

# Kimberley Process

## Observations from the sidelines. Part I

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## **Editorial**

### **Kimberley Process : Observations from the sidelines. Part I**

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## Introduction

Diamonds are culturally valued for symbolising love, fidelity, beauty and status. However, for those states engaged in the diamond value chain, diamonds represent much more. They constitute an important part of national economies and can represent an opportunity for development and poverty alleviation. For producer states like South Africa, Namibia and Botswana diamonds have provided vital revenue for national development, whilst for an estimated 1 million artisanal diamond miners globally they represent, for better or worse, a significant livelihood strategy.<sup>1</sup> Moreover, national economies and livelihoods in important diamond hubs like Belgium, India, Switzerland, the United Arab Emirates, Israel and China derive sizable benefits from diamonds. These benefits render the health of the global trade in diamonds a shared concern.

Ten years after the launch of the Kimberley Process Certification Scheme (KPCS) this paper is the first in a two part series providing an overview of where the Kimberley Process (KP) and international efforts to combat the trade in conflict diamonds currently stand.<sup>(1)</sup> It will analyse some of the present challenges facing the system and some of the potential solutions on the table. This part (Part I) will provide a broad overview of the issues facing the KP as it steps in 2014. It will start by outlining some of the general developments that have taken place both within the diamond industry and the wider social context since the KPCS' negotiation. It will then address some of the strengths and weaknesses of the KP as an international certification scheme and an inter-state system more broadly. This entails an assessment of some of the issues surrounding the functioning and scope of the KPCS. Particular attention will be brought to bear on recent demands for the KP to clarify its position vis-à-vis certain human rights issues. Part II, to be published early 2014, will briefly address recent suggestions for a gemstones supplement to the Organisation for Economic Co-operation and Development (OECD) Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, and its potential relevance to the KP.

## 1. Diamonds: A market ten years into the KPCS

At the end of the 1990s civil society groups and United Nations (UN) expert bodies began to illuminate the ties between the diamond trade and bloody African conflicts characterised by widespread human rights atrocities. These reports shocked public conscience and moved key representatives from States and the industry to come together with civil society groups in pursuit of a practical solution to the conflict diamonds problem. At that time, state engagement in the KP was heavily motivated by two major issues: (1) the potential impact of conflict diamonds on international stability, particularly in Africa; and (2) the economic threat posed by a potential consumer boycott on diamonds both to diamond dependant states and the industry as a whole. The last ten years in which the KPCS has been operative has witnessed notable changes in the diamond sector.<sup>2</sup>

### Changes in the diamond sector

When the KPCS was negotiated the diamond sector was in a state of transformation.<sup>3</sup> The diamond conglomerate, De Beers' transition from industry steward to industry leader saw it relinquish its role as global buyer and stockpiler of rough diamonds, subsequently abandoning its generic marketing of diamonds to focus on its own brand.<sup>4</sup> Its virtual monopoly over the market had formerly enabled it to control both the flow of rough diamonds and diamond prices, holding back stock when prices declined and raising supply when prices increased too quickly. The relaxation of this grip has seen the diversification of diamond supply chains and has also rendered the diamond industry more vulnerable to wider economic forces that typically affect other consumer goods, creating greater price volatility in the sector.<sup>5</sup> For actors in the middle of the diamond pipeline (e.g. cutters and polishers), where margins are reportedly much narrower than in other segments (see Box 1) and indebtedness is often high, this

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<sup>1</sup> IPIS vzw represented former NGO coalition, Fatal Transactions, as an observer to the KP between 2007 to 2010, having produced a number of papers relating to the sector. This paper is the outcome of a desk-based study of relevant literature and press, as well as a limited number of interviews with stakeholders conducted in August and October 2013.

can heighten their vulnerability to shocks.<sup>6</sup>

Moreover, the abandonment of De Beers' US\$200 million a year generic marketing programme has also left the industry discussing new strategies for generic marketing as it seeks to bolster consumer demand in light of competition from other high-priced commodities like hi-tech devices and perfume.<sup>7</sup> Securing supply, maintaining consumer confidence and stimulating consumer demand have been highlighted as critical to continued growth in the industry.<sup>8</sup>

Changes in the diamond industry have also been notable as regards consumer markets. Whereas the US continues to dominate diamond consumption by some considerable margin, retailers are also increasingly looking to emerging markets in the middle and far east, especially China and India. These latter two states have seen appreciable growth as diamond markets with Bain & Co estimating that they will account for 50% of incremental global demand by 2020.<sup>9</sup>

### **The development of corporate social responsibility**

The 2008 financial meltdown has stoked concerns about a failure to regulate business, increasing public suspicion of self-regulation and lack of transparency, and affecting conceptions of corporate social responsibility (CSR).<sup>18</sup>

In 2001, CSR was still defined in terms of voluntarism in respect of social and environmental concerns.<sup>19</sup> By 2008 the UN Special Representative on Business and Human Rights had clarified the role of business vis-à-vis such concerns as one of responsibility.<sup>20</sup> In 2011 this responsibility was further detailed in the UN Guiding Principles on Business and Human Rights, which provided more concrete and practical recommendations for the implementation of the UN "Protect, Respect and Remedy" Framework on business and human rights,<sup>21</sup> including some guidance on human rights due diligence. This shift towards transparency and responsibility has been reflected in regulation and policy in Europe and the US.<sup>22</sup> It has also seen the proliferation of numerous multi-stakeholder, industry and sector-specific initiatives seeking to enhance accountability in the extractives sector and

### **Box 1. THE DIAMOND VALUE CHAIN**

*Slightly over 50% of diamonds extracted become gemstones for jewellery, accounting for 95% of the total value of diamonds.<sup>10</sup> Whilst diamond supply chains vary, this value is broadly distributed over eight main stages: exploration, production, rough sales, cutting and polishing, polished sales, jewellery manufacturing, retail sales and consumer demand.<sup>11</sup> The greatest margins are said to be made by a smaller number of entities at either end of the value chain. Bain & Co report profit margins of 16-20% among large-scale miners and 11-14% for large chains such as Tiffany & Co., Signet, LVMH etc.<sup>12</sup> In the middle of this chain diamonds pass through a complex and fragmented distribution system. Here, thousands of individuals and small businesses compete for between a 1 to 8% margin. The diamond sector is currently reported to be characterised by an inflated price for rough, tight liquidity and sluggish polished demand, which has squeezed manufacturing profit margins in 2013.<sup>13</sup>*

#### **Artisanal mining and the value chain**

*The aforementioned eight stages in the diamond value chain fail to capture margins for the artisanal mining sector. While most diamonds are mined by vertically integrated producers such as De Beers, Rio Tinto and Alrosa, an estimated 10 to 15% of diamonds are produced by artisanal miners, mostly from Africa.<sup>14</sup> For economies such as the Central African Republic and Guyana, artisanal diamond mining accounts for the country's entire diamond production.<sup>15</sup> A 2004 study on artisanal diamond mining highlighted the existence of around 1 million diamond miners globally, most of them unregistered and unregulated.<sup>16</sup> In some countries, diggers have been found to receive only a fraction of the international/Antwerp price for their goods with most of the value going to in-country middlemen or exporters, sometimes with a mark-up of up to 200%.<sup>17</sup> Here, artisanal miners have been found to earn an average of US\$1.25 to US\$2 a day. Certain initiatives have now been established in an attempt to combat such low earnings.*

combat the phenomenon of conflict resources.<sup>23</sup>

Whilst a recent EU study suggests that western consumers may be hardening to CSR assurances where they penetrate little deeper than a company's communications output,<sup>(2)</sup> other research is beginning to indicate that concern for CSR is no longer the prerogative of western consumers alone. This August saw the publication of results from a Nielsen survey of 29,000 consumers in 58 countries, finding that South East Asian consumers from countries like India, the Philippines, Thailand and Indonesia express not only a willingness to pay extra for goods provided by socially responsible companies, but often report having done so in the last 6 months.<sup>24</sup>

Currently the largest diamond consumer by value,<sup>25</sup> the US has the strongest appetite for responsible jewellery with retailers showing particular sensitivity to responsible sourcing.<sup>26</sup> In India too, the third largest market for diamonds, reports indicate a rising significance for CSR.<sup>27</sup> Here, forecasters are predicting that CSR will become increasingly important "especially for Indian companies with an international presence, and particularly those involved in diamond jewellery manufacturing".<sup>28</sup> Moreover, Hong Kong is said to be driving the diamond market in China,<sup>29</sup> where Bain and Company report that retailers are aggressively fuelling demand for diamonds with advertising campaigns "that leverage popular enthusiasm for Western culture and western-style consumption in all its forms".<sup>30</sup> Presently the second largest and fastest growing market for diamonds, China's appetite for western consumer culture may see it adopt greater concern for CSR issues as western consumers become increasingly demanding in this regard.

Being highly dependent on consumer perception, the diamond trade is in many ways uniquely vulnerable to media shocks. Thus, the release of Edward Zwick's *Blood Diamond* prompted the World Diamond Council (WDC) to undertake what has been described as a "furious" marketing campaign to assure consumers that the diamonds they are buying are conflict free.<sup>31</sup>

## Box 2. DIAMONDS AND CONSUMER PERCEPTION

*As a high-price, non-fungible luxury commodity, diamond demand can be sensitive to adverse consumer perception. This is largely because today's value of gem quality diamonds owes much to decades of generic marketing seeking to elevate their prominence as a luxury and status good. De Beers' successful "diamonds are for ever" marketing campaign bred the development of a powerful diamond engagement ring culture in the West, its success replicated in Japan and beyond.<sup>32</sup> The role of marketing in driving consumer demand for diamonds is a fact with which western consumers have become increasingly familiar and has in some instances led to backlash.<sup>33</sup> Today, consumer perception is deemed to be the single most important driver of the diamond industry.<sup>34</sup> Thus, in India, the Indian Diamond Jewellery Promotion Initiative is seeking to stimulate demand by spearheading a woman-centred campaign "that moves away from emotional space to appreciating [a woman's] value and offering the diamond as a symbol that defines it."<sup>35</sup> Such marketing can be a powerful inducer of consumer demand but it also renders the industry particularly vulnerable to negative press. Indeed, if a modern consumer-conscious woman receives a stone as a token of her value, she may nowadays enquire not only after the cost but also responsible sourcing to determine the extent of her esteemed worth.*

<sup>2</sup> Research released by the European Commission in April shows that 41% of EU citizens feel that the overall influence of companies on society is negative. See *How Companies Influence our Society: Citizens' Views, April 2013*. Moreover, Nielsen reports that only 36% of European consumers stated that they would pay more for goods and services that "give back", emphasising that in countries where scepticism towards CSR runs high "social impact programmes must be incontestably authentic to a company's business objectives, vision and values" (Nielsen, *Consumers who care and say that they will reward companies with their wallets, August 2013, p.6*).

