

ARTICLE

CONFLICT DIAMONDS, INTERNATIONAL TRADE REGULATION, AND THE NATURE OF LAW

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1. INTRODUCTION: THE KIMBERLEY PROCESS IN A JURISPRUDENTIAL CONTEXT

On November 5, 2002, representatives of 48 nations, including the world's leading powers, met in Interlaken, Switzerland to announce the agreement on the Kimberley Process International Certification Scheme ("Kimberley Process"), a system designed to exclude conflict diamonds from international trade.¹ Conflict diamonds both financed and motivated vicious terrorist organizations in Sierra Leone, Angola, and the Congo. Atrocities committed by these terrorist organizations, notably chopping off the hands or forearms of innocent civilians to deter opposition, generated substantial publicity throughout the world in the late

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¹ Press Statement from Richard Boucher, Spokesman, U.S. Department of State, U.S. Joins Kimberley Process (Nov. 5, 2002), at <http://www.state.gov/r/pa/prs/ps/2002/14913.htm>; see Alan Cowell, 40 [sic] Nations in Accord on 'Conflict Diamonds,' N.Y. TIMES, Nov. 6, 2002 at A6 (reporting on the agreement on the Kimberley Process as well as critiques by advocacy groups). The Kimberley Process secretariat considered fifty-five nations as participants as of April 15, 2003, and also noted that as of February 13, 2003, Taiwan "may be recognized . . . as implementing the Kimberley Process Certification Scheme." The Kimberley Process Secretariat Website, at <http://www.kimberleyprocess.com/BulletinDisplay.asp?Key=47> (last visited Apr. 15, 2003) (on file with author).

1990s.²

The documents setting forth the Kimberley Process agreement needed no signatures; the agreement was not in the form of a treaty. The meetings that produced the agreement extended over two years and enjoyed no formal or diplomatic status. Including non-governmental organizations (“NGOs”) like Global Witness, Amnesty International, and Oxfam, as well as diamond industry representatives such as the World Diamond Council, no one could have authorized the participants to enact legislation and no one did.

Nevertheless, the agreement has the force of law. The nations involved have begun implementing it, issuing directives and regulations, and even enacting statutes to do so. As the following account will demonstrate, drafting and negotiating the Kimberley Process accords resembled any ordinary legislative process in many important respects. While the meetings had no official mechanism for a participant to introduce a bill to start the drafting process, the representative of the European Union³ provided a first draft of what eventually became the agreement.⁴ Relatively early on, a member of the U.S. Congress introduced a bill⁵ that was never enacted in the United States but which influenced American participation in the negotiations and thus, ultimately the outcome of the agreement. Values, interests, internal politics among the participants, and external political forces brought to bear on the participants shaped and molded the Kimberley Process negotiations the same way they shape and mold any legislation.

On April 25, 2003, another Congressional bill, establishing the “Clean Diamonds Trade Act,” supported this time by the diamond industry, NGOs, and the Bush Administration, became law weeks

² MATTHEW HART, *DIAMOND 187-90* (2001) [hereinafter HART, *DIAMOND*] (discussing the impact of an investigative booklet published by Global Witness).

³ Anthonius de Vries, Economic and Financial Sanctions Coordinator for the European Commission and its chief representative to the talks. *Implementing Kimberley: Stopping the Blood Diamond Trade to Europe*, Report of the European Union Expert Meeting (Oxfam Int'l & Netherlands Inst. for S. Africa (NiZA)), Mar. 7, 2002, [hereinafter *Implementing Kimberley*], at <http://www.niza.nl/docs/200211051321265347.pdf>.

⁴ Interview with Cecilia Gardner, Executive Director and General Counsel of the Jewelers Vigilance Committee, in New York, N.Y. (2002).

⁵ Clean Diamond Trade Act, H.R. 2722, 107th Cong. (2001) [hereinafter *Clean Diamond Trade Act*], available at <http://thomas.loc.gov/cgi-bin/query/z?c107:H.R.2722>.

after its introduction. That bill added additional penalties for violations, but for the most part, merely provided for mechanisms to implement in the United States the policies already set forth in the Kimberley Process accords.⁶

The great American jurisprudential scholar of the third quarter of the twentieth century, Lon L. Fuller, provided numerous examples of effective laws that do not emanate from a sovereign body.⁷ Nevertheless, the positivist view of law—law emanating from a source whose permanent legitimacy can be recognized—has generally prevailed over Fuller’s approach.⁸ We apply our “rule of recognition” in the United States by testing statutes for constitutionality. While we may think of that test as determining whether the statute properly emanates from sovereign authority, we could and perhaps should more realistically think of that test as determining whether the statute includes those elements of inner morality that the U.S. Constitution and state constitutions require.⁹ Many a statute that does not achieve or has outlived its purposes may never be subjected to a constitutional test. “Laws” prohibiting business on Sundays may provide a current example, but common

⁶ U.S. Representative Amo Houghton’s bill, H.R. 1584 of the 108th Congress, enacted as P.L. 108-19, 19 U.S.C.A. §§ 3901-13, 117 Stat. 631, had no apparent opposition. The statute requires the President to prohibit the import into or export out of the United States of any rough diamonds that have not “been controlled through the Kimberley Process Certification Scheme,” designates the Customs Bureau as the importing authority and the Census Bureau as the exporting authority, and authorizes penalties of up to \$50,000 in fines and up to ten years in prison for violations, among other provisions. H.R. 1584, 108th Cong. §§ 4, 6, 8 (2003), available at <http://thomas.loc.gov/cgi-bin/query/z?c108H.R.15>

84. For examples of letters seeking such legislation, see Letter from Amnesty International et al. to U.S. Rep. Bill Thomas, Chair, House Ways & Means Committee (Feb. 26, 2003) (on file with author), and Letter from Eli Izhakoff, Chairman and CEO, World Diamond Council, to Corinna Gilfillan, Global Witness Ltd. (Mar. 24, 2003) (on file with author).

⁷ See LON L. FULLER, *THE MORALITY OF LAW* 110-18 (rev. ed. 1969) (citing U.S. “industrial jurisprudence” in unionized industries as an illustration).

⁸ See, e.g., Jutta Brunnée & Stephen J. Toope, *International Law and Constructivism: Elements of an Interactional Theory of International Law*, 39 COLUM. J. TRANSNAT’L L. 19, 44 (2000) (stating that Hart has won the debate as his canons of analytical positivism have strongly influenced Western legal traditions).

⁹ H.L.A. Hart acknowledged that rules of recognition do not apply to international law. See H.L.A. HART, *THE CONCEPT OF LAW* 233 (Clarendon Press, 2d ed. 1997) [hereinafter HART, *THE CONCEPT OF LAW*]; see also *infra* note 95 and accompanying text. Hart conceded that a rule of recognition could incorporate moral values into an accepted procedure of law adoption. HART, *THE CONCEPT OF LAW*, at 247. However, throughout his work, he gave far more emphasis to what Ronald Dworkin mocked as the “pedigree” aspect of law. *Id.*

sense, or Fuller's viewpoint, suggests that nonfunctional law is not law, just as unconstitutional law is not law.

Fuller said that law develops out of "the activity that sustains it... [not] only the formal sources of its authority.... [T]he imperfectly achieved systems of law within a labor union or a university may often cut more deeply into the life of a man than any court judgment ever likely to be rendered against him."¹⁰ Fuller disapproved of the "strong tendency to identify law, not with rules of conduct, but with a hierarchy of power or command."¹¹ He argued that an "inner morality" reflects among other virtues those that give fair notice, such as publication, internal consistency, and consistency over time, and it also coincides with societal acceptance of "law" more reliably than it coincides with law's emergence from a "recognized" sovereign or formal process.¹²

He found a particularly vivid illustration in Margaret Mead's anthropological work, *New Lives For Old*. The Manus tribe in New Guinea had never encountered the concept of adjudication by an impartial decision-maker—essentially, the judicial process—until Australians arrived after World War II. When they did, they loved the idea so that as Mead said, "far into the interior of New Guinea proper the institution of illegal 'courts' is spreading."¹³ Of course, the Manus chose their own elders as judges, with absolutely no official designation, support, or "legal standing with the Australian

¹⁰ FULLER, *supra* note 7, at 129.

¹¹ *Id.* at 63. H.L.A. Hart advanced greatly over his positivist predecessors J.L. Austin and Hans Kelsen by greatly diminishing the role of "a hierarchy of power or command" in his theory and asserting that law can sometimes exist without a rule of recognition. See, e.g., HART, *THE CONCEPT OF LAW*, *supra* note 9, at 214. Thus, Professor Benjamin Zipursky of Fordham Law School argues that Hart is the wrong "straw man" for Fuller here. E-mail from Professor Benjamin Zipursky, Professor, Fordham Law School, to Author, (Apr. 9, 2003) (on file with author); see also HART, *THE CONCEPT OF LAW*, *supra* note 9, at 48, 202, 217 (supporting Professor Zipursky's statements on Hart). But "secondary rules of change and adjudication," especially rules of recognition, undeniably occupy the central place in Hart's work. *Id.* at 214. Fuller, in contrast, built on concepts equally applicable to municipal and international law.

¹² FULLER, *supra* note 7, at 39. Although the "Hart-Fuller debate" spanned decades of publication, two articles in the same issue of the Harvard Law Review provide the original "record" of that debate: H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958) and Lon L. Fuller, *Positivism and Fidelity to Law*, 71 HARV. L. REV. 630 (1958).

¹³ See FULLER, *supra* note 7, at 145 (quoting MARGARET MEAD, *NEW LIVES FOR OLD* 306-07 (1956)).

government; their powers were quite unsupported by any rule of recognition except a very informal and shifting one among the Manus people themselves."¹⁴

This procedure produced results—results that were accepted by the Manus as functional law. Fuller provides a wealth of additional evidence that in every successful legal system, functionality, not sources in sovereignty or in fixed rules of procedure for the adoption of law, determines law's legitimacy and effectiveness, and thus determines what *is* law.

The Kimberley Process negotiations had many of the hallmarks of the legislative process, but not sovereignty. By Fuller's definition, the Kimberley Process document is law, just as any statute becomes law if it achieves its purposes. Some scholars believe that Fuller's theories may be in resurgence.¹⁵ The Kimberley Process story both provides support for Fuller's approach and illustrates the usefulness of the approach in illuminating modern developments in international law.¹⁶

¹⁴ FULLER, *supra* note 7, at 145.

