious programme of ‘aspirational standards’, thereby allowing for parties to set goals which exceed simple compliance with the original KP mandate. Therefore, for example, an initiative by an NGO to educate children from the artisanal mining fields, rather than allowing them to be involved in child labour, might be “famed” at the KP meeting.

A further ratchet up the rewards side of the dual networked pyramid is the possibility of providing grants to NGOs, national governments or corporations to assist them with projects designed to address the aspirational goals of the suggested new KP mandate. In keeping with the concept of the “pyramid within the pyramid” is the idea that this segment of the model might itself contain a microcosm of the pyramid of rewards. That is, there might be different levels of grants which could be applied to efforts to improve conditions in the artisanal, and cutting/polishing sectors of the diamond industry. One dynamic which might arguably emerge is that an NGO or organisation is provided initially with a grant for a limited duration, or a specific project. In the event that these limited goals are met, or perhaps expectations exceeded, the KP would be likely to provide a larger grant for a longer period of time, creating an upwards dynamic of funding, and progress towards the human rights goals.

Finally, at the peak of the incentives side of the pyramid is a Nobel Peace Prize nomination, chosen for its rough correspondence to international criminal prosecutions, which represent the apex of the sanctions side of the dual model. While any form of international recognition could usefully be employed on the incentives side of the pyramid, a Nobel Peace Prize nomination is arguably the pinnacle of achievement in relation to contributions to world peace, noting that organisations such as the KP arguably would be able to exert influence towards a nomination, with the actual conferral
limited of course to the Nobel Committee itself. While such a nomination might appear, at first, to be overly ambitious in relation to the fledgling KP, it might be noted that two NGOs working on the issue of conflict diamonds, Partnership Africa Canada and Global Witness, already received such a nomination, in 2003.\footnote{I Smillie, \textit{Blood on the Stone}, 8-9}

\section{Concluding Remarks}

After considering the question of whether the conflict diamonds governance system has achieved its objectives, this thesis asks a further question, namely the extent to which the networked pyramid model might offer descriptive or normative insights into the effectiveness of the conflict diamonds system. The networked pyramid model combines the benefits of the dialogic/persuasive networks theory, for responsive parties, with the ability of the regulatory pyramid to escalate punitive interventions in cases of unresponsiveness or outright recalcitrance. The networked pyramid model, intuitively, suggests an ability to both describe the conflict diamonds governance system, as well as prescribe improvements to that system. Before applying the model, however, this chapter has suggested two ways in which it might be modified such that it is optimally placed to describe and prescribe, in relation to the conflict diamonds governance system.

The first modification relates to the fact that the heritage of the networked pyramid model is largely linked to modelling regulation at the national rather than international level. Recognising that the microcosm of national regulation is semi-independent of the international macrocosm, the thesis suggests a modification to the networked pyramid model which incorporates the idea of a "pyramid within a pyramid". The modified model, which could be labelled the dual networked pyramid model, suggests that the base of the international networked pyramid is comprised of a number of smaller national networked pyramids. In this way, the higher institutions of the international system, in particular the Kimberley Process, act as regulators of the national governments, which are the regulated parties. Under the Kimberley Process, the peer review mechanism operates by way of informal naming and shaming to influence national governments in the direction of compliance with their KP obligations. However, in implementing their KP obligations within their own national jurisdiction, national governments also act as regulators, involving themselves in standard-setting, monitoring and behaviour modification in relation to the mining of rough diamonds, and their export.
The second suggested modification creates a further "duality" in the model, through the combination of insights from the pyramid of rewards, as well as the pyramid of sanctions. Rather than presenting these models as operating in parallel, the dual networked pyramid model argues that there are synergies to be realised through laying out the operation of both rewards and sanctions in a single model. This interactivity is particularly valuable should the KP decide to broaden its mandate to include a more ambitious human rights agenda. The combination of both rewards and sanctions has the potential to create a regulatory ratchet towards higher and more ambitious human rights standards within the industry, particularly in relation to the artisanal mining, and cutting and polishing sectors. The KP as it currently operates sets out minimum standards which must be met before a shipment of rough diamonds can be exported. Sanctions attach to those who export rough diamonds without proper authorisation. By contrast with this approach, this thesis suggests that the concept of "development diamonds" can be utilised as a form of voluntary certification which is available to diamond shipments which have been mined and cut/polished in accordance with aspirational human rights standards. While certification as a development diamond is not a prerequisite to export, there is a commercial incentive to do this, as the end product could be labelled as a "development diamond" at the point of retail, thereby attracting the "fair trade" or "ethical consumer" market, who would pay slightly more for a product known to be promoting higher standards of human rights in the industry. It is suggested that a regulatory ratchet might be developed, whereby today's aspirational standard (compliance not required for export) might become tomorrow's minimum standard (compliance required prior to export). For example, the current KP mandate requires that diamonds be free from association with civil war and serious international crime before they can be exported. If freedom from child labour was added as an aspirational goal this year, in several years it might be included as one of the requirements prior to legitimate export under the KP. The ratchet could, furthermore, be used to "raise the ceiling" in relation to other standards, such as health and safety, remuneration for artisanal diamonds, and environmental standards.

Application of the pyramid of rewards, which escalates in proportion to the achievement "above expectations" of the parties, might move from informal recognition through "naming and handing" to grants, and awards, with the apex reward a potential Nobel peace prize nomination. Financial grants might stimulate progress towards incorporating aspirational standards, and the potential for a high level prize or recognition serves to raise the height of the aims of parties.
The Kimberley Process is failing, and it will fail outright if it does not come to grips with its dysfunctional decision-making and its unwillingness to deal quickly and decisively with non compliance.

Ian Smillie, conflict diamonds expert\textsuperscript{564}

\textsuperscript{564} See n 565 below.
8 APPLYING THE DUAL NETWORKED PYRAMID MODEL: NAMING, SHAMING & FAMING

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8.1 Chapter Overview

The aim of this chapter is to return to the original research questions. The first of these is an empirical question, “to what extent has the conflict diamonds governance system achieved its objectives?” In considering this question, it is important to look not only at the degree to which the system has been successful, but also the reasons for that level of success, and the reasons which may be holding the system back from achieving more of its potential. The second research question seeks to provide a theoretical overlay to the conflict diamonds system, asking “to what extent does the networked pyramid model provide descriptive and normative insights into the functioning of the conflict diamonds governance system?” It is necessary to provide an appropriate response to the first question so as to be fully equipped to respond to the second question. When the reasons for the relative success or failure of the conflict diamonds system to date are identified, they may in turn be able to be linked to the features of the networked pyramid model. In so doing, the networked pyramid theory may provide insight into why the system has been as successful as it has been, as well as suggesting ways in which the system might be improved to increase its level of success.

8.2 Has the Conflict Diamonds Governance System Achieved its Objectives?

8.2.1 Has the Kimberley Process Achieved its Objectives?

As the centrepiece of the conflict diamonds governance system, the Kimberley Process has faced a difficult task in seeking to break the link between human rights violations and the rough diamond trade. The central criterion of evaluation is whether the Kimberley Process has prevented the rough diamond trade from benefitting human rights violators. Given the historical lack of transparency that has characterised the diamond industry, it might be commented that there was ample room for improvement. By contrast with this starting position, the Kimberley Process now publishes annual statistical data, setting out the quantity and value of the legitimate trade in rough diamonds. With reference to the parameters of the legitimate trade, the Kimberley Process has come to conclude that conflict diamonds represent

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less than one percent of the world rough diamond trade. Such important gains are an impressive record for an organisation which is less than a decade old. However, recent challenges have emerged which threaten the ability of the Kimberley Process to achieve its core mandate.

Perhaps the greatest irony of the current challenges to the Kimberley Process is that they do not arise from industry, but rather from government. When the conflict diamonds issue first arose in the 1990s, big business, in particular De Beers, was linked to the illegal trade. However, in subsequent years, De Beers has become a staunch backer of the Kimberley Process. Rather than big business, it has been governmental participants which have thumbed their noses recently at the Kimberley Process. In the cases of Venezuela, Zimbabwe, and Angola, the ongoing integrity and success of the Kimberley Process faces strong challenges. Although human rights violations have not been linked to Venezuelan rough diamonds, its lack of cooperation with Kimberley Process instrumentalities has resulted in a significant quantity of uncertified diamonds entering the world diamond market.\textsuperscript{566}

By contrast with its early success with serious non-compliance, the Kimberley Process has been surprisingly spineless in response to these challenges. In relation to Venezuela, the Kimberley Process accepted Venezuela’s ‘voluntary withdrawal’ from the Process, but has effectively turned a blind eye to the fact that it has recommenced diamond trading outside the Kimberley system. There are several negative implications from Venezuela’s action and the Kimberley Process’s inaction. One is that many rough diamonds are entering world markets uncertified as to their origin. Although there has been no concrete evidence that Venezuelan diamonds are linked to human rights abuse, Venezuela’s determination not to be involved in the system means that this cannot be clearly verified. It is possible that, while there are no linkages to human rights violations per se, there may be linkages to corruption and bribery as was found to be the case in neighbouring Brazil. Notably, Brazil cooperated in a review visit by the Kimberley Process and took action to deal with the problems which were unearthed in relation to its diamonds industry. Venezuela also sets a bad example by demonstrating to other nations that it is possible to confront the Kimberley Process and assert your own dominance over it. Finally, the Venezuelan case leaves open the possibility of conflict diamonds entering world markets by being passed off as Venezuelan and using Venezuela as a conduit place.

\textsuperscript{566} The main exception to this analysis is the linkage of De Beers to alleged illegal trading during the early period of the Congolese wars, around 1998-2002.
A more appropriate response to Venezuela’s action would have been to recognise that this behaviour constituted serious non-compliance and for the Kimberley Process to follow-up with expulsion from the Process, meaning that other Kimberley members were not permitted to trade with Venezuela while the problem persisted.

The cases of Zimbabwe and Angola are of more serious concern than Venezuela. Turning to the Zimbabwe situation, diamonds deriving from the Marange fields are connected with human rights violations, and are therefore understood to be conflict diamonds. The approach of the Kimberley Process to the emergence of Zimbabwean conflict diamonds has been less than perfect. Rather than ensuring that Zimbabwe was not rewarded for the violence associated with the diamond discoveries, there was a weak response from the Kimberley Process focussed on a Monitor arrangement nearby the Marange mine. In fact, beyond this, shipments of rough diamonds have been authorised for sale by the KP, often in controversial circumstances, such as was seen when the civil society coalition walked out from the Kinshasa KP meeting on 23 June 2011. A stronger approach would have been to expel Zimbabwe from the Kimberley Process pending its willingness to ensure that appropriate measures were taken to ensure that conflict diamonds were not able to enter world markets.

In the case of Angola, as is detailed in Chapter 2, hundreds of thousands of artisanal miners have been expelled from the Angola to the DRC in circumstances involving widespread rape as well as murder and other human rights violations. Perhaps as a result of the prevailing standoff in the KP regarding Zimbabwean diamonds, the Angola situation has received very little attention, even from the NGOs themselves. However, it would appear that the prevailing situation in Angola might, on its face, represent the commission of crimes against humanity (particularly widespread and systematic rape), meaning that these Angolan alluvial rough diamonds are in fact blood diamonds. Perhaps most ironic of all is the representation of Angola on the KP Artisanal Mining Working Group.

The cases of Zimbabwe, Angola and Venezuela reveal some important problems in the current manner in which the Kimberley Process manages situations of serious non-compliance. Neither the Zimbabwean nor Venezuelan situations have been clearly identified as being cases of serious non-compliance, which is problematic based on the threat to the integrity of the system that each represents. There has been no attempt to more clearly define the parameters of what constitutes serious non-compliance. That is, there is the need
for further standard-setting in relation to the definition. Unfortunately, the Angolan situation has not been given even this much attention and remains largely ignored. Perhaps most important of all is the need for a standardised procedure to deal with situations of serious non-compliance. In the event that such situations persist, and the relevant national government is resistant to attempts to bring its behaviour into line with Kimberley standards, it should be accepted that there will be a ‘ratchet up’ to expulsion from the system. Naturally, there needs to be an ability to re-instate governments which have restored their compliance with the system.

A further aspect to the problems facing the Kimberley Process relates to the failure of the concept of making decisions using ‘consensus’. As discussed in more detail in Chapter 3, this method of decision-making is not appropriate for dealing decisively with situations of serious non-compliance. A system of voting requiring some type of majority is required for decisions in such cases. Furthermore, the use of a third-party assessment system would assist the Monitoring Committee in making clear and unambiguous recommendations regarding situations of serious non-compliance.

The Kimberley Process key concept is that it seeks to establish a ‘chain of warranties’ from the point of production to the point of sale in relation to rough diamonds. Although primary mechanism established under the Process is the export/import certificate, it was always understood that the certificate would be meaningless in the absence of appropriate government controls to ensure that veracity of the certificate. Perhaps most significant in this context is the ability of producing nations, which are often developing nations with low levels of bureaucratic capacity, to certify that rough diamonds at the point of export are in fact free from association with human rights abuse. An important step in this direction was the decision by the Kimberley Process to make the internal controls of producer countries subject to consideration by review teams. However, further measures need to be enacted. In particular, more detailed guidelines should be developed to identify the main criteria for assessing whether a producer country has adequate internal controls in relation to their rough diamond industry.

Further tightening of the Kimberley Process chain of warranties needs to occur once the rough diamonds have entered countries involved in cutting and polishing, such as India and Israel. This is particularly important given the pervasive use of child labour which characterises the cutting and polishing aspect of the international diamond industry in India, a problem which
ought to be addressed by the KP in the context of a new, expanded “development diamonds” mandate. Ideally, a certificate system should be associated with the production and export of all diamond jewellery, so as to ensure that the originating rough diamonds are conflict free. Unfortunately, no such protocols have been created as yet. Further down the chain, at the retail end, there is a further lack of implementation. A 2004 study of the practices of jewellery retailers in the US, Canada and the UK concluded that there was intermittent compliance at best with retail codes of practice. It would appear that customers purchasing diamond jewellery are not given a firm warranty regarding the provenance of the diamonds they are purchasing.

8.2.2 HAVE THE UN SECURITY COUNCIL AND TRIBUNALS HELPED?

As was outlined in Chapters 3 and 5, the United Nations Security Council was the first organisation in the international system to gather information about, and take action, on the issue of conflict diamonds. Furthermore, it actively facilitated the establishment of the Kimberley Process, and continues to provide political support to it through its annual resolutions. Looking further afield, the United Nations Security Council was a major player in the establishment of the Sierra Leone Special Tribunal, which has initiated the first international criminal prosecutions relating to conflict diamonds. The UNSC also has institutional ties to the permanent International Criminal Court, possessing as it does the ability to make formal referrals to that body. Even when one considers the role of particular persons, at least one individual is connected to the work of institutions at all three levels. In the late 1990s, Ian Smillie was chosen to be one of the persons to serve on the United Nations Security Expert Panel which highlighted the ongoing conflict diamonds problem in Sierra Leone. After this, through his role with Partnership Africa Canada, Ian Smillie was an important influence in the establishment of the Kimberley Process. Furthermore, it was Ian Smillie who was called on as an expert witness for the prosecution in the Charles Taylor case before the Sierra Leone Special Tribunal.

Noting the interconnectedness of the main institutions in what I have termed the conflict diamonds governance system, it seems natural to consider them as part of a network which operates to combat the problem of conflict diamonds. The interventions of the United Nations Security Council and the international tribunals have arguably contributed to the level of success which has been achieved to date by the Kimberley Process in seeking to break the link between the rough diamond trade and the commission of human rights violations.
The first role played by the UNSC is its monitoring role through its expert committees. These committees, which have investigated situations in all the African countries which have suffered from conflict and human rights violations as a result of conflict diamonds, have played an important information gathering role not only for the UNSC but also for other actors in the regulatory community, including the Kimberley Process, the international tribunals, industry, NGOs and the media. It might appear redundant in the context of the monitoring now undertaken by the Kimberley Process itself, however, as noted in one critical review, the UNSC reports have sometimes picked up on problems in the implementation of conflict diamonds trading bans which were overlooked by the Kimberley Process monitors in reviews of the same country.  

The imposition of economic sanctions, including diamond trading sanctions, on countries in breach of their obligations relating to conflict diamonds, represents an important coercive ‘ratchet’ which is available to the conflict diamonds governance system. Such interventions were particularly significant in the period before the establishment of the Kimberley Process, but retain their importance in a multi-regulatory environment. In the event that a member country has been excluded from the Kimberley Process, and therefore excluded from the rough diamond trade through this mechanism, UN Security Council sanctions represent a more coercive escalation. This is because resolutions imposing sanctions issued with reference to the Chapter VII powers of the UNSC are legally binding under international law. Furthermore, the United Nations resolutions typically address a range of related issues, such as import bans on armaments, as well as potential bans on diamond exports. The political authority of the UNSC, combined with the possibility of further escalation, suggests that such resolutions have greater impact than exclusions under the Kimberley Process. The UNSC has, in fact, continued its practice of imposing or maintaining diamond trading and other sanctions on African producer countries in particular circumstances despite the contemplated or actual action by the Kimberley Process. Examples include sanctions on the Democratic Republic of Congo, Cote d’Ivoire and Liberia. It is suggested that the ongoing use of this ‘regulatory ratchet’ has been a continuing factor in the success of the Kimberley Process to date.

As discussed previously, the UNSC has important institutional connections with the

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567 The smuggling of Ivory Coast blood diamonds through Ghana was not picked up by the review visit, but was noted by the UNSC Expert Committee: Smillie, ‘Paddles for Kimberley’, above n 51, 10.
international criminal tribunal system. The criminal tribunal system has already played an important role in relation to the conflict diamonds in relation to at least two countries: the Democratic Republic of Congo and Sierra Leone. Following the UNSC expert report about the conflict diamonds problem in the DRC, the Prosecutor of the ICC issued public notices highlighting the potential liability of those parties involved in the conflict diamonds trade including, potentially, businesses at the far end of the trade. Prosecutions initiated by the ICC in relation to the DRC have further highlighted the role of conflict diamonds in exacerbating the conflict there, and the connection to grave human rights abuses, including the use of child soldiers and the killing of civilians. More recently, the cases before the Sierra Leone Special Court have provided even greater attention to the problem of conflict diamonds. Conflict diamonds have been used to provide context to finalised cases, prove liability to subsequent human rights violations, and connected, through mining processes, directly to human rights violations. There has been significant and ongoing media attention to the proceedings of the Special Court, particularly the high profile prosecution of Charles Taylor, which has even involved the testimony of celebrity supermodel Naomi Campbell. The conviction of members of the RUF and AFRC leadership on charges related to conflict diamonds, and the ongoing prosecution of Charles Taylor, have arguably sent a clear message that, in the most serious cases, persons involved in orchestrating the conflict diamonds trade may be subject to criminal prosecution. There is also an arguable moral dimension to prosecution, which serves to reinforce social norms against a trade such as the conflict diamonds trade. It is arguable that the trials before the ICC and the SCSL have focussed international attention on the issue of conflict diamonds and thereby reinforced the important work of the Kimberley Process in seeking to regulate the trade in rough diamonds. Even political leaders of national governments have been made to realise that involvement in the conflict diamond trade, and commission of human rights abuses, may result in international criminal prosecutions. This has arguably increased general willingness of member nations to cooperate fully with the other international agencies of the conflict diamonds governance system, such as the UNSC and the Kimberley Process. In turn, such a contribution must be recognised as one of the factors resulting in the reduction of the conflict diamonds trade to less than one percent of the international rough diamonds market.
8.3 APPLYING THE DUAL NETWORKED PYRAMID MODEL TO THE CONFLICT DIAMONDS GOVERNANCE SYSTEM

8.3.1 NETWORK FEATURES OF THE CONFLICT DIAMONDS GOVERNANCE SYSTEM

THE NETWORK AS A DESCRIPTIVE TOOL

The network models, regulatory webs and government networks, provide important insights into the operation of the conflict diamonds legal system, particularly the functioning of the Kimberley Process. The value of networked regulation was seemingly built into the Kimberley Process, through the use of the tripartite government, business and NGO structure. Each category of participant is in a sense a network. The fact that the majority of governments involved in the rough diamond trade are represented shows that Kimberley is, at least in part, a government network. Furthermore, the Kimberley Process was the catalyst for the large scale diamond industry to organise itself through the formation of the World Diamond Council. With the involvement of the WDC at the Kimberley Process, as well as member businesses such as Rio Tinto and De Beers, the Kimberley Process represented a network of rough diamond trading businesses. Given that each non-governmental organisation is itself a network of like-minded persons, the bringing together of a number of NGOs of global reach through the Kimberley Process is another network feature of the organisation.