## 2. The Kimberley Process: where are we now?

The Kimberley Process (KP) began as a series of tripartite meetings between various state, industry and civil society representatives seeking to find a means of breaking the link between the trade in rough diamonds and brutal armed conflict. The term is now used to denote what has become an intergovernmental system devised to combat the trade in “conflict diamonds” through the application of a certification scheme and measures to ensure compliance. The system functions and was negotiated on a multi-stakeholder basis and administers its oversight function through two meetings a year – one inter-sessional meeting and one plenary meeting.<sup>36</sup>

The Kimberley Process Certification Scheme (KPCS) for rough diamonds was the outcome of three years of negotiations by KP stakeholders. The resultant Interlaken Agreement establishing the scheme came into effect on 1 January 2003. In accordance with the scheme all KP participants are to ensure that all rough diamond exports from their territory are accompanied by a certificate validating those diamonds as conflict free. This certification is founded upon the implementation of internal controls to determine the origin of the diamonds being exported with a view to ensuring that all those diamonds that cannot be guaranteed as conflict free may not enter into the legal trade. Thus, all importing states likewise agree not to permit the import of diamonds into their territory without a valid KPCS certificate.

The dependence of the international diamond trade on consumer confidence was a key driving force behind the unprecedented decision of states to sit with industry and civil society representatives in formulating a solution to the conflict diamonds phenomenon.<sup>37</sup> In its role as negotiator and watch dog, civil society in particular lent the KP a much needed legitimacy.<sup>38</sup>

The KP’s mere negotiation aided to bring about the cessation of conflicts in Angola and Sierra Leone. And the process retains continuing relevance in responding to on-going diamond fuelled conflicts, such as that in the Central African Republic, as well as acting as a potential watchdog against the resumption of such conflicts. Indeed, as the first ever international multi-stakeholder initiative, the KP has served to inspire other multi-stakeholder attempts to change the resource curse narrative, including the Extractive Industries Transparency Initiative and the International Conference of the Great Lakes Region’s response to conflict resources in eastern DRC.

However, ten years on, there is a strong sense among a number of stakeholders that the KP has been left behind. Problems with the Process’s functioning and scope, raised repeatedly by NGOs and some industry representatives since its first review in 2006, have led to the disengagement of key KP architects who feel that the process has failed to live up to the regulatory challenges it has been dealt with. These issues were brought to a head during the KP’s handling of the Zimbabwe’s Marange diamonds, which brought to the fore not only the functional shortcomings of the KP but also discontent over the scope of its definition of “conflict diamond”. Thus, in July 2009, leading civil society representative Ian Smillie relinquished his role as a KP observer, followed in January 2010 by the resignation of *diamantaire* Martin Rapaport from the WDC. Mr Rapaport decried the KP as a “sham”, stating that “instead of illuminating blood diamonds, the KP has become a process for the systematic legalisation and legitimisation of blood diamonds”.<sup>39</sup> In August 2010, another key KP draftsman, African Diamond Council and African Diamond Producers Association chairman Dr. André A. Jackson decried the KP’s on-going ineffectiveness, stating that “the System has failed to thwart trading of diamonds mined as a result of human suffering”.<sup>40</sup> These sentiments were echoed in December 2011, following the KP’s decision to endorse unlimited diamond exports from named companies operating in Zimbabwe’s Marange fields – a move contributing to leading NGO, Global Witness’s decision to announce its departure from the KP.<sup>41</sup>

This crisis of confidence in the KP has occasioned not only the accumulation of a number of alternative responsible sourcing standards and “chain of custody” schemes in the diamond sector,<sup>42</sup> but has also led some actors to engage in unilateral measures to protect their internal markets from contamination by commercially undesirable diamonds.<sup>43</sup> In an attempt to restore the KP’s standing the US tabled the issue of KP reform during its chairmanship in 2012 – an agenda that remains on-going.

Commentators suggest that many of the KP’s problems are derived from the state-centric parameters set for its negotiation and consequently its core document.<sup>44</sup> Indeed, whilst the KP is multi-stakeholder in its functioning it remains nevertheless an inter-state system that relies predominantly on the cooperation

of states in its implementation, oversight and decision making. This has had both its benefits and its pitfalls.

### 3. Kimberley Process: achievements & assets

In co-opting 81 countries to date the KP has achieved an impressive geographical scope.<sup>45</sup> This high level of state participation may well have been aided by an implicit emphasis on budget and sovereignty. Thus, negotiators were charged with devising a “simple and workable”<sup>46</sup> international certification scheme for rough diamonds, with “appropriate arrangements to help to ensure compliance, acting with respect for the sovereignty of States”.<sup>47</sup>

Indeed, the Interlaken Agreement is non-binding, and participation is incentivised for many states to the extent that it entails membership of an exclusive trading club that enables access to lucrative diamond markets, where prices for Kimberley certified goods are high.<sup>48</sup>

Nevertheless, inclusion also comes at the cost of meeting the KPCS’s minimum standards. These include the establishment of a system of internal controls to determine the origin of diamonds from production/import to export; the designation of importing and exporting authorities to issue KP certificates; the enactment and enforcement of necessary legislation, including penalties for transgressors; coordination of customs, trade and law enforcement departments; the collection, maintenance and exchange of official diamond production, import and export data and the submission of an annual report.<sup>49</sup> Compliance is subject to review approximately once three yearly. This requirement for legislative enactment is applicable to all states in the diamond supply chain and makes the agreement binding at national level. Here, one of the KP’s successes has been to trigger a process of formalisation in a sector famed for its entrenched secrecy and informality. This has not only aided some states to raise their revenues from the industry, but has also acted as an initial barrier to illicit diamond trading. Whilst the KP has not halted the flow of illicit diamonds it has, at least in some countries, seen a rise in the level of formalisation in the sector to a degree higher than that so far achieved in

#### **Box 3. ARTISANAL MINING AND CONFLICT DIAMONDS – KP ENGAGES THE DEVELOPMENT SECTOR**

*Artisanal alluvial diamond production is central to the KP’s ability to combat conflict diamonds. Artisanal and small-scale mining (ASM) is primarily a livelihood strategy. Living and working conditions for alluvial diamond miners are notoriously harsh and can involve serious health and safety hazards, as well as child labour and sometimes violence. Nevertheless, being poverty driven,<sup>51</sup> ASM continues to attract hundreds of thousands of diggers, rendering it in some cases a “casino economy” in which workers prefer to take a percentage of their findings than draw a daily wage.<sup>52</sup> Here, lack of regulation and accessibility renders the artisanal diamond mining sector prone to smuggling and insecurity, and makes it extremely vulnerable to predation by rebels and state forces. As such, artisanal alluvial diamond fields are considered to represent a persistent major human security challenge in at least half a dozen countries.<sup>53</sup>*

*Recognition of the particular vulnerability of artisanal producing states to conflict minerals led the KP to establish a Working Group on Artisanal and Alluvial Production in 2006. This group seeks to promote effective internal controls on the production and trade of alluvial diamonds and seeks to find developmental solutions to problems that cannot simply be addressed by regulation. Thus, whilst the KP is not itself a development organisation it has nevertheless sought to mobilise the efforts of the development sector to support internal controls in alluvial producer states.<sup>54</sup> In doing so, it has been aided by the Diamond Development Initiative (DDI), established in 2007, which engages in education, policy dialogue and projects working directly with artisanal diamond miners and their communities. The DDI also brings NGOs, governments and the private sector together in a common effort to ensure that diamonds are an engine for development.<sup>55</sup>*

other highly lootable extractive sectors, such as gold. Thus, for example, whilst around 30% of diamonds leave the Central African Republic clandestinely, for gold this percentage is at least 95%.<sup>50</sup>

Moreover, as a repository of data and knowledge on the diamond trade at both international and national levels, the KP represents an invaluable resource. For example, the reconciliation of trade data has acted as an important warning for supply chain contamination and the decision to make its diamond trade statistics available to the public has been a welcome step towards further transparency. The KP's Working Group on Monitoring, the Working Group on Statistics, the Working Group of Diamond Experts and the Working Group on Artisanal and Alluvial Production, furnish the system with a valuable set of tools for combatting the flow of conflict diamonds. Likewise, the engagement of observers such as the World Diamond Council, the KP Civil Society Coalition, the Diamond Development Initiative and the African Diamond Producers Association make the process useful as a potential forum for expertise and collaboration. Indeed, whilst the KP itself has reportedly been dogged by an inability to be responsive to evolving regulatory problems, its utilisation of working groups to address key issues has created some flexibility and enhanced multi-stakeholder participation in decision making.<sup>56</sup>

## **4. Functional shortcomings of the Kimberley Process**

In spite of the KP's endowments in terms of expertise and jurisdictional scope, the functioning of the KPCS and the Kimberley Process itself have been hampered in a number of respects. A few of the major functional impediments often raised include the following:<sup>57</sup>

### **Decision making**

The KP's core document requires that decisions be made by consensus.<sup>58</sup> To the extent that it requires unanimity this mode of decision making reflects an emphasis on state sovereignty that may risk the collective good. Indeed, it has reportedly proved to be a significant barrier to the KP's ability to render decisions, large and small, being one factor that damages its ability to act as an effective regulatory body. Whilst KP participants are unified by their interest in maintaining the healthy demand and supply of conflict-free diamonds, multiple and sometimes divergent underlying interests are also at play. Here, where grievances erupt between states, in the absence of any other means of decision making, progress can be stymied by one state alone.<sup>59</sup> Allowing one member vetoes to persist has subsequently given the KP an appearance of arbitrariness on the occasion when consensus was abandoned for majority decision making in a bid to overcome deadlock.

