

The Role of Informal Normative Processes in Improving Governance over Natural Resources in Conflict-Torn States

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Abstract Internal armed conflicts have become increasingly self-financing in the last decades, with valuable natural resources figuring among the primary sources of conflict funding. In order to end these armed conflicts, the international community has developed several instruments targeting their funding, most notably by curbing the illegal trade in natural resources. This article examines two of these instruments, i.e. the Kimberley Process for the Certification of Rough Diamonds (KPCS) and the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (OECD Guidance). More in particular, it analyses the mechanisms established by these instruments to stop the trade in conflict resources and the extent to which these contribute to improving the governance of natural resources as a tool for the prevention of new conflicts. This article argues that even though the KPCS and the OECD Guidance do not impose legally binding obligations upon their participants, there are possibilities to enforce these instruments. In order to gain a better understanding of their enforceability, this article argues that it is important to assess these instruments as part of the broader political and legal framework in which they operate. In addition, this article argues that these instruments, notwithstanding their non-binding character do have relevance for the formation of international law in relation to the governance of natural

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resources. Both instruments play an important role in setting standards for this purpose and, in this way, reflect a growing consensus on how natural resources should be managed.

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1 Introduction

Natural resources, including diamonds, gold and precious metals, play a key role in financing some of today's most violent armed conflicts, including those that are currently fought in the DR Congo and the Central African Republic. In the DR Congo, armed groups have taken over control over important mining sites in the east of the country, permitting them to obtain a source of conflict funding from the exploitation of gold and precious minerals. In the Central African Republic, armed groups have gained control over the diamond production in parts of the country, notably in the east, after conflict broke out in December 2012.¹ In both situations, an active UN peacekeeping force has been mandated to help reinstate State authority over the whole territory.²

These are just a few of the most recent examples of natural resources financing armed conflicts. Although not a new phenomenon, recent decades show an increase in this type of conflict financing. Since the end of Cold War rivalry, external sponsoring of armed groups fighting in internal armed conflicts has largely dried up. As a result, armed groups have increasingly turned to natural resources as an alternative source of conflict funding.³ Since the trade in valuable natural resources provides these armed groups an independent source of income to finance their activities, stopping the trade in natural resources that finance armed conflicts is therefore essential to ending these conflicts.

This has been recognized by the UN Security Council in its resolutions and Presidential statements. The UN Security Council has adopted several sanctions regimes targeting specific commodities on a case-by-case basis. Examples include the diamond sanctions imposed against Angola, Sierra Leone and Liberia. In other instances, the Council refrained from imposing commodity sanctions proper, but,

¹ For the CAR, see the KP administrative decision on Vigilance of 18 March 2013, which identifies areas taken over by armed groups.

² For the DR Congo, see UN Security Council Res. 1925 (2010), 2053 (2012) and 2147 (2014) for the deployment and mandate of MONUSCO. For the CAR, see UN Security Council Res. 2127 (2013) for the deployment and mandate of the MISCA (led by the African Union) and Res. 2149 (2014) for MINUSCA (a UN integrated mission). It is interesting to note that MONUSCO has been explicitly mandated to assist the government of the DR Congo in reform of its minerals sector in order to enhance the traceability of these minerals.

³ Ballentine and Nitzschke (2005), Ballentine and Sherman (2003), Collier and Hoeffler (2005), pp. 625–633, Le Billon (2012).

instead, targeted individuals and companies involved in the trade in conflict resources, i.e. natural resources traded by armed groups to fund their activities. An example concerns the sanctions imposed against individuals and companies providing support to armed groups in the DR Congo.

The success of trade-related sanctions depends however on effective control mechanisms and cooperation between States and companies in implementing the sanctions. This article reviews some of the principal instruments which have been set up in recent years to address the trade in conflict resources. More in specific, it discusses the Kimberley Process Certification Scheme (KPCS) for Rough Diamonds (KPCS) and the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (OECD Guidance).

The objective of the article is twofold. Firstly, it aims to determine the contribution of the KPCS and the OECD Guidance to stopping the trade in conflict resources. For this part of the analysis, the article identifies the mechanisms established by the KPCS and the OECD Guidance and the position of these instruments in the broader institutional framework. It relies principally on the constitutive documents of these instruments as well as on decisions by international organisations and national authorities, including case law and national legislation. The approach to assessing the contribution of the KPCS and the OECD Guidance to stopping the trade in conflict resources is therefore primarily institutional. The reason for adopting such an institutional approach is related to a broader ambition to examine how the KPCS and the OECD Guidance—as non-binding instruments—obtain binding force within a broader normative framework, which, arguably, ultimately enhances their effectiveness.

The second objective of this article is to assess the contribution of the KPCS and the OECD Guidance to improving the governance of natural resources in conflict-torn states. In many states where natural resources have financed armed conflicts, the internal structures for the management of these natural resources by the government present serious failures, either pre-existing or as a direct result of the armed conflict.⁴ Addressing these failures in the governance of natural resources is therefore an important tool for the prevention of new conflicts. This part of the analysis assesses the principal rights and obligations of governments in relation to the management of natural resources, ensuing from treaties and customary international law. It further examines whether and to what extent the principal obligations for states ensuing from this assessment are reflected in the constitutive documents of the KPCS and the OECD Guidance.