¹⁵ Brunnée and Toope, *supra* note 8, at 44-45. See David Dyzenhaus, *Fuller's Novelty*, in REDISCOVERING FULLER: ESSAYS ON IMPLICIT LAW AND INSTITUTIONAL DESIGN 78, 78 (Willem J. Witteveen & Wibren van der Burg, eds. 1999) [hereinafter REDISCOVERING FULLER] (proposing that Fuller's philosophy was "too far ahead of his time to be properly appreciated"); Kenneth I. Winston, *Three Models for the Study of Law*, in REDISCOVERING FULLER 51, 77 (explaining why Fuller is relevant to contemporary debate in the United States as well as Eastern Europe); see also RUTI G. TEITEL, *TRANSITIONAL JUSTICE* 14 (2000) (examining legal discontinuity in light of Fuller's procedural approach towards substantive justice values); Jutta Brunnée and Stephen J. Toope, *The Changing Nile Basin Regime: Does Law Matter?*, 43 HARV. INT'L L.J. 105, 158-59 (2002) (supporting Fuller's resurgence by stating that Norms in the Nile basin can generate adherence even if they are not formally binding and are thus law without sovereign authority); Roderick A. Macdonald, *The Fridge-Door Statute*, 47 MCGILL L.J. 11, 13-14 (2001) (corroborating Fuller's theory that not all legislative instruments are enacted by a supreme rulemaking body); Randall Peerenboom, *Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China*, 23 MICH. J. INT'L L. 471, 472 (2002) (contending that the core meaning of law refers to a system in which law is able to impose meaningful restraints on the state, supporting Fuller's contention that functionality determines a law's legitimacy); Luc B. Tremblay, *La Justification de la Législation Comme Jugement Pratique*, 47 MCGILL L.J. 59, 62 (2001) (discussing Fuller's theories in the context of justification in legislation).

¹⁶ Fuller's rules of the "inner morality" of law make law functional and effective. His lectures at Harvard Law School in 1972 took his utilitarianism even further, by showing how law develops functionally out of the imperatives of its cultural context. The Author intends to press Fuller's views here, and not Ronald Dworkin's, even though Dworkin is the dominant successor to Fuller in taking on Hart's challenge, because Dworkin shortchanges Fuller's commitment to the idea of law's organic and utilitarian growth. See Daniel L. Feldman, *J.S. Mill and the*

2. THE PROBLEM

The governments of Sierra Leone, Angola, and the Congo did not win any awards for humanitarianism or competence; however, the rebel guerilla organizations opposing them made those governments look relatively benevolent. At the end of 1998, the London-based NGO Global Witness issued the first powerful and vivid account of the nature of the African conflicts fueled by diamonds.¹⁷ That report set off substantial press attention, even in the United States, primarily on the basis of the guerillas' trademark atrocity of chopping off the hands or forearms of tribal villagers who resisted their authority or who did not show sufficient deference.¹⁸ They received particularly bad press for inflicting this procedure on the children of such villagers. They also liked to burn people—adults and children—alive.¹⁹

Apparently the guerilla groups did not put a particularly high value on their image because the bad publicity did not decrease their enthusiasm for those and other atrocities. Their terror tactics helped them to control substantial areas of the three countries. There, the most important source of income came from rough diamonds, mined or collected from alluvial streams. By controlling the territory, the guerillas controlled the diamonds. By controlling the diamonds, they financed the continuation and

Middle Road for American Constitutional Jurisprudence, 20 PERSP. ON POL. SCI. 197 (1991). Dworkin insists on tying utilitarianism to positivism, and, of course, strongly rejecting both. Dworkin explicitly set forth his own distrust of democratically-controlled legislative sources of positive law, and his greater confidence in judges, with whom he seemed to identify. Ronald Dworkin, Keynote Address to the Conference on Rawls and the Law at Fordham Law School (Nov. 7, 2003). In his address, he argued that utilitarians would choose positivism because "utility is best pursued by a single [legislative] institution" rather than by a host of individual judges sharing lawmaking power with a legislature. Fuller and Dworkin both prefer to see authoritative law emanating from a variety of authoritative sources, but Dworkin vehemently rejects a utilitarian basis for his preference.

¹⁷ Charmian Gooch and Alex Yearsley, *A Rough Trade*, in GLOBAL WITNESS LTD. (1998).

¹⁸ See GREG CAMPBELL, BLOOD DIAMONDS 97-98 (2002) (recounting the violence that accompanies the transport of diamonds in Africa); HART, DIAMOND, *supra* note 2, at 187-89 (describing Global Witness' release of and reaction to the conflict diamond report).

¹⁹ See *Conflict Diamonds: Hearing Before the House Subcommittee on Trade of the Committee on Ways and Means*, 107th Cong. (2001) [hereinafter *Hearing*] (presenting the statement of Mike DeWine, a Senator from Ohio), available at <http://waysandmeans.house.gov/legacy/trade/107cong/10-10-01/107-46final.htm>.

expansion of their military operation.

Although diamond industry leaders insisted that guerillas controlled less than five percent of the world diamond market,²⁰ guerilla behavior presented a threat to the diamond market. Traders bring rough diamonds to Antwerp, Israel, London, St. Petersburg, and India, among other locations, which eventually emerge as polished diamonds. Retail customers in the United States provide the biggest share of the ultimate market for diamond jewelry.

If a product receives bad press, customers respond. The diamond industry knew all too well what People for the Ethical Treatment of Animals ("PETA") did to the fur industry and it had a serious interest in escaping a comparable fate.²¹ PETA created pressure on the fur industry in the United States in the early 1990s by dramatizing the fate of the animals whose fur the fur industry was selling, and claimed to cut fur sales by more than half in Europe between 1991 and 1999.²² Other NGOs such as Global Witness, Oxfam, and Amnesty International threatened to play analogous roles in the conflict diamond context. Diamond retailers in the United States, aware of PETA's history, did not want to be the next prominent target of NGOs. A prominent diamond dealer reputedly suffered nightmares of the standard television commercial for diamonds ending with the tag line, "amputation is forever."²³

In 1912, the American jewelry industry created the Jewelers Vigilance Committee ("JVC") to raise ethical standards in the business.²⁴ Jewelers did not find their motivation in deep commitment to ethical principles. Rather, many retail customers, cheated by dishonest jewelers, began to advise their friends to stay away from a product whose purveyors were likely to cheat on

²⁰ HART, DIAMOND, *supra* note 2, at 193. One source thought the current figure was less than four percent. Dan Atkinson, *Jewels Boycott Would Hit Innocent, Not Warlords*, THE GUARDIAN (London) (Jun. 7, 2000), available at <http://www.globalpolicy.igc.org/security/issues/diamond/000607.htm>.

²¹ See, e.g., Press Release, PETA Europe, Bloody Fur-Wearers "Trapped by Greed" at Fur Centre, People for the Ethical Treatment of Animals, Copenhagen (Jan. 29, 1999) [hereinafter PETA Press Release], available at <http://www.petauk.org/news/raw/auct1299.html>.

²² *Id.*

²³ CAMPBELL, *supra* note 18, at 115.

²⁴ See generally Jewelers Vigilance Committee Website, at <http://www.jvclegal.org> (last visited Oct. 9, 2003).

price and quality. The JVC, if it achieved its purpose, would raise standards at least enough to bring customers back. Over the next eighty years, the JVC worked mostly to combat underkarating, the selling of gold jewelry with lower gold content than claimed, and to mediate disputes between customers and retailers or between retailers and wholesalers.

In 1998, the JVC hired former federal prosecutor Cecilia Gardner as its new Executive Director and General Counsel. Then, JVC did not even know conflict diamonds existed; neither did Gardner, but for two years it would become the biggest part of her job. Diamond dealers like the public to think of diamonds as "the gift of love," and certainly do not want people to think of diamonds as "the gift of chopping people's arms off." As soon as she and other key leaders in the industry understood the problem, they saw that only some system of certification at the source, with a reliable paper trail, could solve the conflict diamond problem.

The industry had its hands on a powerful weapon to enforce a certification system against those trying to cheat with false papers or no papers, as follows: at the big-money level of the diamond trade, diamond dealers play a critical middleman role possibly unique to this industry. Their negotiations with each other result in mixing and matching that send diamonds down the appropriate commercial paths to their ultimate retail customers. These diamond dealers use special venues, or "bourses," in the major diamond trading cities. On the occasions a bourse expels a dealer for dishonest practices, it immediately alerts its sister bourses around the world. When it does, it essentially ends that dealer's career in the industry. Thus, if it wanted to, the industry could impose a very severe sanction on those trying to cheat.

But this approach would run up against another problem. Diamond dealers have never been especially eager to reveal the source of their stock. The traditions of the industry include secrecy and mystery. So while the diamond dealers wanted to solve their public relations problem, they did not necessarily greet certification proposals enthusiastically. Although they had to be seen to support such proposals, they had very mixed feelings about how successful or effective they wanted such proposals to be.

Gardner and some of her industry colleagues had to operate on three levels simultaneously. Officially, she had to give full support to the effort to create an effective certification system. As an agent and employee of the industry, however, she had to be sensitive to

the discomfort of her constituents, and their desire that any system ultimately put into place not impose too much "transparency." Finally, her own principles and background as a truth-seeking former prosecutor and a compassionate political liberal made her personal feelings sympathetic to the NGOs whose pressures were forcing the industry to respond in the first place. So officially and publicly, she had to advocate forcefully for an effective certification system; unofficially, she had to show sensitivity and responsiveness to the industry's fear of an effective certification system; and personally, she truly wanted to produce an effective certification system.

3. LAW AND OUTSIDE POLITICS

The battle to control the conflict diamond problem was fought in many different arenas, each with its own special problems.

At the United Nations, the NGOs could exercise considerable power. Groups like Amnesty International, a prime example, could organize their political power far more effectively by use of the Internet than they ever could before.²⁵ For example, thousands upon thousands of Internet messages prompted Great Britain to bring Augustus Pinochet to trial, when in an earlier era such international constituencies had no way to organize or reveal the extent of their support, much less to focus it on decision-makers. Unfortunately for the NGOs, however, the United Nations itself had limited ability to enforce its own decisions.

In Europe, the General Agreement on Tariffs and Trade ("GATT"), a treaty first signed in 1947, but now governing over 110 countries in the World Trade Organization ("WTO"), including the United States, bars restrictions on trade among the signatories.²⁶ If a British diamond dealer could not send rough diamonds to Antwerp without accompanying certification that no conflict diamonds were included, or an Antwerp diamond polisher could not send polished diamonds to the United States without such certification, trade would seem to be restricted. An international certification treaty would somehow have to be

²⁵ See, e.g., THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* 209, 289-90, 358 (Random House, rev. ed. 2000) (citing the environmentalists' fight for dolphin-safe tuna in the early 1990s, for the Pantanal in South America, and U.S. Army veterans' fight against Cable News Network ("CNN") in 1998 as examples of the power of the internet).