### **Monitoring**

Following an impasse over monitoring during KP negotiations, the Interlaken Agreement refers only to review missions for credible cases of significant non-compliance.<sup>60</sup> Nevertheless, in response to continued stakeholder engagement on the issue of monitoring a peer review mechanism was devised following the KPCS' launch. Peer review teams are typically composed of representatives from three member states, plus one representative from industry and civil society, respectively. The output of these teams is said to be variable in both quality and timeliness, whilst follow up on review recommendations is reportedly little to none.<sup>61</sup> This seriously undermines the review procedure as a credible means of securing compliance. The involvement of what are effectively stakeholders who may have underlying interests unrelated to the issue of compliance in making determinations on that point raises further questions about the impartiality of the procedure – questions that have been averted by other inter-state systems through the use of independent third party experts.<sup>62</sup>

Moreover, participation in review teams is voluntary with participants bearing the costs. This has occasioned a disproportionate burden for civil society and industry representatives, as well as some states due the limited number of stakeholders able to undertake such missions. These factors combined have led the KP Civil Society Coalition to emphasise the KP's need to "develop a stronger monitoring and research arrangement that sets a high standard of evaluation, avoids conflicts of interest, and ensures follow up."<sup>63</sup>

## Public transparency

Whilst information is shared between KP Participants for the purposes of monitoring, there has been a strong reluctance on the part of numerous participants to make information available to the public. This may be one of the KP's greatest shortcomings in gaining public trust, though is perhaps also one of its most readily redeemable. The publication of trade and production data by the KP has been warmly welcomed, as has the agreement to publicise annual and review reports, though we have yet to see the results of this decision.<sup>64</sup> Indeed, transparency is the first indicator that states and industry have nothing to hide and is increasingly needed for both commercial and regulatory purposes. Moreover, greater transparency surrounding the KP's discussions, debates and notable outcomes from meetings may go some way to protecting the KP from negative press and unwarranted criticism.

## Internal controls

The functional cornerstone of the KP is the ability to discern the origin of diamonds. As such, each participant State must "establish a system of internal controls to eliminate the presence of conflict diamonds from shipments of rough diamonds imported into and exported from its territory".<sup>65</sup> To flesh out this stipulation, Annex I of the Interlaken Agreement makes 21 non-binding recommendations. The absence of more detailed minimum standards and the aforementioned obstacles to securing compliance have left levels of implementation as regards internal controls somewhat patchwork among producer, importing and exporting states.

### A. Producers states

Lack of resources, political will or logistical difficulties are said to have left internal controls in many of those countries most vulnerable to conflict weak. This situation has persisted in spite of repeated attention drawn to these inadequacies by KP review teams and civil society groups. Thus, for example, Guinea has reportedly seen a total absence of internal controls for several years, the Democratic Republic of Congo was unable to account for the origin of around 50% of its diamonds between 2005 and 2009,<sup>66</sup> and despite Venezuela's 2008 declaration that it would

### Box 4. INTERNAL CONTROLS AND ARTISANAL MINING

*Diamonds can be mined by a variety of different means depending on the geography in which they are located. This can have significant implications for the ability of states to impose controls over diamonds. For example, the kimberlite mines of Botswana, Canada and Russia can be fenced and protected from outside interference. This enables these states to exert a high level of control over their diamond pipelines, not only preventing smuggling in and out of the country but also enabling the levying of tax revenue on exports. By contrast, in states such as Sierra Leone, the DRC, Angola, Guinea, and the Central African Republic, where diamonds are often found in alluvial deposits, they can be scattered over hundreds of square miles and often across borders. This creates significant regulatory challenges in that such areas cannot be readily fenced and production and transit can only be policed at great cost. Indeed, the climatic prerequisites for the formation of alluvial deposits (high quantity and intensity of rainfall) can make a number of these deposits highly inaccessible due to dense surrounding vegetation. This makes them difficult to mine using industrial methods, rendering them often sub-economical to operate.<sup>68</sup> As such, there are few, if any, corporate investors in these diamond fields, though they continue to attract diggers in search of a means of subsistence. This challenging situation means that when governments in such countries seek to raise or even impose taxes on diamond exports, diamonds disappear for other formal or informal markets. For small producer countries like Liberia, these circumstances make for a poor cost/benefit outcome in determining whether to participate in the KP, as the costs of running its certification scheme would exceed any tax revenue generated.<sup>69</sup> Nevertheless, the participation of these small producer states is important to the KP's effective operation as without their cooperation they may function as conduits for conflict diamonds.*

neither export nor import rough diamonds until it had established internal controls, it has notoriously continued to produce rough diamonds, which reports indicate are smuggled across the border via neighbouring KP participants.<sup>67</sup> Indeed, neighbouring states can sometimes have little incentive to prevent the smuggling of illicit or even conflict diamonds onto their territory where they are able to incorporate them into their own production figures and generate revenue from them.

## **B. Importing states**

Diamonds that evade internal controls in producer states should nevertheless be prevented from entering the legal diamond trade by internal controls in importing states. Whilst neighbouring states have a key role to play in this regard, countries further down the value chain, such as those home to trading centres, like Belgium, China, Israel, India, Switzerland, the UAE and the US, must also maintain strict controls to close down opportunities for supply chain contamination.

### **Box 5. INTERNAL CONTROLS AND TRADING HUBS – INDIA AS A MEDIA CASE STUDY**

*Reports in national and international media have voiced serious concerns about the KP's continued ability to guarantee consumers a conflict free diamond pipeline.<sup>73</sup> In January this year a Foreign Policy investigation reported that "legitimate merchandise [is] mingling openly with undocumented diamonds" amongst diamond traders in Surat, India.<sup>74</sup> This is not the first exposé of its kind. In 2011, India Today reported estimates in local press that "blood diamonds" comprised around 15 to 30 per cent of India's trade.<sup>75</sup> Supplies of uncertified diamonds are reported by traders to enter India's west coast from Dubai by dhow,<sup>76</sup> whilst three conflict diamond seizures by the Indian authorities between 2008 and 2011 saw interceptions of diamonds smuggled in from the UAE on international flights.<sup>77</sup> Foreign Policy reports that mixing openly takes place at Surat's Mahidharpura diamond market where dealers mix conflict stones with legitimate stones in preparing parcels for brokers who then supply polishers – the latter said to openly admit the black market nature of their business.<sup>78</sup>*

*The challenges faced by Indian authorities responsible for implementing internal controls in the country, have been highlighted in these reports. The Directorate of Revenue Intelligence is said to be under-resourced for the magnitude of its task,<sup>79</sup> with a senior investigator in Surat stating "It's a very big market... So many brokers are trading on the pavement itself. It's very difficult to monitor."<sup>80</sup> Likewise in Mumbai's Chhatrapati Shivaji International Airport, the diamond division of the customs office is said to have inspectors with no meaningful powers of inspection as the law requires them to permit even the most suspicious shipment to pass if it meets the minimal KP bar – certification. One senior official allegedly commented that, "[f]or us, the Kimberley Process has no relevance."<sup>81</sup>*

#### **Implications for the diamond trade**

*India is of course not the only country in which the diamond pipeline can be contaminated by conflict diamonds.<sup>82</sup> Indeed, its relative openness and the prevalence of English make it much easier for western consumer-conscious media to highlight deficiencies here than in for example in Dubai and China, which have also been implicated in the blood diamonds trade.<sup>83</sup> However, as polisher of 90% of the world's diamond supply India currently acts as a major geographical choking point for conflict diamonds. Thus, in its coverage of the diamond trade in India, Foreign Policy points out that "if you own a diamond bought in the 21<sup>st</sup> century, odds are it took an overnight journey on the Mail [train from Surat to Mumbai]. Odds are too, that you'll have no idea where it really came from."<sup>84</sup> Industry insiders acknowledge that "[th]is is not a problem only for Surat, or only for India. It's a problem around the world."<sup>85</sup> With Antwerp sourcing over a quarter of its diamonds in volume from India,<sup>86</sup> it may struggle to claim that it can genuinely guarantee a supply of conflict free diamonds, despite its considerable efforts to ensure stringent KP compliance in pursuit of its "Diamonds from Antwerp" ethical quality label.*

Five years after the launch of the KP, Global Witness undertook an analysis of data from the UN Comtrade Database.<sup>70</sup> This analysis highlighted what appeared to be significant illegal and suspicious trading activity between major KP trading hubs and non-KP participants. This illuminated potential leakages in the KP system through international trading and polishing centres, which had not become apparent through the KP's own statistical data. Such leakages appear to prevail today.

For this stage of the supply chain the KP has relied predominantly on industry self-regulation, whilst elucidating some basic recommendations for steps to be taken by states in implementing internal controls.<sup>71</sup> Beyond this, the KP has refrained from imposing more rigorous oversight. As a result, internal controls in states further down the supply chain and coordination between them is highly variable. This has led to diamonds being smuggled directly into some trading hubs, where they have entered the legal trade by being mixed with KP-certified goods.<sup>72</sup> Here, such goods can either be processed for the domestic market or re-exported under a new KP certificate issued by the exporting State. This uneven regulatory playing field undermines the KP's ability to fulfil its basic function: guaranteeing consumers a clean supply of conflict free diamonds. This poses a serious threat to the KPs credibility.

### The cutting and polishing lacunae

The KPCS focuses exclusively on the trade in rough diamonds. As such, the significance of effective regulation to prevent the import of illicit rough diamonds is particularly high for states at the cutting and polishing stages of the diamond pipeline. Indeed, these stages can offer notable opportunities for those seeking to launder illicit (and therefore conflict) rough diamonds. Whilst an experienced eye can often distinguish the origin of rough, the practice of polishing, and in particular deep boiling<sup>87</sup> can prevent such identification by removing distinguishing features.<sup>88</sup> Moreover, at this stage in the supply chain, where profit margins are lower and distribution fragmented, incentives for sourcing illicit diamonds may be high, with non-KP certified diamonds reportedly being bought for up to 40% below the going rate for accredited diamonds.<sup>89</sup>

Most importantly, however, because once it has been polished a diamond no longer falls within the KP's mandate it can be exported without the need for a KP certificate. The only oversight offered in respect of these diamonds is a system of self-regulation.<sup>90</sup> Here, the World Diamond Council's system of warranties requires buyers and sellers of both rough and polished diamonds to issue a statement on invoices affirming that all diamonds in a parcel are conflict free. Traders are required to keep a record of all warranty invoices, to be audited and reconciled annually by the company's own auditors. However, strong and sometimes collective incentives, media reports of open trade in black market rough (see box 6) and seizures of uncertified goods in the US, EU, India and Dubai indicate that such self-regulation as an oversight mechanism is inadequate, particularly for this crucial stage of the diamond supply chain.