For these purposes, the following section briefly sets out the legal framework for the governance of natural resources within states. Sections 3 and 4 examine the KPCS and the OECD Guidance respectively. Particular emphasis is placed on the objectives, means of operation and enforcement of these instruments. Section 5 assesses the contribution of these instruments to stopping the trade in conflict resources, while Sect. 6 assesses their contribution to improving the governance of natural resources in states. Section 7 recapitulates the main findings of this article.

⁴ See e.g. Sierra Leonean Truth and Reconciliation Commission (2004); and Office of the High Commissioner for Human Rights (2010).

2 The Governance of Natural Resources within States

This section assesses the general legal framework for the governance of natural resources within states and discusses the principal challenges to this framework arising from situations of armed conflict. The aim of this section is twofold. Firstly, it aims to provide the theoretical framework for assessing whether the KPCS and the OECD Guidance contribute to improving the overall governance of natural resources within states, as discussed in Sect. 6 of this article, by defining the obligations of states in relation to the governance of their natural resources. Secondly, this section aims to provide the necessary context for assessing the contribution of these instruments to stopping the trade in conflict resources, as discussed in Sect. 5 of this article.

2.1 The General Legal Framework for the Governance of Natural Resources within States

The governance of natural resources within states is based on the right of states and peoples to freely exploit their natural resources, without external interference from other states. Today, this right is firmly established as part of the customary international law Principle of Permanent Sovereignty over Natural Resources (PSNR),⁵ and through the related right of peoples to self-determination as enshrined in identical Article 1(2) of the ICESCR and the ICCPR.

The right of states and peoples to freely exploit their natural resources pursuant to the principle of PSNR is qualified, notably by international economic, human rights and environmental law.⁶ Most relevant for the present purposes are the obligations for a state to exercise sovereignty over natural resources for the well-being of the people and to use the natural resources in a sustainable way, taking due care of the environment. In other words, states are presumed to use their natural resources to promote sustainable development.

The obligation for states to exploit their natural resources in a sustainable way seeks to set limits on the way in which states use the natural wealth and resources situated within their territory and beyond the limits of national jurisdiction, with the aim of safeguarding their capital for the benefit of present and future generations. Sustainability is an essential component of natural resource governance, since it enhances the opportunities for states to promote long-term development by protecting their resource-base from over-exploitation. The principle of sustainable use is reflected in several international conventions in the fields of international environmental and economic law, including the Biological Diversity Convention, the WTO Agreement, UNCLOS, the International Tropical Timber Agreement and

⁵ See International Court of Justice, *Armed Activities on the Territory of the DR Congo (Congo v. Uganda)*, Judgment of 19 December 2005, ICJ Reports 2005, para. 244. In this judgment, the Court affirms the customary nature of the principal UN General Assembly Resolutions that incorporate the Principle of PSNR.

⁶ See Schrijver (1997).

CITES.⁷ In addition, there is a constantly growing body of case law confirming the relevance of the principle in relation to commercial projects undertaken by states.⁸

The obligation for states to use natural resources for the well-being of the people can be derived directly from the 1962 Declaration on PSNR. The very first principle of this Declaration proclaims that '[t]he right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned'.⁹ This obligation has been confirmed *inter alia* in resolutions adopted by the UN Security Council in the context of armed conflicts financed by natural resources¹⁰ as well as in several regional conventions.¹¹

The obligation also follows from the designation of peoples as subjects of the Principle of PSNR and as holders of the right to self-determination, which implies that peoples can directly assert rights over natural resources. This in turn entails a corresponding obligation for the government to put in place procedures which allow peoples to effectively exercise their rights, as confirmed by the Human Rights Committee in its General Comment relating to Article 1 of the ICCPR.¹² Arguably, this can best be achieved by establishing proper procedures for decision-making, which allow for the participation of all the parties concerned. Such a right to participate in government decision-making in relation to the use of natural resources has been recognised by human rights bodies, including the Human Rights Committee, the European Court of Human Rights and the Inter-American Court,

⁷ See e.g. Art. 2 of the Convention on Biological Diversity, Rio de Janeiro, 5 May 1992, 1760 UNTS 79; Preamble to the Agreement Establishing the World Trade Organization, adopted on 15 April 1994, 1867 UNTS 154; Art. 61 of the UN Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 3; Art. 1(m) of the International Tropical Timber Agreement, 27 January 2006; and Art. II of the Convention on International Trade in Endangered Species of Wild Fauna and Flora, 3 March 1973, 993 UNTS 243.