²⁶ GLOBAL AGREEMENT ON TARIFFS AND TRADE, art. III.

reconciled with GATT.

In the United States, the Bush Administration, as a matter of ideological principle, opposed trade restrictions. Efforts in Congress to impose certification requirements on the diamond industry would somehow have to overcome administrative qualms or opposition on this basis.

Angola and Sierra Leone, already held to very strict diamond certification requirements under stringent United Nations sanctions,²⁷ welcomed the Kimberley Process negotiations as a likely route to less rigid restrictions on their diamond exports, but negotiations over the certification process would include the governments of the other diamond-producing nations. Some of these governments would resist measures involving close examination of *their* arrangements with the diamond industry, which were not always pristine. Negotiations would include diamond industry representatives, some of whom were outspoken in their resistance to the imposition of transparency on an area of commerce that traditionally kept some distance from strict and accurate record-keeping requirements. Also, the industry would raise legitimate technical issues. For example, science has not yet devised a practical method of determining the geographical source of a diamond based on its physical characteristics.²⁸ Negotiations would further include the NGOs, which would not want to settle for anything less than a fully monitored system that could be enforced against industry and government alike. This would be quite a negotiation, but DeBeers, the company that has controlled most of the world's diamonds since the nineteenth century, had an enormous stake in the outcome, as did the government participants. They would find a way to make it work.

4. OUTSIDE POLITICS

Civil war has raged on and off in Angola since the 1970s.²⁹ The United Nations sent observers, and after various efforts at making peace, the United Nations came to understand the role of diamonds in motivating and financing the fighting.³⁰ In response,

²⁷ S. Co. Res. 1173, U.N. SCOR, 53rd Sess. (1998); S. Co. Res. 1306, U.N. SCOR, 55th Sess. (2000).

²⁸ HART, DIAMOND, *supra* note 2, at 195-97.

²⁹ *Id.* at 183.

³⁰ See, e.g., Christian Dietrich, *Hard Currency: The Criminalized Diamond Economy of the Democratic Republic of the Congo and its Neighbours*, OCCASIONAL

in June 1998, the U.N. Security Council forbade other nations to import rough diamonds from Angola unless they were accompanied by a certificate of origin from the government through Resolution 1173, presumptively guaranteeing that they were not "conflict" diamonds.³¹ Similarly, in the summer of 2000, the Security Council forbade other nations from importing rough diamonds from Sierra Leone under Resolution 1306.³²

United Nations resolutions have impact; although cynics repeat Stalin's most foolish rhetorical question: "How many divisions has the Pope?" Like the Pope, the moral suasion of the United Nations has effect in some quarters. Whatever moral incentive the Security Council's conflict diamond resolutions may have created, it did not, however, suffice to overcome the financial incentive of the diamonds. Conflict diamonds, smuggled out through Liberia and other countries, continued to finance and motivate violence. Other African nations, led by the South African government, fearful that the violence might spread, and nervous about the potential impact on sales of a most valuable export, convened as a group to seek a solution.³³

In the United States, Congressman Tony Hall, an Ohio Democrat, led his own battle against conflict diamonds. A born-again christian and Peace Corps volunteer in the 1960s, Hall had long shown a profound commitment to the fight against world hunger. In 1993, he protested Congress' decision to abolish its Select Committee on Hunger with a three-week hunger strike. Oxfam, the international humanitarian group, honored him in 1992.³⁴ In 1999, he introduced legislation in Congress to require a certificate of origin for every one of the millions of diamonds imported into the United States every day, polished or rough, with

PAPER #4 (The Diamonds and Human Security Project, Ottawa, Canada), Jun. 2002, at 30.

³¹ CAMPBELL, *supra* note 18, at 129-30.

³² *Id.*

³³ See G.A. Res. 55/56, U.N. GAOR, 55th Sess. (2001) (calling for member states to prevent the illicit transactions of rough diamonds in an effort to curb armed conflict), available at <http://ods-dds-ny.un.org/doc/UNDOC/GEN/NOO/562/75/PDF/NOO56275.pdf?OpenElement>.

³⁴ Office of the Clerk, U.S. House of Representatives, Congressional Biographical Directory, Biography of Tony P. Hall, 3d Congressional District of Ohio, at <http://clerk.house.gov/members> (last visited Oct. 8, 2002) (copy on file with author); U.S. Mission to the U.N./Rome, Biographical Information, Ambassador Tony P. Hall [hereinafter U.S. Mission to the U.N./Rome], at <http://www.usembassy.it/usunrome/files/hall.htm> (last visited Oct. 9, 2003).

a value over one hundred dollars.³⁵ Since the Republicans controlled a majority of the House, Hall enlisted Amo Houghton, a New York Republican who shared Hall's dedication to the advancement of human rights, to serve as the lead sponsor on the bill.³⁶

Shortly thereafter, Gardner, at JVC, received a telephone call from Charmian Gooch, a "senior campaigner" for Global Witness. Initially funded in part by the English playwright Harold Pinter, Global Witness works to reduce human rights abuses by ending the exploitation of natural resources that finance the perpetrators. Gooch had just achieved some success in blocking the use of Cambodian timber to finance violent organizations in that country prior to co-authoring the seminal Global Witness report on conflict diamonds.³⁷ She explained to Gardner the manner in which conflict diamonds threatened the reputation of JVC's industry.

Although Gardner had never heard of the conflict diamond problem prior to Gooch's telephone call, Gooch received an immediate and positive response. Gardner represented the diamond industry, and in view of the industry's long tradition of self-regulation, was likely to respond energetically to address the problem. Gardner promised to help organize an industry response.

5. INSIDE POLITICS I

Gardner first called Matt Runci, Executive Director of Jewelers of America ("JA" or "the jewelers"). While JVC has an influential membership including retail, wholesale, manufacturing, and other segments of the industry, JA has over 10,000 retail jewelers as members.³⁸ If any segment of the industry would be the first to feel the brunt of a public relations disaster, it would be JA's retail jeweler membership.

Runci responded quickly. In short order, he spoke with Congressman Hall's legislative assistant.³⁹ Then, after he and Gardner alerted other key players in the diamond industry, they joined about seventy-five others from the industry, as well as

³⁵ Clean Diamond Trade Act, *supra* note 5.

³⁶ *Id.*

³⁷ Gooch and Yearsley, *supra* note 17.

³⁸ See generally Jewelers of America Website, at <http://www.jewelers.org> (last visited Oct. 17, 2003).

³⁹ Deborah de Young.

academics, customs officials, the U.S. Department of the Treasury ("U.S. Treasury"), and politicians at a meeting sponsored by the U.S. State Department.

Gardner had to play a tricky game. JVC paid her to protect the jewelry industry in the United States at all costs. She had to keep Gooch, Global Witness, and other humanitarian groups from deciding that the industry was the enemy and from painting it as such.

Tony Hall's bill pleased Gooch, but Hall's bill would have imposed an impossible burden on the industry. Importers send innumerable small diamonds, many worth very little, to the United States, and could not possibly attach a certificate of origin to each separate diamond, even if the diamonds could be certified as conflict-free at their source. Dealers mix and match diamonds at every one of the many stages of their journey from origin to customer, and would not—could not, practically speaking—keep millions of individual papers accurately shuffled along with the diamonds. Even if they purported to do so, dealers could never verify the accuracy of the origin certificates, because no practical chemical or mineralogical test can identify the geographical origin of a diamond.

Gardner and her associates in the jewelry industry had to praise Hall, but carefully and diplomatically urge him to understand the realities of the industry and to amend his bill accordingly. Meanwhile, Gardner had to prevent her industry members from exploding at Hall, as many of them had no real commitment to a workable version of Hall's effort.

Every year, in early June, manufacturers and designers come together in Las Vegas to put on the biggest jewelry show in the United States, displaying their latest products to the retail industry. Tens of thousands of individuals participate in this show.

Charmian Gooch gently suggested that Gardner invite Global Witness to the Las Vegas show, to which Gardner agreed. Gardner assembled a panel for the discussion, including: Gooch; the New York Diamond Dealers' Club president;⁴⁰ the International Diamond Manufacturers Association ("IDMA") president;⁴¹ the Diamond Manufacturers and Importers of America ("DMIA")

⁴⁰ Eli Haas, then president of the New York Diamond Dealers Club.

⁴¹ Sean Cohen, president of the International Diamond Manufacturers Association ("IDMA").

president;⁴² a State Department representative;⁴³ Runci; and Gardner herself. Three hundred merchants tore themselves away from the show's frantic haggling and hawking to provide an audience, some screaming at the panel to protect them from charges of trading in "blood diamonds" and others screaming at the panel to "go away – it's not our fault!" Anyone who is anyone in the industry goes to the Las Vegas show. The panel irrevocably put the issue on the table.

Since Global Witness had not painted a target on the industry, the retailers were not feeling much pressure on the street. To demonstrate what they could do, Amnesty International and World Vision arranged for a small demonstration. Early in the summer of 2000, about twenty people, joined by Representative Hall, demonstrated against conflict diamonds in front of the elegant jeweler, Cartier, at Fifth Avenue and Fifty-third Street in Manhattan. Very pointedly, they did *not* call for a boycott of the industry, but the NGOs made sure the industry knew they had the potential to do so. The demonstration did not hurt the jewelers, but it provided a taste of what could lie in store if the industry bungled the issue.

The annual World Diamond Congress in Antwerp is a joint meeting of diamond manufacturers and traders,⁴⁴ but does not resemble the Las Vegas show. Here, industry leaders quietly meet and strategize. In July 2000, shortly after the Las Vegas show and the Cartier incident, the manufacturers' president convened the meeting, ready with a strategy. "We're against conflict diamonds," he said. "But we have to work out our own plan of action, and not leave it to others who do not understand the industry."⁴⁵ The industry would need an organization devoted purely to this issue, and the organization would need a good politician with the time to devote to it. He had already chosen the politician.

Eli Izhakoff had been president of the New York dealers, which the members of the bourse called the Diamond Dealers Club. Only

⁴² Jeff Fisher, president of Diamond Manufacturers and Importers of America ("DMIA").

⁴³ Sylvia Fletcher.

⁴⁴ The IDMA and the World Federation of Diamond Bourses, respectively.