Indeed, focusing as it does on tracking the flow of rough diamonds, the KPCS is not designed to meet the challenges posed by cutting and polishing for

#### Box 6. EXPLOITING KP WEAKNESSES

*A drive by the Surat-based Indian polishing industry to secure access to cheap rough saw the incorporation of Surat Rough Diamond Sourcing India Ltd (SRDSIL), established to "supply rough diamonds on discounted rates".<sup>93</sup> The SRDSIL was founded during a rift in the KP over the certification of Marange diamonds, which saw the US and EU impose embargoes on these stones whilst the KP mandated their unlimited export, thereby rendering them cheap and accessible.<sup>94</sup> The SRDSIL is reported to have entered into a memorandum of understanding with the Zimbabwean government for the regular supply of US\$1.2 billion worth of diamonds a year in exchange for training Zimbabweans in Surat's diamond processing units.<sup>95</sup> This arrangement highlights concerted efforts to exploit not only the economic impacts of divisions in the KP, but also the cutting and polishing loophole in the KP's oversight, with reports that Zimbabwean companies are now setting up diamond-cutting operations at Harare airport to circumvent the need for KP certification for exports.<sup>96</sup>*

maintaining a clean diamond supply chain. Certificates only note the amount of rough carats in a shipment, which can decrease by up to 50% through the process of cutting and polishing, making it easy to add or subtract polished diamonds from a parcel.<sup>91</sup> Moreover, where states with cutting and polishing hubs are also home to large consumer markets, KP certificates used to import diamonds that are sold domestically can reportedly be reused to smuggle stones out of the country, producing a further avenue for laundering.<sup>92</sup>

## **5. Defining the KP's scope: when is a "blood diamond" a "conflict diamond"?**

One of the greatest causes of rift in the KP relates to its very definition of the term "conflict diamond" and the extent to which human rights abuses, whether committed by state or non-state actors, is a component of that definition, ultimately affecting KP participation.

The KP defines conflict diamonds as:

"rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments, as described in various 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 Resolution 55/56, or in other similar UNGA resolutions which may be adopted in the future."<sup>97</sup>

This definition has been interpreted restrictively in practice. Firstly, commentators point out that despite making reference to General Assembly resolution 55/56, which simply encompasses diamonds used by rebel movements to finance their military activities, the KP definition has been interpreted to the exclusion of rebel groups not currently fighting a government.<sup>98</sup> Thus, for example, whilst from 2010 there was increasing evidence to indicate that certain ethnic militia in the north east of the Central African Republic (CAR) were formed in part to secure control over the exploitation of diamonds,<sup>99</sup> the situation in the CAR was not addressed by the KP until after these militia began to militarily threaten the CAR's government in late 2012.<sup>100</sup> Thus, by the time that the trade in CAR's diamonds was wholly suspended by the KP in May 2013, the country's president had already been deposed by a military coup in March 2013.

Most significantly, however, the KP's exclusive focus on rebel activities is charged with failing to engage with the types of human rights abuse instrumental to igniting the consumer boycott risk that helped to drive the KP's establishment.<sup>101</sup> Here, whilst the KP's preamble recognises "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";<sup>102</sup> where such abuses are committed by states, the process appears to remain silent. This has led commentators to note that the definition currently "tends to reinforce the suspicion that governments are simply protecting themselves"

### **The KPs political mandate**

The rift created by the Zimbabwe affair has highlighted what might be described as a duality in the KP's political mandate. At a recent Antwerp Diamond Academy meeting in Pretoria the KP's current South African Chair, Welile Nhlapo, reportedly suggested that by intervening in the Zimbabwean government's actions in Marange the KP had set itself a "bad and dangerous precedent to some extent for going beyond its mandate, which is to filter only rebel blood diamonds."<sup>105</sup> Indeed, the KP's core document defines the parameters of the KPCS, particularly as it relates to minimum criteria for participation. As outlined above, the principle focus of this political agreement is stemming the flow of "conflict diamonds", defined by reference to their contribution to rebel activities. However, civil society and certain industry representatives claim that "[t]o argue for a minimalist interpretation of what a conflict diamond is and to argue that the KP has nothing to do with human rights, ignores the Kimberley Process brand."<sup>106</sup> Certainly, the unique political origins of Kimberley as an on-going multi-stakeholder process – highlighting the political force of diamond consumer confidence on the international plane – may be read to suggest the presence of a further underlying objective to the KPCS (namely, the restoration of consumer confidence

## **Box 7. ZIMBABWE - A STALKING HORSE FOR THE KIMBERLEY HUMAN RIGHTS DEBATE**

*In September 2006 around ten thousand diggers flocked to the Marange diamond fields after the discovery of large diamond reserves. A KP review mission to Zimbabwe found the country to be in compliance with the KP's minimum criteria after attempts to stabilise the area using police force. By October 2008, the artisanal mining population had swelled to an estimated thirty thousand. In response, the Zimbabwean government launched "Operation No Return" deploying the Zimbabwean air force to secure control over the fields. Around two hundred people were estimated to have been killed in the first three weeks of this operation alone. Whilst this widespread abuse subsided, reports of attacks on diggers by both state and private security services have persisted, with the last update on the Marange field in April 2013 identifying 11 attacks, including one killing, in February and March 2013.<sup>104</sup>*

*A KP review mission was deployed to the region in July 2009 and found "credible indications of significant non-compliance", recommending Zimbabwe's temporary suspension. Instead of suspension, November 2009 saw the KP agree a Joint Working Plan with Zimbabwe to address its non-compliance issues under the supervision of a KP monitor. A monitoring mission headed by South African businessman, Abbey Chikane, in May 2010 culminated in a finding that Zimbabwe was now in compliance with the KP's minimum standards and should therefore be allowed to resume exports. Civil society participants contested these findings, occasioning a dispute that ended in deadlock and was overshadowed by Zimbabwe's arrest of Farai Maguwu, a local civil society activist instrumental in bringing the abuses to light.*

*A second review mission in August 2010, found that whilst progress in implementing the KP had been made in respect of some elements of the Joint Work Plan, a number of problems persisted, including smuggling by military and illegal mining syndicates. The KP working group on monitoring established a Zimbabwean civil society focal point, which, while rejected by the Zimbabwean government, assisted in the monitoring of the Marange fields. At the 2010 KP plenary the Zimbabwean government rejected proposals for further supervision of its exports claiming that it was in compliance with the KP's base criteria, and should be entitled to trade without conditions or supervision. In 2011 the Congolese chairman of the KP issued a notice seeking to permit the export of diamonds from compliant mining companies in Marange, a move rejected by participants on the basis that it was issued without consensus. A subsequent Monitoring Working Group draft agreement requiring further monitoring and supervision, as well as measures to cease exports if reports of violence in Marange re-emerged, was rejected by the Zimbabwean government. At a KP inter-sessional in June that year the chairman issued a notice permitting the export of diamonds from compliant mining companies in Zimbabwe. This was contested by some participants, including the US, EU, Australia, Israel and Canada on the basis that it was issued without the requisite consensus. It also contributed to a civil society walk-out from the meeting. In November 2011, the KP Plenary elected to uphold the notice by a majority instead of the usual consensus, bringing an end to the joint working plan.*

*The issues raised between 2008 and 2011 highlighted the KP strengths and weaknesses. Whilst the system broke new ground in attempting to address the situation in Zimbabwe, these attempts brought to the fore various functional concerns, including about the proper use of the consensus voting system, the effectiveness and impartiality of review missions, the impact of global competition between trading centres on KP efficacy, and the proper application of enforcement measures. Most notably, however, it raised questions about the role of human rights in determining the definition of conflict diamonds.*

in diamonds) and thereby an implicit mandate for the KP as a whole.<sup>(3)</sup> From this perspective, the KP may have had little choice in its engagement with Marange if it was to continue to maintain its relevance as a means of reassuring consumers that buying diamonds would not implicate them in atrocities.<sup>107</sup>

Proponents of this view would point to the predominant use of the term “blood diamond” to denote the phenomenon that the KP has been tasked to eliminate in popular everyday media. Indeed, this was the term used to bring the issue to widespread attention in the 2006 Hollywood movie of the same name, its implicit appeal to popular sentiments regarding human rights abuse reportedly prompting the Indian authorities to undertake a crackdown on companies employing underage workers for fear of similar scandal affecting its own industry in the movie’s wake.<sup>108</sup> Charging the KP with misleading consumers on this point, Martin Rapaport has highlighted the dissonance between the terms “conflict diamond”, as interpreted by the KP, and “blood diamond” as understood by consumers and the media: “Blood diamonds are diamonds involved in murder, mutilation, rape or forced servitude.”<sup>109</sup>

## **Redefining KP minimum standards: proposals**

Upon the US’ assumption of the chairmanship of the KP in November 2012, the issue of updating the KP definition of conflict diamonds was placed squarely on the KP’s reform agenda. In its vision statement, the US proposed the modernisation of the definition of conflict diamonds to reflect global standards and consolidate the reputation of diamonds among consumers. The US’ proposal made no suggestions for specific wording but was posited around several key elements:<sup>110</sup>

- the continued focus of the KP on ensuring that rough diamonds do not fuel armed conflict, with this being the single universal certification criteria for the KPCS;
- that relevant violence/armed conflict should be demonstrably diamond related and evidence thereof be independently verifiable;
- that the definition of violence/armed conflict not include isolated incidents; and
- that any revised definition could be implemented on a mining or manufacturing site basis to limit unintended consequences.

The US tentatively proposed that any updated definition of armed conflict could apply to diamond-related conflicts that meet a generally agreed-upon definition for armed conflicts (such as, for example, those developed under international humanitarian law). Nevertheless, it stated that such a definition should also apply to “circumstances of systematic violence, such as protracted and violent internal disturbances and tensions, grave acts of violence or acts of a similar nature over an extended period”, though not individual or isolated cases nor violence unrelated to diamonds.<sup>111</sup> Such a definition would appear to address concerns about the disparity of treatment between diamonds that fuel the perpetration of rebel abuses and those that fuel large scale state abuses without making reference to “human rights”.

Indeed, on the issue of human rights, the US proposal suggested that progress on such matters, as well as progress on issues of human security, financial transparency and development should form part of the KP’s “best practices” and other efforts to foster concrete results through mutual assistance among KP participants and observers. The US asserted that such matters should not form part of the basis for certification, stating: “An updated definition should cover conflict. Human rights issues are clearly implicated in such situations, though it is the concept of conflict that remains at the core of KP certification.”<sup>112</sup>

This proposal appears to represent a compromise between those Participants reticent to acknowledge any human rights relevance to the KP and numerous industry and civil society stakeholders, such as the KP Civil Society Coalition, who deem a certain level of human rights compliance integral to the KP brand. Indeed, in its recent guide to the KP, the KP Civil Society Coalition emphasised that the KP “must include respect for human rights in its minimum standards for all Participants”, requiring the administration of

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<sup>3</sup> The publication of NGO reports on conflict diamonds in Angola and Sierra Leone in 1998 and 1999 prompted De Beers to express “extreme concern” that the actions of NGOs could unintentionally damage the legitimate diamond market via the “blunt instrument of the threat of a consumer boycott”, whilst Nelson Mandela emphasised the importance of diamonds to South Africa and the southern African economy, referring to the potential harm that might be wrought by a boycott. (I Smillie, *Blood on the Stone*, (Anthem Press: 2010), p.171).

security measures and standards in Participants' diamond mining sectors to be consistent with international human rights law.<sup>113</sup> Whilst human rights concerns can extend to issues such as labour rights, electoral rights and revenue transparency, this civil society appeal appears to be more narrowly focused on abuses perpetrated in the implementation of internal controls in diamond areas. Such abuses include the killing or assault of artisanal miners or local inhabitants in alluvial fields by state security forces or private security services as a part of efforts to secure or maintain control over the area.