The Kimberley Process can also be understood as a ‘node’ which acts as a ‘command centre’ by bringing together representatives of the government, NGO and business networks. The Kimberley Process processes the information gathered by these expansive networks and makes concrete regulatory decisions in response.

There are a number of specific features mentioned in the network models which correlate closely to the operation of the Kimberley Process. The concept of ‘webs of information’ is a very apt one in considering the Kimberley Process. The KP brings together expansive networks of information through the government, business and NGO networks. Such information is vital for appropriate regulatory action to occur. For example, in the event there is an outbreak of human rights abuses fuelled by conflict diamonds, it is often the NGO network, which has been coined ‘the conscience of the Kimberley Process’ which brings it to the attention of the Kimberley Process. The manner in which such information is brought back to the Kimberley Process could also be described in terms of ‘webs of accountability’.
Importantly, Kimberley Process incorporates a type of ‘separation of powers’ where each power or interest is able to bring accountability to the others. In the event that big business gets caught up in the conflict trade, national governments which are institutionally removed may bring them to account, particularly national governments from different countries with no particular stake in that business. Big business itself has an interest in holding to account parts of the industry, including the artisanal industry, which might bring into disrepute the diamond trade as a whole. Besides highlighting contraventions, big business has an incentive in assisting small business or parts of the trade which have been traditionally troubled in building capacity and becoming Kimberley compliant. Finally, and perhaps most significantly, is the role that NGOs play in promoting accountability. Entering into the Process without an economic stake in the rough diamond industry, they are able to present an objective third-party perspective into the operation of the Kimberley Process. In particular, they are in a position to hold to account not only business interests but also national government interests where they may be diverging from the larger purpose of the Kimberley Process as a whole.

A further insight into the Kimberley Process derives from Ann-Marie Slaughter’s ‘government networks’ theory. This theory posits that networks of government officials group together around particular subject-matter domains. One of the ways in which they operate she describes as ‘horizontal government networks’. Such networks avoid hierarchical structures, but operate on the basis of government officials coming together as equals, giving rise to the operation of ‘peer pressure’. Through this type of peer pressure, government officials find themselves in social relationships to other governments, and, through this connection, feel a sense of accountability for obligations which are mutually undertaken. This model is particularly mirrored in the way in which the Kimberley Process peer review system works. In the Kimberley Process peer review system, government representatives, assisted by NGO and business representatives, review other governments in terms of their degree of compliance with Kimberley Process requirements. One of the main ways in which this system works is that it draws on the sense of mutual obligation by which Kimberley Process governments come together. Through simply highlighting an inadequacy in the operation of one nation’s diamond processing system, pressure is placed upon that nation to come into greater conformity with its obligations.

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568 John Braithwaite, 'Realism and Principled Engagement in International Affairs and the Social Sciences of Regulation' (Paper presented at RegNet@10 Conference, Australian National University, March 2011) 3.
THE NETWORK AS A NORMATIVE TOOL

It is arguable that the success of the Kimberley Process to date may largely be attributed to its ability to incorporate features from the networks regulatory model. However, as discussed below, this dissertation contends that if its operating procedures more closely conformed to features of the pyramid model, further improvement of the conflict diamonds governance system will follow. However, there should be no backtracking of the networks features already incorporated into the Kimberley Process and its related regulators. While the *sine qua non* of the networks theory is socialisation, the central feature of pyramid theory is its ability to deploy coercion in an optimal manner. However, there is a noted risk in the literature around pyramid theory that coercion, particularly as embodied in classic command-and-control theory of regulation, tends to undermine the normative good will and cooperation which are gained through socialisation, dialogue and persuasion. Therefore, it is important in discussing the deployment of coercive interventions to keep in mind that they must be made in a context where the potential to harm the gains made through persuasive functioning are minimised. This challenge is discussed further below.

While the conflict diamonds governance system has significant lessons to learn through analysis in the light of the networked pyramid model, there are arguably insights which might be suggested in relation to networked pyramid regulatory theory which arise out of a study of the conflict diamonds governance system. One such insight relates to network theory and understanding of the node concept in this theory. Nodes are considered the command centres of networks, with meta-nodes involving representatives of several networks. Nodes are the places where information from the various networks is gathered, and regulatory action determined and carried out. Considering this information, it appears on its face that the Kimberley Process conforms to this definition. The KP plenary brings together three major networks: being representatives of NGOs, industry and national governments. It is the plenary, and between meetings the chair and committees, which carry out regulatory functions relating to conflict diamonds, including information gathering (annual reports, statistics, review visits), standard setting through developing terms of reference for working committees, procedures, or suggestions to reform the primary agreement, and behavioural modification activities, such as reporting back on non-compliance issues highlighted in review visits, reporting issues to the UN system, or recommending that countries be expelled from the Kimberley Process. The Kimberley Process has the further capacity to engage with other networked regulators in the conflict diamonds governance system. It can 'receive' a
ratchet from below from national governments, such as when the Cote d'Ivoire requested that it be removed from the Kimberley Process due its own inability to manage conflict diamonds there. Furthermore, the Kimberley Process is able to 'ratchet up' regulatory interventions to more interventionist institutions such as the UN Security Council or even the International Criminal Court. In all these ways, it functions as a powerful 'meta-node', much in the manner that the combination of the IFAC-3 committee operates as the major regulatory node in the export of US-developed intellectual property rules throughout the international community.

There are, however, significant differences between the nature of the intellectual property node described by Drahos and the nature of the node represented by the Kimberley Process. First of all, the intellectual property node is less formalised than the Kimberley Process. Although there are references to its functioning in terms of finalising trade treaties by the US Congress, the Kimberley Process Agreement is a more comprehensive constitutional document, placing the organisation on a more formal footing than IFAC-3. The other difference, however, is more significant in terms of the nature of nodal theory. In the intellectual property regime, IFAC-3 and the US Government fundamentally agree on the same agenda and promote the same interest. This is perhaps made easy because it is concerned with the alteration of rights overseas to the advantage of US corporations, therefore not confronting US interests in any direct manner. The nature of this node is very different to the Kimberley Process which brings together divergent interests in the name of solving a common problem. Prior to the identification of conflict diamonds as a problem, even large corporations had seemingly no problem in purchasing them. Furthermore, national governments do not necessarily identify regulation of this sector as being in their immediate national interest, as demonstrated by the recent approach of Venezuela and Zimbabwe. It therefore follows that the task of forging a common purpose and common agenda as between NGOs, industry and national governments requires looking beyond immediate self-interest in a manner which is not modelled in the intellectual property regime. Indeed, the bringing together of the three disparate groups can be seen as an example of 'separation of powers'. This constitutionalist concept, previously discussed, indicates that, as far as possible, there should be a division of powers amongst different power bases, and not simply in the normal manner of government (i.e: between judiciary, executive and legislature). Some examples given in the literature include: separation of traditional/tribal power from power in terms of the modern state in developing countries, the separation of church and state, and the breaking
up of the US military industry complex.\textsuperscript{569}

Perhaps the best analogy to the manner in which the Kimberley Process formalises the tripartite involvement of civil society, industry and national governments relates to the much more venerable International Labour Organisation (ILO). The ILO, which seeks to set standards regarding labour standards internationally, combines governments with employers and employees. It is famously one of the only organisations to survive the transition from being connected with the League of Nations to the post-war era of the United Nations (perhaps the only other structure to do so being the Permanent Court of International Justice which was transformed into the International Court of Justice, although this continuity is itself debated in the literature). The three interests separated, but brought together in the ILO, intrinsically will hold each other accountable as each seeks different outcomes from the point of view of their differing constituencies. The ILO could certainly be conceptualised as a "node" according to network theory, however it appears that this has not yet been done. Perhaps this study of the Kimberly Process as a "node" will prompt scholarly investigation into the manner in which the ILO operates in a similar fashion.

\subsection*{8.3.2 \textit{Pyramid Features of the Conflict Diamonds Governance System}}

\textbf{The Pyramid as a Descriptive Tool}

The regulatory pyramid tool is particularly useful in describing the 'vertical' aspect of regulation, that is, the manner in which increasingly coercive measures may be applied to achieve a regulatory outcome. Typically, the regulator who applies such a higher coercive measure is also in a more powerful position than the person or entity which is regulated. In considering the application of the pyramid model to the conflict diamonds legal system, it is perhaps most easily seen in terms of pyramids at two different levels: the national level and the international level. At the national level, the primary regulator is the national government and the regulated persons are artisanal and industrial rough diamond miners and traders.

At the international level, the Kimberley Process is the initial regulator, with national governments themselves being the regulated entities. Peer review represents a regulatory ratchet available to the Kimberley Process, as does expulsion from the system for serious non-
compliance. Further regulatory ratchets may involve the United Nations Security Council and the International Criminal Court in relation to the membership of recalcitrant national governments.

Rather than relying on the earliest iteration of the regulatory pyramid model, the thesis draws on the latest imagining of the model, particularly as it relates to providing for multiple regulators, both sequentially and in parallel. The model anticipates ratchetting up through the regulatory pyramid, even, potentially, from national to international levels. As such, ratchetting up may pass the regulatory baton from national governments, to international actors such as the Kimberley Process, the United Nations Security Council and the International Criminal Court. Furthermore, the incorporation of the idea of regulators working in parallel is a more sophisticated version of the model, which provides a better explanation of the work of multiple regulators on a single regulated entity. The idea that multiple regulators act together with respect to the Kimberley Process incorporates the tripartite nature of the process, which includes, even at the formal level, non-governmental organisations, industry and national governments. These sectors, whether considered within the KP or without it, operate in independent regulatory capacities in relation to regulated industry bodies, or even other national governments and civil society bodies.

Descriptively speaking, it is possible to view the conflict diamonds prosecutions as an informal ratchet from the UNSC to tribunal jurisdiction. The two situations involving conflict diamonds prosecutions, Sierra Leone and DRC, have both been presaged by significant action by the UNSC. In the case of Sierra Leone, the UNSC had issued major reports about the role of conflict diamonds in the perpetration of human rights violations there, and had in place economic sanctions on both Liberia and Sierra Leone. The UNSC was instrumental in the establishment of the Sierra Leone Special Court. Furthermore, the case records, particularly for the Charles Taylor case, show that the UNSC expert committee reports about conflict diamonds were tendered as evidence, supported by the testimony of one of its experts, Mr. Ian Smillie. In contemplating the establishment of the Sierra Leone Special Court, it would be difficult to imagine that its caseload would overlook the role that the conflict diamonds trade played in the conflict.

Similarly, in relation to the DRC cases, the UNSC expert reports highlighted the connection between conflict diamonds and human rights violations in regions such as Ituri. The reports furthermore recommended follow-up action by the UNSC, and the international community.
It is likely that the UNSC expert reports formed the basis for public statements by the ICC Prosecutor regarding the illegality of the conflict diamonds trade. Beyond this, the ICC initiated prosecutions for human rights violations in the area, highlighting the role played by conflict diamonds in exacerbating the situation. In an informal manner, there was a regulatory ratchet here between the statements of the UNSC expert committee, its sanctions, and follow-up prosecutorial action by the International Criminal Court. Importantly, there is an institutional connection between the two, with the UNSC able to refer cases to the ICC even when such cases would not normally fall within its jurisdiction. Although the institutional mechanism was not formally invoked, it makes sense that the ICC prosecutor would be carefully monitoring expert reports by the UNSC for possible independent action on its own motion.

Descriptively, a focus on the role of national regulatory frameworks within the international system gives rise to the concept of a ‘pyramid within a pyramid’. From this point of view, national regulators have their own range of interventions available to them in relation to their local diamond industry, with the apex of that pyramid arguably domestic criminal prosecutions. The prime obligation of the Kimberley Process, by contrast, is to assist national governments in living up to their regulatory tasks. Returning, then, to the national regulatory pyramid, national governments already have a range of regulatory interventions at their disposal. It is clear from analysis of legislation from African producer countries that a number of regulatory tools are already available. These include licensing and zoning mechanisms to manage artisanal and large-scale rough diamond mining. They will need to be built upon, as is discussed below, to provide for a better overall approach to the issue of combating conflict diamonds.

The pyramid as a normative tool

One of the key challenges facing the Kimberley Process at the international level currently can be understood clearly in relation to the pyramid model. The challenge of serious non-compliance in relation to both Zimbabwe and Venezuela can be seen in terms of a normative application of the regulatory pyramid. The pyramid model requires a hierarchical range of sanctions, with a highly coercive option at its apex. Although the regulatory pyramid was not referred to in his remarks, the suggestions made by Partnership Africa Canada for reform of the Kimberley Process are conceptually very similar:
“In sum, the Kimberley Process needs a rigorous, clear and phased compliance enforcement strategy that starts with assistance and internal pressure, moves to public naming and shaming, and then moves to higher levels of sanctions, suspension and expulsion”.

The Kimberley Process has already been successful at providing technical assistance, and also internal pressure, especially in the context of its peer review system. However, it does not have a clear strategy for either for public naming and shaming, or suspension/expulsion from the Kimberley Process. Considering public naming and shaming, one of the continued challenges in relation to enforcement is the fact that review visit reports are not made publically available. The simple fact of making such reports publicly available would increase the ability of both the Kimberley Process and civil society organisations to bring the power of adverse publicity to bear on the national government in question. Finally, and most importantly, there needs to be an agreed process for the expulsion of countries in the event of serious non-compliance. As discussed previously, the parameters of what constitutes serious non-compliance need to be more clearly established, with a body exercising a degree of independence able to assess individual cases. While the decisions of this body, operating in conjunction with the Monitoring Committee, might be subject to confirmation by the Plenary, as soon as a situation of serious non-compliance is recognised, steps must be immediately initiated leading to a review visit followed, potentially, by expulsion of that country from the Kimberley Process. In terms of confirmation of the process by the Kimberley Process plenary, the voting method should provide for some type of majority vote, whether a fifty percent majority or a two-thirds majority. This would liberate the Kimberley Process from the current deadlock arising from its consensus requirement (which has been interpreted as ‘unanimity’), and enable it take appropriate action.

The pyramid model applied normatively suggests the possibility of further escalation to the United Nations Security Council in appropriate cases. There are two possible scenarios where this might be utilised. One is effectively an ‘appeal’ from the Kimberley Process, for a recategorisation of a case as relating to ‘serious non-compliance’. This might be initiated either by the Kimberley Process chair or the Kimberley Process plenary, following a preliminary decision that a case had been deemed not to have related to serious non-compliance. The Security Council would then have an opportunity to reconsider the situation and, if it was of the view that the original decision was incorrect, it would be able to pass a resolution mandating a trading ban in diamonds with the particular country.

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570 Smillie, ‘Paddles for Kimberley, above n 51, 11.
A further scenario is a more traditional use of the pyramid, which would represent a ramping up of sanctions against a particular country which has already been expelled from the Kimberley Process for non-compliance. If, in the view of the UN Security Council, expulsion from the Kimberley Process was not considered as having effectively countered the traffic in conflict diamonds emanating from the expelled country, it could impose, in addition, a trade ban in diamonds mandated under a Chapter Seven resolution or even more extensive economic sanctions (perhaps a ban on arms trading for example) in relation to that country.

Applying the pyramid in a normative manner suggests that the conflict diamonds governance system would be improved if the regulatory ‘ratchet’ between the Kimberley Process, the UNSC and the international tribunals was strengthened. While the connection between the Kimberley Process and the UNSC has already been discussed above, there are connections which can be made between the UNSC and the international courts, and even directly between Kimberley and the international courts. One way in which a greater connection could be made between all three levels, and even down to the national government level, would be to formulate a specific crime of “trafficking in conflict diamonds”. The formulation of a formal conflict diamonds trading crime would serve to strengthen the respective regulatory ratchets in several ways. Primarily it brings clear subject matter clarity between each regulatory level, which heightens awareness between regulators of the relationship and, furthermore, strengthens the awareness of potential perpetrators of the regulatory interest at higher levels of the system. For example, although the ICC and the SLC have both had prosecutions involving conflict diamonds trading, the crimes connected to it have never been labelled specifically as conflict diamonds crimes. In the Charles Taylor case, for example, he was charged with rape, the use of child soldiers, and murder and crimes against humanity, with the conflict diamonds trade used as a way of sheeting home criminal liability to him for the commission of those crimes. While this type of prosecution arguably captures the full extent of his crimes, concurrent prosecution for a more simply defined charge of trafficking in conflict diamonds would arguably have created a stronger conceptual connection back to the Kimberley Process and the UNSC. As is the case at present, concurrent prosecution would not result in more serious sentencing in the event of concurrent convictions, as long as the elements of the crime were captured in the alternative conviction.

A conflict diamonds crime before the international criminal court could be defined in a number of different ways. One definition could attempt to encapsulate the core elements of
the definition, namely, trading in rough diamonds in the knowledge that the proceeds would be used to commit human rights violations. However, other definitions could reinforce its connection “down the pyramid” to other regulators. In particular, there could be a concurrent definition of conflict diamonds trading which was defined as the contravention of UNSC resolutions imposing a ban on trading in diamonds originating from a particular country, along with appropriate *mens rea*. Such an approach would increase the leverage of all the key international regulators. For example, Kimberley Process Review Visits would be able to gather evidence regarding potential conflict diamonds trading in addition to their general functions. The general authority of Kimberley Process review visits would be enhanced by the heightened prospect that an international case may be taken against persons, including government officials and rebel leaders, involved in conflict diamonds trafficking. A Kimberley Process review would be seen much more in terms of the phrase cited by Braithwaite: “speak softly, but carry a large stick”.

Having an internationally defined conflict diamonds crime would also increase the power of the regulatory ratchet as between expulsion from the Kimberley Process and a rough diamond trading ban mandated by a UN Security Council resolution. This is because any breach of a UNSC diamonds trading ban would, by definition, constitute a crime. The relevant persons within that country, whether governmental officials or rebel militia leaders, would be on notice that any contravention of that ban would carry a much greater risk of an international prosecution than simply trading despite expulsion from the Kimberley Process. Furthermore, the UNSC would not be required to take formal referral action to the ICC above and beyond imposing diamond trading sanctions on a particular country. The mere fact of its imposing a diamond trading sanction would alert the ICC that its jurisdiction would be activated in the event of a contravention. The ICC could then activate the “ratchet” by initiating prosecutions in the event of proven contraventions of the UNSC resolution.

In relation to the level of regulation by national governments, the so-called national regulatory pyramid, it is arguable that there need to be further interventions available, both at the base and the apex of the pyramid. At the apex of the pyramid, it is suggested that a clear crime of trafficking in conflict diamonds be enacted. This occurs where the offender knows that the diamonds are connected to the commission of human rights violations. An alternative, perhaps involving a financial rather than imprisonment penalty, is trading in diamonds without due authorisation. This contingency covers the situation where the alleged offender is merely negligent as to ascertaining the nature of the diamonds, or even where conflict-free
diamonds are traded but in the absence of attending to proper procedures and authorisations.

At the bottom end of the national pyramid are initiatives to assist the diamond industry, and the artisanal diamond industry in particular, to be in a better position to be Kimberley compliant. Noting the networked nature of the pyramids being discussed, these initiatives might also connect with the international level. For example, the Kimberley Process established an artisanal diamond mining working group, involving artisanal miners as representatives. Furthermore, significant initiatives have already developed momentum, such as the Development Diamonds Initiative, seeking to enhance practices in the diamond industry which promote human rights and better income returns for artisanal miners themselves. These initiatives, spearheaded at the international level by NGOs, need the significant commitment of national governments to be successful. It is perhaps ironic that the governmental actions of Angola, currently heading the artisanal committee at the Kimberley Process, have come under serious criticism on human rights grounds. In particular, the mass deportation of artisanal miners is of serious concern. An artisanal industry which allows for appropriate incomes, in reasonable working conditions, is less likely to go astray to assist rebel movements.