⁴⁵ Interview with Cecilia Garder, *supra* note 4. The bourses and manufacturers' organizations, at that congress, "issued a joint resolution declaring 'zero tolerance' towards the trade in conflict diamonds." WORLD DIAMOND COUNCIL, THE ESSENTIAL GUIDE TO IMPLEMENTING THE KIMBERLEY PROCESS 12 (2003), available at <http://www.worlddiamondcouncil.com/wdcbk.pdf>.

within that club, literally and physically, do the members conduct business with each other. The single city block on which the Diamond Dealers Club sits, located at West Forty-seventh Street between Fifth Avenue and the Avenue of the Americas, includes 2400 retail diamond establishments.⁴⁶ Virtually all of the high-end trading of diamonds among these merchants—an essential element of the business—takes place within its doors. Although New York is “the capital city of large diamonds,”⁴⁷ each of the major diamond cities in the world—Antwerp, Tel Aviv, and London, among others—has a diamond “bourse” similar in nature, and these “bourses” communicate extensively with each other, forming a powerful network. A dealer who has shown himself (very few dealers are women) untrustworthy in terms of the mores of this subculture has his photograph posted on the bulletin board of his bourse to warn other dealers. It is then sent to the other bourses for posting as well.⁴⁸

Izhakoff’s father had been a very successful diamond dealer. It was rumored that Izhakoff never traded a diamond himself, but he knew everyone and was “one of them.” Included among his numerous relationships in the industry was the most important—he had the support of DeBeers. If New York City is “the capital city of large diamonds,” the true capital of the diamond world is on Charterhouse Street in London, where the DeBeers Company offers sixty percent of the world’s rough diamonds to favored buyers called “sightholders.”⁴⁹ Analysis of the diamond industry will not make sense without taking DeBeers into account.

Because it controls most of the world’s supply of diamonds, has honed political skills in generation after generation of protecting its interests (the Oppenheimer family gained control of

⁴⁶ Interview with Dr. Martin Hochbaum, Director, New York City Diamond Dealers Club, New York, N.Y. (Oct. 25, 2002). See Press Release #732-97, Press Office of the Mayor of New York City, Mayor Giuliani Cuts ‘Diamond,’ Not Ribbon, to Open the 47th Street ‘Diamond District’ Business Improvement District (Dec. 11, 1997) (reporting the official opening of the “Diamond District” Business Improvement District), available at <http://www.nyc.gov/html/97/sp732-97.html>. Hochbaum’s figure of 2400 establishments seems reliable. Former Mayor Giuliani’s press release of Dec. 11, 1997, refers to 2600 “independent businesses” on the street, which constitutes the smallest geographical “business improvement district” in New York City, but Hochbaum referred specifically to diamond businesses and, in any case, provided a more recent estimate.

⁴⁷ HART, DIAMOND, *supra* note 2, at 10.

⁴⁸ Interview with Martin Hochbaum, *supra* note 46.

⁴⁹ HART, DIAMOND, *supra* note 2, at 122.

DeBeers in 1929),⁵⁰ and harbors a certain mystique, DeBeers wields most of its power from behind the scenes. This is accomplished through those dependent on its role, whether they are governments of diamond-producing nations or other players in the diamond industry. Nicky Oppenheimer, the current head of the company, had no trouble establishing a close relationship with the post-apartheid South African government. Diamonds play a larger role in the economy of Botswana, but DeBeers is a South African company, and its wealth and power there, combined with the outspoken opposition of its leadership to apartheid during the apartheid years, often leads the South African government to align its interests with those of DeBeers.⁵¹

Izhakoff had the unanimous support of an industry that had not yet emerged entirely into modernity: the New York Diamond Dealers Club admitted its first female member in the late 1990s, and few women held significant positions in the industry at all. The attendees of the 29th World Diamond Congress in July 2000 in Antwerp, by acclamation, made Izhakoff the first president of the World Diamond Council ("WDC").

Gardner, Izhakoff, and a representative of Tiffany's jewelry store wrote the WDC by-laws, and Gardner became its unpaid counsel. Matt Runci of JA became the executive director. The JVC board strongly supported this use of Gardner's time, since they knew this would bring exposure to JVC. JVC was mandated to advance the integrity of the jewelry industry, and nothing would do so more clearly than this association. The World Diamond Council was committed to fighting conflict diamonds and to putting on a show of fighting conflict diamonds.⁵²

The Kimberley Process negotiations, attempting to devise a solution to the conflict diamond problem, originally included only

⁵⁰ *Id.* at 53.

⁵¹ See, e.g., CAMPBELL, *supra* note 18, at 128 (explaining the relationship between DeBeers and the South African government); Ian Smillie, *Motherhood, Apple Pie, and False Teeth: Corporate and Social Responsibility in the Diamond Industry*, OCCASIONAL PAPER #10, at 7 (The Diamonds and Human Security Project, Ottawa, Canada, Jun. 2003) (charging that DeBeers has played a large role in the social and economic development of South Africa and Namibia). Jonathan Oppenheimer, the son of the current leader of DeBeers, has expressed unhappiness with recent South African legislation that will require DeBeers to transfer ownership of twenty-six percent of its mines to black South Africans over the next decade. Alan Cowell, *A New Generation at DeBeers*, N.Y. TIMES, Apr. 25, 2003, at W1.

⁵² See CAMPBELL, *supra* note 18, at 201-02 (reiterating a World Diamond Council ("WDC") statement condemning illicit diamonds).

government representatives, under the leadership of South Africa. That group then invited the World Diamond Council and Global Witness to participate as observers—the first non-government representatives in the Kimberley Process.⁵³

On the U.S. Congressional front, the World Diamond Council retained Akin Gump, a prominent Washington lobbying law firm specializing in international trade. With input from the jewelry industry in his state, New Hampshire Republican Senator Judd Gregg introduced a conflict diamonds bill much closer to the path of the Kimberley Process than Hall's bill,⁵⁴ and indeed much closer to the industry's point of view. Akin Gump would work with Hall to keep the NGO happy, because Hall, and not Gregg, remained, quite legitimately, their hero. The NGOs considered Gregg's bill too cautious and moderate. It reflected a more practical approach, however.

But Hall also had practical political instincts. As he saw the WDC taking positions closer to Gregg's bill, he began to fear that the WDC might abandon his efforts. Although in reality the WDC could not really afford to do so, he could not be sure of that. He did know, however, that without the WDC's support, his bill would not pass. Indeed, WDC's intervention, through Gardner, moved the Hall bill past a critical moment in its history. The Deputy General Counsel to the United States Trade Representative⁵⁵ gave testimony that reflected the Bush Administration's general philosophical opposition to trade restrictions, including the Hall bill, though the Bush Administration had not taken a formal position against the bill.⁵⁶

⁵³ HART, DIAMOND, *supra* note 2, at 194 (illustrating how the WDC was created to ensure that tracking measures would be in place to exclude conflict diamonds).

⁵⁴ S. 787, 107th Cong. (2001), available at <http://thomas.loc.gov/cgi-bin/query/z?c107:s.787>. Another prominent bill, S. 1084, was introduced by Senator Richard Durbin during that session.

⁵⁵ James Mendenhall.

⁵⁶ See *Hearing*, *supra* note 19, at 12-22 (providing the statements of James Mendenhall in support of the Bush Administration's international trade policy). Mendenhall, the Trade Representative counsel, warned that any effort to exclude conflict diamonds should respect our "international obligations" and should

minimize the impact on the legitimate diamond trade Disrupting the ability of these countries to bring their diamonds to market [presumably by the provisions of the Hall bill] could have a potentially devastating and destabilizing impact on these economies. And as a result, well intentioned efforts to stop the trade in conflict diamonds could, if not designed properly,

In front of Hall's staff, the jewelers' president, the Akin Gump lobbyists, Tiffany's own lobbyist, and a representative of World Vision, Gardner debated against the Trade Representative counsel,⁵⁷ whose comments rested on the Bush Administration's assumption that business would join it in opposing trade restrictions. Gardner's forceful reminder that the jewelry business supported these trade restrictions completely neutralized any negative effect the Trade Representative might have had. But Gardner had yet to convert the Bush Administration, a task she would have to eventually face.

In response to the WDC, Hall gradually brought the provisions of his bill into line with the Gregg bill. At the hearing held on October 10, 2001, Hall came around to advocating a process that was what the WDC had sought all along and essentially what the Kimberley Process would ultimately produce. On that day, he testified to the Trade Subcommittee of the House Ways & Means Committee as to how the system would work:

Rough diamonds are exported in secure containers, whose contents are disclosed on an export certificate that accompanies the diamonds. [The certificate would reflect assurance by officials at the mining site that no guerilla terrorists exercised any control or influence over, or would in any way profit from the mining operation.] The certificate's details are logged into an official database by the exporting country's authorities and checked against that database by the importing country's authorities.

From there, a chain of warranties helps ensure the 'clean stream' of diamonds stays clean. This chain is a series of assurances, by sellers to buyers, that accompanies the diamonds until they are cut and polished. [Since experts add a key element of value by selecting rough diamonds for packaging according to technical characteristics, rough diamonds cannot simply be kept together in the original

be counterproductive.

Id. at 12.

⁵⁷ *Id.* at 23-25.

containers throughout their transit to polishing. Therefore, the initial certificates enable experts at the “mix and match” stage to warrant that all the contents of the newly mixed package came from “clean” sources. Unlike the original certificate, however, the warrant cannot identify the original locale of the diamonds.]

In addition, countries are considering the need for issuing re-export certificates every time a rough diamond is traded. Those may rely in part on the industry’s chain of warranties, but there is not yet consensus on the workability of controls past the first import. The U.S. delegation in particular, prompted by enforcement concerns raised by Customs, has opposed re-export certificates.⁵⁸

This last point reflected open issues that the Kimberley Process negotiations would struggle with over the next year. Not only did Gardner and the other negotiators have to wrangle with the United States and other governments over this issue, but many in the industry fiercely resisted the responsibility for issuing re-export certificates as part of self-regulation. Gardner reminded the diamond dealers regularly that if they would not do this, there could be intrusive government regulation instead; eventually, she prevailed.

In early November 2001, the *Washington Post* broke the story that conflict diamonds helped finance Al Qaeda, the group responsible for the September 11th attacks on the World Trade Center and the Pentagon.⁵⁹ This also helped Hall muster support in Congress. Hall amended the bill to give the President discretion as to whether to impose trade sanctions on nations that violated the ban on conflict diamonds, rather than simply mandating such sanctions. This amendment, along with his earlier softening of the certification requirements, and the *Washington Post* story on the Al Qaeda connection, finally ended the Bush Administration’s opposition to the bill, but the Administration continued to oppose

⁵⁸ *Id.* at 16.

⁵⁹ CAMPBELL, *supra* note 18, at 195.

the Kimberley Process goal of excluding from the diamond trade countries that refused to adopt its principles.