During 2012 the Committee on KPCS Review (CKR) discussed proposed changes to the definition of "conflict diamond" though no consensus could be reached. The KP's 2012 Plenary affirmed the CKR mandate to continue discussions and consultations on the subject, charging it to report further on the matter at the 2013 Plenary.<sup>118</sup>

#### **Box 8. WHAT IS "INTERNATIONAL HUMAN RIGHTS LAW"?**

**International human rights law (IHRL) provides a framework for State actions concerning persons within their territory. Philosophically, it is founded upon the recognition of the inherent humanity and dignity of all persons, and forms part of state efforts to realise the aims of the UN Charter.<sup>114</sup> Legally, States are bound by IHRL only to the extent that they have ratified a human rights treaty. Such treaties can be found at the international<sup>115</sup> and regional<sup>116</sup> level.**

Broadly speaking, human rights obligations take three major forms: duties to respect, protect and fulfil human rights. *Respecting* rights requires states to refrain from violating rights themselves by, for example, subjecting people to extra-judicial killing or torture. The obligation to *protect* rights requires states to take steps to prevent third parties from violating other people's rights, e.g. by criminalising abuse and exploitation, and ensuring effective law enforcement. This obligation forms the first pillar of the UN's business and human rights framework.<sup>117</sup> The obligation to fulfil rights requires that states take active steps to put in place institutions and procedures to enable people to enjoy their rights.

### **Human rights and the Kimberley Process: the substantive debate**

Beyond the issue of political mandate, some notable arguments have been advanced by certain KP Participants as to why human rights should not be included within the KP's scope.

#### **The KP is not a human rights organisation**

Stakeholders resistant to the inclusion of human rights in the KP's mandate have pointed out that the KP is not a human rights organisation and would be overzealous in trying to resolve "the world's human rights problems". Indeed, in his recent address to the Antwerp Diamond Academy, South Africa's KP Chair highlighted that many of the human rights problems raised by NGOs, who are critical of the KP, are in fact governance issues, better dealt with by institutions such as the UN.<sup>119</sup>

Certainly, in addressing the state's engagement with those on its territory, human rights obligations do have implications for governance. Some human rights have been read as having implications for corruption and revenue transparency,<sup>120</sup> whilst others can engage complex issues such as development and labour conditions. Quite aside from the issue of political will, securing state conformity with international human rights obligations in many of these contexts can be politically, economically and socially challenging, requiring the mobilisation of resources, cultural sensitivity and time. Attempting to act as a silver bullet to achieving such ends is well beyond the scope of the KP. Indeed, whilst poverty alleviation is central to resolving the vulnerability of alluvial diamond producing states to conflict, and securing labour rights may form part of such poverty alleviation, using the KP as a compliance mechanism may well be deemed inappropriate. Proponents of this perspective would assert that the KP's primary function is to stem the flow of conflict diamonds, not to secure development, nor to secure human rights compliance. Indeed, many might argue that whilst a link between corruption and diamond conflicts may in some cases seem apparent,<sup>121</sup> the KP would be more effective in such cases by focusing its resources on its core role of ensuring at least that adequate internal controls are

in place. For solutions to other human rights issues, such as labour conditions, the KP may be better to draw on its experiences regarding development. Here, the optimal position may be represented in the US suggestion for “achieving progress on human rights ... through a focused commitment by KP Participants and Observers on development and engagement with other institutions that focus on human rights”.<sup>122</sup>

However, in seeking to advocate any deeper “human rights” engagement on the part of the KP, stakeholders may be wise to be specific about exactly which rights and obligations they wish for the KP to engage. Whilst the above assertions are valid in respect of numerous human rights issues, it might also be said that not all IHRL obligations are complex or difficult to comply with. Most obligations to respect human rights principally require states to refrain from engaging in certain acts. Examples include attempts by state forces or parastatals to expel artisanal miners from diamond fields by brutal methods such as killing, rape or beatings – as witnessed not only in the Congolese diamond mining company MIBA’s 2002 expulsion of illegal miners<sup>123</sup> and Zimbabwe’s 2008 “Operation No Return”, but also in what has been reported as continuing state practice in Angola in respect of Congolese artisanal miners.<sup>124</sup> As outlined above, it would appear that many NGOs and industry stakeholders are primarily concerned with these types of “blood diamond” generating practices. Their resolution may not necessarily entail more expenditure than that in any case accumulated (directly and indirectly) by the use of such measures. Rather, they require efforts to find alternative, and indeed more effective, methods for executing control measures. Arguably, as artisanal mining is poverty driven, the use of brutal means to exert control over diamond areas is ultimately ineffective, as evidenced by the fact that despite the use of such methods by Angolan state forces for many years, Congolese youths continue to travel to the country’s diamond fields to try their luck.<sup>125</sup>

Moreover, it is difficult to ignore the fact that all KP Participants are a party to at least one international human rights convention that may potentially have a direct bearing on how they implement internal controls to prevent the flow of conflict diamonds.<sup>126</sup> Here, Participants acting pursuant to the KPCS may be bound under international law to do so in a manner that is in compliance with their IHRL obligations, which must be abided by in good faith.<sup>127</sup> As such, IHRL could be said to already constitute part of the international legal framework for the implementation of the KPCS. From this perspective, the KP’s ability to support its members in implementing internal controls in a lawful manner could be seen as a natural part of its function as a regulatory system.

Here, whilst input from other human rights bodies would no doubt aid the KP, its experiences over the last few years may nevertheless have rendered it somewhat better equipped to cope with human rights challenges, for example in developing joint working plans and engaging local civil society focal points.<sup>128</sup> In learning lessons from the past, the significance of the KP’s albeit limited gains in supporting Zimbabwe to ameliorate human rights abuses should not be overlooked. For example, throughout the period 2009 to 2011 the KP consistently monitored and raised awareness of the situation in Marange, contributing to “gradual and limited, but nevertheless real, improvements to the situation on the ground.”<sup>129</sup> This attention mobilised not only valuable donor funds to support human rights monitoring for local actors<sup>130</sup> but also helped secure Zimbabwe’s continuing willingness to allow the KP civil society coalition access to Marange.<sup>131</sup> The KP’s ability to offer Participants technical assistance, for example in the form of capacity building for state actors and parastatals, may warrant further attention here.

#### Better in than out?

The inevitable question, however, is whether, and if so where, a line should be drawn when it comes to continued non-compliance with certain human rights obligations. Answering this question may depend on the centrality of an issue to consumer confidence. It may require further legal inquiry. However, it will definitely require serious consideration of the political efficacy of giving human rights compliance this sort of bite through the KP. Stakeholders will need to weigh up the need for credible sanctions to drive human rights compliance with the risk that political expedience trumps their application. Indeed, there are a number of reasons why exclusion may not always be the most effective means for securing compliance – many of them, again, voiced in respect of Zimbabwe. For example, continued participation in the KP even in the face of human rights non-compliance gives NGOs an opportunity to influence. As one commentator has noted:

“The history of Zimbabwe’s relationship with the commonwealth is instructive. When Zimbabwe quit in 2003 it left the commonwealth ineffectively mouthing speeches from the sidelines. The Kimberley Process has probably calculated that Zimbabwe was better in than out: “out” would mean no control at all, risking the potentially destabilising dumping of large quantities of diamonds on the world market, while “in” would mean that Kimberley could continue to send monitors there.”<sup>132</sup>

Moreover, by excluding some states from the trade in diamonds, the KP may, in certain cases, aid those that benefit from illicit trade. One example might be where such persons use KP exclusion as an excuse to undermine revenue transparency by refusing to allow even minimal access to information regarding receipts in the name of “sanctions-busting”<sup>133</sup>

These assertions do not undermine the value of or need for the possibility of exclusion from the KP; rather they highlight that when it comes to human rights compliance in the KP there may be certain political imperatives at play that could, depending on the facts of the case, make exclusion from the KP for failure to comply, difficult and possibly undesirable. This might create further frustration with regard to the uniformity with which the KP approaches compliance – already a matter of concern. It may be that the answer here lies in enhancing the KPs transparency. Indeed, just as reasons of political expedience can militate against KP exclusion, situations in which such expulsion is necessary also cannot be discounted. Where the KP renders decisions on such matters that are clear and outlines a full account of its reasoning by reference to all the social, political and economic factors taken into account it is more likely to keep NGOs and consumers on board.

## **6. Conclusion: what future for the KP?**

Born a maverick institution, the Kimberley Process has been an inspiration to a number of initiatives aimed at changing the resource curse narrative. The last few years have highlighted the essentially political nature of the KP’s regulatory technique. Whilst this may in some ways be seen to have highlighted the system’s potential for creativity, it has also brought about a haemorrhage of faith on the part of those who looked to the KP to guarantee consumers a bloodless diamond supply chain. It has seen the KP slip in credibility and relevance.

The unique vulnerability of the diamond trade to adverse consumer perception has the potential to render it in many ways a harbinger of corporate social responsibility issues. Consumer perception relies on consumer awareness. As globalisation brings about a growth in education and political freedom,<sup>134</sup> so too comes a rise in consumer awareness and appreciation for CSR. Thus, the same growth on which projections for a future rise in diamond demand are predicated will also make consumers more commercially and ethically savvy. Here, change in the sector seems inevitable.

The extent to which the KP will play a role in this regard is difficult to tell. On the one hand, the KP represents a significant focal point for efforts to stem the flow of blood diamonds, having the potential to mobilise energy and resources to this end and acting as a repository for both knowledge and expertise on the diamond trade. On the other, it faces serious challenges. Its consensus decision making may render radical change in the KP impossible in the absence of external stimulus. However, the shared interest in ensuring the health of the global diamond trade may motivate it to try to get to grips with issues such as strengthening internal controls, improving monitoring and addressing the challenges posed by the cutting and polishing sector. One of the simplest and most powerful means of enhancing the KPs credibility might be for it to work on affecting greater transparency. On issues of scope, there may be some more debate yet to come.