⁸ See e.g. International Court of Justice, *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment of 25 September 1997, ICJ Reports 1997, p. 7, para. 140; International Court of Justice, *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010, ICJ Reports 2010, p. 14, para. 175; International Tribunal for the Law of the Sea, *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)*, Requests for Provisional Measures, Order of 27 August 1999, paras. 70-85; and WTO Appellate Body, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, Report of 12 October 1998, Doc. WT/DS58/AB/R, paras. 129-130.

⁹ Declaration on Permanent Sovereignty over Natural Resources, UN General Assembly Res. 1803 (XVII) of 14 December 1962.

¹⁰ See e.g. Res. 1457 (2003) on the DR Congo in which the Security Council reaffirmed the sovereignty of the DR Congo over its natural resources and emphasized that these should be exploited 'transparently, legally and on a fair commercial basis, to benefit the country and its people' and Res. 1521 (2003) on Liberia which stipulates that government revenues from the Liberian timber industry must be used 'for legitimate purposes for the benefit of the Liberian people, including development'. [Italics added by the present author.]

¹¹ See e.g. Art. 21 of the African Charter on Human and Peoples' Rights which stipulates that the right of peoples to freely dispose of their natural resources 'shall be exercised in the exclusive interest of the people'.

¹² See General Comment No. 12: The right to self-determination of peoples (Art. 1), adopted by the Human Rights Committee at its twenty-first session, 13 March 1984, Office of the High Commissioner for Human Rights, para. 3 and Guidelines for the treaty-specific document to be submitted by States parties under article 40 of the International Covenant on Civil and Political Rights, UN Doc. CCPR/C/2009/1 of 22 November 2010, under Art. 1.

in relation to the rights of indigenous peoples. In addition, a broader right to public participation has been recognised in several instruments in relation to environmental matters, including in the regional Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, concluded in Aarhus in 1998 and the 1992 Convention on Biological Diversity.¹³

It follows from the Principle of PSNR and the right of peoples to self-determination that international law requires states to manage their natural resources in an inclusive and sustainable way. These are the standards against which the contribution of the mechanisms discussed in Sects. 3 and 4 to improving resource governance are measured.

2.2 Specific Challenges in Relation to Internal Armed Conflict

By designating states and peoples as subjects of the right to freely exploit natural resources and to exercise sovereignty over them, international law assumes the existence of institutions that exercise the right on their behalf. In most cases, states do indeed have a government that represents the state and its people. In these circumstances, the government is also the appropriate body to exercise control over natural resources. Nevertheless, in internal armed conflicts, the authority of the government is often contested by armed opposition groups. This raises the question of whether the government is in all cases the appropriate body to exercise the right to freely exploit natural resources on behalf of the state and its people.¹⁴ There may be circumstances in which the government has lost its legitimacy and thereby its authority to exercise control over natural resources. The revolution in Libya in 2011 is a relevant example of a situation in which the government lost its legitimacy as a consequence of its own actions, particularly by launching attacks on its own population. The ongoing human rights violations committed by the government in Zimbabwe constitute another relevant example. These situations raise important concerns in relation to the power vested in the government as the central authority responsible for the management of the state's natural resources. These concerns are also reflected in the definition of 'conflict diamonds' pursuant to the KPCS, as discussed in Sect. 3.

Apart from these fundamental questions with respect to the right of the government to exercise sovereignty related rights over natural resources, internal armed conflicts also pose other challenges to the system established by international law for the governance of natural resources. Governments can simply lose control over the state's natural resources as a consequence of armed groups taking over parts of the territory, including mining sites. It is this situation that the instruments discussed in the current article primarily aim to address. Both the KPCS and the OECD Guidance aim to restore the government's control over the state's natural resources, notably by establishing mechanisms to trace the origin of natural

¹³ See Art. 6 of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 28 June 1998, 2161 UNTS 447 and Art. 14 of the Convention on Biological Diversity.

¹⁴ See on this Dam-de Jong (2015b).

resources. These mechanisms are discussed in more detail in the following sections as part of a broader analysis of the nature and functions of the instruments.

3 Kimberley Process for the Certification of Rough Diamonds

The KPCS was developed in response to the armed conflicts raging in Angola and Sierra Leone, where diamonds were used to finance the military campaigns of rebel groups opposing the legitimate government.¹⁵ Even though the Security Council had adopted sanctions targeting the export of diamonds originating from these states, these were undermined by the lack of an effective system in place to track the origin of diamonds mined in these states.¹⁶ The sanctions could therefore easily be busted by armed groups smuggling the diamonds into neighbouring countries, from where they were re-exported and sold on the international market.¹⁷

The KPCS was set up in order to find an effective international solution to the problem of diamond smuggling in contravention of UN sanctions. Its aim was to design a universal certification scheme for rough diamonds that would be applied by all states producing and purchasing diamonds, thereby closing the trade routes for armed groups smuggling so-called ‘conflict diamonds’. In order to ensure its effectiveness, the involvement of all the interested actors, and especially of the diamond industry, was considered crucial. Therefore, the process was set up as a partnership between governments, the diamond industry and interested non-governmental organisations (NGOs). This is one of the most innovative aspects of the KPCS, which brings together three groups with divergent interests working together to find a suitable solution for a pressing need.¹⁸ In addition, the KPCS was the first initiative which directly addressed the role of commodities in financing armed conflict by regulating their trade.