On November 28, 2001, Congress passed House Resolution 2722, while the Kimberley Process negotiations embroiled Gardner and the other participants in their own knotty issues well below the equator in Botswana, Africa.⁶⁰ The Senate, a smaller institution and one whose attention was diverted more effectively by the events of September 11th, adjourned without considering the issue.

6. INSIDE POLITICS II

In Botswana, negotiations reached a peak of intensity. The NGOs wanted an independent secretariat charged with thorough monitoring power over the industry and with the reporting of statistical data.⁶¹ This made the representatives of Angola, Liberia, Sierra Leone, the Congo, and many other nations very nervous, because the industry and those governments had closely intertwined, and probably corrupt, relationships. The industry, with its history of trade secrecy, strongly disliked the notion as well. South Africa and Botswana actually liked the idea of that kind of secretariat. However, the South African representatives appeared to want and expect their country to establish and control it. The NGO vision of the secretariat had the NGOs involved in it. Only Russia actually spoke out against the notion of a secretariat. As one of the world's largest producers of diamonds, Russia spoke with substantial influence. Russian law prohibited revealing the operations of its diamond industry, which officially constituted "trade secrets." Only a modest administrative secretariat ultimately emerged from the Kimberley Process, without the controversial powers.⁶²

While that hot issue remained unresolved, others arose. Without a ban on trade with non-participants, the Kimberley Process could have no significant effect. A trade ban of this sort, however, seemed a red-flag violation of GATT, the basis of the

⁶⁰ Joseph Kahn, *House Votes to Combat Sale of Diamonds for War*, N.Y. TIMES, Nov. 29, 2001, at B6.

⁶¹ See, e.g., Implementing Kimberley, *supra* note 3, at 16-18 (providing statements concerning the importance of statistical data and the office of a secretariat).

⁶² Abbey Chikane, of the South African Diamond Board in Johannesburg, the first chair of the secretariat, serves through 2003. See <http://www.kimberleyprocess.com/news/info1.asp?Id=60> (last visited Oct. 17, 2003).

World Trade Organization. Apparently in a bid for credibility with the WTO in a negotiation on some completely unrelated subject, India blustered that it would sue the Kimberley Process participants at the WTO if the ban provision stayed in the document. Canada argued that the WTO has provisions for waivers or exemptions based on peace and security needs, and that the Kimberley Process could qualify, thereby allowing the ban. The Chinese thought that applying for the waiver would highlight the issue for the WTO and preferred to leave the ban in, hoping the WTO would overlook it or ignore it. Gardner suggested removing the ban provision from the document, but adhering to an unofficial agreement to implement the ban. The Botswana negotiators agreed only to refer the matter to a committee including attorneys from the U.S. government, Russia, South Africa, and China, and an attorney expert on the WTO from Switzerland.

On yet another front, China led the discussion of the definition of "participant" in the document draft, and soon the others understood why. The Chinese managed to arrange for wording that appeared to exclude Taiwan. Since Taiwan's industry needs a lot of industrial diamonds, and the Kimberley Process covers all rough diamonds, including industrial diamonds, this would hurt Taiwan. Gardner exploded: "This is ridiculous!" she said. "The U.N. mandate says that the system should be inclusive and practical." By excluding Taiwan, or any nation active in the market, the arrangement would only leave it under pressure to go outside of the Kimberley Process, to buy merchandise not warranted free of conflict diamonds. The representative of the European Union whispered urgently to Gardner, "You'd better be quiet!" The French representative said, "You shouldn't say these things in public." The Chinese prevailed, but Gardner came to realize that the Taiwanese could eventually be advised simply to ignore the wording. The Kimberley Process document would have no more and no less legal authority than the world granted it, and if Taiwan participated from the beginning, it would be a participant, whatever the document's definition seemed to imply. Without resolving these issues, the negotiators took a break of several weeks for the participants to return to their countries and families.

Negotiations resumed in another African city, Luanda in Angola, the only city in Africa that scared Gardner. There, wealthy mine owners and officials, as well as corrupt government officials, lived in mansions. Luanda, a city that supported a million people

fairly comfortably in 1998, now "housed" three times that many. People attempting to escape from the economic devastation its rulers and their guerilla opponents had wreaked in the countryside in the four years since accounted for the increase. Children orphaned by war lived in alleyways, "on top of each other like puppies."⁶³

In this venue, Gardner had to deal first with the continued reluctance of the industry to take on self-regulatory responsibilities. Assuming that the Kimberley Process succeeded in providing for the control of cross-border trade of rough diamonds, it would still be necessary to control what happens within national borders and also across borders in the trade for polished diamonds and finished jewelry containing diamonds. Otherwise, stolen diamonds from Sierra Leone, for example, could be sold to polishers, who could then sell back the polished product.⁶⁴ As much as the industry representatives disliked the provision in Tony Hall's original bill, which empowered the U.S. government to enforce certificate requirements on all diamonds, including polished diamonds, they resisted the message that if they would not undertake their own warranty process for polished diamonds, the government would exercise control.

Sequentially negotiating, first with the NGOs and various national delegations, then with the industry, then back to the NGOs and national delegations again, Gardner, the representative of the dealers from Antwerp, one of the most important bourses in the world,⁶⁵ and a key DeBeers operative⁶⁶ spent eighteen straight hours working in the hotel lobby to draft what would be named "Annex VI" to the Kimberley Process. The NGOs wanted the industry to fund a board empowered to investigate and prosecute warranty violations. The industry rejected this proposal as being out of hand. Annex VI would simply be an independent agreement by the industry to operate its own system of intra-national warranties. These warranties would not and could not establish the original provenance of each diamond, but they would guarantee that the diamond originated from a "clean" source and

⁶³ *Hearing, supra* note 19, at 11-12.

⁶⁴ *See, e.g.,* Dietrich, *supra* note 30, at 47 (discussing the implications of forcing governments to properly take control of their diamond industries).

⁶⁵ Mark von Bockstahl, from the High Diamond Council of the Antwerp Diamond Bourse.

⁶⁶ Rory More O'Ferral.

had been traded consistent with Kimberley Process principles.

The toughest negotiations were with the industry. Its representatives finally agreed, but emphasized that while they would accept the Annex VI draft, they would not go one inch further.

The next day, Gardner presented Annex VI to the entire body of negotiators. Ton deVries, the E.U. representative, recommended that the Kimberley Process document merely reference it, rather than incorporate it, since the Kimberley Process document was intended to bind governments, while Annex VI would obligate the industry. The plenary session adopted Annex VI as written, and accepted deVries' recommendation.

Gardner's earlier debate in Washington with the Trade Representative's office counteracted the Bush Administration's opposition to the Hall bill in the House. Nonetheless, the State Department representative⁶⁷ still stood by his assurance to the House Ways & Means Committee, on behalf of the Bush Administration, that the United States would not support any such agreement. He told Gardner that, in addition to its continuing general dislike of trade restrictions, the United States especially disliked the document's requirement that each signatory nation create an "export authority" to ascertain the industry's compliance.

Gardner asked the State Department official to find a way for the United States to document industry compliance without setting up a new bureaucracy. In Luanda, with Gardner urging him on, he persuaded the negotiators to add "validation" of the "clean" status claimed for diamonds leaving the country as an element of the draft, although not yet as an alternative to an export authority. Because the draft still included the export authority requirement, the State Department official nevertheless had to "take a reserve"; in other words, the official had to inform the negotiators that under the current terms, the United States would not be able to support the document. Winning inclusion of the validation concept made it hard to take the reserve.

The State Department official then convened an inter-agency meeting in Washington, at which he learned that any time a U.S. company exports goods, the Census Bureau requires it to file a form detailing the transaction. The Census Bureau then issues a unique identification number for that transaction to the company.⁶⁸

⁶⁷ Alan Eastham.

⁶⁸ Collection and Publication of Foreign Commerce and Trade Statistics, 13

He immediately realized that this standard operating procedure could meet the validation requirement and therefore the real intent of the negotiators, even if it did not yet meet the stated requirements of the current draft, without any need to create "a new bureaucracy."

The 150 members of the World Diamond Council met in Milan in early March of 2002. Gardner explained industry responsibilities under Annex VI in detail, distributing copies to each member. With the NGO and government representatives watching, the WDC members unanimously approved the document.

Canada hosted the next Kimberley Process meeting later that month in Ottawa, where the participants encountered snow, in sharp contrast with the Botswana and Angola milieus. About forty nations sent delegations. The NGOs drafted a furious letter, accusing the negotiators of heading toward a process "fatally flawed" by its failure to include monitoring, reporting of statistical data, and a secretariat. The head of the Canadian delegation⁶⁹ gave an eloquent version of the standard hallmark speech at virtually every successful negotiation: everyone hates something in this document, and that is the nature and meaning of compromise. The NGOs backed off of their criticism.⁷⁰

The committee studying the ban on trade with non-participants, with the help of the Swiss WTO expert lawyer, recommended that the ban be left in. The group accepted the committee's advice, apparently concluding that India would either back down and not sue, or would sue and lose. Indeed, in February 2003, several nations, led by Canada, applied for exemption from the GATT ban on trade barriers, and the WTO decided to grant the waiver based on the GATT peace and security provisions.

Finally, the drafters then allowed the governments to "designate" an export authority, in lieu of "creating" one. Some existing institution could fill that role, thus bypassing the Bush Administration's main objection.

U.S.C. §§ 301-07 (1999).

⁶⁹ David Vivach.

⁷⁰ NGO Report on the Ottawa Kimberley Process Meeting, Partnership Africa Canada, (Mar. 20, 2002) (concluding that "NGOs can be very proud of what has been accomplished—with obvious caveats."), available at <http://www.globalpolicy.org/security/issue/diamond/2002/0320ngorep.html>.

With these developments, the document had reached the stage for the legal “scrub,” where the lawyers reviewed it for legal inconsistencies or other technical legal problems. But major problems still lay ahead—first and foremost, the continued opposition of the U.S. government.

In the United States, Gardner pushed the State Department representative as far as she could, and she succeeded in getting him to kick the issue up to a higher level. In New York, at the July 2002 dinner of the American Gemological Society, Gardner, Runci, and the DeBeers operative worked on a State Department official at the ambassador rank,⁷¹ for about an hour. Then Gardner walked with him for another hour, explaining that supporting the Kimberley Process would not commit the United States to the enactment of the Hall bill or any new legislation. As a former federal prosecutor, she explained that under the existing authority of U.S. Customs and the Census Bureau over imports and exports, as well as existing criminal law provisions, violators of the Kimberley Process in the United States could be prosecuted for perjury. Any time a U.S. company exports goods, it must file a form with Customs, which responds with a unique number for that transaction. Should damning information subsequently emerge regarding that transaction, it can be traced to the particular company responsible, as well as to the particular transaction in question. But the deadline approached; the Kimberley Process participants would announce the final agreement at the forthcoming meeting in Switzerland in November, 2002. The United States would be on board, or it would alienate the NGOs and, most likely, annoy many of its foreign allies.