In 2014 the KP’s chairmanship will be passed to China. As the country with the fastest growing diamond consumer market and predictions that it may soon be set to overtake India as the world’s center for cutting and polishing, China has a clear and strong interest in maintaining both consumer confidence and a stable diamond supply. Seizing the opportunity of chairmanship to shape a resolution to the crisis that has beset the KP over the last few years by pushing to ensure its efficiency and aligning its definition of “conflict diamonds” with “blood diamonds” would be commercially astute from a long term

perspective. However, China's resistance with regard to many KP reforms may render its likelihood of taking this tack negligible.

In the meantime, consumers, NGOs and certain industry groups grow impatient. Part II in this series will address recent suggestions that the gemstones sector might benefit from a supplement to the OECD Guidelines on Due Diligence in Conflict Affected and High Risk Areas and the potential relevance of such a supplement to restoring the relevance of the KP.

## Endnotes

- <sup>1</sup> "The Issues", Diamond Development Initiative, available at: <http://www.ddiglobal.org/pages/issues.php>.
- <sup>2</sup> For further elaboration and a full account of the process of negotiation see, I. Smillie, *Blood on the Stone*, (Anthem Press: 2010), p.178.
- <sup>3</sup> M.E. Porter, S. Marciano and A. Warhurst, "De Beers: Addressing New Competitiveness Challenges", 8 May 2009, Harvard Business School Review, p.18.
- <sup>4</sup> "The Diamond Cartel: The cartel isn't forever", 15 July 2004, *The Economist*, available at: <http://www.economist.com/node/2921462>.
- <sup>5</sup> E. Golan, *Diamond Prices and the Forces that Shape them*, *Idex Online*, March 2013, p.99. See also, pp.99-107.
- <sup>6</sup> C. Wyndham, "What If? – Debt, Fragmentation and Transparency", *dDiscourse (Issue 1) November 2009*, DDI International, p.4.
- <sup>7</sup> E. Golan, *Diamond Prices and the Forces that Shape them*, *Idex Online*, March 2013, p.107. This loss has caused considerable concern in the industry, which the World Federation for Diamond Bourses has reportedly sought to meet by commencing a pilot project called the World Diamond Mark, a not-for-profit organisation operating out of Hong Kong, which will operate as the industry's new marketing arm. For further see R. Luis, "World Diamond Congress Drives Industry to Action", *Solitaire International*, November 2012, pp.53-55.
- <sup>8</sup> Per Varda Shine, Diamond Trading Company CEO, in R. Luis, "World Diamond Congress Drives Industry to Action", *Solitaire International*, November 2012, pp.49.
- <sup>9</sup> *The Global Diamond Industry: Portrait of Growth*, Bain & Company and Antwerp World Diamond Centre, (2012), p.71.
- <sup>10</sup> *The Global Diamond Industry: Lifting the Veil of Mystery*, Bain & Company and Antwerp World Diamond Centre, (2011), p.5.
- <sup>11</sup> *The Global Diamond Industry: Lifting the Veil of Mystery*, Bain & Company and Antwerp World Diamond Centre, (2011), p. 19-20.
- <sup>12</sup> *The Global Diamond Report 2013: Journey Through the Value Chain*, Bain & Company and Antwerp World Diamond Centre, pp.5-6. Smaller retail outlets, which comprise 80% of the retail market, are said to operate on a margin of 4-6%.
- <sup>13</sup> Rapaport Weekly Report 13 September 2013, p.7.
- <sup>14</sup> "The Issues", Diamond Development Initiative, available at <http://www.ddiglobal.org/pages/issues.php>.
- <sup>15</sup> Mark Van Bockstael, "Economic Dynamics of Artisanal Diamond Mining in Relation to the Kimberley Process", p.56 in *Artisanal Diamond Mining: Perspectives and Challenges*, K. Vlassenroot and S. Van Bockstael (Egmont: 2008), Belgian Federal Public Service Foreign Affairs, *Foreign Trade and Development Cooperation, DIFD, CASM*.
- <sup>16</sup> Rich Man, Poor Man – Development Diamonds and Poverty Diamonds: *The Potential for Change in the Artisanal Alluvial Diamond Fields of Africa*, *Partnership Africa Canada, Global Witness, 2004*.
- <sup>17</sup> For a discussion of this and an instructive comparison with margins and wages in Guyana and Brazil see, S. Blore, "The misery and mark-up: Miners' wages and diamond value chains in Africa and South America", pp.66-89 in *Artisanal Diamond Mining: Perspectives and Challenges*, K. Vlassenroot and S. Van Bockstael (Egmont: 2008), Belgian Federal Public Service Foreign Affairs, *Foreign Trade and Development Cooperation, DIFD, CASM*.
- <sup>18</sup> See for example, E. Emeseh, R. Ako, P. Okonmah, and L. Ogechukwu Obokoh, "Corporations, CSR and Self Regulation: What Lessons from the Global Financial Crisis?", 11 *German Law Journal* 230 (2010), available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=1234>.
- <sup>19</sup> See for example European Commission Green Paper, *Promoting a European framework for Corporate Social Responsibility*, COM(2001) 366 final, 18 July 2001, para.20, available at [http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001\\_0366en01.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0366en01.pdf).
- <sup>20</sup> J. Ruggie, "Guiding Principles on Business and Human Rights: Implementing the United National "Protect, Respect and Remedy" Framework", Human Rights Council, 21 March 2011, AHRC/17/31, para.6.
- <sup>21</sup> The "Protect, Respect and Remedy" Framework is composed of three pillars: the State duty to protect human rights from the actions of third parties, including business through law, regulation and policy; the corporate responsibility to respect human rights, which requires due diligence to avoid infringing on the rights of others and addressing adverse impacts; and greater access to remedies for victims.

- <sup>22</sup> See, for example, European Commission, *A renewed EU strategy 2011-14 for Corporate Social Responsibility, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2011) 681 final, 25 October 2011.*
- <sup>23</sup> See for example, the Extractive Industries Transparency Initiative, the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, the International Conference for the Great Lakes Region's Regional Initiative against the Illegal Exploitation of Natural Resources, the ITRI traceability system (iTSCI), the Conflict Free Smelter Initiative, the Responsible Jewellery Council Code of Practices and Chain of Custody certification schemes, amongst others.
- <sup>24</sup> Nielsen, *Consumers who care and say that they will reward companies with their wallets, August 2013, p.6-10.* This study notes that existing CSR expectations are particularly high in India where draft legislation seeks to mandate CSR investments from certain companies and three quarters of consumers express a willingness to pay for CSR (p.6). It also states that countries with a greater disparity between expressed and actual willingness to increase spending for CSR, such as Hong Kong (expressed willingness, 52%; actual spend, 32%) represent markets that are uniquely ripe for cause marketing (p.10).
- <sup>25</sup> *The Global Diamond Industry: Portrait of Growth, (2012) Bain & Company and Antwerp World Diamond Centre, p.47.*
- <sup>26</sup> See for example, the Diamond Source Warranty Protocol, launched in October 2012 by the Jewelers of America, the Jewelers Vigilance Council and the Diamond Manufacturers & Importers Association of America. See also responses to the launch of this protocol from industry members in India in P. Narvekar, "Protocol Non-Grata", *Solitaire International, p.59.*
- <sup>27</sup> P. Olden, *OECD Due Diligence Guidance for Responsible supply Chain of Minerals from Conflict-Affected and High Risk Areas: Implications for the Supply Chain of Gold and Other Precious Metals, August 2010; Nielsen, Consumers who care and say that they will reward companies with their wallets, August 2013;*
- <sup>28</sup> P. Olden, *OECD Due Diligence Guidance for Responsible supply Chain of Minerals from Conflict-Affected and High Risk Areas: Implications for the Supply Chain of Gold and Other Precious Metals, August 2010, p.12.* Olden notes that Bollywood stars are extensively being used as brand ambassadors. This renders these ambassadors' own reputations vulnerable to negative publicity around diamonds.
- <sup>29</sup> P. Olden, *ibid, p.12.*
- <sup>30</sup> *The Global Diamond Industry: Portrait of Growth, (2012) Bain & Company and Antwerp World Diamond Centre, p37.*
- <sup>31</sup> A. Krawitz, *Rapaport Weekly Report, 25 December 2009.*
- <sup>32</sup> *The Global Diamond Industry: Portrait of Growth, (2012) Bain & Company and Antwerp World Diamond Centre, pp. 22-25.*
- <sup>33</sup> A recent article in Business Insider, for example, has questioned the extent to which diamonds are truly a commodity capable of retaining value, challenging their place in western engagement culture. Whilst effectively making the consumer case against the purchase of diamonds the article ends with reference to an association of diamonds with "human suffering" and "pillage". R. Dhar, "Diamonds Are A Sham And It's Time We Stop Getting Engaged With Them", *Business Insider, 20 March 2013, available at: <http://www.businessinsider.com/why-diamonds-are-a-sham-2013-3>;* see also L. Nisita, "How Diamond Rings Came To Be: A Tale Of Advertising &...Lies", 22 March 2013, Refinery29 (fashion blog), available at: <http://www.refinery29.com/2013/03/44563/history-diamond-engagement-rings>.
- <sup>34</sup> V. Kuriyan, "India: Keeping the Idea of Diamonds Alive", *dDiscourse (Issue 1) November 2009, DDI International.*
- <sup>35</sup> *Ibid.*
- <sup>36</sup> For a more comprehensive explanation of the KP see *A Guide to the Kimberley Process, September 2013, KP Civil Society Coalition.*
- <sup>37</sup> The involvement of industry was clearly essential to creating a workable system for combatting conflict diamonds. Moreover, being often seen as representative of popular perception, civil society is known to play an important (and cautious) role in the legitimisation of certain political actions and providing an avenue for transparency. (F. Bieri, "The Roles of NGOs in the Kimberley Process", *Global Studies Journal, (10 Nov 2010) 1).*
- <sup>38</sup> *Ibid.*
- <sup>39</sup> M. Rapaport, "Stop buying and selling blood diamonds", February 2010, Op-Ed Rapaport Magazine.
- <sup>40</sup> "Diamond boss blasts KP", 4 August 2010, *The Zimbabwean.*
- <sup>41</sup> "Global Witness leaves Kimberley Process, calls for diamond trade to be held accountable" Global Witness, 5 December 2011.
- <sup>42</sup> Examples include Responsible Jewellery Council initiatives, the Diamond Source Warranty Protocol, De Beers' Forevermark, the Rapaport "ethical certification" system for diamonds, amongst others.
- <sup>43</sup> See for example EU and US sanctions measures: "EU imposes another year of sanctions", 16 February 2010, IRIN; "Anxiety Grips KPCS Plenary", 3 December 2012, Financial Gazette.
- <sup>44</sup> See for example, I. Smillie, *Assessment of the Kimberley Process in Enhancing the Process of Formalisation and Certification in the Diamond Industry – Problems and Opportunities, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, March 2011.*
- <sup>45</sup> *A Guide to the Kimberley Process, September 2013, KP Civil Society Coalition, p.5.*

