

## IS THERE A FUTURE FOR THE KIMBERLEY PROCESS CERTIFICATION SCHEME FOR CONFLICT DIAMONDS?

HOLLY CULLEN\*

*The Kimberley Process is a system of international soft law intended to regulate the trade in conflict diamonds. It has been in operation since 2003, and involves states, industry bodies and civil society. States undertake to certify diamonds in trade as conflict-free and to have adequate internal controls over the production and trade in diamonds. While the Kimberley Process has been effective in reducing the trade in diamonds to fund armed rebellion against governments, it seems unable to meet recent challenges. Some states in the Process, notably Côte d'Ivoire, Venezuela and Zimbabwe, have not been compliant with their undertakings, yet the Process has been unable to achieve consensus for decisions to sanction non-compliant members. Consensus has also proved elusive in the effort to expand the definition of conflict diamonds to address the wide range of human rights abuses that may be associated with diamond mining. As new international regimes to address the problem of conflict minerals have been developed in recent years, it is now time to question whether the Kimberley Process has a future role.*

### I INTRODUCTION

During the 1990s, the exploitation of mineral resource wealth to finance armed conflict emerged as an issue of concern for international law.<sup>1</sup> The United Nations Security Council has at various times targeted sanctions against states with a high incidence of such 'conflict minerals': Democratic Republic of the Congo, Sierra Leone and Liberia.<sup>2</sup> The use of diamonds to finance the activities of armed rebel groups achieved a particularly high profile as a result of the activities of concerned civil society organisations. The Kimberley Process, in operation since 2003, establishes a certification system for rough diamonds to guarantee they have not been used to fund armed conflict.

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\* BCL, LLB (McGill), LLM (Essex); Winthrop Professor of Law, University of Western Australia.

<sup>1</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Merits)* [2005] ICJ Rep 168. For commentary, see Robert Dufresne, 'Reflections and Extrapolation on the ICJ's Approach to Illegal Resource Exploitation in the Armed Activities Case' (2008) 40 *New York University Journal of International Law and Politics* 171.

<sup>2</sup> SC Res 1343, UN SCOR, 56<sup>th</sup> sess, 4287<sup>th</sup> mtg, UN Doc S/RES/1343 (7 March 2001); SC Res 1306, UN SCOR, 55<sup>th</sup> sess, 4168<sup>th</sup> mtg, UN Doc S/RES/1306 (5 July 2000); SC Res 1295, UN SCOR, 55<sup>th</sup> sess, 4129<sup>th</sup> mtg, UN Doc S/RES/1295 (18 April 2000); SC Res 1173, UN SCOR, 53<sup>rd</sup> sess, 3891<sup>st</sup> mtg, UN Doc S/RES/1173 (12 June 1998).

Corporations and civil society organisations such as Global Witness and Partnership Africa Canada have also been involved with the Kimberley Process, and have had a significant role in monitoring its standards. Nonetheless, the Kimberley Process is still a state-dominated system. Only states can be Chair of the Process or vote in its Plenary meetings. Furthermore, decisions are made by consensus, meaning a minority of states can block a proposed decision. This structure has, in recent years, attracted criticism. Several states involved in the Process have been accused of not living up to their undertakings to ensure that conflict diamonds do not enter general trade, but have neither been suspended nor expelled – the only real sanction available within the Kimberley Process. Particularly in light of the emergence of other approaches to the problem of conflict minerals, it is open to question whether the Kimberley Process will continue or fade into irrelevance.

## II THE KIMBERLEY PROCESS — AN OVERVIEW

The Kimberley Process is a coalition of states, non-governmental organisations (NGOs) and business bodies interested in the diamond trade. It is deliberately constructed to avoid the creation of legally binding rules under international law. The foundational documents are clearly intended not to be treaties. However, it is still a state-dominated organisation, where NGOs and corporate actors are Observers rather than Participants, and have no voting rights.

The Process seeks to regulate conflict diamonds to stop them being used as a source of revenue for rebel groups, but does not seek to ban conflict diamonds.<sup>3</sup> Not surprisingly, this approach has been attractive not only to states but to the diamond industry. Business groups appear to have become involved largely because of reputational concerns arising from wide publicity given to conflict or ‘blood’ diamonds.<sup>4</sup> After concerted NGO attention to conflict diamonds,<sup>5</sup> the diamond industry sought to secure confidence in its product. Business support may have been comparatively easy to achieve because of the quasi-monopoly role of De Beers in the diamond trade.<sup>6</sup> A further impetus came from the United Nations, when the General Assembly put its weight behind moves towards regulation of conflict diamonds.<sup>7</sup>

The Kimberley Process defines the problem it seeks to address as conflict diamonds: ‘rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments’.<sup>8</sup> The *Kimberley Process Certification Scheme Core Document*, in its preamble, states that:

<sup>3</sup> Lesley Wexler, ‘Regulating Resource Curses: Institutional Design and Evolution of the Blood Diamond Regime’ (2010) 31 *Cardozo Law Review* 1717, 1737.

<sup>4</sup> *Ibid* 1734, 1737.

<sup>5</sup> See, eg, Global Witness, *A Rough Trade: The Role of Companies and Governments in the Angolan Conflict* (Global Witness, 1998); Ian Smillie et al, *The Heart of the Matter: Sierra Leone, Diamonds and Human Security* (Partnership Africa Canada 2000).

<sup>6</sup> Wexler, above n 3, 1734.

<sup>7</sup> *The role of diamonds in fuelling conflict: breaking the link between the illicit transaction of rough diamonds and armed conflict as a contribution to prevention and settlement of conflicts* GA Res 55/56, GAOR 55<sup>th</sup> sess, 79<sup>th</sup> plen mtg, Agenda item 175, UN Doc A/RES/55/56 (29 January 2001).

<sup>8</sup> *Ibid*; See also Kimberley Process, *Kimberley Process Certification Scheme Core Document* (2003) <<http://www.kimberleyprocess.com/documents/10540/11192/KPCS%20Core%20Document?version=1.0&t=1331826363000>> (‘Core Document’) s I: ‘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

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 illicit traffic in and proliferation of, armaments, especially small arms and light weapons;<sup>9</sup>

This definition focuses narrowly on one problem, the exploitation of mineral wealth by non-state armed groups to fund armed conflict. More recently, the idea of conflict minerals has been expanded. Some commentators argue that the idea of conflict minerals should also include the extraction of minerals, under the control of an armed group, where serious human rights abuses occur in the process of extraction.<sup>10</sup>

All United Nations member states are invited to be Participants.<sup>11</sup> Regional economic integration organisations may also be Participants, with the result that the European Union is a Participant, but not its individual member states. Fifty-four Participants therefore represent eighty countries. The Kimberley Process web site asserts that its Participants represent 99.8% of global diamond production.<sup>12</sup> In addition, seven states are currently applicants to become Participants, most from Africa.<sup>13</sup> Non-state actors may only be Observers in the Kimberley Process.<sup>14</sup> The current observers are: Civil Society Coalition,<sup>15</sup> the Diamond Development Initiative, the World Diamond Council and the African Diamonds Producers Association.<sup>16</sup> Only Participants have defined rights and undertakings, although Observers do have some influence on proceedings, and are explicitly permitted to take part in Plenary meetings.

The states that set up the Kimberley Process went to great lengths to ensure that the system being established would not create binding obligations at international law. The terminology used emphasises the effort to avoid being categorised as a treaty.<sup>17</sup> There is no mention of signature or ratification. The states are referred to as Participants rather than parties. The document itself is called the ‘*Core Document*’ rather than a treaty, convention or covenant. The provisions are called ‘undertakings’ rather than obligations. The Kimberley Process can therefore be described as soft law. Soft law obligations, being non-binding, do not give rise to

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General Assembly (UNGA) Resolution 55/56, or in other similar UNGA resolutions which may be adopted in the future’.

<sup>9</sup> Kimberley Process, *Core Document*, above n 8; see also Kimberley Process, *Interlaken Declaration of 5 November 2002 on the Kimberley Process Certification Scheme for Rough Diamonds* (2002) <[http://www.kimberleyprocess.com/documents/10540/11192/0005\\_Interlaken\\_declaration\\_en.pdf?version=1.0&t=1327412628000](http://www.kimberleyprocess.com/documents/10540/11192/0005_Interlaken_declaration_en.pdf?version=1.0&t=1327412628000)>.

<sup>10</sup> Shannon Raj, ‘The Blood Electronics: Congo’s Conflict Minerals and the Legislation that Could Cleanse the Trade’ (2011) 84 *Southern California Law Review* 981, 989. Global Witness also includes human rights abuses in its definition of conflict diamonds: Global Witness, *Conflict Diamonds* (10 September 2013) <<http://www.globalwitness.org/conflict-diamonds>>.