The Ambassador said he would call back in a week, which he did. On July 17, with his help, Gardner made the rounds of the State Department, Customs, the Trade Representative, and the Commerce Department, briefing them and being briefed on the administrative role they would be playing, since the United States would be among the nations registering its support for the Kimberley Process.

The Bush Administration moved shrewdly to take Hall out of the picture. It was moved to do so to give the Republicans a chance at retaking the congressional seat in Ohio (which they did on Election Day 2002), but it had the incidental effect of stopping

⁷¹ J.D. Bindenagel, designated by the State Department as Special Negotiator for Conflict Diamonds.

the Hall bill: without Hall's energy and commitment behind it, it would go no further. It takes some imagination to "buy off" a highly ethical, born-again Christian thrice nominated for the Nobel Peace Prize. On September 10, 2002, Hall resigned his House seat to accept appointment as the ambassador from the United States to the United Nations Food and Agriculture Organization,⁷² where he could devote the rest of his life to ameliorating hunger among the world's poor.

The full World Congress, which under the leadership of the president of the IDMA had created the World Diamond Council to get the industry out front, publicly, against conflict diamonds, met in London in late October 2002. This meeting included the membership, not just the leadership, of IDMA and of its other organization, the World Federation of Diamond Bourses ("WFDB"). On the agenda was the formal, final adoption of the Annex VI System of Warranties and Voluntary Code of Self-Regulation. Gardner explained the system again: after jewelry Manufacturer X receives a package of rough diamonds from overseas with a Kimberley Process certificate asserting the clean provenance of its contents, he ships diamonds from that package to his cutter/polisher with a warranty that those diamonds are indeed "clean." After polishing, the polisher sends them back warranting, on paper, the same assertion. The manufacturer uses a diamond from that package to make a piece of jewelry, and sells the jewelry to a retailer, accompanied yet again by a warranty. The warranty says, "[t]he diamonds herein invoiced have been purchased from legitimate sources not involved in funding conflict and in compliance with United Nations resolutions. The seller hereby guarantees that these diamonds are conflict free, based on personal knowledge and/or written guarantees provided by the supplier of these diamonds."⁷³

But somehow everything seemed to fall apart. Dealers who assented in Luanda or who voted for Annex VI in Milan now

⁷² U.S. Mission to the U.N./Rome, *supra* note 34; Press Release, Grocery Manufacturers of America, Ambassador Hall a Tireless Advocate for Alleviating World Hunger (Feb. 12, 2003).

⁷³ THE ESSENTIAL GUIDE TO IMPLEMENTING THE KIMBERLEY PROCESS, *supra* note 45, at 2; *see also* Kimberley Process [Final] Working Document (Mar. 20, 2002) (outlining the essential elements of an international scheme of certification of rough diamonds), available at <http://www.globalpolicy.org/security/issues/diamond> (link under "Kimberley Process").

claimed, "I never saw this before," and accused Gardner of inserting the provisions herself covering diamonds in their polished state and as finished jewelry, without their authorization.

On Tuesday, October 29, after particularly loud protests by the industry representatives of India, Israel, and Belgium, the manufacturers were prepared to reject Annex VI. Gardner warned them that if they rejected it, the NGOs would attack ferociously, especially because the industry already pledged support. At that point, the room held sixty male diamond dealers in addition to Gardner. She slipped out to find Izhakoff, Runci, and the DeBeers operative. She could not bring Izhakoff back in because he was in the middle of presenting Annex VI to the bourses, the other half of the congress. When Izhakoff finished, he found Gardner in the manufacturers' room and, astonishingly, told her, "I was a little surprised to see this," referring to the same language in Annex VI he was supposed to have been championing since Luanda. Nonetheless, he said that convincing the bourses had been "smooth sailing," and they had approved the document easily.

The DeBeers official and Runci came back in with Gardner. Gardner and Runci privately told the manufacturers' president that if IDMA rejected the agreement, they would both resign their positions with the WDC. The IDMA president asked Runci to speak to his manufacturers. Runci told them that his own 10,000 retail jewelers in the United States had already committed to the warranty process, so if the manufacturers wanted to sell their product, they'd better get on board. Besides, he warned, "if we don't regulate this, the U.S. government will." Finally, the manufacturers gave their assent.

On October 31, Gardner and the Ambassador were scheduled to meet at 10 a.m. at the Diamond Dealers Club in New York with the president of the importers/manufacturers,⁷⁴ which is a different group (in fact, the presidents of the two groups were brothers). Attending the meeting as well would be lawyers for Brinks Global Services and Malka-Amit, two major shippers of diamonds, to work out the process of intranational warranties for the self-regulation process. Although Izhakoff made a play for WDC to issue the warranties, the major industry players rejected his proposal, preferring that the shipping companies take on the responsibility for issuing them.

⁷⁴ Leon Cohen, president of the DMIA.

At the meeting, the importers/manufacturers president took an international telephone call informing him that the Israelis and the Belgians were "mutinying" against Annex VI. Despite his brother's deep involvement and commitment, he reported the bad news to Gardner and the Ambassador, managing to convey his own shaky commitment in the process. Gardner said, "But it's done; it was unanimous!" referring to the London meeting. The Ambassador, back from London, had by now invested enough time and effort to feel committed to the Kimberley Process himself. He told the importers/manufacturers president, for the latter's edification and also for communication back to the Belgians and Israelis, "If you do not do this, we [the government of the United States] will regulate you." The president then passed on the warning to the Belgians and Israelis that unless they complied with the self-regulation requirements, they would have to be licensed in the United States to sell diamonds, a threat they could not have been happy to hear. It was one thing for Runci to make that assertion to manufacturers in London, but it was quite another coming from a representative of the Bush Administration, which only a year earlier had opposed the Kimberley Process as a restriction on trade.

One can only speculate about the resistance to Annex VI that developed internationally at the end of October 2002. Eli Izhakoff's behavior may provide a clue. Although president of the WDC, ostensibly committed to the Kimberley Process as a solution to the conflict diamond problem, Izhakoff had been unofficially assuring industry leaders from the beginning that "this will never happen." The industry, of course, disliked self-regulation almost as much as it disliked ordinary regulation. If Izhakoff could keep the NGOs from attacking the industry for two years by pretending to cooperate, perhaps the diamond wars would peter out in Africa, the problem would "go away," and the Kimberley Process would fail with the industry having achieved everything it wanted. One possibility, then, was that the industry leaders panicked, seeing that the Kimberley Process was coming uncomfortably close to a *fait accompli* despite Izhakoff's easy assurances.

On the very last day of October, the final piece of chaos erupted. Pan Africa Canada, an NGO, issued a press release on behalf of all the NGOs condemning Annex VI as inadequate, full of loopholes, and worse than worthless. In view of all Gardner's efforts to get the industry to accept Annex VI, and the NGOs' awareness of those efforts and earlier acknowledgments that

Annex VI was the best possible outcome, this development seemed particularly outrageous. Runci had already departed for Switzerland to prepare for the final meeting in November, at which the nations would send their foreign ministers to Switzerland—including the Assistant Secretary of State for African Affairs for the United States⁷⁵—to officially “bless” the agreement.⁷⁶ Izhakoff disappeared altogether. Gardner called Tiffany’s public relations company—Powell, Tate—headed by former president Jimmy Carter’s press secretary Jody Powell and a partner. Since the diamond wars had stopped, at least for the moment, the Pan Africa Canada’s press release received no real attention, so the Powell, Tate account executive advised Gardner to let it pass.

Word of trouble started leaking to Gardner at the Swiss meeting, scheduled to begin November 3rd: Russia would not agree because it wanted another year before revealing its diamond trade secrets. Canada would not tack the Kimberley Process onto existing statutes, but needed to enact its own new statutory scheme, which meant it would not be ready to agree at the Swiss meeting, either. Gardner began to consider the pleasures of resigning.

But in Switzerland, Gardner found that her two years of long and hard work on this problem, with all its frustrations, had paid off. Russia and Canada would go along. So would every other national representative, except the Taiwanese, whom she found wandering disconsolately in the halls, convinced that the Republic of China, through its success in imposing a definition of “participant,” had excluded Taiwan. Gardner found herself in a position to do what she had been advised that “someone” should or would do: to tell Taiwan to ignore the apparent exclusion, and go ahead with issuing necessary certificates for its diamond trade, thereby establishing “facts on the ground” or “legislative history” that would control later interpretations. The Taiwanese representative’s eyes widened. It simply had not occurred to him.

The other nations had gone too far down the road to back out now. The United States, now fully committed to the Kimberley

⁷⁵ Walter Kansteiner.

⁷⁶ Indeed, the Bush Administration support had strengthened to the point that it would eventually support legislation and issue regulations aiding in the implementation of agreement. *See infra* note 87 and accompanying text (explaining the administration’s stance).

Process, helped push it along. On November 5, “[r]epresentatives of more than 40 countries, along with mining executives, diamond dealers and campaigners from advocacy groups . . . commit[ted] themselves to a United Nations-backed certification plan intended to insure [sic] that only legally mined rough diamonds, untainted by conflict, reach established markets.”⁷⁷

Pan Africa Canada continued its criticism of the Kimberley Process as flawed, but “a wall against illicit gems,” as the *New York Times* called it, even a flawed one, backed by fifty-five nations “that account for 90 percent of the world’s legal trade in rough diamonds,”⁷⁸ had to be acknowledged as a major accomplishment. Indeed, given the obstacles, it had to be acknowledged as an accomplishment against tremendous odds.

7. VALUES

None of the values motivating participants in the Kimberley Process should look unfamiliar to students of the legislative process in the United States. However, many nations contributed players to this controversy, so other balances of values, not just the typical American balance, may have driven behavior.

Business interests play a central role. The Bush Administration, in its initial refusal to restrict trade in order to protect human rights, thought it was choosing the property interests of American business over the physical security and safety of citizens of African countries. On a deeper level, the jewelry industry itself seemed to believe that protecting its property interests actually required restrictions that would protect the lives and safety of African nationals. Once the Ambassador turned the Bush Administration position around in recognition of the industry position, he touted human rights values as a justification for the agreement. On yet another level, the jewelry industry may have felt that it needed only to *appear* to protect African nationals in order to protect its own property interests.