The Kimberley Process was launched in November 2002, only two and a half years after the first meeting in Kimberley, South Africa.¹⁹ The following subsections discuss the objectives, means of operation and enforcement mechanisms of the KPCS in more detail.

¹⁵ See Dam-de Jong (2015a), Chapters 5 and 7 for more details on these conflicts, and Chapter 8 for more details on the KPCS.

¹⁶ See UNSC Res. 1173 (1998) and 1295 (2000) concerning the armed conflict in Angola; Res. 1306 (2000) concerning the armed conflict in Sierra Leone; and Res. 1343 (2001) concerning Liberia’s involvement in the smuggling of diamonds from Sierra Leone. For a more detailed discussion of these resolutions, see Dam-de Jong (2015a), Chapter 5. It should be noted that the first meeting leading to the Kimberley Certification Scheme took place before the Security Council adopted diamond embargoes for Sierra Leone and Liberia.

¹⁷ For more information, see the report of the Panel of Experts on Angola (the Fowler report), UN Doc. S/2000/203, paras. 75–114; and the report of the Panel of Experts on Sierra Leone, UN Doc. S/2000/1195, paras. 65–166.

¹⁸ For an overview of the negotiating history, see Wright (2012).

¹⁹ See the Interlaken Declaration of 5 November 2002 on the Kimberley Process Certification Scheme for Rough Diamonds. The KPCS became fully operational in August 2003. See <http://www.globalpolicy.org/the-dark-side-of-natural-resources-st/diamonds-in-conflict/kimberley-process.html>. Accessed 14 October 2015.

3.1 Objectives

The KPCS's primary aim is to protect the legitimate diamonds trade by excluding 'conflict diamonds' from it.²⁰ It is premised on the idea that 'urgent international action is imperative to prevent the problem of conflict diamonds from negatively affecting the trade in legitimate diamonds, which makes a critical contribution to the economies of many of the producing, processing, exporting and importing states, especially developing states'.²¹

In order to gain a proper understanding of the KPCS and its objectives, it is essential to take a closer look at its definition of 'conflict diamonds'. The Kimberley Process defines conflict diamonds as:

rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments, as described in relevant United Nations Security Council (UNSC) resolutions insofar as they remain in effect, or in other similar UNSC resolutions which may be adopted in the future, and as understood and recognized in United Nations General Assembly (UNGA) Resolution 55/56, or in other similar UNGA resolutions which may be adopted in future.²²

There are five elements in this definition that merit closer attention. The first is the reference to 'rough diamonds', defined elsewhere as 'diamonds that are unworked or simply sawn, cleaved or bruted'.²³ The KPCS therefore does not aim to regulate the diamond trade as such; its objective is limited to eliminating those diamonds from the market that are most easily obtained and traded by armed groups. Of course, this considerably narrows the scope of the scheme and provides loopholes for bypassing it. Since KP certificates are only necessary when the rough diamonds leave the country, it is possible to polish illegal diamonds locally and to export them as polished diamonds without a KP certificate.²⁴ This is why major NGOs, like Global Witness, have pushed for cut and polished diamonds to be included in the KPCS.²⁵

Secondly, the objective of the KPCS is limited to eliminating the trade in diamonds that are used by *armed groups* to finance a *conflict*. It therefore does not cover diamonds mined by national authorities, even when the authorities use them to finance an armed conflict involving gross human rights violations. In addition, it excludes diamonds that are used to finance human rights violations outside the context of an armed conflict. These turn out to be very problematic limitations,

²⁰ See KPCS, ninth para. of the preamble.

²¹ KPCS, fourth para. of the preamble.

²² KPCS, Section I.

²³ KPCS, Section I.

²⁴ Financial Action Task Force, 'Money Laundering and Terrorist Financing Through Trade in Diamonds', p. 60.

²⁵ See Global Witness, Making it Work: Why the Kimberley Process Must Do More to Stop Conflict Diamonds. <https://www.globalwitness.org/archive/making-it-work-why-kimberley-process-must-do-more-stop-conflict-diamonds-0/>. Accessed 14 October 2015.

threatening the very survival of the Kimberley Process. A considerable measure of controversy has arisen in relation to the decision of the KPCS participants in 2011 to allow Zimbabwe to resume export of its diamonds,²⁶ while NGOs participating in KPCS as well as an official KPCS review mission provided clear indications of human rights abuses committed by the Zimbabwean army at particular mining sites.²⁷ If the KPCS is to cover these types of situations, its definition of ‘conflict diamonds’ should be amended. Such an amendment would however also entail a reconsideration of the KPCS’ objectives. Given the diverse interests of the KPCS participants, this will not be an easy process.²⁸

The third element that merits closer attention is the reference in the definition to rebel movements and ‘their allies’, which signals that the KPCS also targets actors who provide support to rebel movements, either by trading with them or by other means. This includes foreign states, such as Liberia during the Taylor administration, which supported the Revolutionary United Front (RUF) in Sierra Leone, as well as companies.²⁹ The objective of the KPCS is therefore not only to eliminate the trade in rough diamonds by armed groups directly, but also to address support given to these armed groups.