8.3.3 Insights from the Networked Pyramid of Rewards

As has already been discussed, one of the current challenges before the Kimberley Process is a sensible understanding of its existing mandate. It is unfortunate that elements within the KP continue to focus on a narrow reading, which, by focussing on the connection between the rough diamond trade and civil war, would seemingly exclude serious human rights violations from the definition of “conflict diamonds”. This misunderstanding led the Namibian Chair of the KP, Bernhard Esau, to make the disturbing pronouncement that “the Kimberley Process is not a human rights organisation”. 571 By contrast with this approach, this thesis argues that the KP is quintessentially a human rights organisation, with the breaking of the link between diamonds and serious human rights violations at the very core of its mandate and the definition of “conflict diamonds”. In making this point, a further important distinction arises, well understood in the jurisprudence of international law, between serious violations of human rights which qualify as international crimes, such as crimes against humanity, war crimes and genocide, and other human rights breaches which, although they may also be of a

disturbing nature, do not qualify as international crimes. The category of crimes just mentioned are classified in international law being *jus cogens*, meaning that they are fundamental or peremptory norms of international law. This classification has a number of legal consequences. First of all, exceptions to following these rules which may apply to other rules are not allowed, such as because there is a “state of emergency” at the time: the norm is stated to be “non-derogable”. Another attendant consequence, in terms of crimes classified as *jus cogens*, is that the “obligation to prosecute or extradite” attaches. Above and beyond the standard obligation to implement the provisions of a convention, this an emphatic and specific obligation to either take prosecutorial action through a domestic or international process, or extradite the person to a government or tribunal which will take prosecutorial action. Furthermore, in relation to *jus cogens*, an attendant legal concept applies known as *erga omnes*. This indicates that the international rule is applicable to humanity as a whole. This classification attaches to situations where one country sues another country in a civil international action before a body such as the International Court of Justice. Normally, when international legal action is initiated, procedural rules called “rules of standing” apply, stating that a case can only be brought by a party which has a legal interest in its outcome. In most cases, this means that the party bringing the action must have suffered in some direct way because of the behaviour of the other party. However, where an obligation is *erga omnes*, any country can take an international law suit, as it is considered that humanity as a whole has suffered a loss as a result of the conduct in question.

In a nutshell, it is more accurate to say that conflict diamonds are diamonds connected to “international crimes” rather than simply “human rights violations” for this reason, even though the former is a subset, albeit a more serious subset, of the latter. It is submitted that the connection between international crimes and diamonds is already defined within the parameters of the current KP mandate. The majority of this thesis has been concerned with improving the effectiveness of the KP to achieve its core mandate, hence the focus on the regulatory pyramid, or pyramid of sanctions, to strengthen its ability to deal effectively with issues of serious non-compliance.

It should be noted, however, that the long-term effectiveness of breaking the link between diamonds and international crimes is linked to the more general condition of the artisanal mining fields. Even in the absence of international crimes, reports on the condition of the informal sector in countries such as the DRC and Sierra Leone show it to be in a deplorable state. As discussed in Chapter 2, problems include the prevalence of child labour, unsafe and
unhealthy working conditions, extremely low return for labour (less than a US dollar a day, according to one study), as well as lasting environmental damage to artisanal mining areas. For example, artisanal mining may require extensive periods of digging in mud or dirty water, or, alternatively, spending time in dangerously constructed ad-hoc mine shafts.

This thesis suggests that, in the interests of its own long-term success, the KP vote to extend its mandate to include a broader range of human rights issues and development goals for the artisanal mining sector. To achieve this, the KP might do well to explore the implications of the “pyramid of rewards” theoretical model. While the regulatory pyramid focuses on sanctions and disincentives, the pyramid of rewards focuses on rewards and incentives. A natural juxtaposition between these two models is to propose, in addition to “conflict diamonds”, a counter-part which could be termed the “development diamond”. While the basic concept of the development diamond has already been coined by some of the key NGO players within the Kimberley Process, the main field for work in the area has been removed from the KP itself. An interesting discussion of the politics behind this separation appears in the work by Franziska Bieri entitled From Blood Diamonds to the Kimberley Process: How NGOs Cleaned up the Global Diamond Industry. Through her interviews with key players, she shows that while De Beers was prepared to back the upstart NGO “Development Diamonds Initiative International”, the remaining voices from industry, represented by the World Diamond Council, as well as national governments, were keen to exclude the KP mandate from moving in this direction. A revealing quote from a diamond industry representative put it in these terms:

This is definitely where the NGOs and the industry are not on the same footing. Some people want to glide the Diamond Development Initiative, which is a fantastically positive initiative that has nothing to do with the Kimberley Process, they want to glide that into the Kimberley Process itself. I think that’s a wrong attitude. ... And in the case of the Kimberley Process we are talking about stopping conflict diamonds from happening, and stopping conflicts in especially diamond producing countries in Africa. We are not talking about free trade, and fair trade. And when you talk about DDI you’re talking especially about the fair trade issue. And let’s not be forgetting one little tiny detail. We got away with the WTO waiver on the free trade issue, because in fact we are blocking free trade. I am not so sure that WTO would be willing to extend its waiver to cover also issues like fairer trade and DDI. ... But then of course what you are going to do is you are de facto overloading the scheme, with a fat chance that by doing that the scheme itself will not be very functional any more. And I don’t really fancy that. 572

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572 Interview with Mark Van Bockstael, 27 September 2005, from Bieri, above n 17, 162.
In fact, as long ago as 2006, the government representative from Australia was speaking of the winding up of the Kimberley Process due to the completion of its mandate. These words, it would seem, were a little premature given the emergence of new sources of conflict diamonds from Cote d’Ivoire, Zimbabwe and Angola at around this time, as well as the ongoing problems in the Democratic Republic of the Congo. What it speaks to, it would seem, is a lack of political will on the part of governments to ensure an ongoing role for the KP. Even if conflict diamonds were no longer entering the global system, there ought to be a process for preventing this occurring, should the nexus between international crimes and the rough diamond trade recur: that is, a preventative role is important. The potential uptake by the KP of a broader human rights agenda simply is a reinforcement of this preventative role, through addressing the root causes of the emergence of conflict diamonds. Put simply, if more artisanal miners are able to make a reasonable living, in good conditions, without sending their children to work, then they are less likely to sell the product of their labour to benefit international war criminals.

One of the ironies relating to the “pyramid of rewards” concept, is the fact that, unfortunately, incentives-based approaches have been misused by the international community to exacerbate conflict in central Africa. In particular, the Ugandan and Rwandan governments unfortunately received inappropriate recognition following their alleged plunder of the natural resources of the Congo, including Congolese diamonds. It was reported that the International Monetary Fund and the World Bank actually praised the Rwandan and Ugandan governments for their unexpected increase in GDP which was, according to UNSC reports, based on plunder of the DRC’s natural resources. 573

### 8.4 CONCLUDING REMARKS

This chapter has returned to consider the original thesis research questions: (1) to what extent has the conflict diamonds governance system achieved its objectives? and (2) to what extent does the networked pyramid model provide descriptive and normative insights into the functioning of the conflict diamonds governance system? In responding to the first question, the first sub-question was whether the KP had achieved its objectives. Noting the distinctive

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573 D. Montague and F. Berrigan, “The Business of War in the Democratic Republic of Congo”, Dollars and
collaboration between governments, civil society and industry that constitutes the Kimberley
Process, it has managed in the first instance to socialise the large-scale industry players into
being KP supporters. Beyond this, the quantity of conflict diamonds in the international
system is at low levels, compared with the extremes of the diamond wars of the 1990s. It is,
however, in the area of managing serious non-compliance that the KP now faces its most
serious test. Although it was precocious in dealing with the threat posed by diamonds being
funnelled through the RCB back in 2004, subsequent challenges of equal or greater severity
from Venezuela, Zimbabwe and Angola have been mishandled. In particular, the way in
which the KP has turned a blind eye to gross human rights abuses in the Zimbabwe and
Angolan artisanal fields shows that it is failing in its core mandate, and raises the risk of the
complete collapse of the current arrangements.

The second sub-question considers the extent to which the United Nations Security Council
and the international tribunal system have contributed to the effectiveness of the conflict
diamonds governance system. The UNSC has played a decisive role on the issue of conflict
diamonds and was in large part the midwife of the Kimberley Process by calling for its
implementation in its resolutions. Furthermore, the UNSC has itself embodied important
monitoring and enforcement roles through its expert committees to various affected diamond-
producing countries, and the imposition of diamond trading and other related embargoes.
Finally, the emerging jurisprudence on conflict diamonds from the Sierra Leone Special Court
and the permanent International Criminal Court has provided support to the work of the
UNSC, the KP and national governments. By prosecuting key leaders in the AFRC, RUF,
CDF and Taylor cases, the Special Court has sent a clear message that behaviours such as
using child soldiers, terrorising, murdering and raping civilians in the pursuit of diamond
profits are intrinsically criminal and unacceptable to the international community. This
message is not lost on the participants in the Kimberley Process, who are galvanised by the
prospect of breaking the link between diamond profits and international crime through the
chain of custody system.

The second research question considers the conflict diamonds governance system in the light
of dual networked pyramid model. The analysis is facilitated by breaking the model into its
three components, so as to consider insights based on the network model, the regulatory
pyramid model, and, finally, the pyramid of rewards model. The essence of the networks
model is its reliance on the techniques of dialogue and socialisation to achieve its purposes. The Kimberley Process can be considered as a command-centre, or node, where networks from civil society, national government and the diamond industry engage in dialogue and socialisation. Its successful features largely reflect the benefits described in this model: particularly as can be seen with the strong engagement and commitment of diamond industry major players to the KP. Its use of peer review is another ‘horizontal’ technique which has been used to promote best practice in different countries involved with the KP. It is with reference to the regulatory pyramid, rather than network theory, that the KP’s shortcomings are highlighted.

The regulatory pyramid provides for a range of more coercive interventions where particular regulated parties actively oppose the purpose of the regulatory regime. In terms of the functioning of the KP, expulsion from membership represents a more coercive escalation for situations where a government member is in serious non compliance with KP standards. It is argued that the KP should have taken this step in relation to Venezuela, Zimbabwe and Angola, all of which have actively resisted the core purposes of the KP. This action is important to protect the credibility of the KP, as the failure to remove diamonds originating from these countries from general circulation shows that the conflict-free label provided by KP certification can not be entirely trusted. The development of a new international crime for trading in conflict diamonds would further reinforce the pyramid structure of the conflict diamonds governance system, particularly as the jurisdiction of the international criminal court would automatically be triggered following a breach of UNSC diamond trading sanctions. The enactment of this crime would further strengthen the negotiating hand of the KP, as the consequences for serial conflict diamond offenders would loom larger.

The pyramid of rewards offers a further window of opportunity for the development of the conflict diamonds governance system. Beyond dealing with the current ‘midlife crisis’ it finds itself in, the KP and its collaborators have an opportunity to broaden their horizons in the direction of an incentive-based system focused on the concept of ‘development diamonds’. Building on the important work of the Development Diamond Initiative International, the KP has a great opportunity to engage with the human rights issues associated with alluvial diamond mining in a proactive, incentive-based manner, beyond its existing sphere of activity. The thesis proposes that a system of voluntary certification, aimed at connecting to a ‘fair trade’ niche market in developed countries, accompany the existing system of KP minimum standards. The voluntary certification is made with reference to a number of
proposed aspirational standards, which move beyond the core domain of the existing KP mandate to encompass other issues confronting the artisanal industry: child labour, workplace health and safety standards, appropriate remuneration for work, and environmental standards. When both systems are established, the intention is that a standards-raising regulatory ratchet be created, with today's aspirational standard becoming tomorrow's mandatory standard, without which export is denied. An application of the pyramid of rewards to the conflict diamonds governance system might well reinforce the new aspirational standards with a system of 'naming and faming' to parallel the 'naming and shaming' in the regulatory pyramid. That is, countries, corporations and NGOs making particular progress towards aspirational standards might be singled out for particular encouragement. Beyond this, a system of grants might well be established so as to fund new initiatives towards meeting aspirational standards. The apex of the pyramid of rewards, a Nobel peace prize nomination, would serve as a fitting counterpart to the apex of the regulatory pyramid, international criminal prosecution.
High on the Jungfrau overlooking the town, it had snowed during the night, and for a few moments the clouds broke to reveal the mountain, looming over the town in its brilliant cloak of new white snow. Unresolved issues notwithstanding, it seemed like a metaphor for the event: a brief opening and a small step towards solving a problem that a group of NGOs had been battling for more than four years.

Ian Smillie, on the establishment of the KP in Interlaken, 2002^574

^574 See n 575 below.
9 Did You Hear Something? Concluding Remarks

9.1 Chapter Overview

9.2 Findings

9.3 Recommendations

9.3.1 National Governments

9.3.2 The Kimberley Process

9.3.3 The UN Security Council

9.3.4 The International Criminal Court

9.4 Further Research

9.5 Concluding Remarks
9.1 Chapter Overview

This chapter summarises the main findings of the thesis, in response to the original two research questions. Furthermore, the chapter sets out recommendations for improvement of the conflict diamonds governance system, based on these findings, and directed towards national governments, NGOs, the diamond industry, the KP, the UN Security Council and the International Criminal Court. The chapter then suggests areas for further research, before giving concluding remarks.\(^{575}\)

9.2 Findings

In Chapter 1, I posited two research questions: (1) has the conflict diamonds governance system achieved its objectives? and (2) does the networked pyramid regulatory model provide descriptive and normative insights into that system? Chapter 2 of the thesis outlined the conflict diamonds problem, showing the connection between the rough diamond trade, conflict and serious human rights violations in five African producer nations. The salient features of the networked pyramid regulatory model were set out in Chapter 3, with networks theory explained by processes of persuasion and socialisation, while pyramid elements established a coherent rationale for deploying more coercive interventions in appropriate cases. Chapter 4 introduced the Kimberley Process as the centrepiece of the conflict diamonds governance system, with its import/export certification process established and monitored by industry, government and civil society representatives. The United Nations Security Council and the international tribunals, the conflict diamonds governance system institutions discussed in Chapter 5, have also played key roles through imposing economic sanctions and carrying out international criminal prosecutions. Chapter 6 involved responding to the two original research questions by applying the networked pyramid model in descriptive and normative terms to the conflict diamonds governance system.

In response to the question of whether the conflict diamonds governance system has achieved its objectives, I have argued that, with the reduction of conflict diamond traffic to less than one percent of the world’s diamond trade, there has been a marked improvement since the pre-Kimberley era. It is, furthermore, arguable that the success of peace initiatives in Sierra

Leone, Angola and Liberia have been in part attributable to the conflict diamonds governance system. While it is difficult to assess whether the conflict diamonds governance system has helped in the ongoing problems with Cote d’Ivoire and the DRC, it would appear that the conflict diamonds governance system has fallen short of the mark in its response to the emergence of conflict diamonds in Zimbabwe. The seeming inability of the system to grapple with persistent non-compliance by Venezuela has posed a further challenge.

Analysis of the reasons for the conflict diamonds governance system’s level of success to date must start with its proven ability to bring together the vast majority of the rough diamond industry, together with the vast majority of national governments, and concerned NGOs, to combat the issue. In an industry that was once considered opaque, the publication of global diamond statistics is a huge breakthrough in transparency. Other monitoring, through annual reports and peer reviews, has a proven ability to highlight relevant issues of non-compliance. The Kimberley Process has even had some level of success with situations of serious non-compliance. On the lower end of the scale, efficacy of the peer review system to promote normative compliance was demonstrated in the case of Brazil. Once its problems had been highlighted by an NGO report, and confirmed by a Kimberley Review Visit, Brazil acted conscientiously in taking legal action against illicit trafficking. Another example of success was the initiative taken by the Kimberley Chair, occupied at that time by the Canadian government, in expelling the Republic of Congo from membership when it became clear that that country was a conduit for smuggled DRC diamonds.

The conflict diamonds governance system has not been unqualified success. It faces three major problems: the continued role of conflict diamonds in ongoing conflicts in Cote d’Ivoire, the DRC and Zimbabwe; the serious non-compliance, and active resistance of two of its members, namely Zimbabwe and Venezuela; and the threat that, ironically, the Kimberley Process may become a victim of its own success, with some governments calling for it to be dissolved. Of these threats, the inability of the Kimberley Process to deal with the active resistance of its own membership is the most serious. This is because this threat represents not uncertainty in the potential result of Kimberley Process action, but the actual failure to take action. The continued flow of Venezuela’s diamonds represents an open breach by which conflict diamonds might contaminate the Kimberley chain of custody, while the Zimbabwean case is worse, in that it enables the continued flow of Zimbabwean conflict diamonds into the Kimberley system. It appears a little ironic that the Kimberley Process was able to deal with
serious non-compliance by the Republic of Congo early in its mandate, with the chair expelling it from membership following a rapidly deployed Review Visit, but similar action has not been forthcoming in the cases of Zimbabwe and Venezuela. Certainly, this type of discrepancy leaves the Kimberley Process open to the criticism, as suggested by Global Witness in its research interview response, that the effectiveness of the response is largely dictated by which person is the occupant of the Kimberley Process rotating Chair. Perhaps the same argument, put differently, is that there is no clear procedure for dealing with situations of serious non-compliance, including which body (whether the Chair or the Plenary) is empowered to act. If it is the Plenary which is so empowered, there is a further problem in relation to the choosing of “consensus” as the mode of decision-making. Consensus by the Plenary voting membership in a decision to expel a national government from the Kimberley Process for serious non-compliance is well nigh impossible to achieve. If expulsion is to be a regulatory ratchet available to the Kimberley Process, then a majority vote by the Plenary is the only viable option.

The Kimberley Process has proven itself able to evolve since the decision to finalise its founding Agreement in 2002. Two important examples are the peer review mechanism and the artisanal diamond working group. When the Kimberley Process Agreement was finalised, there was no monitoring mechanism included in its provisions. Led by NGOs, the Kimberley Process agreed within its own plenary membership to the creation of the Working Group on Monitoring and the Participation Committee and the central mechanism of peer review, which has been central to the amount of success that the Kimberley Process has enjoyed to date. Another example, also on the initiative of NGOs, was the Artisanal Mining Working Group. Aware of the centrality of artisanal diamond mining to the problem of conflict diamonds, the Plenary was able to approve the creation of a committee mandated to assist with the working conditions of artisanal miners globally. It is this ability to evolve which is now being challenged in relation to its ability to deal with issues of serious non-compliance. Also needing to be addressed is the formalisation within the Kimberley Process agreement, and backed up by UN Security Council resolution, that the definition of conflict diamonds includes diamonds which are connected to human rights violations even in situations where there is no ongoing conflict.

Armed with a clear picture of both the success and failure to date of the conflict diamonds governance system, it is possible to consider insights which may be gained by analysing it in the light of the networked pyramid regulatory model. The coming together of NGOs, industry
and governments to create the Kimberley Process is almost by definition a network approach. It has, almost exclusively, relied upon methods of persuasion and socialisation, rather than coercion and punitive action, to date. The discussion which occurs in the Kimberley Plenary, the information shared by industry about technical issues or NGOs about compliance issues, the informal naming and shaming as a result of peer review visits all represent the standard tool-kit of networked governance. Such approaches confirm what has already been suggested in the literature to date, that networked governance can achieve a great deal. Beyond this statement, the Kimberley Process itself has a contribution to make towards networks theory. One of the features of Kimberley which is not accounted for in networks theory is that fact that, as a network, it embodies a ‘separation of interests’. This constitutionalist model operates to create checks and balances in the regulatory operation of the Process. As such, it represents a very different type of network to the networked regulation of the intellectual property regime. While the initial driver for the IP regime was the profit motive of corporations, supported by the US national government, the Kimberley Process set itself up, at least in the short term, as a break on free-for-all profit maximisation by the international diamond industry. The role of NGOs and enlightened national governments has been to help socialise big business into choosing long-term enlightened self-interest over short-term profit maximisation. It has been remarkably successful in this effort, with the diamond industry major players coming on board. This task has naturally been a lot more difficult than promoting immediate self-interest. The ‘separation of interests’ model establishes a more robust organisational model whereby such a socialisation process can occur. Furthermore, it now faces significant challenges in confronting the immediate self-interest of a number of key national government participants.