- <sup>46</sup> UN General Assembly Resolution 55/56 The role of diamonds in fuelling conflict: breaking the link between the illicit transaction of rough diamonds and armed conflict as a contribution to prevention and settlement of conflicts, 1 December 2000, para.3 (a)-(b). Emphasis added.
- <sup>47</sup> Ibid, para.4.
- <sup>48</sup> Cf. *Assessment of the Kimberley Process in Enhancing the Process of Formalisation and Certification in the Diamond Industry – Problems and Opportunities*, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, March 2011, Annex 2.
- <sup>49</sup> Section IV.
- <sup>50</sup> K. Matthysen & I. Clarkson, *Gold and Diamonds in the Central African Republic, February 2013*, IPIS Research, Actionaid, Cordaid, pp. 7, 18-20. The same is said to be true of smuggling from the DRC, see S. Blore, “Gold & Diamonds”; Discourse, November 2009: “Artisanal miners from the region bring both [gold and diamonds] into Isiro for sale. And there a curious thing happens. Most diamonds travel west to the capital Kinshasa, where government taxes are paid and the diamonds are legally exported. Much of the gold takes a different route. Stuffed inside sacks of rice it gets smuggled east, traversing borders illegally on its way from the DRC to Uganda and Dubai. ... A key difference is that diamond exports are regulated via an international certification system, the Kimberley Process”.
- <sup>51</sup> S. Geenen, “A dangerous bet. The challenges of formalizing artisanal mining in the Democratic Republic of Congo”, *Resources Policy*, 37, 3, September 2012, pp. 322–330.
- <sup>52</sup> Rich Man, Poor Man – Development Diamonds and Poverty Diamonds: *The Potential for Change in the Artisanal Alluvial Diamond Fields of Africa*, Partnership Africa Canada, Global Witness, 2004.
- <sup>53</sup> Ibid., p.2.
- <sup>54</sup> See for example the 2005 Moscow Declaration on Improving Internal Controls over Alluvial Diamond Production and the more recent 2012 Washington Declaration on Integrating Development of Artisanal and Small Scale Diamond Mining with Kimberley Process Implementation.
- <sup>55</sup> For further see the Diamond Development Initiative website, available at: <http://www.ddiglobal.org/>.
- <sup>56</sup> *A Guide to the Kimberley Process, September 2013*, KP Civil Society Coalition, p.15-16.
- <sup>57</sup> Other concerns not addressed in explicit detail here include transparency, sanctions and enforcement. Further elaboration on concerns about the KP’s function can be found in publications such as I. Smillie, *Paddles for Kimberley, June 2010*, Partnership Africa Canada; *Assessment of the Kimberley Process in Enhancing the Process of Formalisation and Certification in the Diamond Industry – Problems and Opportunities*, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, March 2011; *A Guide to the Kimberley Process, September 2013*, KP Civil Society Coalition.
- <sup>58</sup> Interlaken Agreement, Section VI, para.5.
- <sup>59</sup> As occurred for example during Zimbabwe’s refusal to endorse the US as Kimberley vice-chair in 2011. See I. Smillie, *Assessment of the Kimberley Process in Enhancing the Process of Formalisation and Certification in the Diamond Industry – Problems and Opportunities*, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, March 2011, p.4.
- <sup>60</sup> Interlaken Agreement, Section VI, para.13(b).
- <sup>61</sup> IPIS interview with Alan Martin (Partnership Africa Canada), August 2013, Brussels; and telephone interview with Ian Smillie (Diamond Development Initiative), August 2013.
- <sup>62</sup> See, for example, the provision for independent third party auditors made as part of the International Conflict of the Great Lakes Region’s Regional Certification Mechanism for natural resources; Briefing Note on the ICGLR Regional Certification Mechanism; ICGLR & PAC, p.5, available at: [http://www.pacweb.org/Documents/icglr/PAC\\_Briefing\\_Note\\_on\\_the\\_ICGLR\\_Regional\\_Certification\\_Mechanism\\_June\\_2012.pdf](http://www.pacweb.org/Documents/icglr/PAC_Briefing_Note_on_the_ICGLR_Regional_Certification_Mechanism_June_2012.pdf).
- <sup>63</sup> *A Guide to the Kimberley Process, September 2013*, KP Civil Society Coalition, p.26.
- <sup>64</sup> Ibid.
- <sup>65</sup> Interlaken Agreement, Section IV(a).
- <sup>66</sup> I. Smillie, *Blood on the Stone*, (Anthem Press: 2010), p.200.
- <sup>67</sup> *A Guide to the Kimberley Process, September 2013*, KP Civil Society Coalition, p.23; I. Smillie, *Paddles for Kimberley, June 2010*, Partnership Africa Canada, p.8.
- <sup>68</sup> Mark Van Bockstael, “Economic Dynamics of Artisanal Diamond Mining in Relation to the Kimberley Process”, p.56 in *Artisanal Diamond Mining: Perspectives and Challenges*, K. Vlassenroot and S. Van Bockstael (Egmont: 2008), Belgian Federal Public Service Foreign Affairs, *Foreign Trade and Development Cooperation, DIFD, CASM*.
- <sup>69</sup> Rich Man, Poor Man – Development Diamonds and Poverty Diamonds: *The Potential for Change in the Artisanal Alluvial Diamond Fields of Africa*, Partnership Africa Canada, Global Witness, 2004, pp.5-6. See also, I. Smillie, *Assessment of the Kimberley Process in Enhancing the Process of Formalisation and Certification in the Diamond Industry – Problems and Opportunities*, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, March 2011, Annex 2.
- <sup>70</sup> *Loopholes in the Kimberley Process: Illegal trade undermines efforts to combat conflict diamonds*, Global Witness, October 2007.

- <sup>71</sup> Including the registration of diamond traders, record-keeping of diamond transactions and spot checks on companies engaged in the trading and polishing of rough diamonds (Interlaken Agreement, Annex II: Recommendations as provided for in section IV, paragraph (f), para. 13-16); see also, *Loopholes in the Kimberley Process: Illegal trade undermines efforts to combat conflict diamonds*, *Global Witness*, October 2007, p.4.
- <sup>72</sup> *Loopholes in the Kimberley Process: Illegal trade undermines efforts to combat conflict diamonds*, *Global Witness*, October 2007, p.3.
- <sup>73</sup> J. Miklian, "Rough Cut", 2 January 2013, *Foreign Policy*.
- <sup>74</sup> *Ibid.*
- <sup>75</sup> S. Guha Ray, "Globally barred blood diamonds from Sierra Leone find their way to Gujarat" 7 May 2011, *India Today*. See similar reports in M. R. Thomas, "Surat Rough Diamond Sourcing India runs into rough weather", 7 June 2013, *The Times of India*.
- <sup>76</sup> In J. Overdorf, "Special Report: India plays the middleman", 6 October 2011, *Global Post*, available at <http://www.globalpost.com/dispatch/news/regions/asia-pacific/india/111005/blood-diamonds-india-surat-gujarat-kimberley-process?page=0,0>.
- <sup>77</sup> *Ibid.* In April 2012, an MoU was signed between the Dubai Chamber of Commerce and Industry and the Southern Gujarat Chamber of Commerce and Industry, with commentators suggesting that the pact "has the potential to make Dubai the world's biggest diamond trading hub and at the same time give Surat direct access to the world, bypassing Mumbai", in part See S. Shahbandari, "Dubai-Surat pact could reshape world gem trade", *gulfnews.com*, 27 April 2012, available at: <http://gulfnews.com/business/general/dubai-surat-pact-could-reshape-world-gem-trade-1.1014256>.
- <sup>78</sup> J. Miklian, "Rough Cut", 2 January 2013, *Foreign Policy*. "Every month, diamonds are coming from Zimbabwe without a Kimberley Certificate" states Karta Shah, a Surat Municipal Corporation official and diamond trader; J. Overdorf, "Special Report: India plays the middleman", 6 October 2011, *Global Post*.
- <sup>79</sup> J. Miklian, "Rough Cut", 2 January 2013, *Foreign Policy*.
- <sup>80</sup> In J. Overdorf, "Special Report: India plays the middleman", 6 October 2011, *Global Post*.
- <sup>81</sup> J. Miklian, "Rough Cut", 2 January 2013, *Foreign Policy*.
- <sup>82</sup> For further see S. Guha Ray, "The Diamond Files", *Tehelka Magazine*, Vol.6, Issue 47, November 2009.
- <sup>83</sup> See for example "Beijing's African Safari: Beijing's investments in blood diamonds increase", 7 May 2011, *India Today*, available at: <http://indiatoday.intoday.in/story/chinese-government-is-entrenched-in-diamond-trade-in-africa/1/137306.html>; "Zimbabwe's 'blood diamonds' flood Dubai", 7 April 2013, *Bulawayo 24 News* (by *Financial Times*), available at: <http://bulawayo24.com/index-id-news-sc-international-byo-28598.html>.
- <sup>84</sup> J. Miklian, "Rough Cut", 2 January 2013, *Foreign Policy*.
- <sup>85</sup> Quote from Damji Mavani, secretary of the Surat Diamond Association, in J. Overdorf, "Special Report: India plays the middleman", 6 October 2011, *Global Post*.
- <sup>86</sup> In 2010, Belgium imported 2,005,381.57 carats from India to the value of US\$ 1,944, 651,927 - third only in terms of value to the US and Hong Kong. See Antwerp Diamond data 2012 in Antwerp Diamond Report 2012, Antwerp *World Diamond Centre*, p.8.
- <sup>87</sup> The process of placing diamonds in a form of acid to remove traces of dirt from fine inclusions to enhance a polished diamond's shine. For further see the Israeli Diamond Industry, WikiDiamond, <http://www.israelidiamond.co.il/english/wikidiamond/Boiling-Diamonds>.
- <sup>88</sup> IPIS interview former diamond trader, August 2013; J. Miklian, "Rough Cut", 2 January 2013, *Foreign Policy*.
- <sup>89</sup> J. Miklian, "Rough Cut", 2 January 2013, *Foreign Policy*.
- <sup>90</sup> A system of warranties was devised by the World Diamond Council to strengthen KP credibility and assist in assuring consumers as to the origin of their diamonds. Here diamonds and sellers of both rough and polished diamonds are required to issue a statement on all invoices affirming that all diamonds in a parcel are conflict free, and also to keep a record of all warranty invoices to be audited and reconciled annually by the company's own auditors. Industry organisations undertake to abide by a series of principles of self-regulation. For further see *The Essential Guide to Implementing the Kimberley Process*, *World Diamond Council*, available at: <http://www.jvclegal.org/kimberely.pdf>.
- <sup>91</sup> J. Miklian, "Rough Cut", 2 January 2013, *Foreign Policy*.
- <sup>92</sup> *Ibid.*
- <sup>93</sup> Quote by Chandrakant Sanghavi, director of the SRDSIL, in M. R. Thomas, "Surat Rough Diamond Sourcing India runs into rough weather", 7 June 2013, *The Times of India*.
- <sup>94</sup> In June 2013, a few months after the EU's review of its policy on Zimbabwe, the SRDSIL was reported to be discussing its dissolution.
- <sup>95</sup> S. Guha Ray, "Globally barred blood diamonds from Sierra Leone find their way to Gujarat" 7 May 2011, *India Today*
- <sup>96</sup> *Ibid.*