<sup>11</sup> Kimberley Process, *Core Document*, above n 8, s I.

<sup>12</sup> Kimberley Process Certification Scheme, *Participants* (2013) <[www.kimberleyprocess.com/web/kimberley-process/kp-participants](http://www.kimberleyprocess.com/web/kimberley-process/kp-participants)>.

<sup>13</sup> Kimberley Process Certification Scheme, *Applicants* (2013) <[www.kimberleyprocess.com/web/kimberley-process/applicant-countries](http://www.kimberleyprocess.com/web/kimberley-process/applicant-countries)>.

<sup>14</sup> Kimberley Process, *Core Document*, above n 8, s I: ‘a representative of civil society, the diamond industry, international organisations and non-participating governments invited to take part in Plenary meetings.’

<sup>15</sup> Kimberley Process Certification Scheme, *Civil Society Coalition* (2013) <[www.kimberleyprocess.com/web/kimberley-process/civil-society-coalition](http://www.kimberleyprocess.com/web/kimberley-process/civil-society-coalition)>.

<sup>16</sup> Kimberley Process Certification Scheme, *Observers* (2013) <[www.kimberleyprocess.com/web/kimberley-process/observers](http://www.kimberleyprocess.com/web/kimberley-process/observers)>.

<sup>17</sup> See Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 2(1).

state responsibility when they are breached.<sup>18</sup> However, the distinction between hard and soft law in international law may be one of degree rather than kind. Many binding international law obligations are not subject to compulsory arbitration or adjudication. Although numerous treaties provide for dispute resolution at the International Court of Justice, only a handful of cases are initiated at the Court each year.<sup>19</sup> On the other hand, soft law may be functionally similar to binding international law.<sup>20</sup> As Chinkin has argued, soft law may establish expectations on states which have a normative effect.<sup>21</sup> This is true of the Kimberley Process, which sets out in detail what states must do to maintain membership, and which has an institutional framework, including Administrative Decisions, to implement its substantive rules.

Since 2000, there has been a clear preference for soft law in matters relating to international regulation of business activity.<sup>22</sup> Although the *Kimberley Process Core Document* is addressed primarily to states, the diamond industry was a major influence in its adoption, and it shares with documents such as the *OECD Guidelines on Multinational Enterprises* and the *Guiding Principles on Business and Human Rights* a use of soft law and a reluctance to create new binding obligations.<sup>23</sup>

Although the Kimberley Process avoids creating binding obligations, the model described above is not unique in contemporary international law, where non-state actors often have a defined role in the implementation of international legal rules.<sup>24</sup> Dame Rosalyn Higgins argued that international law could no longer be defined in terms of a clear distinction between subjects and objects of international law but instead should be seen as being made up of participants.<sup>25</sup> Ironically, the Kimberley Process uses Participants in a narrow way to designate states only. Nonetheless, in Higgins' sense of the term, both Participants and Observers are participants in the Kimberley Process.

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<sup>18</sup> See, eg, James Crawford (ed), *Brownlie's Principles of Public International Law* (Oxford University Press, 8<sup>th</sup> ed, 2012) 560-61: arguing that international responsibility only attaches to the breach of international duties.

<sup>19</sup> International Court of Justice, *List of cases referred to the Court since 1946 by date of introduction* (2013) <<http://www.icj-cij.org/docket/index.php?p1=3&p2=2>>.

<sup>20</sup> Matthias Goldmann, 'We Need to Cut Off the Head of the King: Past, Present and Future Approaches to International Soft Law' (2012) 25 *Leiden Journal of International Law* 335.

<sup>21</sup> Christine Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 *International and Comparative Law Quarterly* 850.

<sup>22</sup> See United Nations Global Compact, *What is the UN Global Compact?* (2013) <<http://www.unglobalcompact.org>>: an attempt to create binding obligations for business in international law; *Sub-Commission on the Promotion and Protection of Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN ESCOR, 55<sup>th</sup> sess, 22<sup>nd</sup> mtg, Agenda Item 4, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (13 August 2003), failed to attract sufficient support to progress.

<sup>23</sup> John Ruggie, *Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, John Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, and Remedy" Framework*, UN Doc A/HRC/17/31 (21 March 2011); Organisation for Economic Cooperation and Development, *OECD Guidelines for Multinational Enterprises* (OECD Publishing, 2011).

<sup>24</sup> Holly Cullen and Karen Morrow, 'International Civil Society in International Law: The Growth of NGO Participation' (2001) 1 *Non-State Actors and International Law* 7; Committee on Non-State Actors, 'Second Report of the Committee: Non-State Actors and International Law: Law-Making and Participation Rights' (Report, International Law Association, 29 August 2012).

<sup>25</sup> Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press, 1994) 39-55; Alan Boyle and Christine Chinkin, *The Making of International Law* (Clarendon Press, 2007) 41-97.

The ‘undertakings’, to use the language of the *Core Document*, apply to Participants. By virtue of Section II, every shipment of raw diamonds exported or imported must contain a certificate whose creation and issuance meets minimum certification standards.<sup>26</sup> Section III calls on Participants to require a certificate when importing or exporting diamonds, and to ensure that no shipment of rough diamonds is imported from or exported to a non-participant.<sup>27</sup>

Section IV sets out detailed undertakings with respect to internal controls. Each Participant is expected to establish a system of internal controls. This includes use of tamper-resistant containers for shipping diamonds and penalties for violation of the internal controls. The internal controls must be enacted as legislation, and states have not been allowed to join as Participants until they have adopted appropriate legislation.<sup>28</sup> Furthermore, the 2006 *Administrative Decision 11* on state Internal Controls extended expectations of what states will do, stipulating more documentation for transactions and more inspections, including random checks.<sup>29</sup> As a result, although the Kimberley Process itself does not impose binding international law obligations, the expectations associated with membership in the Process do require that binding domestic law be adopted. Section IV is supplemented by annex II, which makes more specific recommendations. These include licensing of all mines and restricting mining to licensed mines.<sup>30</sup> Participants should also license diamond buyers, sellers and exporters.<sup>31</sup>

Section IV also requires Participants to collect and exchange data on production, import and export of rough diamonds.<sup>32</sup> Section V elaborates on the undertakings with respect to information. Participants should provide information about designated authorities for implementing the scheme and information about relevant law and practices. They should compile and make available to all other Participants statistical data in line with the principles in annex III of the *Core Document*.

The Kimberley Process expanded its focus to include alluvial diamond production from 2005. The Moscow Declaration followed a report from a sub-group of the Working Group on Monitoring on challenges facing alluvial miners and examples of best practice.<sup>33</sup> The Declaration was intended to build on the Recommendations for Participants with Small-Scale Diamond Mining in annex II of the *Core Document*. The recommendations in the Declaration focused on ensuring traceability through a stringent regime of recording production and regulation of both mining and trade in alluvial diamonds. Artisanal miners were also to be encouraged to move into the formal economy. The recommendations would clearly impose heavy burdens on states with alluvial diamond mining on their territory, so the Declaration

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<sup>26</sup> Kimberley Process, *Core Document*, s II.

<sup>27</sup> *Ibid* s III.

<sup>28</sup> Wexler, above n 3. 1748.

<sup>29</sup> Kimberley Process Certification Scheme, Administrative Decision 11, *Improving Implementation of Internal Controls in the KPCS*, November 2006.

<sup>30</sup> Kimberley Process, *Core Document*, annex II, [9] (general), (artisanal and informal diamond miners): at [11]-[12].

<sup>31</sup> *Ibid* [13]-[16].

<sup>32</sup> Wexler, above n 3, 1766-67: Wexler notes that there is still some dispute between NGOs and states over what data should be published, and how much the data should be independently verified by the Kimberley Process itself.

<sup>33</sup> Kimberley Process Certification Scheme, *Improving Internal Controls Over Alluvial Diamond Production – Declaration Adopted by the Moscow Plenary Meeting of the Kimberley Process* (16 November 2005) <<http://www.kimberleyprocess.com/en/2005-administrative-decision-moscow-declaration-alluvial-diamond-production>>.

also recommended that Participants and other donors support states in regulating and formalising the alluvial diamond mining sector.