The network theory concept of a ‘node’ is a valuable tool in recognising the potential of the Kimberley Process to ‘ratchet up’ interventions by engaging with higher level regulators such as the UNSC and the international criminal tribunals. The further insights into enhancing the conflict diamonds governance system, however, relate more to the domain of pyramid than networks theory. Part of the success to date of the Kimberley Process has to be credited to the ongoing efforts of both the UNSC and the international tribunals. However, there are a number of ways in which the regulatory ratchet from expulsion to UN sanctions to international prosecutions can be strengthened. Chief amongst these is the creation of an international crime of trafficking in conflict diamonds, which is defined in the International Criminal Court statute in terms of a contravention of UNSC diamond trading sanctions. With
the benefit of such an amendment, the threat of escalation to the UNSC and then the International Criminal Court becomes more meaningful, thereby enhancing the ability of the Kimberley Process to “carry a big stick” at the same time as it speaks softly. The enactment of a crime of trafficking in conflict diamonds at the domestic level would be a logical progression of this connection. Furthermore, it would create a fitting “apex” a regulatory pyramid at the domestic level: the “pyramid within the pyramid”. The base of the national pyramid also needs attention, as national government backing to initiatives such as the Development Diamonds Initiative would assist working conditions for artisanal diamond miners, thereby reducing the incentive to sell to illegal operatives engaged in human rights abuses.

9.3 RECOMMENDATIONS

9.3.1 NATIONAL GOVERNMENTS

- Rough diamond producing countries to implement sufficient “internal controls” to ensure the integrity of KP certificates issued at the point of export;
- Producer nations might seek the assistance of developed countries and NGOs to promote the achievement of “development diamond” aspirational standards in their artisanal mining industries, especially freedom from child labour;
- Cutting/polishing national jurisdictions, especially India and Israel, must put in place stronger legislation, and regulatory approaches, to combat the use of child labour in this sector.

9.3.2 THE KIMBERLEY PROCESS

- It is recommended that the Kimberley Process clarify that the definition of ‘conflict diamonds’ encompasses rough diamonds associated with the commission of international crimes such as war crimes, crimes against humanity and genocide;
- It is recommended that the Kimberley Process clarify its procedures concerning serious non-compliance so as to emphasise that governments openly trading in conflict diamonds must be expelled from the KP;
- It is recommended that Zimbabwe be expelled from the KP as a result of serious non-compliance in relation to the blood diamonds originating from the Marange region;
- It is recommended that Angola be the subject of a KP review visit focussing on the
alleged commission of international crimes in relation to the expulsion of artisanal miners from that country to the DRC;

- It is recommended that the KP extend its mandate to encompass the concept of "development diamonds", defined in terms of achieving aspirational human rights standards, such as the freedom from child labour in diamond mining and diamond cutting/polishing sectors;

- In adopting a "development diamonds" agenda, it is recommended that diamonds produced in accordance with higher human rights standards be certified with the label "development diamonds" so as to provide these producers with access to fair trading markets in developed countries;

- It is recommended that the KP consider a range of incentives-based approaches in relation, particularly, to its proposed new mandate. These might include "naming and shaming", as well as provision of development grants and international recognition through prestigious awards.

9.3.3 The UN Security Council

- It is recommended that the UNSC pass a binding resolution clarifying that the definition of ‘conflict diamonds’ includes rough diamonds associated with the commission of international crimes such as war crimes, crimes against humanity and genocide;

- It is recommended that the UNSC impose diamond trading embargoes on Zimbabwe and Angola as a result of the ongoing conflict diamond problem in those countries.

9.3.4 The International Criminal Tribunals

- It is recommended that the Rome Statute of the International Criminal Court 1998 be amended so as to incorporate explicitly a crime of trafficking in conflict diamonds, defined in terms of contravening a UNSC diamond embargo;

- It is recommended that the ICC Prosecutor investigate the situations in the artisanal diamond mining fields of Zimbabwe and Angola to determine whether to initiate prosecutions for alleged international crimes committed in those countries.
9.4 **FURTHER RESEARCH**

Further research projects might relate both to the theoretical and empirical investigations of this dissertation. On the theoretical side, the “dual networked pyramid” model might usefully be applied to other complex international systems, such as the intellectual property system, so as to determine its strengths and weaknesses in other contexts. In relation to the conflict diamonds governance system, further studies might investigate the extent to which the KP is responsive to undertaking a wider mandate based around the concept of “development diamonds”.

9.5 **CONCLUDING REMARKS**

This chapter has summarised the findings of the thesis in response to the two thesis research questions. Question one sought to assess how effective the conflict diamonds governance system has been in meeting its goals. In response, the thesis argues that it has achieved a measure of success, notably reducing the quantity of conflict diamonds in the international system from estimates as high as fifteen percent in the 1990s to less than one percent in recent years, and establishing an innovative tripartite partnership which has socialised the major diamond industry players into becoming active proponents of the Kimberley Process. The system as a whole is able to draw on a range of enforcement mechanisms, from ‘horizontal’ peer review and informal naming and shaming, to expulsion for serious non compliance, and, through its networked relationship with the UNSC and international tribunals, UNSC diamond embargoes and international criminal prosecutions.

Despite the measure of success it has achieved, the Kimberley Process and its collaborators have fallen into a state of deepening crisis, beginning with its inability to manage serious non compliance by Venezuela in 2006. Even worse, the KP did not act decisively following the commission of international human rights crimes by Zimbabwe and Angola in artisanal diamond fields in those countries. This inability to quarantine conflict diamonds from Zimbabwe and Angola from the KP regime continues to undermine the legitimacy of the conflict diamonds system and may lead to complete system failure.

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576 For discussion about estimates of the quantity of the conflict diamonds trade, see Chapter 2.
The second question asks whether the dual networked pyramid model offers a description of how conflict diamonds governance currently operates or, furthermore, if it may be deployed normatively so as to suggest ways in which the system might be improved. The networked pyramid model is a hybrid, combining insights from networks theory, the regulatory pyramid model and the pyramid of rewards. Networks theory suggests that regulation occurs through the combined operation of different individuals and organisations, which are considered roughly on equal terms. Its main regulatory techniques are dialogue and persuasion, as well as informal naming and shaming, which, altogether, create a process of socialisation towards compliance with a particular set of standards. Networks theory is an intuitive fit for the Kimberley Process, which combines networks of national governments, NGOs and diamond industry corporations. Acting as a command-centre or node for these networks, the Kimberley Process is able to collect information and deploy a range of regulatory interventions, including peer review reporting, which largely resembles the informal naming and shaming of networks theory. Indeed, one of the most dramatic examples of socialisation in the KP is the manner in which major diamond corporation, and alleged conflict diamonds trader, De Beers, became a stalwart proponent of the new system.

It is, however, the regulatory pyramid model which is best able to give insight into the deployment of more coercive interventions, where these are appropriate. The conflict diamonds governance system intuitively fits this model, with regulation at the national level regulated by the informal naming and shaming of the KP peer review process. The system appears to be floundering, however, in being capable of ratchetting up from here to expulsion from the KP in the event of serious non compliance. To achieve this, the KP needs to clearly define what constitutes serious non compliance, clarify that the definition of ‘conflict diamonds’ includes diamonds connected to grave human rights abuses, abandon the ‘consensus’ approach to these issues when considered by the Plenary, and empower the rotating Kimberley Chair to take expeditious expulsion decisions where time is of the essence.

Further improvements to current KP governance involve strengthening links to regulators at higher levels of the regulatory pyramid: namely the UNSC and the International Criminal Court. The UNSC has at its disposal a more powerful diamond embargo than the KP, as it is binding under international law. It would serve to strengthen the effectiveness of the system if the UNSC saw itself as a type of appeals body in relation to the KP. That way, a serious non compliance issue might be forwarded to it for consideration, or it might consider the issue on
its own motion, and imposing a diamond embargo in situations where, for political or other reasons, the KP has failed to act. Such action would strengthen the hand of the KP, making it clear to member states in serious non compliance that the UNSC will take action if the KP doesn’t. Contemplation of conflict diamonds governance in terms of the regulatory pyramid gives further insights into how the ‘ratchetting up’ pathway might be strengthened. Legislating for a specific crime of trading in conflict diamonds under the statute of the International Criminal Court would be a strengthening measure, particularly if the new crime was defined in terms of breaching UNSC diamond trading embargoes. If such a crime were created, then the UNSC diamond trading embargo would be strengthened as an intervention, because sanctions busting would carry with it the possibility of international criminal prosecution. All of these developments at the UNSC and international tribunal levels would strengthen the hand of the KP in carrying out its activities. This is because responsiveness to the KP “speaking softly” would be increased so as to avoid the possibility of the “big stick”.

The KP is in a state of crisis and needs to consider seriously the measures suggested above so as to protect the integrity of its activities from the taint of conflict diamonds originating from Zimbabwe and Angola. Without diminishing the importance of this primary activity, an organisation is sometimes bolstered by envisioning a future for itself above and beyond the crisis it finds itself in. If the KP is to move beyond simply “fixing” its current problems, and look at a longer term preventative mandate, it would do well to reflect on insights available from the “pyramid of rewards”. This model is the “carrot” to the regulatory pyramid’s “stick”. It promotes the concept of “development diamonds” voluntarily certified against aspirational standards as a counterpoint to diamonds which must be certified as conflict-free prior to export. If artisanal diamonds are mined without, for example, the use of child labour, they would qualify for the “development diamonds” label which would enable them to access greater profits through being sold as a “fair trade” commodity. Should the KP become the central administrator of this system, it could generate a standards-raising regulatory ratchet, whereby today’s aspirational standard becomes tomorrow’s mandatory standard, without which rough diamond export would be prohibited. Beyond the certification of development diamonds, a system of escalating rewards might include the practice of “naming and faming” NGOs, industry groups and national governments who have made the greatest progress towards aspirational standards. A notch up, grants might be made available for projects supporting the achievement of aspirational standards. At the apex of the pyramid, if it had been merited, might be nomination for a Nobel Peace Prize.
This chapter has also included a number of recommendations to national governments, the Kimberley Process, the UN Security Council and international criminal tribunals for action to strengthen the conflict diamonds governance system. Finally, the chapter has suggested new areas for further research, in relation to both theoretical areas of interest and the conflict diamonds governance system.
GLOSSARY: ACRONYMS

ADFL – Alliance of Democratic Force for the Liberation of Congo (Congo, militia which became the government of the Democratic Republic of Congo)
AFRC – Armed Forces Ruling Council (Sierra Leone, rebel militia)
DRC – Democratic Republic of Congo
ECOMOG – Economic Community of West African States Cease-Fire Monitoring Group
FNI – Front for National Integration (Congo, rebel militia)
FNLA – National Liberation Front of Angola (rebel militia)
FRPI – Patriotic Force of Resistance in Ituri (Congo, rebel militia)
ILO – International Labour Organisation
IMF - International Monetary Fund
NAFTA - North Atlantic Free Trade Area
MLC – Congolese Liberation Movement
MONUC – United Nations Mission in the Democratic Republic of Congo
MPLA – Popular Movement for the Liberation of Angola (militia which became the government of Angola)
OECD – Organisation of Economic Cooperation and Development (check)
RCD – Congolese Rally for Democracy (Congo, rebel militia, which later split into three groups: RCD-Goma, RCD-National and RCD-ML)
RUF – Revolutionary United Front (Sierra Leone, rebel militia)
UNDP – United Nations Development Program
UNITA – National Union for the Total Independence of Angola (rebel militia)
UNOCI – United Nations Operations in Cote d’Ivoire
UNOMSIL – United Nations Operation Monitoring Sierra Leone
UPC – Union of Congolese Patriots (Congo, rebel militia)
GLOSSARY: DIAMOND INDUSTRY TERMS

Carat
Unit of measurement of a diamond, there are five carats to one gram. Diamonds vary from a fraction of one carat up to a very rare couple of thousand. In trade a stone of sixty carats would be considered large.

The 4 “C”s
Colour, clarity, cut, carat. These four factors are considered when valuing a stone.

Colour
Diamonds come in a wide range of hues, tints and colours; they can be described as whitish, yellowish, greenish, brownish, pinkish, bluish and so on. Stones from different countries can vary in colour.

Inclusions
The particles and matter sometimes found within a diamond.

Rough
Rough diamonds are unworked, and in their natural state.

Polished
The term used to described stones when they have been worked. Up to fifty per cent of the diamond can be lost when polished, depending on the shape of the stone.

Gem
The highest quality of diamond, which is normally in high demand and commands top prices

Quality

Parcel
This is a quantity of diamonds, and can vary from 10 carats up to thousands of carats

Mixed
This is a parcel of rough diamonds from more than one country

Parcel

Garimpeiros
Illegal miners, usually artisanal
(Angola)

Comptoir
Small-scale diamond buyers, who act as middlemen
(Angola)

Kimberlite
The name of a type of diamond and the type of mine it is extracted from, which has deep subterranean volcanic pipes.

Alluvial
The name of a type of diamond and the type of shallow mine it is extracted from, with diamonds found in river beds and in shallow deposits. A form of mine that can be exploited by artisanal techniques

Artisanal
A small-scale miner of alluvial deposits, tools are typically simple, such as shovels and hand sieves.

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ANNEX I: THE KIMBERLEY PROCESS CORE DOCUMENT

KIMBERLEY PROCESS CERTIFICATION SCHEME

PREAMBLE

PARTICIPANTS,

RECOGNISING that the trade in conflict diamonds is 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;

FURTHER RECOGNISING the devastating impact of conflicts fuelled by the trade in conflict diamonds on the peace, safety and security of people in affected countries and the systematic and gross human rights violations that have been perpetrated in such conflicts;

NOTING the negative impact of such conflicts on regional stability and the obligations placed upon states by the United Nations Charter regarding the maintenance of international peace and security;

BEARING IN MIND that urgent international action is imperative to prevent the problem of conflict diamonds from negatively affecting the trade in legitimate diamonds, which makes a critical contribution to the economies of many of the producing, processing, exporting and importing states, especially developing states;

RECALLING all of the relevant resolutions of the United Nations Security Council under Chapter VII of the United Nations Charter, including the relevant provisions of Resolutions 1173 (1998), 1295 (2000), 1306 (2000), and 1343 (2001), and determined to contribute to and support the implementation of the measures provided for in these resolutions;

HIGHLIGHTING the United Nations General Assembly Resolution 55/56 (2000) on the role of the trade in conflict diamonds in fuelling armed conflict, which called on the international community to give urgent and careful consideration to devising effective and pragmatic measures to address this problem;

FURTHER HIGHLIGHTING the recommendation in United Nations General Assembly Resolution 55/56 that the international community develop detailed proposals for a simple and workable international certification scheme for rough diamonds based primarily on national certification schemes and on internationally agreed minimum standards;

RECALLING that the Kimberley Process, which was established to find a solution to the international problem of conflict diamonds, was inclusive of concerned stake holders, namely producing, exporting and importing states, the diamond industry and civil society;

CONVINCED that the opportunity for conflict diamonds to play a role in fuelling armed conflict can be seriously reduced by introducing a certification scheme for rough diamonds designed to exclude conflict diamonds from the legitimate trade;

RECALLING that the Kimberley Process considered that an international certification scheme for rough diamonds, based on national laws and practices and meeting internationally agreed minimum standards, will be the most effective system by which the
problem of conflict diamonds could be addressed;

ACKNOWLEDGING the important initiatives already taken to address this problem, in particular by the governments of Angola, the Democratic Republic of Congo, Guinea and Sierra Leone and by other key producing, exporting and importing countries, as well as by the diamond industry, in particular by the World Diamond Council, and by civil society;

WELCOMING voluntary self-regulation initiatives announced by the diamond industry and recognising that a system of such voluntary self-regulation contributes to ensuring an effective internal control system of rough diamonds based upon the international certification scheme for rough diamonds;

RECOGNISING that an international certification scheme for rough diamonds will only be credible if all Participants have established internal systems of control designed to eliminate the presence of conflict diamonds in the chain of producing, exporting and importing rough diamonds within their own territories, while taking into account that differences in production methods and trading practices as well as differences in institutional controls thereof may require different approaches to meet minimum standards;

FURTHER RECOGNISING that the international certification scheme for rough diamonds must be consistent with international law governing international trade;

ACKNOWLEDGING that state sovereignty should be fully respected and the principles of equality, mutual benefits and consensus should be adhered to;

RECOMMEND THE FOLLOWING PROVISIONS:

SECTION I
Definitions

For the purposes of the international certification scheme for rough diamonds (hereinafter referred to as “the Certification Scheme”) the following definitions apply:

CONFLICT DIAMONDS means rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments, as described in relevant United Nations Security Council (UNSC) resolutions insofar as they remain in effect, or in other similar UNSC resolutions which may be adopted in the future, and as understood and recognised in United Nations General Assembly (UNGA) Resolution 55/56, or in other similar UNGA resolutions which may be adopted in future;

COUNTRY OF ORIGIN means the country where a shipment of rough diamonds has been mined or extracted;

COUNTRY OF PROVENANCE means the last Participant from where a shipment of rough diamonds was exported, as recorded on import documentation;

DIAMOND means a natural mineral consisting essentially of pure crystallised carbon in the isometric system, with a hardness on the Mohs (scratch) scale of 10, a specific gravity of approximately 3.52 and a refractive index of 2.42;

EXPORT means the physical leaving/taking out of any part of the geographical territory of a Participant;
EXPORTING AUTHORITY means the authority(ies) or body(ies) designated by a Participant from whose territory a shipment of rough diamonds is leaving, and which are authorised to validate the Kimberley Process Certificate;

FREE TRADE ZONE means a part of the territory of a Participant where any goods introduced are generally regarded, insofar as import duties and taxes are concerned, as being outside the customs territory;

IMPORT means the physical entering/bringing into any part of the geographical territory of a Participant;

IMPORTING AUTHORITY means the authority(ies) or body(ies) designated by a Participant into whose territory a shipment of rough diamonds is imported to conduct all import formalities and particularly the verification of accompanying Kimberley Process Certificates;

KIMBERLEY PROCESS CERTIFICATE means a forgery resistant document with a particular format which identifies a shipment of rough diamonds as being in compliance with the requirements of the Certification Scheme;

OBSERVER means a representative of civil society, the diamond industry, international organisations and non-participating governments invited to take part in Plenary meetings; (Further consultations to be undertaken by the Chair.)

PARCEL means one or more diamonds that are packed together and that are not individualised;

PARCEL OF MIXED ORIGIN means a parcel that contains rough diamonds from two or more countries of origin, mixed together;

PARTICIPANT means a state or a regional economic integration organisation for which the Certification Scheme is effective; (Further consultations to be undertaken by the Chair.)

REGIONAL ECONOMIC INTEGRATION ORGANISATION means an organisation comprised of sovereign states that have transferred competence to that organisation in respect of matters governed by the Certification Scheme;

ROUGH DIAMONDS means diamonds that are unworked or simply sawn, cleaved or bruted and fall under the Relevant Harmonised Commodity Description and Coding System 7102.10, 7102.21 and 7102.31;

SHIPMENT means one or more parcels that are physically imported or exported;

TRANSIT means the physical passage across the territory of a Participant or a non-Participant, with or without transshipment, warehousing or change in mode of transport, when such passage is only a portion of a complete journey beginning and terminating beyond the frontier of the Participant or non-Participant across whose territory a shipment passes;

SECTION II
The Kimberley Process Certificate

Each Participant should ensure that:
(a) a Kimberley Process Certificate (hereafter referred to as the Certificate) accompanies
each shipment of rough diamonds on export;

(b) its processes for issuing Certificates meet the minimum standards of the Kimberley Process as set out in Section IV;

(c) Certificates meet the minimum requirements set out in Annex I. As long as these requirements are met, Participants may at their discretion establish additional characteristics for their own Certificates, for example their form, additional data or security elements;

(d) it notifies all other Participants through the Chair of the features of its Certificate as specified in Annex I, for purposes of validation.