Fourthly, the KPCS defines ‘conflict diamonds’ as diamonds that are used to finance conflicts aimed at undermining *legitimate* governments. The reference to ‘legitimate’ with respect to governments implies that the term ‘conflict diamonds’ does not include diamonds that are used by rebel movements to finance an armed conflict for the purpose of overthrowing a government that is not—or no longer—recognised by the international community. Even though it is not clear whether the KPCS participants expressly intended to limit the definition of ‘conflict diamonds’ in this way, it is important to realise that this limitation is supported by a textual interpretation of the KPCS instrument.

The last element of the definition that merits closer attention is related to the role of the UN Security Council. The KPCS assigns an exclusive role to the Security Council to determine whether rough diamonds used by armed groups constitute ‘conflict diamonds’ for the purposes of the KPCS. This implies that the exclusive focus of the KPCS is on eliminating the trade in rough diamonds that have explicitly been labelled ‘conflict diamonds’ by the Security Council. This is also apparent from the preamble to the Kimberley Scheme, in which participants state their

²⁶ Final Communiqué from the Kimberley Process Plenary Meeting, 3 November 2011. <http://www.worlddiamondcouncil.com/>, resources section, para. 19. Accessed 14 October 2015.

²⁷ See the Final report of the Kimberley Process Certification Scheme Review Mission to Zimbabwe from 30 June to 4 July 2009. <http://graphics8.nytimes.com/packages/pdf/world/ZimFinaldraft020909.pdf>. Accessed 14 October 2015. For an overview of KP action in relation to Zimbabwe, see Cullen (2013, pp. 74–77).

²⁸ An attempt to redefine ‘conflict diamonds’ in order to include human rights abuses in conflict situations has been made during the US Presidency in 2012, triggered by the Zimbabwe incident, but no progress has been made since. See the KP Chair Vision Statement of 7 August 2012. <http://www.kimberleyprocess.com/en/system/files/documents/Chair%20Vision%20Statement.pdf>. Accessed 14 October 2015.

²⁹ See also Wetzel (2010, pp. 173–174).

determination ‘to contribute to and support the implementation of the measures provided for in [relevant Security Council] resolutions’.³⁰

In conclusion, the KPCS objectives are twofold: to protect the reputation of the diamond industry by taking away the opportunities for armed groups to obtain revenues for conflict financing derived from the trade in rough diamonds and to provide support to sanctions regimes imposed by the Security Council in relation to particular armed conflicts. Its aims should therefore not be overestimated. The KPCS is not an instrument that aims to address human rights violations associated with the diamond trade generally nor is it intended to address situations that fall outside the scope of the UN Security Council’s attention.

3.2 Means of Operation

The KPCS is a certification scheme based on a system of import and export permits for shipments of rough diamonds. A large discretion is left to the participants themselves—i.e., countries producing and trading diamonds—in devising and implementing a certification scheme, as long as they meet certain technical requirements prescribed by the KPCS. In addition to the focus of the KPCS on national implementation, it is furthermore important to note that the KPCS does not impose legally binding obligations upon its participants. It is based on voluntary commitments undertaken by them. These commitments include the adoption of appropriate national legislation in addition to setting up a system of internal controls designed to eliminate conflict diamonds from shipments of rough diamonds imported into or exported from their territory.³¹ Interestingly enough, the KPCS also requires participants to share statistical data concerning the volume of their trade in rough diamonds with other participants.³² Subsequent administrative decisions have built on this standard, formulating more specific reporting requirements.³³ Furthermore, participants should provide to other participants up-to-date information on their relevant laws, regulations, rules, procedures and practices.³⁴ Implementation of these minimum standards is a prerequisite for participation in the KPCS. Additional non-mandatory requirements relevant for the governance of diamonds include furthermore the licensing of mines and tracking cash purchases of rough diamonds through official banking channels.

Decision-making within the KPCS is done by the Plenary, which meets once a year. The Plenary consists of the participating states, representatives from the diamond industry and NGOs. Even though the diamond industry and NGOs participate in the Plenary and have been granted the right to intervene and to submit proposals and amendments, decision-making is reserved to the participating states,

³⁰ KPCS, preamble, para. 5.

³¹ KPCS, Section IV(a).

³² KPCS, Section V and Annex III.

³³ See the 2003 Administrative Decision on Statistical Reporting, which sets out that participants are to submit these data four times a year to the Working Group on Statistics and that a failure to do so will be reported to the Chair.