During the following years, however, the issue of the rights and welfare of alluvial miners was not fully resolved.<sup>34</sup> In 2012, the Plenary adopted the Washington Declaration on integrating the development of artisanal and small-scale diamond mining in the implementation of the Kimberley Process.<sup>35</sup> The aim of the Declaration is to advance the artisanal and alluvial mining sector as an engine of economic development.<sup>36</sup> Its recommendations to Participants include improvements to both the economic and social aspects of artisanal mining. Although formalisation and improved governance are still emphasised, the economic recommendations include reducing fees for registration and licensing of miners and improving access to training and equipment.<sup>37</sup> Social recommendations included encouraging environmental sustainability, protection of health and safety of mine workers and diversification of livelihoods.<sup>38</sup> The Declaration also advocates promotion of gender equality and protection of children, particularly through the elimination of child labour in mining.<sup>39</sup> However, beyond this, there is no discussion of human rights issues in artisanal mining. A Working Group on Artisanal and Alluvial Mining with Angola as Chair oversees the Kimberley Process efforts in this area.<sup>40</sup>

Section V(e) sets out an expectation that Participants inform the Chair if they think another Participant's rules, procedures or practices are inadequate. Under s V(f), Participants are expected to cooperate to resolve problems which could lead to 'non-fulfilment of the minimum requirements for the issuance or acceptance of the Certificates.' In practice, however, the requirement of unanimity and the emphasis on state sovereignty within the Process have limited the ability of the Process to engage in the sort of problem solving envisaged in s V.

Section VI provides that Participants and Observers will meet in Plenary each year, and otherwise as the Participants deem necessary. The Meetings are chaired on a rotating basis by the Participant who is hosting the meeting. A rotating annual Chair, however, deprives the Process of stability at the centre. Section VI also foresees ad hoc working groups and other subsidiary bodies. This provision has in practice been fundamental in allowing the Process to evolve and to strengthen its implementation processes. Finally, it provides that decisions of Participants are to be reached by consensus.<sup>41</sup> The need for consensus limits potential action

<sup>34</sup> Letter dated 8 December 2010 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General, UN GAOR, 65<sup>th</sup> sess, Agenda item 32, UN Doc A/65/607 (8 December 2010) ('2010 UN report') [37].

<sup>35</sup> United States of America Department of State and Kimberley Process Certification Scheme, *Final Communiqué from the Kimberley Process Plenary Meeting* (30 November 2012) <<http://www.kimberleyprocess.com/en/2012-final-communicue-plenary-washington>> [28] ('2012 Plenary Communiqué').

<sup>36</sup> Kimberley Process Certification Scheme, *Washington Declaration on Integrating Development of Artisanal and Small-Scale Diamond Mining with Kimberley Process Implementation* (29 November 2012) <<http://www.kimberleyprocess.com/en/2012-washington-declaration>>.

<sup>37</sup> Ibid 4-6.

<sup>38</sup> Ibid 7-8.

<sup>39</sup> Ibid 8.

<sup>40</sup> Kimberley Process Certification Scheme, *Artisanal and Alluvial (WGAAP)* (2013) <[www.kimberleyprocess.com/web/kimberley-process/artisanal-and-alluvial](http://www.kimberleyprocess.com/web/kimberley-process/artisanal-and-alluvial)>.

<sup>41</sup> Kimberley Process Certification Scheme, *Administrative Decision 1: Kimberley Process Rules of Procedure of Meeting of the Plenary, and its Ad Hoc Working Groups and Subsidiary Bodies* (2003)

by allowing a small minority of states, or even a single state, to block the adoption of a decision.

Section VI also sets out what Participants are expected to do for Plenary meetings. They are to submit the information required in s V, and may be asked to provide further details at the request of the Plenary. The Participants at the Plenary, acting of course by consensus, may decide on additional verification measures, including possible review missions. Review missions are intended to be ‘analytical, expert and impartial’ and may only be conducted with the consent of the Participant in question. They include representatives of Observers as well as Participants. The mission reports to the Chair of the Plenary and to the Participant, who may comment on the report. All these documents remain in the restricted access section of the Kimberley Process web site, with Participants and Observers expected to maintain confidentiality with regard to the entire matter. The sole provision concerning dispute resolution allows Participants to raise issues regarding compliance with the Chair, who is to inform all Participants and enter into dialogue on addressing the issue raised. Again, Participants and Observers are expected to treat such issues as confidential.

Section VI is somewhat paradoxical. Its procedures are clearly intended to operate on the basis of the consent of the state about which concerns are raised. It is intended that such concerns are to be discussed internally only, with no publication of reports or discussions. However, it is nonetheless the case that these procedures are intended to improve compliance. Despite being a soft law measure, the Kimberley Process treats compliance as a rule-based rather than political issue.<sup>42</sup> Nonetheless, recent issues involving questions over Participants’ compliance indicate that politics may be an increasing factor.

The early years of the Kimberley Process saw the development of more detailed review procedures. While Participants had a good rate of submitting reports,<sup>43</sup> the reports were not of consistent levels of detail.<sup>44</sup> As a result, the Monitoring Working Group was created to verify the completeness of reports.<sup>45</sup> It also standardised reporting.<sup>46</sup> The peer review process established in *Administrative Decision 5* also created the system of review visits, calling on

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<<http://www.kimberleyprocess.com/en/2003-administrative-decision-rules-procedure-meetings-plenary-and-its-ad-hoc-working-groups-and>> r 42.

<sup>42</sup> Wexler, above, n 3, 1749.

<sup>43</sup> *2012 Plenary Communiqué*, above n 35, [7]: 49 of 54 Participants submitted reports on implementation in 2011 to the 2012 Plenary.

<sup>44</sup> Wexler, above n 3, 1751-52 n 171, citing Kimberly Process Working Group on Monitoring, *Assessment of the Annual Reports Submitted by Participants for the Period of 1 January to 31 December 2004* (Assessment of Annual Reviews, Kimberly Process Certification Scheme, 2006).

<sup>45</sup> Wexler, above n 3, 1752; See Kimberley Process Certification Scheme, *Administrative Decision 5: Implementation of Peer Review in the KPCS* (30 October 2003)

<<http://www.kimberleyprocess.com/en/2003-administrative-decision-implementation-peer-review-kpcs>> (‘AD5’); Working Group on Monitoring, *Terms of Reference*, Kimberley Process Certification Scheme (31 October 2003) <<http://www.kimberleyprocess.com/en/2003-terms-reference-working-group-monitoring-composition-and-working-methodes>>: The Working Group is composed of members appointed by the Plenary from among Participants and Observers and chaired by a Participant appointed by the Plenary: at [2]; This was revised by Kimberley Process Certification Scheme, *Administrative Decision 16: KPCS Peer Review System* (2007) <<http://www.kimberleyprocess.com/en/2007-administrative-decision-kpcs-peer-review-revised>>, and; Working Group on Monitoring, *Terms of Reference*, Kimberley Process Certification Scheme (15 January 2011)

<<http://www.kimberleyprocess.com/en/2011-terms-reference-working-group-monitoring-revised>>; A proposal for further amendments was endorsed by the Plenary in 2012: *2012 Plenary Communiqué*, above n 35, [10].

<sup>46</sup> *AD5*, above n 45, annex I.

‘the largest number of Participants possible to volunteer to receive a review visit’ by the time the full implementation of s VI was operational.<sup>47</sup> *Administrative Decision 5* also established review missions, which were to take place when there are ‘credible indications of significant non-compliance’ in a particular state.<sup>48</sup> The first review mission, to include three Participants appointed by the Chair, a representative of the World Diamond Council and a representative from NGOs, was organised following an Administrative Decision on the Central African Republic in 2003.<sup>49</sup> To date, only Venezuela has refused a request to allow a peer review mission.<sup>50</sup>

Section VI(20) of the *Core Document* provides for periodic review of the Kimberley Process. In 2006, in the context of the Third Year Review,<sup>51</sup> the Participants agreed to institute a second cycle of peer review.<sup>52</sup> However, a second comprehensive review has not yet been completed, although an ad hoc committee for conducting such a review was created in 2011.<sup>53</sup>

The *Core Document* does not directly address the question of expulsion or suspension of Participants, but states in s VI(8) that participation is open to states which are able to fulfil the requirements of the scheme. The authority of the Plenary to vote to expel members is supported by its practice. The Republic of Congo was expelled in 2004, and readmitted in 2007.<sup>54</sup> In addition, in 2008 the Plenary adopted *Administrative Decision 17, Rules and Procedures for Re-Admission of a Former Participant to KP*, to formalise the process.<sup>55</sup> It requires a written application following demonstrated compliance with Kimberley Process minimum standards and the removal of ‘inconsistencies’ which had led to exclusion. The application is then assessed by the Participation Committee, which may request or seek additional data. The applicant state will invite a Kimberley Process expert mission to assess implementation of minimum standards and internal controls. The Participation Committee makes a recommendation to the Chair concerning re-admission, which is then transmitted to the Plenary for consideration and decision.