SECTION III
Undertakings in respect of the international trade in rough diamonds

Each Participant should:
(a) with regard to shipments of rough diamonds exported to a Participant, require that each such shipment is accompanied by a duly validated Certificate;

(b) with regard to shipments of rough diamonds imported from a Participant:
  • require a duly validated Certificate;
  • ensure that confirmation of receipt is sent expeditiously to the relevant Exporting Authority. The confirmation should as a minimum refer to the Certificate number, the number of parcels, the carat weight and the details of the importer and exporter;
  • require that the original of the Certificate be readily accessible for a period of no less than three years;

(c) ensure that no shipment of rough diamonds is imported from or exported to a non-Participant;

(d) recognise that Participants through whose territory shipments transit are not required to meet the requirement of paragraphs (a) and (b) above, and of Section II (a) provided that the designated authorities of the Participant through whose territory a shipment passes, ensure that the shipment leaves its territory in an identical state as it entered its territory (i.e. unopened and not tampered with).

SECTION IV
Internal Controls

Undertakings by Participants

Each Participant should:
(a) establish a system of internal controls designed to eliminate the presence of conflict diamonds from shipments of rough diamonds imported into and exported from its territory;

(b) designate an Importing and an Exporting Authority(ies);

(c) ensure that rough diamonds are imported and exported in tamper resistant containers;

(d) as required, amend or enact appropriate laws or regulations to implement and enforce
the Certification Scheme and to maintain dissuasive and proportional penalties for transgressions;

(e) collect and maintain relevant official production, import and export data, and collate and exchange such data in accordance with the provisions of Section V.

(f) when establishing a system of internal controls, take into account, where appropriate, the further options and recommendations for internal controls as elaborated in Annex II.

Principles of Industry Self-Regulation
Participants understand that a voluntary system of industry self-regulation, as referred to in the Preamble of this Document, will provide for a system of warranties underpinned through verification by independent auditors of individual companies and supported by internal penalties set by industry, which will help to facilitate the full traceability of rough diamond transactions by government authorities.

Section V
Co-operation and Transparency

Participants should:

(a) provide to each other through the Chair information identifying their designated authorities or bodies responsible for implementing the provisions of this Certification Scheme. Each Participant should provide to other Participants through the Chair information, preferably in electronic format, on its relevant laws, regulations, rules, procedures and practices, and update that information as required. This should include a synopsis in English of the essential content of this information;

(b) compile and make available to all other Participants through the Chair statistical data in line with the principles set out in Annex III;

(c) exchange on a regular basis experiences and other relevant information, including on self-assessment, in order to arrive at the best practice in given circumstances;

(d) consider favourably requests from other Participants for assistance to improve the functioning of the Certification Scheme within their territories;

(e) inform another Participant through the Chair if it considers that the laws, regulations, rules, procedures or practices of that other Participant do not ensure the absence of conflict diamonds in the exports of that other Participant;

(f) cooperate with other Participants to attempt to resolve problems which may arise from unintentional circumstances and which could lead to non-fulfilment of the minimum requirements for the issuance or acceptance of the Certificates, and inform all other Participants of the essence of the problems encountered and of solutions found;

(g) encourage, through their relevant authorities, closer co-operation between law enforcement agencies and between customs agencies of Participants.
Section VI
Administrative Matters

MEETINGS
1. Participants and Observers are to meet in Plenary annually, and on other occasions as Participants may deem necessary, in order to discuss the effectiveness of the Certification Scheme.

2. Participants should adopt Rules of Procedure for such meetings at the first Plenary meeting.

3. Meetings are to be held in the country where the Chair is located, unless a Participant or an international organisation offers to host a meeting and this offer has been accepted. The host country should facilitate entry formalities for those attending such meetings.

4. At the end of each Plenary meeting, a Chair would be elected to preside over all Plenary meetings, ad hoc working groups and other subsidiary bodies, which might be formed until the conclusion of the next annual Plenary meeting.

5. Participants are to reach decisions by consensus. In the event that consensus proves to be impossible, the Chair is to conduct consultations.

ADMINISTRATIVE SUPPORT
6. For the effective administration of the Certification Scheme, administrative support will be necessary. The modalities and functions of that support should be discussed at the first Plenary meeting, following endorsement by the UN General Assembly.

7. Administrative support could include the following functions:
   (a) to serve as a channel of communication, information sharing and consultation between the Participants with regard to matters provided for in this Document;

   (b) to maintain and make available for the use of all Participants a collection of those laws, regulations, rules, procedures, practices and statistics notified pursuant to Section V;

   (c) to prepare documents and provide administrative support for Plenary and working group meetings;

   (d) to undertake such additional responsibilities as the Plenary meetings, or any working group delegated by Plenary meetings, may instruct.

PARTICIPATION
8. Participation in the Certification Scheme is open on a global, non-discriminatory basis to all Applicants willing and able to fulfill the requirements of that Scheme.

9. Any applicant wishing to participate in the Certification Scheme should signify its interest by notifying the Chair through diplomatic channels. This notification should include the information set forth in paragraph (a) of Section V and be circulated to all Participants within one month.

10. Participants intend to invite representatives of civil society, the diamond industry, non-participating governments and international organizations to participate in Plenary meetings as Observers.
PARTICIPANT MEASURES

11. Participants are to prepare, and make available to other Participants, in advance of annual Plenary meetings of the Kimberley Process, information as stipulated in paragraph (a) of Section V outlining how the requirements of the Certification Scheme are being implemented within their respective jurisdictions.

12. The agenda of annual Plenary meetings is to include an item where information as stipulated in paragraph (a) of Section V is reviewed and Participants can provide further details of their respective systems at the request of the Plenary.

13. Where further clarification is needed, Participants at Plenary meetings, upon recommendation by the Chair, can identify and decide on additional verification measures to be undertaken. Such measures are to be implemented in accordance with applicable national and international law. These could include, but need not be limited to measures such as;
   a. requesting additional information and clarification from Participants;
   b. review missions by other Participants or their representatives where there are credible indications of significant non-compliance with the Certification Scheme.

14. Review missions are to be conducted in an analytical, expert and impartial manner with the consent of the Participant concerned. The size, composition, terms of reference and time-frame of these missions should be based on the circumstances and be established by the Chair with the consent of the Participant concerned and in consultation with all Participants.

15. A report on the results of compliance verification measures is to be forwarded to the Chair and to the Participant concerned within three weeks of completion of the mission. Any comments from that Participant as well as the report, are to be posted on the restricted access section of an official Certification Scheme website no later than three weeks after the submission of the report to the Participant concerned. Participants and Observers should make every effort to observe strict confidentiality regarding the issue and the discussions relating to any compliance matter.

COMPLIANCE AND DISPUTE PREVENTION

16. In the event that an issue regarding compliance by a Participant or any other issue regarding the implementation of the Certification Scheme arises, any concerned Participant may so inform the Chair, who is to inform all Participants without delay about the said concern and enter into dialogue on how to address it. Participants and Observers should make every effort to observe strict confidentiality regarding the issue and the discussions relating to any compliance matter.

MODIFICATIONS

17. This document may be modified by consensus of the Participants.

18. Modifications may be proposed by any Participant. Such proposals should be sent in writing to the Chair, at least ninety days before the next Plenary meeting, unless otherwise agreed.

19. The Chair is to circulate any proposed modification expeditiously to all Participants and Observers and place it on the agenda of the next annual Plenary meeting.

REVIEW MECHANISM

20. Participants intend that the Certification Scheme should be subject to periodic review, to allow Participants to conduct a thorough analysis of all elements contained in the scheme.
The review should also include consideration of the continuing requirement for such a scheme, in view of the perception of the Participants, and of international organisations, in particular the United Nations, of the continued threat posed at that time by conflict diamonds. The first such review should take place no later than three years after the effective starting date of the Certification Scheme. The review meeting should normally coincide with the annual Plenary meeting, unless otherwise agreed.

THE START OF THE IMPLEMENTATION OF THE SCHEME
21. The Certification Scheme should be established at the Ministerial Meeting on the Kimberley Process Certification Scheme for Rough Diamonds in Interlaken on 5 November 2002.

22. ANNEX I
Certificates

A. Minimum requirements for Certificates

A Certificate is to meet the following minimum requirements:

- Each Certificate should bear the title “Kimberley Process Certificate” and the following statement: “The rough diamonds in this shipment have been handled in accordance with the provisions of the Kimberley Process Certification Scheme for rough diamonds”
- Country of origin for shipment of parcels of unmixed (i.e. from the same) origin
- Certificates may be issued in any language, provided that an English translation is incorporated
- Unique numbering with the Alpha 2 country code, according to ISO 3166-1
- Tamper and forgery resistant
- Date of issuance
- Date of expiry
- Issuing authority
- Identification of exporter and importer
- Carat weight/mass
- Value in US$
- Number of parcels in shipment
- Relevant Harmonised Commodity Description and Coding System
- Validation of Certificate by the Exporting Authority

B. Optional Certificate Elements

A Certificate may include the following optional features:

- Characteristics of a Certificate (for example as to form, additional data or security elements)
- Quality characteristics of the rough diamonds in the shipment
- A recommended import confirmation part should have the following elements:
  - Country of destination
  - Identification of importer
  - Carat/weight and value in US$
  - Relevant Harmonised Commodity Description and Coding System
  - Date of receipt by Importing Authority
  - Authentication by Importing Authority

C. Optional Procedures
Rough diamonds may be shipped in transparent security bags. The unique Certificate number may be replicated on the container.

Annex II
Recommendations as provided for in Section IV, paragraph (f)

General Recommendations
1. Participants may appoint an official coordinator(s) to deal with the implementation of the Certification Scheme.

2. Participants may consider the utility of complementing and/or enhancing the collection and publication of the statistics identified in Annex III based on the contents of Kimberley Process Certificates.

3. Participants are encouraged to maintain the information and data required by Section V on a computerised database.

4. Participants are encouraged to transmit and receive electronic messages in order to support the Certification Scheme.

5. Participants that produce diamonds and that have rebel groups suspected of mining diamonds within their territories are encouraged to identify the areas of rebel diamond mining activity and provide this information to all other Participants. This information should be updated on a regular basis.

6. Participants are encouraged to make known the names of individuals or companies convicted of activities relevant to the purposes of the Certification Scheme to all other Participants through the Chair.

7. Participants are encouraged to ensure that all cash purchases of rough diamonds are routed through official banking channels, supported by verifiable documentation.

8. Participants that produce diamonds should analyse their diamond production under the following headings:
- Characteristics of diamonds produced
- Actual production

Recommendations for Control over Diamond Mines
9. Participants are encouraged to ensure that all diamond mines are licensed and to allow only those mines so licensed to mine diamonds.

10. Participants are encouraged to ensure that prospecting and mining companies maintain effective security standards to ensure that conflict diamonds do not contaminate legitimate production.

Recommendations for Participants with Small-scale Diamond Mining
11. All artisanal and informal diamond miners should be licensed and only those persons so licensed should be allowed to mine diamonds.

12. Licensing records should contain the following minimum information: name, address, nationality and/or residence status and the area of authorised diamond mining activity.

Recommendations for Rough Diamond Buyers, Sellers and Exporters
13. All diamond buyers, sellers, exporters, agents and courier companies involved in carrying rough diamonds should be registered and licensed by each Participant's relevant authorities.

14. Licensing records should contain the following minimum information: name, address and nationality and/or residence status.

15. All rough diamond buyers, sellers and exporters should be required by law to keep for a period of five years daily buying, selling or exporting records listing the names of buying or selling clients, their license number and the amount and value of diamonds sold, exported or purchased.

16. The information in paragraph 14 above should be entered into a computerised database, to facilitate the presentation of detailed information relating to the activities of individual rough diamond buyers and sellers.

**Recommendations for Export Processes**

17. A exporter should submit a rough diamond shipment to the relevant Exporting Authority.

18. The Exporting Authority is encouraged, prior to validating a Certificate, to require an exporter to provide a declaration that the rough diamonds being exported are not conflict diamonds.

19. Rough diamonds should be sealed in a tamper proof container together with the Certificate or a duly authenticated copy. The Exporting Authority should then transmit a detailed e-mail message to the relevant Importing Authority containing information on the carat weight, value, country of origin or provenance, importer and the serial number of the Certificate.

20. The Exporting Authority should record all details of rough diamond shipments on a computerised database.

**Recommendations for Import Processes**

21. The Importing Authority should receive an e-mail message either before or upon arrival of a rough diamond shipment. The message should contain details such as the carat weight, value, country of origin or provenance, exporter and the serial number of the Certificate.

22. The Importing Authority should inspect the shipment of rough diamonds to verify that the seals and the container have not been tampered with and that the export was performed in accordance with the Certification Scheme.

23. The Importing Authority should open and inspect the contents of the shipment to verify the details declared on the Certificate.

24. Where applicable and when requested, the Importing Authority should send the return slip or import confirmation coupon to the relevant Exporting Authority.

25. The Importing Authority should record all details of rough diamond shipments on a computerised database.

**Recommendations on Shipments to and from Free Trade Zones**

26. Shipments of rough diamonds to and from free trade zones should be processed by the designated authorities.
Annex III
Statistics

Recognising that reliable and comparable data on the production and the international trade in rough diamonds are an essential tool for the effective implementation of the Certification Scheme, and particularly for identifying any irregularities or anomalies which could indicate that conflict diamonds are entering the legitimate trade, Participants strongly support the following principles, taking into account the need to protect commercially sensitive information:

(a) to keep and publish within two months of the reference period and in a standardised format, quarterly aggregate statistics on rough diamond exports and imports, as well as the numbers of certificates validated for export, and of imported shipments accompanied by Certificates;

(b) to keep and publish statistics on exports and imports, by origin and provenance wherever possible; by carat weight and value; and under the relevant Harmonised Commodity Description and Coding System (HS) classifications 7102.10; 7102.21; 7102.31;

(c) to keep and publish on a semi-annual basis and within two months of the reference period statistics on rough diamond production by carat weight and by value. In the event that a Participant is unable to publish these statistics it should notify the Chair immediately;

(d) to collect and publish these statistics by relying in the first instance on existing national processes and methodologies;

(e) to make these statistics available to an intergovernmental body or to another appropriate mechanism identified by the Participants for (1) compilation and publication on a quarterly basis in respect of exports and imports, and (2) on a semiannual basis in respect of production. These statistics are to be made available for analysis by interested parties and by the Participants, individually or collectively, according to such terms of reference as may be established by the Participants;

(f) to consider statistical information pertaining to the international trade in and production of rough diamonds at annual Plenary meetings, with a view to addressing related issues, and to supporting effective implementation of the Certification Scheme.
ANNEX II: MEMBERS OF THE KIMBERLEY PROCESS

The following are members of the Kimberley Process as at 1 June 2011.578

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European Union consists of: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom.579 On a nation-state basis, there are seventy five countries represented in the Kimberley Process.

The rough diamond-trading entity of Chinese Taipei has also met the minimum requirements of the KPCS.

* Venezuela has voluntarily suspended exports and imports of rough diamonds until further notice.

** Côte d’Ivoire is currently under UN sanctions and is not trading in rough diamonds.

578 http://www.kimberleyprocess.com/structure/participants_world_map_en.html. The website refers to “European Community” which is the old name for the entity now known as the “European Union”.
ANNEX III: INTERVIEW TRANSCRIPTS

TRANSCRIPT: FIRST TELEPHONE INTERVIEW
BETWEEN NIGEL DAVIDSON (ANU) AND
GLOBAL WITNESS REPRESENTATIVE

Monday 30 April 2007, 11.30am (Netherlands time)

Nigel Davidson (ND): OK. So I’ve just pressed record. If you wouldn’t mind just saying
your name and organization just for the recording.


ND: Fantastic. And as we discussed before you were going to send that consent form through
the fax. But we’ll now get onto the questions. Question one here is and we will probably
have five minutes per question, that should get them done in the hour altogether. So question
one. What are the benefits and drawbacks, if any, of the involvement of industry in the
Kimberley Process? Its got a couple of parts to it. Is it appropriate to consider the Kimberley
Process as a form of self-regulation? And the final part. Does industry implement its own
compliance systems for employees and business partners and to what extent are these
effective? So do you want me to read the first part again?

GW: No I think I know all that. The industry, the whole thing about the KP which I’m sure
you know is that it is multi-stakeholder. And on the one hand you had to have the industry
there to make it happen, because otherwise I think it would have been difficult to get a
Kimberley process together. In the governments... in order to make it all happen it was
necessary to have the industry on board. So there is good and bad with that. It was good in
that it in a sense makes it more credible and the fact that you have all the major industry
players definitely makes it more effective. The drawback is that obviously the industry, by
being part of the process has an opportunity to try and obviously influence it. And, so that has
been a drawback in that we haven’t been able to get as strong a regulation as we would have
liked...

ND: Right.
GW: As would have been necessary in order to really address the problem. The KP is a like a combination of regulatory and voluntary measures. You still have the, all the governments of the KP that have to implement all the regulations of the KP which are enforceable, obviously.

But within the KP there has been a lot which has been left open, as far as how much government oversight is necessary and that is where the industry has tried to avoid a lot of regulation has had its own self-regulation to solve the problem of conflict diamonds, tried to minimise the government oversight of the industry. And that self regulation, through which I hope you've looked at our reports which you've done, investigations and self-regulation, it really hasn't been implemented industry hasn't monitored, basically the industry cannot police itself because the industry was at the table and kind of demanded that that approach should be taken. You have some governments which try to regulate this industry more, like the European Commission which actually monitors and enforces self-regulation and it really does vary on the country as to what regulation is taken. But I would argue that the industry does not have its own compliance programme. It's more of a public relations exercise than a form of regulation that is really monitored and enforced.

ND: Would you say that the - just a quick followup and then we'll move on - would you say that the are of, the chain of warranties at the retail end would be where the industry has the largest self-regulation role or you wouldn't necessarily agree with that?

GW: I think it goes all the way up the chain, we focus on the retailers because obviously they have a lot of purchasing power a lot of influence to put pressure up the chain, but on the other hand it is the diamond traders the rough diamond traders who have the ability to directly affect who they are buying from, the integrity of the chain, it really is across the diamond pipeline that it needs to be implemented.

ND: That's great. So we might move on to question two if that's all right. Do you consider that the alluvial/artisanal diamond sector as opposed to the Kimberlite diamond sector is sufficiently engaged and represented in the Kimberley Process?

GW: I think that is a good question and I think the answer is probably no. There is a lot of large diamond money mining companies that tend to dominate, the BHPs and the Rio Tintos the larger companies, but of course you do have the traders represented as well and they are obviously dealing with a lot of artisanal diamond countries where they are getting their
diamonds from. So in that sense it is pretty well represented but as far as the artisanal miners the diggers I would say that no they are not represented and Global Witness and PAC have been trying to raise attention draw attention to the challenges in the artisanal mining sector including the miners themselves. Its not like labor unions or trade unions or other kinds of groups from those countries that are actually representing. Now you’ve got some of the artisanal mining producers like Sierra Leone that are sitting at the KP and are members of the KP and are bringing some of that perspective with them but as far as the industry there is not nearly enough of that kind of representation.

ND: OK. Now that is a good response. There is actually a second part here. Is this sector sufficiently represented by national governments to ensure the conflict-free status of exports.

GW: That’s one of the biggest challenges I think is the, is that artisanal mining sector in most of the African countries and the latin American countries we are finding is that it is not adequately regulated. In that for a variety of reasons the governments are not able to control the mining sites. You have a lot of diamond diggers who may be unregistered, unlicensed who are still able to dig. You have some illicit smuggling that also goes on, some of the stuff from those mining areas may be smuggled out, you may have illicit smuggled diamonds coming in which may be passed off as certified because of the weak controls. I mean basically many of those countries are not able to have an effective tracking system from the mine to the point of export so like in Sierra Leone more and more diamonds are going through legitimate channels but you know there’s a lot that’s still being smuggled out.

The review visit report in Sierra Leone estimated that ten to twenty percent or something that would be illegally smuggled. So, there are still a lot of challenges. We did a lot of monitoring in Sierra Leone. And you go to the mining centres and you find that the government mining monitoring officers really aren’t able to monitor effectively on the ground. You have a lot of illicit mining going on in these areas. And furthermore you’ve got lot of diggers that are not getting a good deal who are getting a very bad deal that are working in dangerous conditions, that are getting less than a dollar a day.