An older philosophical view, characteristic of the pre-1937 U.S. Supreme Court, might have seen protection of liberty, in the form of freedom of contract, in tandem with the property interest. This would be in opposition to the restrictions designed to protect

⁷⁷ Cowell, *supra* note 1.

⁷⁸ *Id.* See The Kimberley Process Secretariat Website, *supra* note 1 (reporting fifty-five participants as of February 2003). *But see* Smillie, *supra* note 51, at 11 (indicating that as of June 2003, about seventy nations were participating).

human rights and the physical safety of Africans. The African nations, represented in the Kimberley Process negotiations stood up strongly for their perquisites of national sovereignty in resisting the efforts of the NGOs to impose monitoring, to mandate the collection of statistical data, and to establish a secretariat independent of control by those nations. In terms of American regime values, one might read into their stance a commitment to representation: a duly constituted government should be responsible only to its national constituency and should not turn over the power delegated to it by its people to some other, independent authority. However, in the American case, representation comes out of some amalgam of liberty and equality, through the democratic process of elections. Not all of the African countries utilize this process in a way that could be said to advance liberty and equality. South Africa, in the post-apartheid period, does employ what seems to be a fully democratic electoral process. However, DeBeers so powerfully influences South African policy that the DeBeers property interest most likely overwhelmed any other factor motivating that nation's initiatives.

The NGOs fought for the safety and security of Africans under the banner of human rights. They could certainly claim to be fighting for equality and liberty as well: equality with citizens not subject to oppression by greedy and violent militias and liberty from that oppressive rule. At the same time, when the NGOs sought an independent secretariat to administer the certification and warranty process, they seemed to have a fairly clear idea of where the secretariat's staff would come from: the NGOs. So, like good government groups lobbying anywhere, they had their own political – or property – interests in mind as well.

From another perspective, the business interests of DeBeers, magnified through the African nations dependent on the diamond industry but thus arguably dependent on DeBeers, could be said to have overwhelmed any other values. With the tremendous production out of the new Russian and Canadian diamond fields helping to bring DeBeers' share down to about sixty-five percent and while DeBeers continued to dominate rough diamonds, it could no longer exercise the level of control, essentially free of any meaningful competition, at the ninety percent level it had enjoyed previously. The conflict diamond issue, handled properly, would give DeBeers a new competitive edge.⁷⁹ In 2000, DeBeers stopped

⁷⁹ See, e.g., HART, DIAMOND, *supra* note 2, at 199 (explaining that the

buying diamonds on the open market, guaranteeing that no new conflict diamonds would enter its inventory. That same year, with retail demand from the United States at a record high level, DeBeers cleared out an extraordinary twenty-five percent of its total inventory. In 2001, DeBeers, for the first time, began selling its own brand of polished diamonds.⁸⁰

Once it cleared out its pre-2000 inventory, DeBeers would be the only source of diamonds in complete control from initial mining to retail sale. DeBeers would potentially be the only source of diamonds that could promise, with complete confidence, that no government inspector at the mining site was bribed to deny that guerilla forces controlled the miners, that no customs official was bribed to issue a certificate that the package of stones was conflict-free, and that no diamond merchant on Forty-seventh Street in Manhattan slipped a gem into the package bought cheap from someone who had smuggled it in under his tongue.⁸¹

This description certainly overstates the case, in that at least one other diamond enterprise, the Polar Bear company, operating the new Canadian diamond mines, claims to control its product from mining to retail sale.⁸² From a public relations point of view, however, Canadian diamonds, obviously untouched by "conflict," would have enjoyed a bigger competitive advantage over any African-source diamonds were it not for the Kimberley Process.

Some NGOs continue to doubt the efficacy of the Kimberley Process, given the absence of "regular independent monitoring."⁸³ But the cynical view may underestimate the power of the sanctions built into the Kimberley Process. Diamond dealers caught with conflict diamonds in violation of their warranties will be expelled from their bourse, or trading association, such as the Diamond Dealers Club for New York dealers. Such an expulsion acts as excommunication from the church: it ends one's ability to operate as a significant player in the diamond industry. Astute industry leaders helped create the Kimberley Process because they

inscription of DeBeers' logo on a diamond could carry a presumption of a war-free pedigree).

⁸⁰ See CAMPBELL, *supra* note 18, at 133-34 (citing DeBeers' joint business venture with a French luxury retailer to begin selling its own brand of diamonds).

⁸¹ See *id.* at 134 (describing how DeBeers can guarantee that its finished jewelry comes from clean sources).

⁸² Lisa Marsh, *Diamond Rush in Icy Canada*, N.Y. POST, Nov. 6, 2002, at 44.

⁸³ See Smillie, *supra* note 51, at 11, 14 (describing the need for regular, independent monitoring).

understood the enormous stake they had in keeping conflict diamonds out of the market. The industry itself has the same incentive to police and enforce the Kimberley Process. So cheating will carry a big risk. Those who incur the increased risk will want to be paid a large premium for doing so. But the buyer of illegal diamonds will want to pay a lower price for goods that lack legitimate credentials. Thus, if the Kimberley Process works effectively, the clean diamonds should push the dirty diamonds out of the market.

The NGOs and the more idealistic of the Kimberley Process participants hope that the relative ease with which “clean” diamonds can be exported, processed, and sold will mean that risk and bribery will actually make “dirty” diamonds, “conflict” diamonds, and “blood” diamonds cost more to export. Obviously, no one will pay a premium for such diamonds—anyone buying them would at least demand a discount—so if that happens, merchants will no longer be able to profit from their sales. The Kimberley Process will have succeeded in its intended sense, and diamonds will no longer be the prize for those who maim and kill more ruthlessly than the competition.

Which analysis proves accurate—the cynical one or the idealistic one—will depend on whether the industry’s tradition of “secrecy and mystery” enables smuggling to continue at relatively little risk and therefore relatively little cost; or whether the industry’s stake in excluding conflict diamonds impels it to implement the Kimberley Process efficiently enough to keep the cost of compliance down and the cost of violation high.

In any case, however, the DeBeers diamond countries rely on the worldwide operation of this corporate behemoth. In Botswana and Namibia, DeBeers and the governments take equal shares of the diamond production; South Africa has in essence the same relationship, but under the guise of taxation.⁸⁴ While some dispute the relative importance of the diamond industry to South Africa’s economy,⁸⁵ it provides as much as thirty-five percent of Botswana’s gross national product, for example.⁸⁶

⁸⁴ See CAMPBELL, *supra* note 18, at 127-28 (stressing how a diamond boycott would have “disastrous economic and geopolitical effects in these countries”).

⁸⁵ See Smillie, *supra* note 51, at 5-6 (outlining South Africa’s history to explain the relatively weaker link between the diamond industry and that country’s development).

⁸⁶ See CAMPBELL, *supra* note 18, at 127 (emphasizing the importance of the diamond industry to Botswana’s economy).

Whatever additional profits DeBeers may make, the livelihood of millions of people—mostly Africans, but also people in India, China, and other places around the world—depends on this industry. Perhaps the Kimberley Process will fail to eliminate conflict diamonds, but will help to sustain retail demand through its effect as a public relations tool. If so, and even if profits for DeBeers in fact provided the ultimate motivating force that created the Kimberley Process, who is to say that the humane values of the other participants did not nonetheless triumph?

8. LAW

No sovereign power issued the Kimberley Process documents, as negotiators produced them rather than a legislature. International trade agreements do not have legally binding force in the absence of appropriate ratifications by individual nations. How, then, can we consider its genesis a variety of the legislative process?

The United States enacted legislation providing for implementation of the Kimberley Process agreement.⁸⁷ Even had it not, the United States could have promulgated regulations implementing the agreement pursuant to the executive authority of the President. When attempting to effectuate a U.N. Security Council resolution, the President can do so under the International Emergency Executive Economic Powers Act.⁸⁸ Indeed, under that authority, the usual requirement of a notice and comment period for administrative regulations does not apply; the regulations simply become law.⁸⁹

Violations of the Kimberley Process could have been prosecuted in the United States as perjury in the context of the Census Bureau's export tracking powers if Congress had not enacted the new legislation creating new penalties for violations.

In Europe, the Commission of the European Union would promulgate a directive implementing the Kimberley Process, also

⁸⁷ See Clean Diamond Trade Act, Pub. L. No. 108-19, 2003 U.S.C.C.A.N. (117 Stat.) 631 (to be codified at 19 U.S.C.A. § 3901) (detailing initiatives taken to promote and facilitate the adoption of the Kimberley Process). Subsequently, President Bush issued Executive Order 13312, pursuant to the statute. Implementing the Clean Diamond Trade Act, 39 WEEKLY COMP. PRES. DOC. 999 (July 29, 2003).

⁸⁸ See 50 U.S.C. §§ 1701-07 (2000) (outlining when and how the President may exercise his executive authorities).

⁸⁹ *Id.*

under existing statutes already issued by the European Parliament.⁹⁰ The African and Asian nations likewise would find their own methods of implementing the agreement.

For all practical purposes, the Kimberley Process negotiations worked as a legislative process. No one conferred legislative authority on the negotiators, but when they finished, the governments of the participating nations would find ways to implement their conclusions as law. The negotiators engaged in the legislative process as the members of a legislature, effectively using many of the same techniques and tools. Already, the Kimberley Process document has itself acquired legitimacy as law, as the diamond industry and the various nations have taken steps to implement it. National governments and the world at large expect the diamond industry to conduct itself accordingly.

International law often puzzles students as well as experienced attorneys who wonder about enforcement mechanisms.⁹¹ For example, national courts have enforced international law in preference to a country's own statutes where that nation's constitution "by no means" gave precedence to the international law.⁹² The results of the Kimberley Process especially should perplex the observer who views it through the lens of a casually considered conventional jurisprudence. Since the participants in the Kimberley Process were not elected by anyone, and were not delegated authority by their respective nations to enter into a treaty, it might seem surprising that their efforts could produce law.

The history of the Kimberley Process negotiations should shake our comfortably held notions of what constitutes legislation. After eighteen years as a member of a state legislature and six years as a member of congressional and state legislative staff, the Author views the Kimberley Process negotiations as clearly legislative.

⁹⁰ See, e.g., Peggy Jo Donahue, *EU Plans Tough Conflict Diamond Rules*, PROFESSIONAL JEWELER, Aug. 8, 2002 (discussing the European Union's proposed plan to require a certificate of origin stating the country of extraction for rough diamonds), *available* at <http://www.professionaljeweler.com/archives/news/2002/080802story.html>.

⁹¹ See HART, *THE CONCEPT OF LAW*, *supra* note 9, at 214-15 (differentiating between municipal law and international law, in that the latter is not enforced by any central organ); Brunnée & Toope, *supra* note 8, at 64-65 (referring to doubts regarding the existence of international law).