The *Core Document* does not set out undertakings for Observers, but does contemplate action by corporations. In s IV, it is stated that ‘Participants understand that a voluntary system of industry self-regulation’ is to be established. The industry Observers were expected to develop a system of warranties. The 2002 World Diamond Council resolution set out that members must 1) rely on an invoice system; 2) not buy from sources not in compliance with

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<sup>47</sup> Ibid [II(a)]; In the 2006 Plenary Communiqué, *Letter dated 17 November 2006 from the Permanent Representative of Botswana to the United Nations addressed to the Secretary General*, UN GAOR, 61<sup>st</sup> sess, Agenda item, 10, UN Doc A/61/589 (21 November 2006), (‘2006 UN report’) Enclosure 1, para 8, it was determined that this goal had been achieved.

<sup>48</sup> AD5, above n 45, [III], annex II.

<sup>49</sup> Kimberley Process Certification Scheme, *Administrative Decision 4: Administrative Decision CAR* (2003) <<http://www.kimberleyprocess.com/en/2003-administrative-decision-central-african-republic>>. Wexler, above n 3, 1753.

<sup>50</sup> 2006 UN report, UN Doc A/61/589, enclosure 2.

<sup>51</sup> Ibid enclosure 1 [8].

<sup>52</sup> Kimberley Process Certification Scheme, *Administrative Decision 36: The Periodic Review of the KPCS* (2011) <<http://www.kimberleyprocess.com/en/2011-administrative-decision-kpcs-periodic-rev>>.

<sup>53</sup> *Letter dated 13 November 2007 from the Head of Delegation of the European Commission to the United Nations addressed to the Secretary General*, UN GAOR, 62<sup>nd</sup> sess, Agenda item, 13, UN Doc A/62/543 (21 November 2006) appendix I, [9] (‘2007 UN report’).

<sup>54</sup> Kimberley Process Certification Scheme, *Administrative Decision 17* (2008) <<http://www.kimberleyprocess.com/en/2008-administrative-decision-rules-and-procedures-re-admission-former-participant-kp>>.



the Kimberley Process; 3) not knowingly buy or sell or assist others to buy or sell conflict diamonds; and 4) ensure relevant employees are informed on rules and policies restricting the trade in conflict diamonds.<sup>56</sup> Member organisations expected to enforce the code by expelling and publicising expulsion of violating members, but NGOs have expressed concerns that the industry bodies do not adequately police their members.<sup>57</sup> The 2007 *Brussels Declaration on Internal Controls of Participants with Rough Diamond Trading and Manufacturing* put greater pressure on Participants to verify industry compliance.<sup>58</sup>

In 2009, the Kimberley Process adopted an Administrative Decision regulating the participation of Observers.<sup>59</sup> It sets out that Observers may seek to participate via one of the existing civil society or industry coalitions, or as independent Observers. Observers should at least have experience or knowledge in activities relating to natural resources exploitation, particularly diamonds; demonstrated interest in the Kimberley Process; and a willingness and ability to participate in the activities of the Kimberley Process.<sup>60</sup> The Administrative Decision foresees the possibility of withdrawal of privileges if an Observer is not meeting its responsibilities.<sup>61</sup>

While the Kimberley Process requires extensive reporting and information gathering by Participants, the Process itself relies heavily on confidentiality. Section VI of the *Core Document* calls for confidentiality in relation to review missions and other compliance matters. In 2010, the Plenary adopted an Administrative Decision on *Procedures for Respecting Confidentiality within the KP*.<sup>62</sup> It states that all documentation is to be considered confidential until finalised, that material to remain confidential amongst Participants or Participants and Observers should be clearly identified, and that Participants and Observers are to respect the confidentiality of any material identified as such. The World Diamond Council and some Participants resisted the publication of data provided.<sup>63</sup> Since 2007, however, trade and production data has been published after a six-month delay.<sup>64</sup> Nonetheless, Global Witness continued to push for greater independent verification of data submitted by Participants.<sup>65</sup>

There have been some clear examples of success of the Kimberley Process. In 2003, the Plenary issued an Administrative Decision on Liberia. This decision resolved to consider an

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<sup>56</sup> World Diamond Congress London 2002, *Resolution: Industry System of Self-Regulation*, World Diamond Council (29 October 2002) <<http://www.diamonds.net/Docs/Conference/KPresolution.pdf>>.

<sup>57</sup> See, eg, Global Witness, *Why we are leaving the Kimberley Process – A message from Global Witness founding director Charmian Gooch* (5 December 2011) <<http://www.globalwitness.org/library/global-witness-leaves-kimberley-process-calls-diamond-trade-be-held-accountable>> ('*Global Witness Statement*').

<sup>58</sup> Kimberley Process Certification Scheme, *Brussels Declaration on Internal Controls of Participants with Rough Diamond Trading and Manufacturing* (8 November 2007) <<http://www.kimberleyprocess.com/en/2007-brussels-declaration-internal-controls-participation-rough-diamond-trading-and-manufacturing>>.

<sup>59</sup> Kimberley Process Certification Scheme, *Administrative Decision 23: Participation of Observers in the Work of the Kimberley Process* (2009) <<http://www.kimberleyprocess.com/en/2009-administrative-decision-participation-observers-kpcs>>.

<sup>60</sup> Ibid [5].

<sup>61</sup> Ibid [6].

<sup>62</sup> Kimberley Process Certification Scheme, *Administrative Decision 29* (2010) <<http://www.kimberleyprocess.com/en/2010-administrative-decision-procedures-respecting-confidentiality>>.

<sup>63</sup> Wexler, above n 3, 1766.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid 1767.

application from its government to become a Participant only after the Security Council had lifted the diamond trade embargo. Upon such application, a review mission would be organised.<sup>66</sup> The United Nations Security Council lifted sanctions on Liberia in 2007 following cooperation with the Kimberley Process.<sup>67</sup> The Democratic Republic of the Congo was re-admitted to the Kimberley Process after improved internal controls in 2007.<sup>68</sup> Overall, it is estimated that the presence of conflict diamonds in international trade reduced from 4% of the market to 1% during the period of operation of the Kimberley Process Certification Scheme.<sup>69</sup>

### III THE KIMBERLEY PROCESS NOW — A FLAWED DIAMOND?

Up to 2006, the image of the Kimberley Process is one of progressive evolution, in every sense. The framework of the Process has been strengthened. Monitoring processes are now more detailed and an embryonic institutional framework has been established through the Working Groups and the Third Year Review.<sup>70</sup> Presciently, Botswana's Chair's report to the General Assembly in 2006, following the Third Year Review noted that:

‘[t]here has been a steady stream of innovations, developments and improvements initiated in working groups, transforming the [Kimberley Process] over time. However, there are questions about the sustainability of this over the long term.’<sup>71</sup>

It also noted that diamonds mined in rebel-held areas of Côte d'Ivoire were leaking into legitimate trade, posing an ongoing challenge for the Kimberley Process.<sup>72</sup> The stage was therefore set for a decline in the optimism which accompanied the apparent progress of the first three years of the Kimberley Process.<sup>73</sup>

Nonetheless, commentators began using the Kimberley Process as an example of a successful international regulatory scheme,<sup>74</sup> approving of the fact that it involved business on a voluntary basis rather than through the imposition of binding norms. Paul Collier in particular argued for its value as a prototype.<sup>75</sup> Harrington, while not as unequivocal in her praise, also argued for the extension of the Process to other mining sectors.<sup>76</sup>

<sup>66</sup> Kimberley Process Certification Scheme, *Administrative Decision 3: Liberia* (28 April 2003) <<http://www.kimberleyprocess.com/en/2003-administrative-decision-liberia>>.

<sup>67</sup> 2007 UN report, *UN Doc A/62/543*, [9], appendix 1 [8].

<sup>68</sup> Ibid.

<sup>69</sup> Wexler, above n 3, 1777.

<sup>70</sup> 2006 UN report, *UN Doc A/61/589*, enclosure 2; in 2007, the Plenary Communiqué noted that most of the recommendations of the review had been implemented: 2007 UN report, *UN Doc A/62/543*, appendix 1 [12].

<sup>71</sup> 2006 UN report, *UN Doc A/61/589*, [22.2].

<sup>72</sup> See, eg, *Letter dated 20 November 2008 from the Permanent Representative of India to the United Nations addressed to the Secretary General*, UN GAOR, 63<sup>rd</sup> sess, Agenda item 11, UN Docs A/63/560 (21 November 2008) enclosure [10] ('2008 UN report').

<sup>73</sup> 2006 UN report, *UN Doc A/61/589*, [23]-[26].