So there are all sorts of labor, social and environmental issues around the mining that the government does not have a hold of. Some of the problems are broader governance problems, lack of capacity of the government to be able to implement, a lot of them are corruption problems.
I mean you’ve got mining company officers that are paid very little money. As you can imagine where you are working in places where there are diamonds going in and out there is a real potential for corruption so I think that there are all sorts of levels of problems. I also think that the Kimberley Process as a whole hasn’t really been able to give that sector a lot of attention. There was a declaration on artisanal mining issues passed in the Moscow Plenary two years ago coming up with some broad recommendations about what artisanal diamond mining countries should be doing but there really hasn’t since that meeting been a lot of focus on working with those countries to make those recommendations be achieved.

But what I think I would stress is that its not just the artisanal mining sector because obviously all these illicit diamonds even if they are not certified in the country they’re still being smuggled out and they get into major trading centres such as Belgium, Dubai, and New York and other places so the trading centres still have loopholes, there is still smuggling going on.

ND: So perhaps the suggestion is that trading centres can take more responsibility as well.

GW; Yes, that’s right.

ND: Well, we might keep moving. Question three. What are the benefits and drawbacks, if any, of the involvement of non-governmental organizations in the process.

GW: Well I think there are mostly positives but some drawbacks. The positive is that we are a seat at the table. We play a major role in the Kimberley Process unlike some other agreements.

Even though we are categorised as an observer, we are treated very seriously by governments and industry. We have a lot of ability to put forward proposals and work with other governments and industry to okay or to approve decisions and all sorts of different issues. We can participate in all the different working groups just like we are a member, a country member we have that level of participation and involvement in the process, so I think that’s really important, that’s made a critical difference in really trying to influence the Kimberley Process.
When we first joined, or part of creating the Kimberley Process, we were concerned because in the beginning when it was launched there was no monitoring mechanism there was no way of monitoring whether a country was implementing the KP effectively or not and we were very unhappy with that however we decided to still support the Kimberley Process. But then over the next year we worked from inside the process to get a monitoring system which we now have. So we have seen through being able to participate in the process and were able to strengthen the scheme and close some of the loopholes but at least we are able to make some progress which probably would be difficult to do if we were completely outside the process.

That being said its always hard when you are inside a process. We’ve played a two-pronged role where we’ve been inside the process and we’ve also been outside and been quite critical. We have gone to the President and complained and done campaigns to try and pressure the industry to do more. That’s the only potential drawback that it can be a little bit complex to do that if you are inside a process and also try to exert pressure from the outside. We have played both of those roles, basically.

ND: So being inside may have a mitigating influence on what you can do as an external sense.

GW: To an extent, although we have still been able to still be very critical from the outside. I think the KP has been quite good at the international level to get NGO involvement but I think there are some serious weaknesses on the country level. I think there has not been adequate NGO participation at the various country levels say in Sierra Leone, Congo, India, Brazil or other places there is not enough consultation and involvement of NGOs in monitoring how KP controls are working in these various countries. So I think that internationally there is quite good civil society participation but not at the national level and I think that’s a real drawback because I think that civil society groups can play a very important role in holding governments to account and pressure governments to strengthen their controls so that if you don’t have an active civil society presence then it can be difficult to do that.

ND: Yeah yeah OK, we might then move to question four, you don’t need a glass of water or anything?

GW: No I’m alright.
ND: What are the benefits and drawbacks of the government-to-government peer review system for monitoring and enforcement of Kimberley Process standards? And there is a second part to it. Is it more effective than a command-and-control mechanism for the majority of participants?

GW: The peer review system has worked pretty well, almost all the participants have participated in the review visits. It works well because of peer pressure, right, you’ve got other members looking onto your system and it does create some type of pressure. The quality of the review visits has really varied. I think some have been very good and thorough and others not quite as thorough. The challenge is that typically you only go to countries for three to five days and you’re going to get some information but obviously its not an investigative kind of trip its more like a diplomatic kind of trip so you’re not necessarily going to get at all the problems in a country.

So that’s one challenge to the system. I think the other is that a lot of time these reviews find problems and come up with recommendations but there is not a lot of good follow-up either by the government or the KP in making sure that that system is followed and maybe there is not a lot of incentive. If you have a review visit and you can say you have a review visit and maybe there is not a lot of incentive for you to care to follow-up on the recommendations unless they are serious and you are worried that you are going to get kicked out of the process. So I think that has been one of the weaknesses in the system.

I wouldn’t really say that it should be either command-and-control or peer review, I don’t think they are mutually exclusive. I think that what we want certainly is a peer review system so peer pressure will provide some pressure to government to care more about the controls but also having stronger laws at home on the industry would also be important and that’s the problem is that for some of these laws we don’t have enough government oversight. So if the Kimberley Process were to mandate that that governments have stronger controls and maybe strengthen the minimum requirements and that would also be very important and then the peer review system could evaluate whether those measures are being implemented effectively the problem right now is that a lot of the government oversight provisions are not requirements they are suggestions and that is a real limitation and that is a question of strengthening the actual terms of the agreement.
ND: That kind of leads to the question of how much you strengthen the agreement. I mean do you have in mind for example a formal treaty, or other mechanisms?

GW: No I don’t have a formal treaty in mind what I’m just saying is if countries could possibly decide that certain things are not optional, for government oversight, and require all countries to have minimum government oversight of the industry and do spot-checks and all that kind of stuff, and if that could be checked through the peer review system

ND: So working within the current framework but being clear that it is not negotiable.

GW: I mean it would be useful if there was outside pressure as well. So if the UN or others were putting a bit of pressure on the process. I think that some outside pressure would be useful.

ND: Now, well that leads into question five which I’ll read out. Please provide any comment on the nature of the relationship between the KPCS and the UN Security Council including the investigatory Panels of Experts. Is there a high level of coordination between the two institutions?

GW: I would say at some level. I mean obviously the Security Council has played an enormously role in helping to get the Kimberley Process and to get it credibility. Obviously it all started out with the sanctions and the UN panel reports has also been very important. I would say now there have not been as many of those panel reports. The Ivory Coast one is the most recent example. Both the KP and the UNSC are actually both providing eachother with information on the Ivory Coast situation. The Kimberley Process came out with a resolution expressing concern about the situation in the Ivory Coast and the Security Council reacted to that and issued sanctions the following month, so it is really an exchange and interaction between the two interviews I guess you could say.

The fact that the UN endorsed the Kimberley Process was incredibly important. There hasn’t really been a Security Council resolution since that initial resolution was passed I think in 2003. It would be helpful to continue to give the Kimberley Process credibility and to show that it is still very important and working for conflict prevention. I worry a little about the waning interests that the Liberia UN sanctions have just been lifted. I’m worried that if the Security Council backs away and is not really as concerned because there is not any more
sanctions, that that’s a real issue for the KP so that it still has the political backing and the political will that it needs.

ND: I suppose I’m interested in the concept that sanctions can be ratcheted up from the Kimberley Process to the Security Council. Would you say that this is kind of what is happening or are they kind of working autonomously with say the Ivory Coast situation.

GW: I think it did, I think it was ratcheted up. It started at the KP and the KP provided information to the UN and then they ratcheted it up with an embargo. I think that was the case and hopefully that will continue to be the case. The issue is that if there aren’t any more diamonds fuelling conflicts what is the situation then? I mean that’s what we’re trying to achieve, the challenge is that when conflict stops just making sure that the KP is still there to deal with future conflicts. At least we have the system in place where we are monitoring and passing the information on to the Security Council so that they can take action where necessary.

ND: Do you think we have time to squeeze one more question in? How are you going there?

GW: Yep, yep.

ND: Lets do one more, and then we can move on. Question six. Would it be desirable to strengthen the connection between the two bodies by making KPCS obligations legally binding under a UN Security Council resolution? Would a direct relationship with the Security Council strengthen the bargaining position of the KPCS in its activities?

GW: I think it would be great to make it legally binding I just think it would be very difficult at this point to do that. I think that we’re at a point now where there’s not that many conflicts fuelled by diamonds where politically it would be very difficult to get that. Not saying that we wouldn’t, that it wouldn’t be the logical next step but I’m just not sure politically if that’s realistic.

ND: Right, as you mentioned before, it seems that perhaps more in an ad hoc way you have that relationship.

GW: An ad hoc way. Because our criticism has been that they didn’t react as quick enough as
they could and I think that we still feel that way with the Ivory Coast situation and so that’s why what you’re suggesting may help but I also feel like the Kimberley Process itself just needs to be more proactive, and that’s what we’ve been calling for them to be much more than just to react when a situation arises, but to do much more proactive research and monitoring.

ND: Prevention before it gets to a crisis.

GW: They don’t do that. They send a review visit every three years. They may respond to pressure points to an extent, but they don’t do a lot of proactive monitoring of what is going on.

ND: I think that is fantastic and I think we have made good progress with those questions. [Discussion of administrative issues]

TRANSCRIPT: SECOND TELEPHONE INTERVIEW
21 MAY 2007
BETWEEN NIGEL DAVIDSON (ANU) AND GLOBAL WITNESS REPRESENTATIVE

ND: So, OK, here we go with the second part of the interview regarding the Kimberley Process and I’ve got ……., could you say your second name again.

GW: ……..

ND: here from Global Witness. So lets go with the second question. Is there a role for the International Criminal Court in hearing prosecutions for serious cases of conflict diamonds trading? Are there advantages in cases being forwarded to the ICC from the Security Council?

GW: Well we are very supportive of the ICC. I think that the case of Charles Taylor is an example of that, someone who engaged in the trade of illicit resources, someone who used those resources to fuel regional instability. I think we are very very supportive of that. I think that enough hasn’t been done to hold those to account who use diamonds to commit human rights abuses for example in the Sierra Leoneon civil war. There hasn’t unfortunately been enough done to really go after those whether they are diamond traders or arms dealers or
traffickers or whatever, to go after those who have violated sanctions and committed human rights abuses and that type of thing. I don’t know exactly how that would play out and I think one of the challenges would be being able to gather enough evidence to prosecute those, that’s the tricky part obviously.

ND: You just mentioned people who violate sanctions, so would one of your key triggers be if there were formal sanctions in place, like a UN Security Council sanction?

GW: If there were formal sanctions in place?

ND: I was just wondering if that would be one of your key triggers?

GW: Well we had sanctions on the diamonds stuff. We had sanctions on Angolan diamonds, sanctions on Sierra Leonian diamonds. Even though we had sanctions, we had criminal networks, criminals and illicit traders who were actually violating those sanctions. The question is how do you catch and hold accountable those criminals who are doing that. That’s the tricky party. There’s been a few but not very many, there’s really not been very much done to catch people and prove that someone is violating sanctions. We knew through our investigations that that was happening. That was one reason why they made the Kimberley Process so there could be a global system so that you didn’t have sanctions on one country, that the diamonds would be finding their way out illicitly to another country. I think that that’s one thing which is challenging. Sanctions can be very effective but it doesn’t completely solve the problem.

ND: I’m interested in how these mechanisms may end up working, in particular would you envisage a prosecution being mediated through the Kimberley Process for example or do you think a better way to go would be for it to be referred from the Security Council. I’m just interested in your view on that.

GW: Actually I would say that how it is working now is that each government like the US has its own law for enforcing the Kimberley Process, and if someone is found to be violating that law then they are prosecuted, and that happens in the UK as well or in Belgium, and if they are violating sanctions, I believe how it works is that if some one is found to be in the UK violating sanctions, or someone in Belgium is violating sanctions, then they are prosecuted under in Belgium for whatever law it is or whatever mechanism it is that they have violated.
My understanding is that in Belgium right now they are pursuing some investigations of people that have allegedly violated sanctions, so I think that that is how its been done.

One of our concerns is just how effective these laws are and how seriously they are enforced as a way of having an oversight mechanism or some kind of mechanism within the KP or through the ICC to try and help facilitate that and make that happen more.

I’m very concerned that there is not enough done by enforcement agencies that are not cooperating with other enforcement agencies to go after some of these players. They can easily hop, you have got a trader that takes diamonds, who flies from this country to that country, who can easily evade controls by funnelling them across borders very easily.

ND: You have mentioned the Charles Taylor case. Is there any comment you have about the significance of that?

GW: Of which one?

ND: The Charles Taylor case.

GW: I think its significant because he’s actually being brought to justice. There’s going to be a trial. I think it is very significant, it sends a strong message to others like him, other dictators that totally loot state assets. His example is the extreme of someone who completely became the state itself and plundered the natural resources and used that to further his own goals and committed atrocities and human rights abuses and supported other groups like the RUF. I think it does send a very important message to othera that you will be held to account if you engage in these kinds of activities. It took a lot to get him there though.

ND: I think that he was at large for quite a while so to speak.

GW: We’ve been working for years on this. We documented all of the abuses and violations of sanctions and this and that. And of course, he almost got away, he almost got out of it I should say.

ND: In a sense we can see the international system starting to kind of tighten up a little bit, that things like that prosecution is happening. That’s really good for question seven, so we
might go to question eight. Do you have a view on the effectiveness of the system in dealing with serious breaches in relation to, for example, the recent situation dealing with the expulsion of the Congo from the Kimberley Process or the current situation in the Ivory Coast.

GW: So its about the expulsion of a country?

ND: Generally about how the Kimberley Process manages serious non-compliance.

GW: I think that the Republic of Congo is an example where the KP worked in the sense that through our statistical analysis and through reports of what was going on in the field there it was clear that they were in non-compliance of the agreement and swift action was taken from the chair to expel them. Now we’re facing a case that, unfortunately there is no formal suspension mechanism in the KP. It really depends who is at the helm and how they decide to do it. Fortunately, the Canadians were at the chair at the time of the Republic of Congo situation, were very proactive and took the decision and took action to ensure the integrity of the system.

Now we are facing a problem with Venezuela, where they are in blatant noncompliance with the scheme. There has been reports showing widespread smuggling, they have failed to respond to the Kimberley Process, they have failed to meet certain requirements, there is blatant non-compliance and they are still in the process. The problem is that we don’t have a set-up scheme for suspension and a lot of it is politics. Countries don’t want to take a step of expelling a country like Venezuela and then we have a real problem on our hands. We’ve got some countries in the process which are free-riding, that are blatantly blowing-off the Kimberley Process yet they are still in the agreement. What does that say to other countries that are actually complying in a meaningful way? So I think there is that, that’s a real credibility issue, especially with the non-compliance of Venezuela.

ND: There seems to be, just from looking at the documentation on the internet, there seems to be some system through the monitoring committee, you’re suggesting that that’s not consolidated enough or not clear enough.

GW: It is not the monitoring committee it is really the participation committee which decides who is expelled or not. So far, the participation does not have a clear procedure for expelling
or suspending rather countries. It is largely done on an ad-hoc basis. Our point is that if a country is there, there should be some procedure for dealing with countries which are in non-compliance.

ND: It is possibly too discretionary. You mention that Canada played a pro-active role in one case but in other cases, possibly Venezuela, in the absence of that pro-active role it may not happen. That’s a really interesting comment. So we might get to question nine, which is a very generic question.

GW: I really think that the government oversight of the industry is a real difficult one that hasn’t been addressed. There is a certificate, every rough diamond that goes in and out of a country has a certificate, but the question is what does that certificate mean?

If someone in one country stamps and OK’s the shipment of diamonds without having a the proper checks in place, then those diamonds could be conflict diamonds or illicit diamonds but they are still being certified. How do we determine whether those diamonds are KP compliant? In many cases now there really aren’t rigorous enough controls to ensure that those are actually clean diamonds. They get into the legitimate system, they get passed off as Kimberley Process compliant diamonds. I think that is a real issue. You have a wide variety of participants in the process, some which have good controls but many which don’t many which have poorly enforced controls.

You’ve challenges in Sierra Leone, some of the countries who are coming out of conflict. The combination of lack of capacity, governance issues, to a certain extent lack of political will. You have trading centres, the same thing, the United States there is very little checking of companies and shipments here and its because it is a low priority for business and governments. I think that government controls, government oversight is at the heart of this agreement. It is very dangerous if you get certificates that seem to be valid that seem to be OK, but if there is not very much backing up for the paper, it really creates a kind of sham agreement. We are very concerned that that is not the case, that’s why we want to see greater oversight.

The other issue that I would argue on is the sustainability of the KP. There is not as many diamonds fuelling conflict right now, and what does this mean? Are people going to forget, give up on the process. The whole point of this is a preventative measure. Its supposed to put
controls in place so that diamonds never fuel conflict again. We start to lose momentum, its not all that important, you start getting instability especially in artisanal diamond areas and that's where you start to get conflict being fuelled again, you may have a rebel group going into a diamond mining area and taking control of it in the future. Hopefully that wouldn't be able to reach the market but again it's a question of how tight the controls are.

ND: I suppose that some of the attention goes off if there aren't so many live situations, there might be some moves in some quarters to say there is no need, but as you're saying there is a preventative role. Well thanks for those comments. There are actually a couple of questions right at the end here which were about the Kimberley process in Australia. I think you have some comment to make, I might let you make any comment you wish to in relation to Australia.

GW: Australia has not yet had a review visit. It hasn't actually been verified, independently verified, their controls. They have submitted their annual reports every year and they appear to comply with the minimum requirements. So hopefully that will be done this year. My recollection is that the Australian system is OK. There is mostly large-scale industrial mining with kimberlite pipes mined by groups like Rio Tinto, and BHP probably. With the conflict diamond issue. I don't want to speak in saying that there aren't any issues generally, but on the conflict diamonds issue, but because its large-scale industrial mining, its not too much of an issue there. My recollection is that it is hands-off, like the US system, so I would question as to how many actual checks are going on. I think you need to have adequate government control over the system, and my recollection of the Australian system was that it was very much like the US, not, perhaps, doing enough oversight.

ND: Was that particularly in relation to the production of diamonds or the import level?

GW: I think the production of diamonds its probably pretty good. You know I am not an expert on the system, its hard to know because I just haven't been there, but I think that every system should be robust, because there are probably loopholes, there should be support for a review visit to happen.

ND: That's really good. [Discussion of administrative issues].

GW: The only other thing I would say that I would say is an issue which you may like to
address in your paper is the issue of civil society participation. I don’t know if I mentioned that before, but GW and PAC participate on the international representatives of civil society at the KP meetings, we contribute and make proposals, and that’s the very innovative thing about the KP is that despite the fact we are observers we are taken very seriously. I think the real issue is at the country level. In African civil society, there are very little NGOs at the country level that are taking part in the Kimberley Process and monitoring what is going on in their own countries. I think in Africa it is a capacity issue. NGOs need the capacity to take this on. We are trying to tap into various coalitions that are organising around the management of natural resources, we work with them and there is definitely a lot of interest.

I just don’t think that the KP, the governments, really recognise or appreciate the importance of civil society. They just want to have us go on review visits and that’s it. This process will not be sustainable, you will not get effective controls in Sierra Leone if you don’t have any civil society groups involved in monitoring the process. What we do here in the US, we put pressure on the United States government, we do press, we do advocacy, and it does have a difference, it does help strengthen the controls. Unfortunately that’s not happening in a lot of the countries. Governments don’t want to deal with it, don’t want to support civil society. If the KP truly wants to be a multistakeholder agreement, it needs to work out how it can support those groups.

ND: Is that financial support?

GW: financial support and also working on how it can support review visits and other activities of the Kimberley Process.

ND: I suppose your comment possibly feeds into what you identified as an ongoing challenge, particularly internal controls, and possibly particularly in the producing countries in Africa.

GW: I would say in the producing, particularly in artisanal mining. There are also issues in relation in regular mining, in relation companies and communities, and also to contractual agreements between companies and countries, which can fuel a lot of unrest and conflict I think with these kind of issues. I think particularly for producing countries.

ND: You had made some of those points before, but it doesn’t hurt to emphasise that.
GW: I think its something that hasn’t really been focussed on and I think its interesting to look at this issue, academically. Some are hailing the KP as this great multistakeholder agreement and I would say that in some ways yes but in other ways very seriously no. To be truly a multistakeholder agreement they have to bring in civil society groups in the producing countries, to get them more involved. That hasn’t resonated with people, particularly the governments, they just don’t want to do that, to be bothered basically.