⁹² See TEITEL, *supra* note 15, at 20 (discussing the precedence given to international law by the Constitutional Court of Hungary in the political cases related to the 1956 uprising).

Furthermore, the outcome of the negotiations, the Kimberley Process accord, has the force of law, as individuals have changed and will change their behavior to avoid violating its commands. Subsequent and consequent enactments by the U.S. Congress, by other national legislatures, and by the European Union attest to the efficacy of the Kimberley Process accord, but ironically they mean less in terms of policy choice and policy formation. They may have the nominal features of legislation, but in effect, they merely implement the policy choice already made by the accord.

This suggests that a conference of delegates not given treaty-making authority by their nations, along with representatives of NGOs and industries who clearly and obviously have no sovereignty, can produce law, which in this case, since it clearly does not fit into the category of adjudication, must be legislation.

H.L.A. Hart conceded that the acceptance of principles of behavior by the relevant law-conscious community can produce international law.⁹³ His strong defenders continue to stress his acknowledgment that in international law a rule can "count" as law because it is treated as such, notwithstanding its provenance or adherence to formal criteria.⁹⁴ Nevertheless, his great positivist predecessor, J.L. Austin, insisted that law must emanate from sovereign power, and the main thrust of the presentation of Hart's own rule of recognition suggested at least a permanent source of law within any developed law-conscious community.

Hart clearly understands that no rule of recognition underlies international law.⁹⁵ Thus, he seems to acknowledge that international law does not fit very well into his formulation. Sounding both wistful and hopeful, he says,

it is true that, on many important matters, the relations between states are regulated by multilateral treaties, and it is sometimes argued that these may bind states that are not parties. If this were generally recognized, such treaties

⁹³ See HART, *THE CONCEPT OF LAW*, *supra* note 9, at 227 (tying together moral obligation and international law).

⁹⁴ See *id.* at 238 (analogizing the basic norm of international law with the rules of etiquette in most modern societies); Telephone Interview with Benjamin Zipursky, Dean, Fordham Law School, Mar. 18, 2003.

⁹⁵ See HART, *THE CONCEPT OF LAW*, *supra* note 9, at 233 ("[T]hose who have embarked on the task have found very great difficulties in formulating the 'basic norm' of international law.")

would in fact be legislative enactments and international law would have distinct criteria of validity for its rules. A basic rule of recognition could then be formulated Perhaps international law is at present in a stage of transition toward acceptance of this and other forms which would bring it nearer in structure to a municipal system. If, and when, this transition is completed the formal analogies, which at present seem thin and even delusive, would acquire substance, and the skeptic's last doubts about the legal 'quality' of international law may then be laid to rest.⁹⁶

But international law has not gone in that direction. George Bush, to put it mildly, does not ordinarily acknowledge unsigned treaties as binding. In fact, with the increasing role of non-sovereign bodies like NGOs and industries shaping the outcome of litigation, as well as "legislation" like the Kimberley Process at the international level, the "form" of international law has actually moved further away from analogy with the processes out of which come "municipal" rules (by which Hart meant ordinary rules of a nation) recognized as law.

Hart's theory mostly concerns the kinds of laws to which rules of recognition apply, while Fuller's applies to those kinds of law, the ordinary laws of nations, and to international law.⁹⁷ The question is which approach, in its main points of emphasis, better explains the development and status of international law.

While it is clearly true that international law need not be "moral" to be followed, recent international law developments vindicate Fuller's refusal to rely on a rule of recognition as the basis for the legitimacy of a law. A rule of recognition capable of capturing the "complex, collaborative effort"⁹⁸ of the Kimberley Process seems unlikely to evolve. So this, more than Fuller's insistence on "internal morality," now seems especially right.

However, even some version of his insistence on a moral component of law still has currency, or "legs." Ruti Teitel described the normative power of human rights law, in the international law context, as in effect substituting for the positivist

⁹⁶ *Id.* at 231.

⁹⁷ See FULLER, *supra* note 7, at 234 (building on the inconspicuous role of custom in different systems of enacted law).

⁹⁸ *Id.*

legitimacy of sovereignty or rules of recognition, a reality closer to Fuller's than to Hart's approach. She notes, for example, that international human rights law enjoys "significant normative force in periods of transition" and is able to "mediate the supposed theoretical divide of positivism and natural law, thus transcending law's conventional relation to politics."⁹⁹

Fuller, in his rejection of positivism, more clearly anticipated lawmaking of the Kimberley Process variety. A central thrust of his work set forth the notion that law could emerge "from the ground up," so to speak, with the imprimatur of a sovereign power sometimes completely unnecessary, even if conferred. Students of Fuller need not "treat delegation (the 'granting' of authority to third parties to implement rules) as particularly central to a description of law's influence."¹⁰⁰ His examples from private commercial law pointed out that the enforcement of contract law generally relied on commercial penalties imposed by private parties and had no need whatsoever for the imposition of the sovereign power of government.¹⁰¹ Similarly, enforcement of the Kimberley Process agreement relies primarily on the power of the world's diamond bourses to bar their doors against diamond dealers who violate its precepts, a power terrifying to those in the diamond trade.

Thus, the lawmaking role of the Kimberley Process makes more sense when seen through the lens of Fuller's jurisprudence. Conversely, the history of the Kimberley Process provides strong support for the relevance of Fuller's approach.

In recent years, international law scholars have noted the emergence of various trends in this direction, although the Kimberley Process may be the clearest example.

NGO and industry representatives have won official roles participating in the creation of international law in adjudicative as well as "legislative" contexts. Until 1998, international adjudicative bodies like the Appellate Body of the WTO or the International Court of Justice at the Hague refused to accept amicus briefs from NGOs. In that year, for the first time, the Appellate Body decided that the WTO's "first instance" panels

⁹⁹ TEITEL, *supra* note 15, at 222.

¹⁰⁰ Brunnée & Toope, *supra* note 8, at 72.

¹⁰¹ See FULLER, *supra* note 7, at 135-36 (illustrating the power of commercial penalties through hypotheticals).

could accept such briefs if they so chose.¹⁰²

At the U.N. Framework Convention on Climate Change in 1999, a “legislative” forum, observers from 211 NGOs, such as Friends of the Earth and from companies such as British Petroleum, took up much of the space in the negotiating rooms.¹⁰³ In the context of discussing the “close intersection and spillover” between standards (“soft law”) and legally binding rules (“hard law”), another international law scholar notes the increasing participation of such “actors other than sovereign states and [official] international organizations” in “the development of international standards.”¹⁰⁴

Although Fuller never precisely addressed a situation in which law was apparently generated by the kind of body that produced the Kimberley Process accords, we need only to extrapolate a little to apply his insights here. Fuller explained “implicit law” as immanent in the folkways and customs of a people, such as the evolving traditions of market transactions that first produced a body of common law, and then a statutory structure, the Uniform Commercial Code, modeled on the common law.¹⁰⁵ International law scholars now note that such “customary law,” based on “the general recognition among countries of a certain practice or usage . . . has often been developed more rapidly in international conferences” in recent times.¹⁰⁶

For Fuller, common law, or adjudication, hews more closely to its roots in implicit law; “made law,” or legislation, depends to a greater extent for its authority on the sovereignty or role of its authors.¹⁰⁷ But even “made law” cannot endure without some “congruence” with implicit or customary law.¹⁰⁸ Sovereign power

¹⁰² See RAJ BHALA, *INTERNATIONAL TRADE LAW: THEORY AND PRACTICE* 1634ff (2d ed. 2000) (detailing a report on the U.S. import prohibition of certain shrimp and shrimp products, adopted in November of 1998).

¹⁰³ See Philippe Sands, *Turtles and Torturers: The Transformation of International Law*, 33 N.Y.U. J. INT'L L. & POL. 527, 547 (2001) (discussing the increased rights of participation in international legislative processes).

¹⁰⁴ Herbert V. Morais, *The Quest for International Standards: Global Governance vs. Sovereignty*, 50 U. KAN. L. REV. 779, 782 (2002).

¹⁰⁵ See Gerald J. Postema, *Implicit Law*, in *REDISCOVERING FULLER*, *supra* note 15, at 255, 256-57 (explaining Fuller's perspective on the implicit dimension of law).

¹⁰⁶ Morais, *supra* note 104, at 807.

¹⁰⁷ See Postema, *supra* note 105, at 256-57 (detailing how the origin of a law determines the source of its practical force).

¹⁰⁸ See *id.* at 265, 275 (highlighting Fuller's congruence thesis).

alone cannot guarantee acceptance or survival of its “legislative” product. Attempts at lawmaking are likely to succeed when they reflect what people have come to expect of each other¹⁰⁹ and when they pass Fuller’s tests of law’s “inner morality”: generality, publication, non-retrospection, clarity, consistency, possibility (not impossible to obey), stability, and application as formulated.¹¹⁰ Congruence with implicit law, and adherence to the principles of law’s inner morality, can more effectively produce acceptance and survival, and thus law that will endure.

If the Kimberley Process produced law, it clearly did not produce adjudication. Just as clearly, it did not produce “managerial direction,” another category of decision-making and institutional design that was a subject of Fuller’s attention.¹¹¹ Through the lens of Fuller’s jurisprudence, then, we should accept the Kimberley Process as a legislative process and the accords as legislation. Fuller could have anticipated that effective law would emerge from a process that included a wide variety of participants—industries and NGOs, as well as governments—that could effectively inform its product with all the relevant mores and expectations bearing on the conflict diamond controversy from each of their respective spheres.¹¹² The very existence of the Kimberley Process accords and the expectation that they will indeed operate as effective law demonstrate the worth of Fuller’s legacy.

¹⁰⁹ See Willem J. Witteveen, *Rediscovering Fuller: An Introduction*, in REDISCOVERING FULLER, *supra* note 15, at 31 (quoting LON L. FULLER, ANATOMY OF THE LAW 65 (Penguin 1971) (1968)); Brunnée & Toope, *supra* note 8, at 21, 65 (citing mutual expectations as the determinative factor in creating law and norms).

¹¹⁰ See FULLER, *supra* note 7, at 39 (discussing the consequences of failure in any one of the eight tests).

¹¹¹ See *id.* at 210 (reviewing the basic difference between law and managerial direction); Wibren van der Burg, *The Morality of Aspiration: A Neglected Dimension of Law and Morality*, in REDISCOVERING FULLER, *supra* note 15, at 184 (mentioning the link between instrumental legislation and managerial direction).

¹¹² See Brunnée & Toope, *supra* note 8, at 70 (describing the non-state actors as involved in pre-legal norm creation as builders of the legal system in addition to the state actors).