<sup>74</sup> Wexler, above n 3, 1720.

<sup>75</sup> See especially, Paul Collier, 'Laws and Codes for the Resource Curse' (2008) 11 *Yale Human Rights and Development Law Journal* 9, 17-18, 22-26.

<sup>76</sup> Alexandra R. Harrington, 'Facing the Future: The Need for and Proposal of the Adoption of a Kimberley Process-Styled Legitimacy Certification System for the Global Gemstone Market' (2009) 18 *Transnational Law and Contemporary Problems* 353.

One development which suggests growing disenchantment with the Kimberley Process Certification Scheme is the fact that the United States has begun acting independently of the Kimberley Process to strengthen controls on conflict minerals, although these do not yet impact on diamonds. In 2010, the United States included measures directed at conflict minerals in the Dodd-Frank Wall Street Reform and *Consumer Protection Act*.<sup>77</sup> Section 1502 of the *Dodd-Frank Act* gives the Securities and Exchange Commission the power to adopt regulations requiring companies to disclose whether any tin, tantalum, tungsten or gold originated in the Democratic Republic of Congo or a neighbouring country. Companies that cannot confirm the origin of minerals they use must report on what due diligence measures they have employed. The Securities and Exchange Commission adopted the rules implementing the conflict minerals provision in August 2012.<sup>78</sup>

The Kimberley Process has had successes since 2006. Its membership has steadily increased, from 47 to 54 Participants between 2006 and 2012.<sup>79</sup> In 2011, following specific improvements to its internal controls,<sup>80</sup> the Plenary removed precautionary measures imposed on Ghana in 2006.<sup>81</sup> While a period of five years to establish satisfactory internal controls is not beyond criticism, the result is clearly improved compliance, which is particularly important because of Ghana's proximity to Côte d'Ivoire, which continues to be a source of conflict diamonds despite being a Participant in the Kimberley Process.

The Kimberley Process has also demonstrated a willingness to use the tools at its disposal at least in some circumstances. On 23 May 2013, South Africa as Chair announced that, by means of a written process, the Participants had agreed to suspend the Central African Republic on a temporary basis.<sup>82</sup> This followed two Vigilance Notices, in December 2012 and April 2013, based on activity by a new rebel alliance attacking diamond-producing areas.<sup>83</sup> This is a relatively quick reaction by an international group.

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<sup>77</sup> Pub L No 111-203, §13, 124 Stat. 1376, 1113-18 (2010). See generally Raj, above n 10, 1000-02.

<sup>78</sup> *Conflict Minerals* 17 CFR § 240, 249b (2012); a legal challenge to these rules has been initiated: *National Association of Manufacturers, et al. v. U.S. Securities and Exchange Commission* (DC Cir, No. 12-1422).

<sup>79</sup> *2006 UN report, UN Doc A/61/589; 2012 Plenary Communiqué*, above n 35.

<sup>80</sup> Problems with Ghana's internal controls were first identified in 2004: Global Witness and Partnership Africa Canada, *The Key to Kimberley: Internal Diamond Controls, Seven Case Studies*, Partnership Africa Canada (2004) <[http://www.pacweb.org/images/PUBLICATIONS/Conflict\\_Diamonds\\_and\\_KP/key\\_to\\_Kimberley-eng-elect\\_Oct2004.pdf](http://www.pacweb.org/images/PUBLICATIONS/Conflict_Diamonds_and_KP/key_to_Kimberley-eng-elect_Oct2004.pdf)>. The report concluded, that while Ghana had a good implementation framework, there were insufficient resources to monitor and control the illicit diamond mining and trade, and that diamond smuggling was an issue. It further noted problems in alluvial and artisanal mining, particularly in respect of chain of custody: at 5.

<sup>81</sup> Kimberley Process Certification Scheme, *Administrative Decision 32: Ghana, revised* (3 November 2011) <<http://www.kimberleyprocess.com/en/2011-administrative-decision-ghana-revised>>; replacing Kimberley Process Certification Scheme, *Administrative Decision 14: Ghana* (9 November 2006) <<http://www.kimberleyprocess.com/en/2006-administrative-decision-ghana>>. Even at the time of the 2006 Administrative Decision, Ghana had begun to improve its practices.

<sup>82</sup> Kimberley Process Certification Scheme, *Administrative Decision, Central African Republic [Temporary Suspension]* (23 May 2013) <<http://www.kimberleyprocess.com/en/2013-administrative-decision-central-african-republic-0>>.

<sup>83</sup> Kimberley Process Certification Scheme, *Vigilance Notice* (18 April 2013) <[www.kimberleyprocess.com/documents/10540/84771/CAR%20April%202013%20KP%20Vigilance.pdf](http://www.kimberleyprocess.com/documents/10540/84771/CAR%20April%202013%20KP%20Vigilance.pdf)> Kimberley Process Certification Scheme, *Vigilance Notice* (28 December 2012) <[www.kimberleyprocess.com/documents/10540/84771/CAR%20December%202013%20KP%20vigilance.pdf](http://www.kimberleyprocess.com/documents/10540/84771/CAR%20December%202013%20KP%20vigilance.pdf)>.

Nonetheless, in the period following 2006, there has been evidence of division within the membership of the Kimberley Process. Some Participants, predominantly Western states, began to identify larger human rights questions as a problem in the diamond trade,<sup>84</sup> and have sought to expand the scope of the Kimberley Process. However, it has been difficult to achieve consensus even on action against states who do not comply with existing Kimberley Process undertakings. Three states have, in different ways, challenged the ability of the Kimberley Process to deliver on its promises. Diamond smuggling out of Côte d'Ivoire has continually been identified as a problem.<sup>85</sup> Venezuela has been in default on its internal controls and reporting undertakings. Most significantly, alleged abuse of alluvial diamond miners in Zimbabwe has divided Participants and demonstrated the limits of consensus-based decision-making.

Decision-making by consensus can be a strength in international law. Without strong external enforcement mechanisms, international law is only as strong as states allow it to be. Where consensus decision-making works, it can allow trust to be built between member states of an international organisation, as happened in the evolution of the European Union.<sup>86</sup> The period necessary for building that trust, however, turned out to be two decades longer than was intended by the drafters of the Treaty. The European Union was supposed to shift from unanimous decision-making to majority voting by 1962, but did not until the adoption of the Single European Act in 1986.<sup>87</sup> In the case of the Kimberley Process, after 2006, trust between Participants decreased. Without that trust, the need for consensus was a barrier to the ability to adopt decisions in controversial matters. It operated as a limit to the ability of the Kimberley Process to function.

#### A Côte d'Ivoire

Côte d'Ivoire raises problems for the Kimberley Process in achieving its core goal of eliminating trade in diamonds which is likely to fund armed conflict against established governments. Although Côte d'Ivoire is a Participant, it has been subject to United Nations sanctions for several years and is not trading in rough diamonds. From 2005, diamond production in northern Côte d'Ivoire, where rebel groups were active, became a matter of international concern.<sup>88</sup> At that stage, the Kimberley Process pledged to work with the United Nations Security Council, which was imposing sanctions against Côte d'Ivoire partly due to the proliferation of conflict resources.<sup>89</sup>

The Plenary adopted the Brussels Initiative in 2007 'to identify steps to enhance the control and monitoring of rough diamonds from Côte d'Ivoire, including the role of neighbouring countries.'<sup>90</sup> In 2008, the Kimberley Process report to the General Assembly noted evidence

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<sup>84</sup> See 2007 UN report, *UN Doc A/62/543*, [20]: identifying human rights, environment and labour standards as challenges for the future of the Kimberley Process.

<sup>85</sup> See, eg, 2007 UN report, *UN Doc A/62/543*, [5], [8].

<sup>86</sup> Joseph Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2403.

<sup>87</sup> *Ibid* 2461-63. See also David Freestone and J Scott Davidson, *The Institutional Framework of the European Communities* (Croom Helm, 1988) 69.

<sup>88</sup> Kimberley Process Certification Scheme, *Administrative Decision, Resolution Adopted by the Kimberley Process Plenary Meeting, Moscow, 15-17 November 2005, on the subject of illicit diamond production in Côte d'Ivoire*, (17 November 2005) <<http://www.kimberleyprocess.com/en/2005-administrative-decision-moscow-resolution-cote-divoire>>.

<sup>89</sup> *Ibid*. See SC Res 1584, UN SCOR, 60<sup>th</sup> sess, 5118<sup>th</sup> mtg, UN Doc S/RES/1584 (1 February 2005).