ND: When you say civil society would you include for example unions of artisanal miners? Or would you see that as industry or quasi or?

GW: Yes you could say that there is an issue there. I think that is a very good point, there is very very little representation of artisanal diggers in the KP. You can say the KP is not going to solve all the problems in artisanal mining, but certainly conflict diamonds is a big issue. The whole instability in that sector, the biggest challenge to the KP is that you have instability, if you have very poor diggers who get very low wages, that provides the conditions for which conflict can erupt. Artisanal diggers are not represented at all at the KP. You’ve got governments there that are representing the governments, but you don’t have anyone representing artisanal diggers. I am also talking also about civil society groups, civil society groups in these countries that are trying to promote better use of natural resources, and trying to ensure that diamonds actually benefit people in the country.

ND: Yeah I suppose that one of those roles is that monitoring role and just making sure it is happening and that on-the-ground information gathering role.

[Administrative discussion and end of interview].
INTERVIEW NIGEL DAVIDSON (ANU) AND RIO TINTO REPRESENTATIVE

30 MAY 2007

ND: If you wouldn’t just mind mentioning your name and company just before we get going.

RT: Yes of course, my name is ........, and I’m ........... for Rio Tinto Diamonds.

ND: Fantastic, thanks very much. Just before we hit the questions .... , just to remind you that if possible if you can get that consent form faxed through, I think I put it into an email.

RT: Yes sure, I’ll do that in the morning.

ND: Its just a university requirement, that’s all.

RT: I know, I understand.

ND: Yeah fantastic.

ND: Lets go from the top and see how we go. Normally we average about five minutes or maybe a little less, that’s all. I’ll just read it out, maybe that’s the easiest way, and let you do your response. So question one, what are the benefits and drawbacks, if any, of the involvement of industry groups in the Kimberley Process? Is it appropriate to consider the Kimberley Process as a form of self-regulation? Does industry implement its own compliance systems for employees and business partners and to what extent are these effective? So its kind of multipart, but if you want to give it your best shot that’s great.

RT: To answer part one, I think the involvement of industry groups has been very important, particularly the World Diamond Council but of course there a number of others that have had an involvement as well, but WDC has been the most significant one. What they have done has been manyfold. In particular they have helped to draw the industry together, to work on the policy elements of Kimberley to make it functional for companies and indeed for governments, and basically to be a forum for discussion, not just with industry groups but also with NGOs and governments and other stakeholders. I don’t think there are any drawbacks
apart from the time that people put into but of course it’s something that does require a lot of time. I don’t think that’s an issue.

Is it appropriate to consider KP as a form of self-regulation? Yes and no I suppose is the answer to that. In a sense it’s a form of self-regulation in that it relies on the application of process by a number of companies. But on the other hand it has a high level of government oversight and indeed also civil society oversight. So it isn’t purely a system of self-regulation I don’t think but it has a high level of industry involvement in putting it together. That’s the secret to it I think. These sorts of schemes need to be practical in order to be implementable on the ground. I think it is axiomatic to say this.

Does industry implement its own compliance system? Of course it does. I can speak for Rio Tinto, we have extensive and detailed enforcement processes. Every package of diamonds is monitored to a very high degree of accuracy which of course is what the KP demands but its also what we would demand as a company. Of course the tracking of stones, of diamonds in particular, we are not talking about the tracking of iron ore here, we are talking about very, very valuable little stones, being able to track them to a very, very high degree of accuracy is important for our own governance processes as well as KP so its something I would do and I’m sure the other diamond mining companies would say the same type of thing to you.

ND: Are you able to detail any particular systems that you put in place?

RT: There are security reasons about detailing them. Just let me close my door Nigel hang on a sec. There are security reasons why I can’t actually detail them, but I can tell you what they are in principle. They involve double and triple security levels. A person is never left alone for example in a sorting room or in a room where there are rough diamonds. The ingress and egress is very strictly controlled. The level of security of every individual is strictly controlled, in the sense that there is very limited access to the areas, in fact I don’t even have access to the sorting room in Rio Tinto diamonds, because I don’t need to.

There is very elaborate processes to double and triple check, and that allow documentation to be cross-checked with other pieces of documentation and pieces of process. At all ends of the movement of stones they can be tracked back and forth, there is a sort of back and forth chain of documentation so that allows for a KP reviewer to say “show me the paper trail that relates to a particular set of stones”, and of course that’s the sort of question they do ask, and that can
be demonstrated both by virtue of showing them the policy standard and also the paper trail physically.

ND: That's the type of valuable input I can get from speaking to you. Even in those general terms it gives me a flavour of what you are putting into practice which is really useful. So we might move onto question two then I suppose. Do you consider that the alluvial or artisanal diamond sector as opposed to the kimberlite diamond sector is sufficiently engaged and represented in the Kimberley Process? Is this sector sufficiently regulated by national governments to ensure the conflict-free status of exports?

RT: Look I think that generally the answer is that there is a need for greater engagement in the alluvial or artisinal diamond sector and there is an initiative underway driven by Partnerships Africa Canada called the Diamond Development Initiative which is designed to do just that. It is a sector that is almost necessarily more difficult to regulate, because it is often a more community-based sector for obvious reasons. There is a need for a greater focus on the sector, but I think that that is increasingly recognised. I think we will see more programmes that are actually focussed on that sector as opposed to the conventional large mining sector kimberlite mines which are different of course and in a sense are easier to regulate.

ND: I suppose you have kind of done question one, I suppose the second part there was just in relation to national governments in particular.

RT: I think the nature of regulation by national governments probably varies quite a lot and in a sense the answer is that these things can always be improved. Does the industry think it is a fundamental issue, no I don't think it does. I mean the evidence about the efficacy of the Kimberley Process is pretty strong. It is generally agreed that less than one percent of traded diamonds could be said to have some issues attached to them. To be able to say that KP has been more than ninety-nine percent successful is a pretty good thing to be able to say of any system of regulation. That is not to say that it ought not be one hundred percent. That is what we all ought to be seeking. Quite a lot of companies are supporting the Diamond Development Initiative, including ourselves, and we of course don't have any involvement in artisanal diamond mining, but we do feel that it is something that the industry as a whole should take responsibility for. A number of companies are getting behind the process. It is chaired by a person called .......... I believe. It would be worth while interviewing him.
ND: He is with Global Witness I believe.

RT: No, he is Partnerships Africa Canada.

ND: Oh, I was getting my wires crossed.

RT: Global Witness are supportive of it as well, but Partnerships Africa Canada are the primary NGO that is managing it.

ND: He might be another one to have a discussion with. We might be keep moving down the list. This one is about NGOs. What are the benefits and drawbacks, if any, of the involvement of non-governmental organizations in the Kimberley Process.

RT: I think the benefits have been absolutely profound. Our view generally is that engagement with NGOs and civil society more broadly is very important for business and for the NGOs themselves. I think that the Kimberley Process is a very fine example of where business, government, triple bottom-line engagement or tri-sector engagement I should say between the three sectors has actually created a process which is practical and effective so I think the engagement with the NGOs has been vital. Indeed, I think we acknowledge that the leadership of Global Witness was the keystone in moving the KP forward. It then took governments and companies to come on board, but there is no doubt that Global Witness provided absolutely vital leadership and that they were right to point out the issues that were occurring in Sierra Leone, and that there needed to be a system to, and they and other NGOs have been at the table and continue to. Global Witness were at the World Diamond Council convention a couple of weeks back in Jerusalem and I was there. They have always had a formal seat at the table, in fact .......... addressed the plenary. I don’t think that anyone would resile from the fact that they have played a pivotal role and I hope that they would say the same for us.

ND: Yeah. Its interesting for me, you mention your convention, and obviously the links are strong even beyond the formal Kimberley Process as such. It wasn’t necessarily a KP meeting.

RT: There are many programmes and processes and engagements that go on between NGOs and business. Speaking for Rio Tinto, its an article of faith for us. In fact we have our global
partnership with a whole range of NGOs on a whole range of issues and our sites have hundreds of NGO relationships. We are certainly no stranger to that and we don’t resist from saying that of course NGOs are an important element of a pluralist society and that they do have an important voice which needs to be respected and engaged with.

ND: We might move to question four. What are the benefits and drawbacks of the government-to-government peer review system for monitoring and enforcement of Kimberley Process standards? Is it more effective than a command-and-control system for the majority of participants?

RT: I think it is more effective than a command-and-control system. I think the benefits are that the system involves not just government people obviously but it involves other experts from business, and of course also civil society representatives. So again that tripartite approach continues through the monitoring system and I think that is very important because it keeps it honest. I think the involvement of experts is also very important and there have been a number of expert missions to KP countries that have helped in many ways to enhance standards procedurally and practically. And those people have been contributed by ourselves and a number of other companies. And we are only too happy to do. We are also often asked for advice by other mines in some countries where we work to help them with their own KP enforcement activities. In fact quite recently that happened with one of our mines. And again we were happy to offer that advice because we are all judged by the standards of the industry, and therefore we are all jointly and if you like severally responsible.

ND: So in a sense the KP becomes a system also for within-industry sharing of that expertise, between different companies like you’ve mentioned.

RT: And it has become that. In fact I sit on a committee here in Antwerp which is designed to do precisely that. It is a subcommittee of the WDC. I think the peer review system is a good one. Its not perfect but probably no system is. It can always be improved. I think we have to listen to people that are suggesting ways it can be improved. I think the lines of communication are open and we are listening. I think the results of the KP plenary last year are indicative of that. You say more effective than a command-and-control system, I think it is more effective than that. Command-and-control systems can have limited effect in reality. Whereas systems based on continuous improvement and engagement in my experience are far more effective. I can think for example of the environmental standards and social standards
that are applied by Rio Tinto. Most of those standards have been developed by us. In some of the countries where they work our own standards far exceed any legislative requirements. In other words systems that involve continuous improvement and engagement I think are often better than command-and-control systems. Because command-and-control systems can sometimes be rather lowest common denominator requirements. I think what we should be looking for here is best practice.

ND: Just following on from that comment, would you say that through the experience of the Kimberley Process there has been a continuous improvement process? Can you see that happening?

RT: Yes I think you can. There were several issues for improvement that were raised by Global Witness primarily I think at the last KP Plenary, I wasn’t present but I understand what happened. And they were all accepted, all of the issues were accepted by the Plenary as being things which needed to be acted upon. That’s an example of people saying “you’re right, we do need to look at that, to publish statistics, we do need to provide funds for civil society and those sorts of thing”. That tells you three years down the track that there is an approach to improving the process and not just resting on its laurels.

ND: And maybe in a sense it is a dynamic thing, attempting to improve and not just attempting to maintain a status quo.

RT: Well I mean the nature of the challenge changes too, it is not a static thing. And so I think the system needs to respond to shifts in the challenge too.

ND: Are you able to in general terms outline some of those. That might be question nine, or maybe we can do that question now. Question nine was what do you see as the greatest challenges to the success of the Kimberley Process into the future.

RT: I think the challenges are the maintenance of engagement by government, which can of course be variable. I think we need to make sure that governments are held to account. Because this is not something that only business can be held accountable for. That’s probably going to be an ongoing issue, but that probably could be said for any regulatory structure that involves key government engagement. The capacity for bureaucracies to implement these things is variable around the world. And sometimes the intestinal fortitude of governments
can be variable. And that no doubt is an ongoing issue but not just for KP.

ND: Do you have in mind any ways of supporting this commitment?

RT: Yes, you mention in some of the other questions the involvement of United Nations agencies. That’s one such level of scrutiny. I think that business itself in its own engagement can do things to reinforce the importance of KP and I think they do. So there is no simple answer to it. But certainly the engagement of other international agencies. I think the EU chairmanship for example has been important, again for obvious reasons.

ND: Especially with centres such as Antwerp being where they are. Its interesting you have raised that because its not something that I have targeted in the questions. Do you have any particular comment on the nature of that engagement following on from the obvious importance. For example are there EU regulations which are coming into play here?

RT: No, not directly, but I think the involvement of the EU as an entity has been significant, and to give them their due, they have taken it seriously.

RT: Its come in as a significant agency in its own right, which has put in some pretty significant resources into it and has applied some good brainpower as well. And it sends a message that the EU, which is now one of the most significant regulatory agencies in the world, takes the KP very seriously and wants to play a proper role in it. I think that is a powerful message in itself.

ND: And particularly for the member governments, we were talking before about intestinal fortitude. If we have the EU there it tends to bolster that.

RT: Yes precisely.

ND: We seem to be moving into question five so I’ll just read that out. Please provide any comment on the nature of the coordination between the KPCS and the United Nations Security Council. Is there a high level of coordination between the two institutions?

RT: You know what, I don’t know the answer to that. I really don’t know. It would be better to ask them that directly? I haven’t personally had any experience of that.
[Discussion of administrative issues].

ND: Alright, well, we might move on, unless you’ve got further comments, move to question six, its just about strengthening any relationship which may exist and would a direct relationship with the UNSC strengthen the bargaining position of the KPCS in its activities?

RT: Oh, perhaps, it would need to be thought about I suppose.

ND: But it wouldn’t necessary be the first cab off the rank on the things to do list so to speak.

RT: No it wouldn’t. I think this is about the efficacy of the process. Whether or not there is a UN Security Council resolution can be either meaningful or meaningless depending on who the audience is. But its not necessarily significant in and of itself. And I don’t mean to play down the significance of the UN Security Council when I say that. The KP is a very practical thing. Its efficacy is about the preparedness of government and business to make it work.

ND: What would you say, just to follow-on from that comment, what would you say about the so-called serious noncompliance cases, some people would say Liberia, there had been until recently UN sanctions there. Would you see a role for those sanctions in those situations? How do you view that?

RT: Yeah, I think the answer is yes to that question. Where there are very serious issues like that yeah of course. It is almost axiomatic to say that UN Security Council Resolution under those sorts of circumstances in entirely appropriate.

ND: Alright well that seems to push us towards question seven. Another international organization. Is there a role for the International Criminal Court in hearing cases of conflict diamonds trading. Are there advantages in cases being forwarded to the ICC from the Security Council.

RT: I think the answer to that is probably yes because it would reinforce the KP. And would send a message around the world that conflict diamond trading is going to be prosecuted.

ND: Again, we might be mentally trying to discriminate between those very serious
noncompliance issues and your run-of-the-mill process.

RT: Yeah I mean the ICC would have to make a decision on the efficacy of the prosecution. Of course there is an established process for that. The cases have to be brought by DPPs or the equivalent don’t they?

ND: Well I believe that the local DPPs get first bite of the cherry so to speak, and have to see if they can take the case themselves, and can then refer it back to the ICC.

RT: There is a protocol for that to occur obviously. Well in principle I think the answer is yes.

ND: Well lets move to question eight. Do you have a view on the effectiveness of the system in dealing with serious breaches for example the recent situation with the expulsion of the Republic of Congo (Brazzaville) or the current situation in the Ivory Coast.

RT: Well I think appropriate action was taken and was taken in a relatively timely manner. There was a serious approach to seeking evidence, which is proper of course. Then action was taken. Action is being considered at the moment with respect to Venezuela about its alleged failure to engage at all in relation to the Kimberley Process. So yeah there is a process for taking serious breaches seriously and for taking action. And I don’t think the KP has resiled form that. But its careful about that, and so it should be. You have to look at allegations of that kind of misconduct with a very close scrutiny, to make sure that the evidence has been made out and I think there has been a process for doing that and that they have followed that up.

ND: What would you say to the comment that the way the system is is somewhat susceptible to who is in the rotating chair, the current people administering the process in a given year.

RT: Not necessarily because I think that the system is very robust and the level of oversight is very robust as well. There is a high degree of transparency in the way the KP operates. And the tripartite engagement is key to that. In the end all systems are susceptible to influence by a particular country which might be in the chair. However, I would not think that that influence would seriously be able to compromise the efficacy of the KP.
ND: You commented already at least in those two cases appropriate action was taken, giving due consideration of the gathering of evidence, and that the action taken was appropriate. Alright. We seem to have gone through those top nine questions, and I discussed with you earlier about the fact that there are five on Australia and you mentioned that you may not be in a position to necessarily comment on those.

RT: Well not very usefully because I have not had personal experience of the application of the Australian process.

[Discussion of administrative matters]

ND: I suppose then just to give you any last chance to make any general comment on the questions as a whole or anything you might want to add further.

RT: No, only that I think the KP has been a remarkably successful process and has made an astonishing level of inroad into the issue of conflict diamonds. We have to keep going. We have to keep improving it. But I think there is a genuine desire on the part of the various elements of it to do that. I think it is remarkable how much it has achieved in quite a short time. I really do think it is a great example of business, government and NGO coming together and working through what was a very very difficult and complex issue. And coming up with a practical way that has now got effectively pretty well every government that produces diamonds as a signatory to it. To think you can do that in less than five years is remarkable.

ND: One article I read used the words “blazing speed” perhaps in comparison to other processes.

RT: Yeah perhaps when you consider other international processes then its pretty remarkable. From industry’s perspective, our reputation is, it is one of the cornerstones of our reputation as an industry. We are all only as good as our weakest link. That’s an element of it that has galvanised the industry approach. We cannot have laggards in other words, we have to be reaching for the highest standards. There is a strong reputational element to it of course, but the reputation can only be managed if the process is strong and workable. So its not the matter of being a PR exercise, far from it.
ND: I'm interested, just following on from that, and we did talk previously about artisanal diamond mining. I know they are very different things, the type of large scale industry that you are, you are involved in, but do you see there being any scope for cooperation there.

RT: Yes I do. I think that the bigger companies need to look for opportunities and that's one of the things that DDI is looking at. For corporate citizenship reasons, for reputational reasons, and also sometimes because there will be companies operating in areas where there is also artisanal mining. There's a responsibility there to take some action, obviously in appropriate collaboration with the community. Particularly in relation to things like work and safety standards. And perhaps, even things like the management of marketing systems perhaps, so that people can achieve value for their work. They're some of the things that groups of organisations including companies could help do, that small-scale artisanal miners would find difficult to do unilaterally, and without support. There are cases where large artisanal mining companies can actually support artisanal miners. I can think of one case in our company where we did just that. Its in the gold-mining sector not the diamond-mining. And we did that for a number of reasons.

ND: And that was in the areas you have mentioned, things like work and safety standards?

RT: Yeah, provision of equipment, so that crushing and separation could be done on a scale that will allow them to extract better product and do it a lot more safely than if they'd done it on a small scale, doing things we would prefer that they didn't do, such as the use of chemicals without proper management. These are the sorts of things where big organizations can help little ones. There are beginning to be some examples of that but we need to do a lot more. It requires a lot, like KP, a lot of civil society engagement to make that work properly. Companies are not comfortable about doing these things on their own, for good reasons I think. I think the partnership approach is very important when it comes to these sorts of initiatives. I think that Partnerships Africa Canada has been right in seeking broadscale engagement on DDI.

[Discussion of administrative issues and end of interview]
PROPOSED QUESTIONS ON KIMBERLEY PROCESS

[Note on methodology: these questions will be discussed by means of a telephone interview prior, which will be recorded using a tape recorder. A written transcript will then be provided to interviewees for verification. It is estimated that the interview will last approximately one hour, which allows for about four minutes to respond to each of the fifteen questions].

The Kimberley Process internationally

1. What are the benefits and draw-backs (if any) of the involvement of industry groups in the Kimberley Process? Is it appropriate to consider the Kimberley Process as a form of self-regulation? Does industry implement its own compliance systems for employees and business partners and to what extent are these effective?

2. Do you consider that the alluvial/artisanal diamond sector, as opposed to the Kimberlite diamond sector, is sufficiently engaged and represented in the Kimberley Process? Is this sector sufficiently regulated by national governments to ensure the conflict-free status of exports?

3. What are the benefits and draw-backs (if any) of the involvement of non-governmental organisations in the Kimberley Process?

4. What are the benefits and draw-backs of the government-to-government peer-review system for monitoring and enforcement of Kimberley Process standards? Is it more effective than a command-and-control system for the majority of Participants?

5. Please provide any comment on the nature of the relationship between the KPCS and the United Nations Security Council (UNSC) (including the UNSC investigatory Panels of Experts)? Is there a high level of coordination between the two institutions?