³⁴ KPCS, Section V(a).

which decide on the basis of consensus.³⁵ This system of consensus decision-making has been heralded by some as an important means to secure the necessary support for subsequent implementation of KP decisions and criticised by others for its effects on decision-making in general, where a single participant is able to block decisions, including on suspension of non-compliant states.³⁶ The KPCS furthermore does not contain direct obligations for the diamond industry. It is paralleled by a system of self-regulation for the diamond industry under the auspices of the World Diamond Council.³⁷

3.3 Enforcement

Notwithstanding the fact that the KPCS is not legally binding, participation in the process is dependent on participants' implementation of minimum standards formulated by the KPCS. These are aimed at ensuring a sufficient quality and compatibility of national systems of internal controls.³⁸ If states do not meet these minimum standards, they can be suspended from the Process.³⁹ Suspension is a matter that should not be taken too lightly, since participants in the KPCS, accounting for 99.8 % of the worldwide production in rough diamonds and including all the major diamond trading countries, are not allowed to trade diamonds with non-participants or with participants that fail to satisfy the scheme's basic requirements.⁴⁰ There have been several cases in which states were temporarily suspended from the KPCS, the most recent being the Central African Republic after the 2013 *coup d'état*.⁴¹

³⁵ See KPCS, Section VI(5) and the 2003 KP Administrative Decision Rules of Procedure of meetings of the plenary and its AD HOC Working Groups and Subsidiary bodies (Johannesburg) for more specific rules regarding decision-making (Rule 42) and on participation of observers (Rule 45).

³⁶ See generally on consensus decision-making and how it operates within the KPCS, Grant (2013). It should however be noted that the author does not properly distinguish between participants (which have a formalized role in decision-making) and observers (which do not have a formal role in decision-making).

³⁷ The World Diamond Council has been established in 2000 with the purpose of 'represent[ing] the diamond industry in the development and implementation of regulatory and voluntary systems to control the trade in diamonds embargoed by the United Nations or covered by the Kimberley Process Certification Scheme'. See <http://www.worlddiamondcouncil.com> for more details.

³⁸ These minimum requirements include the following commitments: to establish a system of internal controls designed to eliminate the presence of conflict diamonds from shipments of rough diamonds imported into and exported from its territory; to designate an Importing and an Exporting Authority(ies); to ensure that rough diamonds are imported and exported in tamper resistant containers; as required, amend or enact appropriate laws or regulations to implement and enforce the Certification Scheme and to maintain dissuasive and proportional penalties for transgressions; and to collect and maintain relevant official production, import and export data, and collate and exchange such data with other participants and the KPCS. See KPCS, Section IV(a).

³⁹ Guidelines for the Participation Committee in Recommending Interim Measures as regards Serious Non-compliance with KPCS Minimum Requirements, adopted on 5 November 2008. www.kimberleyprocess.com. Accessed 14 October 2015.

⁴⁰ See <http://www.kimberleyprocess.com>, 'About' section.

⁴¹ See <http://www.kimberleyprocess.com>. Other cases of suspension include the Republic of the Congo in 2004 and Venezuela in 2008. The latter was a case of self-suspension. See Grant (2012), p. 165 for more information.

The KPCS has introduced a peer-review system in order to monitor compliance by participating states of the minimum standards. Review visits are regularly sent to the participating states, consisting of representatives of other participating states, the diamond industry and NGOs. In cases of suspicion of non-compliance with the KPCS standards, the Plenary can further decide to conduct a review mission. Even though participants formally have to consent to the carrying out of such a mission,⁴² this is primarily in their own interest since it enables them to demonstrate compliance with the requirements of the scheme and thereby to prevent suspension. For the success of the KPCS in general the peer-review is an important asset, since it functions both as an early-warning system and as a means to determine non-compliance. In both situations, follow-up action can be taken, including a request to the respective government to formulate an action plan to ensure compliance.

Notwithstanding the existence of these internal enforcement mechanisms, one of the most important enforcement mechanisms of the KPCS is perhaps situated outside the initiative itself. As indicated at the beginning of this section, the UN Security Council has regularly imposed sanctions against states where diamonds financed the armed conflict, referring to implementation of a reliable Certificate of Origin system as a means for the government to resume diamond exports. In Liberia, for example, the Security Council demanded that the government led by Charles Taylor ‘cease all direct or indirect import of Sierra Leone rough diamonds which are not controlled through the Certificate of Origin regime of the Government of Sierra Leone’ and called upon the government ‘to establish an effective Certificate of Origin regime for trade in rough diamonds that is transparent and internationally verifiable’.⁴³ In later resolutions, the Council explicitly referred to implementation of the KPCS as a means to expedite the lifting of the sanctions for diamonds traded by the government.⁴⁴ It is therefore clear that the KPCS and the sanctions reinforce each other. Whereas the KPCS was first developed to assist in the implementation of these sanctions, these same sanctions assist in enforcing the KPCS in specific instances.