<sup>90</sup> 2007 UN report, *UN Doc A/62/543*, [3].

that uncertified diamonds of Ivorian origin were being sold through Mali.<sup>91</sup> There was also evidence that such diamonds were being controlled and taxed by non-state forces.<sup>92</sup> The response within the Kimberley Process was to advocate greater vigilance by Participants and to seek dialogue with Ivorian authorities.<sup>93</sup> In 2010, the Plenary discussed the situation in Côte d'Ivoire in light of Security Council Resolution 1946 (2010), and a report submitted by Côte d'Ivoire itself.<sup>94</sup> It noted indications of increased diamond and mining activity, and called on Participants 'to continue implementation of vigilance requirements.'<sup>95</sup> In the 2012 Plenary Communiqué, emphasis was placed on engagement with the Ivorian authorities and cooperation with the United Nations Security Council.<sup>96</sup>

The most recent regime of United Nations sanctions is contained in Security Council Resolution 2101 (2013).<sup>97</sup> This Resolution notes the continuing contraband in natural resources, including diamonds, and determines that Côte d'Ivoire remains a threat to international peace and security. The Resolution has renewed, until 30 April 2014, 'the measures preventing the importation by any state of all rough diamonds from Côte d'Ivoire' which were first imposed in 2005.<sup>98</sup> The ongoing problems with Côte d'Ivoire demonstrates that even within its core function of regulating diamonds which might be used to fund forces rebelling against established governments,<sup>99</sup> the Kimberley Process has limited capacity to affect active conflict zones. It can call for vigilance by Participants and work with governments but, where rebel forces are active, the impact may be very limited.

## B Venezuela

Venezuela raises different questions about the effectiveness of the Kimberley Process. The issue in this instance is failure to report, particularly on internal production of diamonds. A report by Partnership Africa Canada in 2006 found that, although Venezuela had a high level of diamond production, it had no official exports of diamonds since the beginning of 2005, and smuggling appeared widespread.<sup>100</sup> It recommended expelling Venezuela from the Kimberley Process.<sup>101</sup> The Working Group on Monitoring, partly based on the Partnership Africa Canada report, determined that there were credible indications of serious non-

<sup>91</sup> 2008 UN report, UN Doc A/63/560, enclosure 1 [10]; Mali is not a Participant in the Kimberley Process, and Global Witness found Ivorian diamonds being smuggled to Mali in 2005: Global Witness, Partnership Africa Canada and World Diamond Council, *Open Statement to UN Security Council on sanctions on diamonds from Côte d'Ivoire*, Global Witness (12 December 2005) <<http://www.globalwitness.org/library/open-statement-un-security-council-sanctions-diamonds-cote-d039ivoire>>.

<sup>92</sup> 2008 UN report, UN Doc A/63/560.

<sup>93</sup> Ibid [11], annex I [8].

<sup>94</sup> 2010 UN report, UN Doc A/65/607, [18].

<sup>95</sup> Ibid.

<sup>96</sup> 2012 Plenary Communiqué, above n 35, [12].

<sup>97</sup> SC Res 2101, UN SCOR, 68<sup>th</sup> sess, 6953<sup>rd</sup> mtg, UN Doc S/RES/2101 (25 April 2013).

<sup>98</sup> Ibid para 6.

<sup>99</sup> Partnership Africa Canada notes that Côte d'Ivoire is one of the few remaining sources of conflict diamonds as traditionally defined: Partnership Africa Canada, *Conflict Diamonds Today* (2013) <<http://www.pacweb.org/en/conflict-diamonds-today>>.

<sup>100</sup> Partnership Africa Canada, *Occasional Paper # 16, The Lost World: Diamond Mining and Smuggling in Venezuela* (Partnership Africa Canada, 2006).

<sup>101</sup> Ibid; in 2007, Global Witness also called for Venezuela to be expelled: Global Witness, 'Kimberley Process Must Expel Venezuela' (Press Release, 9 October 2007).

compliance in Venezuela, and suggested a review mission be sent.<sup>102</sup> Its recommendations were adopted by the Plenary as *Administrative Decision 13*.<sup>103</sup> In 2007, the Plenary adopted a revised Administrative Decision, welcoming progress by Venezuela including the submission of reports.<sup>104</sup>

Venezuela invited a review visit for 2008,<sup>105</sup> but later voluntarily withdrew from the Kimberley Process in 2008 for a period of two years, extended for a further year in 2010.<sup>106</sup> During the withdrawal period, Venezuela undertook neither to import nor export rough diamonds, but was expected to fulfil all other rights and obligations under the Kimberley Process.<sup>107</sup> The extension was accepted on the condition that Venezuela complied with reporting undertakings for 2009.<sup>108</sup> In 2011, the Plenary decided that Venezuela would be removed as a Participant if it did not submit the annual reports requested.<sup>109</sup> In the plenary of 2012, Venezuela made a presentation to the Participation Committee, asserting an intention to re-join.<sup>110</sup> The Participation Committee agreed that Venezuela should then submit accurate statistics and permit a Review Mission with access to all diamond producing and trading facilities.<sup>111</sup> The deadline for completing these steps was 1 April 2013, and the Plenary declared that ‘appropriate actions will be taken, which may ultimately lead to Venezuela being removed from the [Kimberley Process].’<sup>112</sup> While the initial reaction of the Plenary was robust, in determining that a review mission should be undertaken, the follow-up has allowed Venezuela indefinitely to postpone a final decision and possible expulsion.

### C Zimbabwe

The discovery of diamonds in the Marange district of Zimbabwe in 2006 has led to a continuing crisis for the Kimberley Process and has revealed its limitations. Partnership Africa Canada has commented that although a number of states have not complied with Kimberley Process undertakings, ‘Zimbabwe sets itself apart from the others because of the government’s brazen defiance of universally agreed principles of humanity and good governance expected of adherents to the Kimberley Process.’<sup>113</sup> The Marange diamond deposits are suitable for small-scale alluvial mining. At first, the concern was under-regulation – that large numbers of unlicensed small miners were working the Marange diamond deposits.<sup>114</sup> However, in 2008, the Zimbabwean military was deployed to the diamond fields, and accusations of serious human rights abuses emerged.<sup>115</sup> Illegal miners

<sup>102</sup> Kimberley Process Certification Scheme, *Administrative Decision 13: Venezuela* (9 November 2006) <<http://www.kimberleyprocess.com/en/2006-administrative-decision-venezuela>>.

<sup>103</sup> *Ibid.*

<sup>104</sup> Kimberley Process Certification Scheme, *Administrative Decision 15: Venezuela, revised* (8 November 2007) <<http://www.kimberleyprocess.com/en/2007-administrative-decision-venezuela>>.

<sup>105</sup> *Ibid.*

<sup>106</sup> *2012 Plenary Communiqué*, above n 35, [19].

<sup>107</sup> *2008 UN report, UN Doc A/63/560*, appendix I [6].

<sup>108</sup> *2010 UN report, UN Doc A/65/607*, appendix I [11].

<sup>109</sup> *2012 Plenary Communiqué*, above n 35, [19].

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid.*

<sup>112</sup> *Ibid.*

<sup>113</sup> Partnership Africa Canada, *Diamonds and Clubs: The Militarised Control of Diamonds and Power in Zimbabwe* (Partnership Africa Canada, 2010) 2 (‘*Diamonds and Clubs*’).

<sup>114</sup> Wexler, above n 3, 1769-70.

<sup>115</sup> Partnership Africa Canada, *Occasional Paper # 18, Zimbabwe, Diamonds and the Wrong Side of History*, (Partnership Africa Canada, 2009) (‘*Wrong Side of History*’); *Diamonds and Clubs*, above n

have been killed or injured by police and security forces.<sup>116</sup> Human Rights Watch has also documented forced labour,<sup>117</sup> including child labour,<sup>118</sup> as well as torture and inhuman treatment.<sup>119</sup>

The Marange diamonds are not conflict diamonds as defined by the *Kimberley Process Core Document*. The abuses alleged in the Marange are said to be committed by government agents rather than anti-government rebels, and the abuses do not relate to the funding of conflict but to violations of human rights in the process of diamond extraction.<sup>120</sup> However, it also seems clear that Zimbabwe is not complying with the undertakings set out in the *Core Document* in terms of internal controls over the movement of diamonds. This alone would be enough to justify a review mission, and possibly expulsion.