- <sup>97</sup> Interlaken Agreement, section I. UN General Assembly Resolution 55/56 defines conflict diamonds as “rough diamonds which are used by rebel movements to finance their military activities, including attempts to undermine or overthrow legitimate Governments”.
- <sup>98</sup> *A Guide to the Kimberley Process, September 2013, KP Civil Society Coalition, p.27.*
- <sup>99</sup> S. Spittaels, & F. Hilgert, *Mapping Conflict Motives: Central African Republic, IPIS/ Fatal Transactions, February 2009, p.42; International Crisis Group, Dangerous Little Stones: Diamonds in the Central African Republic, December 2010, pp.15-20.*
- <sup>100</sup> See correspondence of KP Chair, Gillian Milovanovic date 28 December 2012, requesting all KP Participants and industry members to remain vigilant regarding the possible illicit introduction of rough diamonds into the supply chain by Seleka and its allies following attacks on a number of diamond producing areas.
- <sup>101</sup> The preamble to an international agreement is generally considered to help frame the agreement’s object and purpose; Vienna Convention on the Law of Treaties, Article 31(2). It should be noted that the KP is not itself a legally binding treaty, nor does it require States to express their consent to be bound by it. Nevertheless, as a political pact it constitutes an international agreement between states that is governed by international law. As such, it falls within the scope of the Vienna Convention.
- <sup>102</sup> Interlaken Agreement, preamble, clause.2.
- <sup>103</sup> P. Fabricius, “Are governments also guilty of mining blood diamonds?,” 24 October 2013, Institute for Securities Studies.
- <sup>104</sup> Update on Marange, Center for Research and Development, March 2013, available at: <http://www.swradioafrica.com/Documents/CRD%20UPDATE%20ON%20MARANGE%20ARTICLE%202.pdf>
- <sup>105</sup> *Ibid.*
- <sup>106</sup> I. Smillie, *Paddles for Kimberley, June 2010, Partnership Africa Canada, p.15.*
- <sup>107</sup> This point led Ian Smillie to comment: “If human rights were not part of the KP’s implicit mandate, they would not have been discussed in the 2009 Review Mission to Zimbabwe in 2009 [sic], nor would the Joint Work Plan have included calls for the demilitarization of the diamond fields.” *Paddles for Kimberley, June 2010, Partnership Africa Canada, p.15.*
- <sup>108</sup> J. Miklian, “Rough Cut”, 2 January 2013, *Foreign Policy*. Article also published on 31 January 2013, on *gulfnews.com* as “Surat, the world’s diamond capital” available at <http://gulfnews.com/about-gulf-news/al-nisr-portfolio/weekend-review/surat-the-world-s-diamond-capital-1.1140054>
- <sup>109</sup> M. Rapaport, “Stop buying and selling blood diamonds” (Op-Ed) Rapaport Magazine, 1 February 2010. An example of the sense that the risk of a consumer boycott was concerned with human rights atrocities as much as fuelling conflict per se might be seen in the determination of political contest over the US Clean Diamond Bill between NGOs and industry. Here, airtime purchased by World Vision at the end of popular US serial drama West Wing, showed Sierra Leonean children with amputated hands appealing for support of the Hall/Wolf Bill; “within days the Gregg Bill had vanished” (I Smillie, *Blood on the Stone, (Anthem Press: 2010), p.188.*
- <sup>110</sup> 2012 Chair Vision Statement, 7 August 2012, Gillian Milovanovic, available from the KP website.
- <sup>111</sup> “Frequently Asked Questions” Concerning a Revised Definition of “Conflict Diamond”, (attachment to 2012 Chair Vision Statement), August 2012, Kimberley Process, p.4, available from the KP website.
- <sup>112</sup> *Ibid, p.2.*
- <sup>113</sup> *A Guide to the Kimberley Process, September 2013, KP Civil Society Coalition, p.27.*
- <sup>114</sup> Charter of the United Nations, Article 1(3).
- <sup>115</sup> E.g. the International Convention on Civil and Political Rights 1966, the Convention against Torture or Other Cruel, Inhumane or Degrading Treatment or Punishment 1984.
- <sup>116</sup> E.g. the European Convention on Human Rights 1950, the American Convention on Human Rights 1969 and the African Charter on Human and Peoples’ Rights 1981.
- <sup>117</sup> See J. Ruggie, “Guiding Principles on Business and Human Rights: Implementing the United National “Protect, Respect and Remedy” Framework”, Human Rights Council, 21 March 2011, AHRC/17/31, Part I.
- <sup>118</sup> See Final Communiqué from the Kimberley Process Plenary Meeting, 30 November 2012, Washington DC, US, para. 31.
- <sup>119</sup> P. Fabricius, “Are governments also guilty of mining blood diamonds?,” 24 October 2013, Institute for Securities Studies.
- <sup>120</sup> *Corruption and Human Rights: Making the connection, 2009, IHCHRP and Transparency International, available at: [http://www.ichrp.org/files/reports/40/131\\_web.pdf](http://www.ichrp.org/files/reports/40/131_web.pdf).*
- <sup>121</sup> For example, in 2010 International Crisis Group pointed to the link between former President Bozize’s use of the diamond sector to privilege his own ethnic group, and its ultimate culmination in disenfranchised groups taking up arms to secure participation in the sector in the east (International Crisis Group, *Dangerous Little Stones: Diamonds in the Central African Republic, December 2010*). Whilst no action was taken in respect of these findings, these armed militia went on to form a coalition that ultimately toppled the CAR’s government.
- <sup>122</sup> “Frequently Asked Questions” Concerning a Revised Definition of “Conflict Diamond”, (attachment to 2012 Chair Vision Statement), August 2012, Kimberley Process, p.2, available from the KP website.

- <sup>123</sup> *Rich Man, Poor Man – Development Diamonds and Poverty Diamonds: The Potential for Change in the Artisanal Alluvial Diamond Fields of Africa*, Partnership Africa Canada, Global Witness, 2004, p.30.
- <sup>124</sup> For the long history of this practice in Angola see F. De Boeck, "Diamonds Without Borders: A short history of diamond digging and smuggling on the border between the Democratic Republic of Congo and Angola (1980-2008), in *Artisanal Diamond Mining: Perspectives and Challenges*, K. Vlassenroot and S. Van Bockstael (Egmont: 2008), Belgian Federal Public Service Foreign Affairs, Foreign Trade and Development Cooperation, DIFD, CASM. In 2002, Amnesty International also reported the shooting of dozens of artisanal miners working illegally on a Congolese parastatal concession; see,
- <sup>125</sup> F. De Boeck, "Diamonds Without Borders: A short history of diamond digging and smuggling on the border between the Democratic Republic of Congo and Angola (1980-2008), p.51.
- <sup>126</sup> All State Participants of the KP are parties to the International Covenant on Civil and Political Rights 1966, except the United Arab Emirates, which is a party to the UN Convention against Torture and Cruel, Inhumane or Degrading Treatment or Punishment 1984, and Malaysia, which is a party to the Convention on the Rights of the Child 1989. See status of ratifications on the UN Treaty Collection Database, available at: <http://treaties.un.org/UNTC/Pages/Treaties.aspx?id=4&subid=A&lang=en>.
- <sup>127</sup> Vienna Convention on the Law of Treaties 1969, article 26 (*Pacta Sunt Servanda*): "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." See also Article 27 (*Internal law and observance of treaties*): "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."
- <sup>128</sup> S. Chardon, "A Reality Check – The Kimberley Process and Marange" in *Politics, Principles and Practice: Zimbabwe's Diamonds and the Kimberley Process (2011 Perspectives, 3:11)*, Heinrich BöllStiftung, p.25.
- <sup>129</sup> *Ibid.*
- <sup>130</sup> Telephone interview with James Mupfumi, Director, Centre for Research and Development (Zimbabwe), in October 2013.
- <sup>131</sup> Final Communiqué from the Kimberley Process Plenary Meeting, 30 November 2012, Washington DC, US, para. 16.
- <sup>132</sup> P. Gappah, "Some say Zimbabwe's diamonds are drenched in blood. They are wrong", 19 July 2010, *The Guardian*, available at: <http://www.theguardian.com/commentisfree/2010/jul/19/zimbabwe-diamonds-ngos>.
- <sup>133</sup> This was one of the principle reasons for calls by most MDC opposition members in the Unity government for the end of sanctions on Zimbabwe. See D. Coltart, "Sanctions shielding Zanu PF", 23 September 2013, on David Coltart (MDC Senator) website, available at: <http://www.davidcoltart.com/2013/09/sanctions-shielding-zanu-pf/>; and C. Kabemba, "Resolving the Marange Impasse: What Role for Zimbabwe, its Neighbours and Other Stakeholders?" in *Politics, Principles and Practice: Zimbabwe's Diamonds and the Kimberley Process (2011 Perspectives, 3:11)*, Heinrich BöllStiftung, p.14. Further indications that embargoes can, amongst other things, help to drive production and export underground are discussed in K. Matthysen & A. Zaragoza Montegano, 'Conflict Minerals' initiatives in DR Congo: Perceptions of local mining communities, November 2013, *IPIS Research, Humanity United, Eurac*. available at: [http://www.za.boell.org/downloads/perspectives\\_3.11.pdf](http://www.za.boell.org/downloads/perspectives_3.11.pdf).
- <sup>134</sup> In February 2013 *Freedom House* released its annual survey of freedom around the world finding that: "One remarkable aspect of the annual survey is that while the countries listed as Free vary greatly in terms of size, geography, ethnic composition, religious diversity, and history, they all share one common feature: a market-based economy. [...] A market economy and human rights both set limits on the authority of the state and empower individuals: they are two sides of the same coin." K. G. Davis, "Promoting Human Rights through Economic Development", 5 March 2013, *Freedom House*, available at: <http://www.freedomhouse.org/blog/promoting-human-rights-through-economic-development>.