4 OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas

The Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas was developed by the Organization for Economic Co-operation and Development (OECD) to address the responsibility of corporations in respect of the trade in conflict minerals. The Guidance was adopted in 2011, covering the three categories of minerals that are mostly associated with armed conflict. These are tin, tantalum and tungsten, including their ores or mineral

⁴² See the 2003 Administrative Decision on the Implementation of Peer Review in the KPCS. <http://www.kimberleyprocess.com>, documents section. Accessed 17 April 2015. The peer review system has been revised several times, the last revision dates from 2012.

⁴³ UN Security Council Res. 1343 (2001), operative paras. 2(c) and 15.

⁴⁴ See e.g. UN Security Council Res. 2045 (2012) on Côte d’Ivoire.

derivatives.⁴⁵ The Guidance was subsequently amended in 2012 to cover gold sources.

The Guidance is embedded in a broader framework of instruments adopted by the OECD in the field of International Investment and Multinational Enterprises. Most importantly, the Guidance is an implementation tool for the supply chain due diligence requirements set out in the OECD Guidelines for Multinational Enterprises. The 2011 revised Guidelines contain recommendations on responsible business conduct for multinational companies, including recommendations on supply chain due diligence for the purpose of helping companies ‘to identify, prevent and mitigate actual and potential adverse impacts [...] and account for how these impacts are addressed’.⁴⁶ The Due Diligence Guidance aims to provide companies sourcing minerals from states struggling with armed conflicts or insecurity the means to carry out a supply chain due diligence assessment as recommended by the Guidelines. The following sub-sections discuss the objectives, means of operation and enforcement mechanisms of the OECD Guidance in more detail.

4.1 Objectives

The OECD Guidance aims to ensure that companies procuring minerals from conflict-affected and high-risk areas ‘respect human rights, avoid contributing to conflict and successfully contribute to sustainable, equitable and effective development’.⁴⁷ Notwithstanding these rather lofty goals, the Guidance is first and foremost a practical instrument, designed to help companies to set up procedures to assess the risks of their activities contributing to armed conflict or human rights abuses and to find adequate responses to eliminate these risks.

The Guidance addresses several types of risks. First of all, it aims to prevent companies sourcing from, or operating in conflict-affected and high-risk areas from complicity to *serious abuses* associated with the extraction, transport or trade in minerals. The Guidance outlines the following forms of serious abuses: any forms of torture, cruel, inhuman or degrading treatment, any forms of forced or compulsory labour, the worst forms of child labour, other gross human rights violations and abuses such as widespread sexual violence, and war crimes or other serious violations of international humanitarian law, crimes against humanity or genocide.⁴⁸ In other words, the Guidance aims to ensure that neither companies engaged in the minerals sector in fragile states or their business partners are in any way involved in the violation of fundamental human rights or the commission of international crimes.

⁴⁵ Recommendation of the OECD Council on Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, adopted on 25 May 2011 (amended on 17 July 2012), Doc. C(2012)93.

⁴⁶ OECD (2011), Chapter II, para. A 10.

⁴⁷ Ibid., especially para. 1.

⁴⁸ OECD (2011), Annex II.

Secondly, the OECD Guidance seeks to prevent companies from providing support—either direct or indirect—to non-state armed groups or public or private security forces that illegally control mining sites or transportation routes. In other words, it seeks to prevent the trade in conflict minerals, understood rather broadly as minerals exploited by armed militias, either by private armed bands or by contingents of the national army. It is here that the objectives of the OECD Guidance coincide with those of the KPCS.

Finally, the Guidance aims to prevent companies from engaging in bribery or fraudulent misrepresentation of the origin of minerals. The Guidance requires companies to support efforts to eliminate money laundering and to ensure that all taxes, fees and royalties related to mineral extraction, trade and export are paid to the government and disclosed in accordance with the principles of the Extractive Industries Transparency Initiative (EITI), a voluntary instrument that requires governments to report on revenues obtained from concessions and companies to report on their payments to governments.⁴⁹ In this way, the OECD Guidance seeks to prevent illegal taxation in all its forms by non-state armed groups and criminal bands in conflict-affected and high-risk areas. In addition, it aims to combat government corruption.

It can be concluded from the above that the objectives of the OECD Guidance are broad, in the sense that the Guidance encompasses issues that are not directly related to the problem of conflict financing. It also seeks to address the wider responsibility of mineral companies and their policies on society in conflict-affected and high-risk areas, in particular with the provisions on serious abuses and bribery. This does not imply that the OECD Guidance is an instrument designed for the promotion of responsible business practices generally. It clearly sets a very high standard with regard to abuses in the minerals sector that are not directly related to the issue of providing support to armed groups. By addressing only violations of fundamental human rights and the commission of international crimes, the relevance of the Guidance is limited to addressing only the most serious irregularities in the extractive sector.