The challenge of small-scale mining exacerbated the challenge of ensuring adequate internal controls in the case of Zimbabwe. In 2008, the Kimberley Process Plenary first expressed concern about the situation in the Marange diamond fields,<sup>121</sup> although it rejected calls from Partnership Africa Canada to suspend Zimbabwe.<sup>122</sup> The Working Group on Monitoring and the Working Group on Statistics conducted investigations.<sup>123</sup> A review mission was also established, reporting in 2009 that Zimbabwe was not compliant and recommending it be suspended from the Kimberley Process.<sup>124</sup> The Zimbabwean government committed itself to improving compliance, but failed to withdraw the police and military from the Marange.<sup>125</sup> Human Rights Watch<sup>126</sup> and Partnership Africa Canada both published detailed reports on human rights abuses in the Marange diamond fields.<sup>127</sup> Both organisations, along with Global Witness, recommended that the Kimberley Process Plenary suspend Zimbabwe from membership.<sup>128</sup>

Action by the Plenary in 2009 was blocked by a minority of Participants refusing to agree to consider expulsion.<sup>129</sup> Instead, *Administrative Decision 20* was adopted, which concluded that there were ‘credible indications of significant non-compliance’ but noted Zimbabwe’s

<sup>113</sup> Human Rights Watch, *Diamonds in the Rough: Human Rights Abuses in the Marange Diamond Fields of Zimbabwe* (Human Rights Watch, 2009) (*‘Diamonds in the Rough’*)

<sup>116</sup> *Wrong Side of History*, above n 115, 7-8; *Diamonds and Clubs*, above n 113, 18, 20.

<sup>117</sup> Human Rights Watch, *Deliberate Chaos: Ongoing Human Rights Abuses in the Marange Diamond Fields of Zimbabwe* (Human Rights Watch, 2010) 5-6.

<sup>118</sup> *Diamonds in the Rough*, above n 115, 39.

<sup>119</sup> *Ibid* 43-44.

<sup>120</sup> Julie Elizabeth Nichols, ‘A Conflict of Diamonds: The Kimberley Process and Zimbabwe’s Marange Diamond Fields’ (2012) 40 *Denver Journal of International Law and Policy* 648, 667.

<sup>121</sup> 2008 UN report, UN Doc A/63/560, annex I [10], [22].

<sup>122</sup> Partnership Africa Canada, ‘Conflict Diamond Scheme Must Suspend Zimbabwe’ (Press Release, 12 December 2008).

<sup>123</sup> Kimberley Process Certification Scheme, *Administrative Decision 20: Zimbabwe* (5 November 2009) <<http://www.kimberleyprocess.com/en/2009-administrative-decision-zimbabwe-jwp>> (*‘Administrative Decision 20’*).

<sup>124</sup> *Ibid*.

<sup>125</sup> Wexler, above n 3, 1772; Nichols, above n 120, 669.

<sup>126</sup> *Diamonds in the Rough*, above n 113.

<sup>127</sup> *Wrong Side of History*, above n 115.

<sup>128</sup> Global Witness, ‘Global Witness backs calls for halt to Zimbabwe Diamond Trade’ (Press Release, 31 July 2009); Human Rights Watch, ‘Kimberley Process: Suspend Zimbabwe’ (Press Release, 29 October 2009); Partnership Africa Canada, ‘Zimbabwe’s Blood Diamonds Not Key to Economic Recovery: Suspending Zimbabwe from the Kimberley Process is Essential’ (Press Release, 3 August 2009).

<sup>129</sup> Wexler, above n 3, 1772.

willingness to implement an action plan to improve its internal controls.<sup>130</sup> Only diamond shipments certified by a Kimberley Process monitor would be permitted.<sup>131</sup> It is worth noting that the report of the Chair of the Kimberley Process to the United Nations General Assembly did acknowledge that the concerns about Zimbabwe included issues of human rights abuses,<sup>132</sup> even though human rights protection was not part of the action plan agreed between Zimbabwe and the Kimberley Process. In 2010, Participants could not agree to a recommendation that Zimbabwe be allowed to re-commence export under the Certification Scheme on the basis of being compliant,<sup>133</sup> but individual sales were allowed despite the failure of the Participants to formally agree.<sup>134</sup> During 2011, the Chair allowed sales from two specific mines, and finally, in November 2011, the Plenary adopted an administrative decision, ratifying the sales from Marange Resources and Mbada and allowing Zimbabwe to re-commence exports more generally, following verification by a Kimberley Process monitoring team.<sup>135</sup> The Administrative Decision imposed conditions that Zimbabwe must report to the 2011 Plenary and the 2012 Intersessional meeting, and that Zimbabwe must allow Kimberley Process Civil Society Coalition representatives access to the Marange.<sup>136</sup> However, Global Witness argued that the decision withdrew official status from a local civil society focal point and thereby weakened the role of civil society in the oversight process.<sup>137</sup>

The Kimberley Process Civil Society Coalition had boycotted the 2011 Plenary fearing its ongoing concerns about Zimbabwe would be ignored.<sup>138</sup> On 2 November 2011, following the Plenary, Global Witness criticised the Kimberley Process for failing to use its ‘main point of leverage over the Zimbabwean Government’.<sup>139</sup> A few days later, Global Witness announced that it was withdrawing from the Kimberley Process.<sup>140</sup> In its statement, Global Witness argued that while the Kimberley Process had made progress on the issue of conflict

<sup>130</sup> *Administrative Decision 20*, above n 123.

<sup>131</sup> *Ibid.*

<sup>132</sup> *Letter dated 8 December 2009 from the Permanent Representative of Namibia to the United Nations addressed to the Secretary-General*, UN GAOR, 64<sup>th</sup> sess, Agenda item 12, UN Doc A/64/559 (9 December 2009) annex [3].

<sup>133</sup> *2010 UN report*, UN Doc A/65/607, annex, [22].

<sup>134</sup> Nichols, above n 120, 669.

<sup>135</sup> *Letter dated 6 December 2011 from the Chargé d'affaires a.i. of the Democratic Republic of the Congo to the United Nations addressed to the Secretary-General*, UN GAOR, 66<sup>th</sup> sess, Agenda item 33, UN Doc A/66/593 (8 December 2011) [8] (*‘2011 UN Report’*); The compliance verification reports are: KP Monitoring Team on Marange, *Compliance Verification Report, Diamond Mining Corporation*, Kimberly Process (January 2012)

<<http://www.kimberleyprocess.com/documents/10540/40003/Compliance%20Verification%20Report%20DMC?version=1.0&t=1334921470000>> (*‘DMC Report’*); KP Monitoring Team, *Compliance Verification Report, Anjin Investments (Pvt.) Inc*, Kimberly Process (9 November 2011)

<<http://www.kimberleyprocess.com/documents/10540/40003/Compliance%20Verification%20of%20Anjin%20Investments?version=1.1&t=1335082209000>> (*‘Anjin Report’*); Although security of mines is addressed in the reports, there is no direct discussion of human rights issues, only some comment on the impact of relocating villagers away from intended mine sites, albeit quite extensive comment in the case of Anjin: *DMC report* at 13-14, *Anjin report* at 17-22; The Monitoring Team appears to have had no consultation with people working these mines or living in the area, nor with civil society representatives in the case of the DMC report. In the Anjin report, it met with members of the local community concerning relocation issues: *Anjin report* at 17.

<sup>136</sup> Global Witness, ‘Kimberley Process lets Zimbabwe off the hook (again)’ (Press Release, 2 November 2011).

<sup>137</sup> *Ibid.*

<sup>138</sup> *Ibid.*

<sup>139</sup> *Ibid.*

<sup>140</sup> Global Witness, ‘Global Witness leaves Kimberley Process, calls on diamond trade to be held accountable’ (Press Release, 5 November 2011).



diamonds, it had not lived up to its promise. It blamed governments for failing to hold each other to account, and the diamond industry for failing to institute independent monitoring of its system of verification.<sup>141</sup> While the situations in both Côte d'Ivoire and Venezuela were cited, the handling of Zimbabwe by the Kimberley Process received the greatest criticism. The decision to allow unlimited diamond exports from Zimbabwe was described as 'turn[ing] an international conflict prevention mechanism into a cynical corporate accreditation scheme.'<sup>142</sup>

Some elements of the diamond industry have also criticised the acceptance of Zimbabwe within the Kimberley Process. Tiffany's asserts that it has a 'zero tolerance policy' for Marange diamonds.<sup>143</sup> The Rapaport Group withdrew from the World Diamond Council in 2010, arguing that a Kimberley Process certificate was insufficient to guarantee conflict-free diamonds, particularly from Zimbabwe.<sup>144</sup>

In 2012, the Plenary commended Zimbabwe for its efforts to implement more effective internal controls, and the Plenary resolved to lift the special measures imposed in 2011.<sup>145</sup> Zimbabwe was admitted to membership to a number of Working Groups and Committees, including the Participation Committee and the Working Group on Monitoring.<sup>146</sup> Zimbabwe also sought membership of the Kimberley Process Review Committee, but as membership of that committee is restricted to current and past Chairs of the Kimberley Process, Zimbabwe was invited to participate as a guest in the Committee's discussions.<sup>147</sup>

#### IV THE DEFINITION OF CONFLICT DIAMONDS — AN INDICATOR OF RESISTANCE TO CHANGE

Events since 2011 have done little to suggest that the Kimberley Process can in fact evolve to address the problems around diamond mining in Zimbabwe. The Kimberley Process has always focused solely on the use of diamonds to fund rebel armies. As a result, it does not directly capture abuses by governments or corporations,<sup>148</sup> and has no direct role in diamond mining in situations which do not count as armed conflict. After the decision to allow Zimbabwe to export diamonds from all sites, it became clear that there was limited scope to address broader human rights concerns through a focus on a Participant's internal controls. As a result, there has been pressure, including from within the membership of the Process, to broaden the definition of conflict diamonds. As noted above, Global Witness has taken a broader approach to what should be covered by the concept of conflict diamonds, making a more explicit link with human rights abuses.