6. Would it be desirable to strengthen the connection between the two bodies by making KPCS obligations legally binding under a UNSC resolution? Would a direct relationship with the UNSC strengthen the bargaining position of the KPCS in its activities?

7. Is there a role for the International Criminal Court in hearing prosecutions for serious cases of conflict diamonds trading? Are there advantages in cases being forwarded to the ICC from the Security Council?

8. Do you have a view on the effectiveness of the system in dealing with serious breaches in relation to, for example, the recent situation leading to the expulsion of the Republic of Congo (Brasaville), or the current situation in the Cote d’Ivoire?

9. What do you see as the greatest challenges to the success of the Kimberley Process into the future?

The Kimberley Process in Australia

10. Please give a brief outline of the administrative arrangements for the export of rough diamonds in Australia.

11. Please give a brief outline of the administrative arrangements for the import of rough diamonds in Australia.

12. Please discuss the role, if any, of self-regulation in the implementation of the Kimberley Process at the national level? Are you aware of within industry mechanisms for ensuring compliance with Kimberley Process standards by employees and business partners?

13. Please describe the available incentives and disincentives ("carrots and sticks", including dialogue and engagement with industry) which are available to regulators of Kimberley Process implementation in Australia?

14. What capacity does Australia have to prosecute its own nationals for trading in conflict diamonds, whether that involvement was in Australia or overseas? Does the existence of such criminal sanctions increase the bargaining power of the national government?

15. What are the strengths and weaknesses (if any) of Kimberley Process implementation in Australia to date?
Response to questions

1. It is beneficial to secure industry commitment and input in the development of any regulatory regime.

The border control measures implemented under the Kimberley Process Certification Scheme (KPCS) are implemented under the legislation or regulations of each participating country, and are mandatory.

As noted in the Third Year Review of the Kimberley Process Certification Scheme submitted to the Gaborone Plenary Meeting in November 2006 by the Ad Hoc Working Group on the Review of the KPCS (Australia was a member of the Working Group), representatives of the diamond industry play an essential role in the day-to-day operations of the KPCS. The World Diamond Council (WDC), which was established by the industry to represent its interests in the Kimberley Process (KP), has led industry efforts to spread the use within the trade of the System of Warranties to support and strengthen the scheme.

Under this system, diamond traders include an affirmative statement on their invoices declaring that the goods invoiced are of legitimate origin. The standard wording used is:

*The diamonds herein invoiced have been produced from legitimate sources not involved in funding conflict and in compliance with United Nations resolutions. The seller hereby guarantees that these diamonds are conflict free, based on personal knowledge and/or written guarantees provided by the supplier of these diamonds.*

The WDC has also undertaken an education programme to raise awareness in the trade of the functioning of the KPCS and the trade’s responsibility to ensure its effective operation. The Third Year Review of the KPCS concluded that the WDC should be encouraged to continue these activities.

2. The Governments of KPCS Participants which host artisanal production are well represented in the KPCS, and at the 2006 Plenary meeting a new Working Group of Alluvial/Artisanal Producers Group was established.

As noted in the Third Year Review of the KPCS, ensuring effective internal controls in artisanal-alluvial producing Participants remains a major challenge for the KPCS. In this regard, the Moscow Plenary meeting adopted a Declaration on enhancing internal controls in artisanal-alluvial producers.

At the Gaborone Plenary Meeting it was agreed the KP will continue to cooperate and liaise with the United Nations (UN) and other organisations and initiatives, such as the Extractive Industries Transparency Initiative, the Diamond Development Initiative and international and local Non-Government Organisations (NGOs) to address the governance, regulatory, social and development issues facing countries with

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1 For further details of the role of the diamond industry in the KPCS, see pp64-65 of the Third Year Review of the Kimberley Process Certification Scheme. The report can be accessed on the KPCS website.

2 For further details of efforts underway in the KPCS to improve internal controls in artisanal-alluvial producers, see pp48-50 of the Third Year Review of the Kimberley Process Certification Scheme.
artisanal-alluvial mining and develop closer partnerships with the communities affected and civil society at the local level.  

3. As noted in the Third Year Review of the KPCS, NGOs played a key role in the creation of the KPCS and subsequently in the operations of the KPCS. Through their active role in conducting independent NGO reviews of participants, NGOs play an important watchdog role in assessing how well the KP is functioning and by alerting the KP to emerging issues.

4. As noted in the Third Year Review of the KPCS, the operation of the peer review enhances the overall effectiveness and credibility of the KPCS. It has enabled the KP to detect and address some major compliance issues, work with Participants to remedy a range of practical implementation issues and identify areas where capacity-building assistance is required.

5. The initial mandate for the KP was established by United Nations General Assembly (UNGA) Resolution 55/56 in December 2000. This mandate has been renewed on a regular basis by a series of UNGA and Security Council resolutions. The support of the UN through these resolutions has been important for the legitimacy and authority of the KP.

There has also been close cooperation between the KP and UNSC Investigatory Panels of Experts. For example, a joint mission comprising representatives of the KP and the Group of Experts appointed to report on developments in Côte d'Ivoire under UNSC resolution 1572(2005) was undertaken to Côte d'Ivoire in April 2006.

There has also been close cooperation with the UN Group of Experts appointed to report on developments in Liberia under UNSC resolution 1521(2003). In March 2007, a review mission (led by the European Community) concluded that Liberia had designed effective controls in line with KP requirements and presented its findings to the UN Security Council. The UN Security Council decided to lift its diamond embargo on Liberia on 27 April 2007. Liberia was admitted to the KP on 4 May 2007.

The Third Year Review of the KPCS noted that Participants had called for a closer working relationship with international organisations which have activities that are relevant to diamond production and trade. Participants suggested that organisations such as the UNDP, international financial institutions and the UN Secretariat should be consistently invited to KPCS Plenary meetings as Observers and be kept informed of KP decisions and reports to improve information flows about the KP.

6. Implementation of the KPCS relies on national laws, procedures and personnel, as mandated by the UNGA 55/56(2000) Resolution. The KPCS is not a legally binding document, as a matter of international law. However, the KP Participants considered it necessary to voluntarily fulfil the KPCS minimum requirements at the national level and have adopted relevant laws and/or executive acts to that effect.

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1 See media release issued following the Gaborone Plenary. The media release can be accessed on the KPCS website.
2 For further details of the role of civil society in the KPCS, see pp64-65 of the Third Year Review of the Kimberley Process Certification Scheme.
3 For details of relevant UNGA and UNSC resolutions, see pp15-16 of the Third Year Review of the Kimberley Process Certification Scheme.
4 Third Year Review of the Kimberley Process Certification Scheme, p65.
It was noted in the Third Year Review of the KPCS that one consequence of this ‘individualised’ approach to implementation of the Scheme is the absence of harmonisation, as different Participants have interpreted the KPCS ‘working document’ in different ways. However, the report also noted that it is not certain that an ‘international, harmonised’ approach would have yielded fewer discrepancies when translated into national law.

The Third Year Review of the KPCS assessed the Scheme was operating well, and there were no recommendations put forward to make KPCS obligations legally binding under a UNSC Resolution. As noted in the response to (5) above, Participants considered there was scope to improve information flows with international organisations.

7. The International Criminal Court (ICC) has jurisdiction over war crimes, crimes against humanity and genocide committed after the general entry into force of the Rome Statute of the ICC on 1 July 2002. Conflict diamonds trading is not a crime within the jurisdiction of the ICC. Accordingly, there is no role for the ICC in hearing prosecutions for serious cases of conflict diamonds trading.

States Parties to the Rome Statute of the ICC retain primary responsibility for prosecuting those responsible for committing war crimes, crimes against humanity and genocide. The ICC’s jurisdiction is enlivened when a country manifestly fails to take action to investigate or prosecute a particular situation which otherwise falls within the jurisdiction of the ICC. Where a country does not take such action, and unless it is a State Party to the Rome Statute of the ICC and itself refers the situation to the ICC for investigation, the United Nations Security Council may refer a situation to the ICC for investigation under Chapter VII of the Charter of the United Nations (as was the case with the situation in Darfur, Sudan, pursuant to SCR 1593 (2005)). Such referral would require a finding that the situation constitutes a threat to international peace and security and requires the approval of nine of the fifteen members of the Security Council, including all five permanent members. However, such referral is not possible in the case of conflict diamonds trading for the reason outlined above.

Although there is currently no role for the United Nations Security Council in forwarding conflict diamond cases to the ICC for investigation, the Security Council is addressing the issue in other ways. In particular, following a proposal by the Belgian Mission to the United Nations, the Security Council engaged in a thematic debate on ‘Natural Resources and Armed Conflict’ on 25 June. The illicit trade in diamonds was one item considered during that debate. As a result of this discussion, the Security Council adopted a presidential statement on natural resources and armed conflict which "underlined the importance of taking this dimension into account, where appropriate, in the mandates of UN and regional peacekeeping operations, within their capabilities'. The Security Council stressed that 'natural resources are a crucial factor in contributing to long-term economic growth and sustainable development', while noting that 'in specific armed conflict situations, the exploitation, trafficking and illicit trade of natural resources have played a role in areas where they have contributed to the outbreak, escalation or continuation of armed conflict'. The Security Council also emphasised 'the important contribution of commodity monitoring and certification schemes such as the Kimberley Process'. The press release and presidential statement are available through the following links:


Canada spoke for Canada, Australia and New Zealand. A copy of that statement is attached. (refer Attachment A)

8. There has so far been one occasion where the formal provisions of the KP for dispute resolution have been invoked. These led ultimately to the removal of a Participant (Republic of Congo). By general consensus, this instance is perceived to have strengthened the credibility of the KPCS.

To date, all other disputes have been handled informally by the Chair or by KP Working Groups within the terms of their mandate. In the case of the current situation in Cote d’Ivoire, the Gaborone Plenary meeting heard reports from the United Nations’ Group of Experts that diamonds mined in rebel-held territory were entering international markets through Ghana. As a result, the KP endorsed an action plan intended to remedy the weaknesses identified in Ghana’s system of internal controls. This approach was seen by all Participants and industry and civil society representatives as an appropriate and effective response to a serious breach of the KP.

As noted above, processes relating to potential expulsions and/or penalties for Participants have been dealt with on a case by case basis. The 2006 Gaborone Plenary meeting agreed that proposals should be developed for the creation of a dispute resolution mechanism to determine how such cases should be formally processed in future. Australia supports this approach and will work constructively with other Participants in the development of such a mechanism.

9. As was noted in the 2006 report of the Kimberley Process to the United Nations General Assembly (submitted by the Republic of Botswana, KP Chair for 2006), a major challenge for the KPCS is preventing rough diamonds from Cote d’Ivoire contaminating legitimate production from other countries. The report also notes that measures adopted at the Gaborone Plenary make it more difficult for diamonds from Cote d’Ivoire to enter the legitimate diamond trade.

The report also notes there is a continuing need to strengthen KPCS processes. In this regard, it is important to implement the recommendations of the Third Year Review of the KPCS as a matter of urgency. There is a need for Participant countries to continue to pursue improvement of internal controls, deal with the problem of diamonds from Cote d’Ivoire and further expand the KP membership to those countries who have yet to join. Australia will be working closely with other Participants towards these goals.

10. The institutional arrangements for the implementation of the KP involve the Department of Foreign Affairs and Trade (DFAT), the Department of Industry, Tourism and Resources (DITR) and the Australian Customs Service (Customs) working collaboratively to ensure the KP is implemented efficiently and correctly in Australia.

DFAT has responsibility for the overall implementation of the scheme within Australia. It is the lead agency for dealing with international issues associated with the effectiveness of the scheme, including implementation of international sanctions against importation of diamonds from certain countries.
DITR has been designated as the KP Export Authority. It is the lead agency for all KP technical issues associated with the export of rough diamonds, submits export and production data and issues KP certificates.

Customs has been designated as the KP Import Authority. It is the lead agency for all KP technical issues relation to import procedures and submits all import data to the KPCS. Customs enforces the import/export controls at the border, which came into effect on 1 January 2003.

Australia’s commitment to the KPCS for the export of rough diamonds is administered under Regulation 9AA of the Customs (Prohibited Exports) Regulations 1958. Under this regulation the Minister for Industry, Tourism and Resources or an authorised person may, on application, grant permission for the exportation of rough diamonds (defined as diamonds that are unworked or simply sawn, cleaved or bruted and fall to headings 7102.10, 7102.21 or 7102.31 of the Harmonized System for classification of goods) to a country by issuing a Kimberley Process Certificate (KPC).

The regulation prohibits the export of rough diamonds unless the exporter holds a KPC, the original is produced to Customs at or before the time of exportation and the rough diamonds are exported in a tamper resistant container.

Australia has established a two-tier system of managing export certification. “Occasional Exporters” are required to apply to DITR in writing for each shipment and provide documentary evidence of the origin of rough diamonds they wish to export. Applicants are required to complete a Criminal History Check through the Australian Federal Police. Packages of rough diamonds to be exported must be declared to Customs on departure, and the KPC presented.

Businesses wishing to regularly export shipments of rough diamonds may apply for a “Frequent Exporter” licence. Under the licensing arrangements, businesses are pre-issued with sequentially numbered stocks of partially completed KPCs. Using database applications supplied by DITR, the companies are able to complete the details of the goods for shipment and the importing business and then finalise the validation of the KPC. Details of each KPC are transmitted to DITR and incorporated into the Export Authority’s database records. Under this decentralised system, Frequent Exporters work closely with Australian KPCS Authorities to manage the certification procedures. Customs verifies the shipment satisfies the requirements of the regulations at export.

Further information on Australia’s KPCS export controls is available at www.industry.gov.au

11. The import regulation, Regulation 4MA of the Customs (Prohibited Imports) Regulations 1956, prohibits the import of rough diamonds unless the diamonds are accompanied by a KPC, they are imported in a tamper resistant container and the diamonds are imported from a country that is a participant in the KP.

12. Diamond businesses in Australia can seek the assurances of KPCS compliance prescribed under the System of Warranties.

13. The Customs Act 1901 provides Customs with the appropriate powers to enforce compliance with the regulations and take any appropriate action. Shipments that do not
meet the requirements of the import or export controls may be detained or seized by Customs.

Customs undertakes checks to verify compliance in an environment that is largely self-regulated, by intervening in transactions proportionate to the perceived level of risk.

Intervention by Customs is generally aimed at encouraging compliance and is appropriate to the assessed level of risk. Customs compliance programs focus on assisting clients who are willing and capable of complying with the legislation but there is scope to impose sanctions on entities where appropriate.

For exports of diamonds from Australia, DITR may decline to grant a KPC where the circumstances warrant such action.

14. In Australia, the import or export of prohibited diamonds is an offence under the Customs Act 1901.

Regulation 9AA of the Customs (Prohibited Exports) Regulations 1958 makes it an offence to export rough diamonds from Australia without a KPC. Regulation 4MA of the Customs (Prohibited Imports) Regulations 1956 makes it an offence to import rough diamonds into Australia without a KPC.

Regulation 4N of the Customs (Prohibited Imports) Regulations 1956 and Regulations 8A of the Charter of the United Nations (Sanctions – Côte d’Ivoire) make it an offence to import rough diamonds into Australia either from Cote d’Ivoire (whether or not the rough diamonds originated in Cote d’Ivoire) or of Cote d’Ivoire origin from a third country.

In all cases, the offences only apply where rough diamonds are exported from or imported into Australia. There is no specific offence under Australian law of trading in rough diamonds where the trade does not involve Australian territory.

The penalty on conviction is, if the Court can determine the value of the diamonds, a penalty not exceeding 3 times the value of the goods or 1,000 penalty units (currently A$110 per unit) whichever is the greater. If the Court cannot determine the value then the penalty would not exceed 1,000 penalty units.

15. Cooperation with industry (facilitated by the relatively concentrated nature of the diamond mining industry in Australia) has been one of the major strengths of Australia’s implementation of the KPCS.
Statement by Canada, Australia and New Zealand on Natural Resources and Conflict to the United Nations Security Council (25 June 2007)

Canada, Australia and New Zealand (CANZ) welcome this open debate on natural resources and conflict. We congratulate Belgium on taking this valuable initiative and look forward to their continued leadership on this issue within the Council. After years of case by case, resource by resource Council activity, today’s debate provides a timely opportunity for the Council to consider a more comprehensive approach to its work in this area.

While the challenges here are complex and multi-dimensional, there is no doubt that the Security Council has an important role to play both in breaking the link between natural resource exploitation and the fuelling of armed conflicts, and in promoting effective natural resource management in fragile states and post-conflict peacebuilding situations.

Today’s debate is also an opportunity to highlight the potential for effective management of natural resources to contribute to conflict prevention, and to international peace and security. Natural resource revenues can be a force for sustained economic growth, social development, and stability.

Sadly, though, recent history has demonstrated that the often illicit extraction of natural resources has too frequently led to, deepened and prolonged conflicts by providing belligerents with both the incentive and the means to perpetuate campaigns of armed violence. Facilitated by economic globalization and access to international markets, many warring parties have turned to the predatory exploitation of lucrative natural resources such as timber, precious minerals and gemstones. Conflicts can develop a “self-financing nature”, with the revenues generated from the trade in conflict resources helping to procure weapons and military materiel, hire mercenaries, line the pockets of corrupt warlords and government officials, and buy the support of neighbouring regimes.

Action by the Security Council on the often illicit exploitation of resources has focused largely on the role of diamonds with sanctions being imposed in four separate cases – Angola, Sierra Leone, Liberia and Cote d’Ivoire. But we should not forget the other resources that have been the subject of the Council’s attention – from support for a moratorium on log exports during the Cambodian civil war to the ban imposed on timber exports on Liberia during Charles Taylor’s rule. And reports from the Panel of Experts on the Democratic Republic of Congo have identified a series of other resources such as gold and coltan as resources directly linked to instability in that volatile region.

Effective action to address the peace and security challenges can arise from the exploitation of natural resources must necessarily be well coordinated with broader efforts related to conflict prevention, peacebuilding, resources governance and economic development. Building on the Council’s successful cooperation with the Kimberley Process, stronger links could be forged within the UN system including the Peacebuilding Commission and UNDP, the International Financial Institutions as well as international initiatives such as the International Conference on the Great Lakes Region and the Extractive Industries Transparency Initiative. There is a clear role here as well for the private sector, particularly through engagement with initiatives such as the Voluntary Principles on Security and Human Rights, OECD Tool for Multinational Enterprises in Weak Governance Zones, the Equator Principles and the IFC Performance Standards.

While coordination with broader international efforts is indispensable, much of what needs to be done lies squarely within the mandate of the Security Council including the imposition and monitoring of targeted sanctions regimes and the integration of natural resource issues into peacekeeping mandates and post-conflict peacebuilding strategies.

Targeted sanctions have been used in multiple contexts to address the link between resources and conflict. These mechanisms have been used to prevent the trade in a specific conflict resource,
block the exchange of these resources for weapons, and disrupt the trade in conflict resources through asset freezes and travel bans. Experience has shown however that the effectiveness of sanctions depends both on systematic monitoring by Panels of Experts and thorough implementation within national jurisdictions.

UN missions in the DRC, Liberia and Cote d'Ivoire have been directly involved in monitoring and securing sources of resources that have been linked to conflict and instability. Building on these experiences, future operations should be planned and deployed with an understanding of the nature and implications of the distribution of natural resources in their area of operation.

CANZ strongly encourages members of the Security Council to undertake a comprehensive examination of the intersection between the exploitation of natural resources and the persistence, and in some cases intensification, of armed conflicts. We know that natural resources play a complex role in a number of contemporary civil wars – these issues have and will continue to recur in Council deliberations.

Dedicated attention to the unique role of the Security Council, and to potential collaboration with other organizations and initiatives, is an important dimension of the maintenance of international peace and security. The discussions here today represent an important first step down this path.
MAP OF SIERRA LEONE AND ITS DIAMOND FIELDS

582 Smillie, Giberie and Hazleton, above n 2, 5.
THE DEMOCRATIC REPUBLIC OF CONGO & ITS DIAMOND FIELDS

Map of Zimbabwe and the Marange Diamond Fields