Nonetheless, a recent debate on revising the definition of conflict diamonds did not lead to change and failed to achieve a consensus. In 2012, the Kimberley Process Plenary, with the United States in the Chair, debated revision of the definition of conflict diamonds, following

<sup>141</sup> *Global Witness Statement*, above n 57.

<sup>142</sup> *Ibid.*

<sup>143</sup> Simon Goodley, 'Death, sanctions and big business in the struggle for Zimbabwe's diamonds' *The Observer (online)*, 17 February 2013 <<http://www.guardian.co.uk/business/2013/feb/17/zimbabwe-death-sanctions-business-diamonds?INTCMP=SRCH>>.

<sup>144</sup> Rapaport Group, 'Rapaport Resigns from World Diamond Council', (Press Release, 1 February 2010).

<sup>145</sup> *2012 Plenary Communiqué*, above n 35, [16]-[19]; See also *2011 UN Report*, UN Doc A/66/593, [8].

<sup>146</sup> *2012 Plenary Communiqué*, above n 35, [4], [20], [46], [50].

<sup>147</sup> *Ibid* [39].

<sup>148</sup> Wexler, above n 3, 1731.

discussion within the Committee on Kimberley Process Review.<sup>149</sup> Ambassador Gillian Milovanovic, representing the United States, had argued in favour of reconsideration of the definition in her address to the 2012 Intersessional meeting.<sup>150</sup> In August 2012, she released a ‘vision statement’ on the definition of conflict diamonds for comment.<sup>151</sup> The key element proposed for a revised definition was that diamonds should be certified as free of all conflict.<sup>152</sup> In other words, the expansion of coverage sought was modest, and would not have satisfied critics such as Global Witness (which by this time had left the Kimberley Process), as the revision proposed no conditions concerning human rights compliance. It might still have captured the situation in Zimbabwe, where there is undeniably conflict, but it is the government rather than non-state armed groups which benefit from their exploitation.<sup>153</sup>

Over the following months, Ambassador Milovanovic consulted widely, and the United States made the issue of the definition a priority for the 2012 Plenary.<sup>154</sup> Although there were ‘lengthy discussions’ in the Plenary, no consensus was reached and therefore the definition remains as set out in the *Core Document*.<sup>155</sup> Throughout, there were arguments that proposals to change the definition of conflict diamonds were a disguised attack on particular countries, an assertion that the United States continually denied.<sup>156</sup> It argued that consumer expectations were changing and in future greater assurances might be expected.<sup>157</sup> The issue remains on the table as an issue for the Kimberley Process Certification Scheme Review.<sup>158</sup> However, given that some Participants feel that the revision is an implicit attack on states such as Zimbabwe, it seems unlikely that progress will be made.

## V CONCLUSION

In 2006, following the Third Year Review, Botswana as Chair of the Kimberley Process listed its strengths as the inclusive nature of the Process, flexibility in its working methods,

<sup>149</sup> 2012 Plenary Communiqué, above n 35, [31].

<sup>150</sup> Ambassador Gillian Milovanovic, (Speech delivered to Intersessional Meeting of the Kimberley Process Certification Scheme, 4 June 2012) <<http://www.kimberleyprocess.com/documents/10540/49668/Milovanovic.pdf>>; But see Susan Shabangu, South African Minister for Mineral Resources, (Speech delivered to Intersessional Meeting of the Kimberley Process Certification Scheme, 4 June 2012) <<http://www.kimberleyprocess.com/documents/10540/49668/Shabangu.pdf>>: ‘over regulating the diamond industry may lead to unintended consequences that could reverse the laudable progress and achievements that we have made since the establishment of the Kimberley Process.’

<sup>151</sup> Rapaport, *KP Chair Updates Vision Statement, Seeks Comment by Aug. 24* (10 August 2012) Diamonds.Net <[www.diamonds.net/News](http://www.diamonds.net/News)> (‘*KP Chair Vision Statement*’).

<sup>152</sup> Ibid. Other states, notably the United Kingdom, had indicated a desire to expand the definition to include human rights more broadly. See United Kingdom, *Parliamentary Debates*, House of Commons, 17 July 2012, vol 548, col 212WH (Alistair Burt).

<sup>153</sup> See generally Nichols, above n 120, 672-673: discussion of unsuccessful arguments that Marange diamonds fit within the current definition of conflict diamonds.

<sup>154</sup> Jose Fernandez, (Speech delivered to Kimberley Process Plenary, 27 November 2012) <<http://www.kimberleyprocess.com/documents/10540/49668/Fernandez%20Plenary%20Opening.pdf>>: ‘a system that guarantees “rebel movement free” diamonds is simply not good enough.’

<sup>155</sup> 2012 Plenary Communiqué, above n 35, [31].

<sup>156</sup> *KP Chair Vision Statement*, above n 151.

<sup>157</sup> Ibid.

<sup>158</sup> *Note verbale dated 14 December 2012 from the United States Mission to the United Nations addressed to the Secretary-General*, UN GAOR, 67<sup>th</sup> sess, Agenda item 32, UN Doc A/67/640 (14 December 2012), annex [34].

and decision-making by consensus ‘on the basis of mutual respect and trust’.<sup>159</sup> After a decade of operation, the Kimberley Process seems to have reached a delicate position. In terms of its original mandate, it appears to have succeeded, given the low estimates of conflict diamonds in worldwide diamond trade. However, in terms of ensuring its Participants live up to their undertakings, its weaknesses are increasingly evident. Its Plenary is often divided between Western states seeking to expand the coverage of the scheme, and Asian and African states which are sceptical about reform,<sup>160</sup> arguing that the reforms are designed to target particular Participants. It is difficult to envisage how the Kimberley Process can move beyond this impasse.

The Kimberley Process has stalled, and has lost the support of at least one key civil society Observer,<sup>161</sup> but all Participant states remain committed to maintaining its operation. The United States has not indicated any wish to withdraw from the Kimberley Process despite the failure of its proposal to expand the definition of conflict diamonds. The United Kingdom government has expressed an unwillingness to include diamonds in other regimes on conflict minerals because of a desire to protect the Kimberley Process.<sup>162</sup> However, concerns about the inability of the Kimberley Process to meet its challenges may ultimately lead some Participants to look elsewhere for an international law mechanism to address the full range of issues relating to conflict diamonds, and possibly one with stronger enforcement mechanisms than a soft law regime can provide.

While soft law is useful for enhancing flexibility and for integrating non-state actors such as the diamond industry and NGOs into international regulatory processes, it is inevitably weak on enforcement. The Kimberley Process as a soft law regime has worked well with states such as Liberia, which use it as a standard to work towards when improving compliance and which cooperate with its mechanisms. It has worked less well with states with weak compliance capacity such as Côte d’Ivoire or with states able to draw out the process of determining non-compliance to avoid a definitive finding, such as Venezuela. The question of whether the Kimberley Process has a future depends on whether Participants continue to believe that the examples of ineffectiveness do not undermine the credibility of the entire Process.

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<sup>159</sup> 2006 UN Report, *UN Doc A/61/589*, [22].

<sup>160</sup> Roxane Horton, ‘For Kimberley Process, Next Challenge is Broadening Mandate on Conflict Diamonds’ *World Politics Review (online)*, 6 December 2012, <<http://www.worldpoliticsreview.com/articles/12546/for-kimberley-process-next-challenge-is-broadening-mandate-on-conflict-diamonds>>.

<sup>161</sup> Global Witness, ‘Global Witness leaves Kimberley Process, calls on diamond trade to be held accountable’ (Press Release, 5 November 2011).

<sup>162</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 17 July 2012, vol 548, col 213WH (Alistair Burt).