4.2 Means of Operation

The OECD Guidance seeks to realise its objectives by establishing a framework for corporate due diligence, defined as ‘an on-going, proactive and reactive process through which companies can ensure that they respect human rights and do not contribute to conflict’.⁵⁰ This process operates on the basis of a five-step approach to due diligence. The basic components of this approach are the establishment of strong company management systems, the identification and assessment of supply chain risks, the design and implementation of strategies to respond to identified

⁴⁹ For more details on the EITI Initiative, see the Extractive Industries Transparency Initiative, *The EITI Standard*, EITI International Secretariat (May 2013). <http://eiti.org>. Accessed 14 October 2015. See also Dam-de Jong (2015a), Chapter 8.

⁵⁰ OECD (2013), p. 13.

risks, the performance of independent third-party audits, and annual reporting on supply chain due diligence.

The Guidance therefore requires companies first of all to implement internal policies aimed at introducing transparency in the minerals supply chain. The Guidance requires downstream companies, referring to the supply chain from smelters/refiners to retailers, to obtain information from their suppliers about the origin of the minerals purchased by them, while upstream companies, referring to the supply chain from the mine to smelters/refiners, should provide such information to their business partners. In addition, the Guidance builds in safeguards, including independent audits in order to ensure the credibility of the information relied on by downstream companies, as well as the information provided to them by upstream companies.

The OECD Guidance further contains two supplements which provide specific guidance to companies on how to implement the five steps referred to above in their particular sectors. One supplement focuses on supply chain due diligence for companies trading in tin, tantalum and tungsten, while the other focuses on gold. Without entering into technicalities, it is important to note that the Guidance requires companies to suspend or discontinue their contracts with their suppliers once they identify a particular risk.⁵¹

4.3 Enforcement

As an implementing tool for the due diligence requirements set out in the OECD Guidelines for Multinational Enterprises, the Guidance can benefit from the institutional structure established for these Guidelines, including its dispute settlement mechanism. Pursuant to the OECD Guidelines, states are to set up a system of so-called National Contact Points (NCPs). One of the principal aims of these NCPs is to increase the effectiveness of the Guidelines by resolving issues that arise in relation to their implementation.⁵² These issues can be raised by all the interested parties, including worker organizations and non-governmental organizations, resulting in a decision by the NCP on whether the company complained of has complied with its responsibilities under the Guidelines.⁵³ Even though the NCPs cannot take binding decisions and their principal task is to mediate in disputes rather than to settle them, the dispute resolution mechanism has proven to be a valuable resource for non-governmental organizations challenging the human rights policies of individual companies.

Most of the cases regarding due diligence in the extractives sector NCPs have dealt with involve corporate violations outside situations of armed conflict.⁵⁴ Cases dealing specifically with conflict minerals predate the adoption of the Guidance and

⁵¹ OECD (2013), Annex 2, paras. 2, 4, 10 and 14.

⁵² OECD (2011), p. 68, Section I(1).

⁵³ OECD (2011), p. 72, Section C.

⁵⁴ See e.g. Final Statement by the Canadian National Contact Point for the OECD Guidelines for Multinational Enterprises: Canada Tibet Committee v. China Gold International Resources, 1 April 2015; Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: IAC & WDM vs. GCM Resources, 20 November 2014.

the 2011 revision of the Guidelines. Most of these were unsuccessful,⁵⁵ with one notable exception. This concerns the complaint brought before the British NCP by the NGO Global Witness against Afrimex, a British mineral trading company operating in the DR Congo. The complaint accused Afrimex of paying taxes to rebel forces in the Democratic Republic of Congo (DRC) and of practising insufficient due diligence in the supply chain, sourcing minerals from mines that use child and forced labour.⁵⁶ Even though this complaint also predates the adoption of the Guidance and the 2011 revision of the Guidelines,⁵⁷ the UK National Contact Point applied the Guidelines very progressively, taking into account new developments in corporate responsibility for human rights abuses emanating from the 'Protect, Respect and Remedy Framework' developed by John Ruggie, Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises.⁵⁸ The NCP concluded that Afrimex failed to fulfil the due diligence requirements, because (1) it relied exclusively on statements by its suppliers on the origin of the minerals purchased and (2) it 'did not take steps to influence the supply chain and to explore options with its suppliers exploring methods to ascertain how minerals could be sourced from mines that do not use child or forced labour or with better health and safety'.⁵⁹ It is clear from the statement issued by the British NCP that supply chain due diligence requires companies to actively monitor the supply chain and to search for ways to improve conditions in the supply chain.

The *Afrimex* case is important from the point of view of standard-setting. Yet, it also signals the shortcomings of the OECD framework in terms of enforcement. In this particular case, Afrimex' statements that it had stopped trading in minerals from the DRC after September 2008 were sufficient for the NCP to end its inquiries.⁶⁰ The possibilities for NCPs to 'enforce' their recommendations largely depend on

⁵⁵ These cases were brought by NGOs to several NCPs, following a 2002 report by the UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the DRC, naming several companies considered to be violating the OECD Guidelines. In most of these cases, the NCP either argued that the claims were not sufficiently substantiated or concluded that the UN Panel had resolved the case and that there was therefore no need for the NCP to reopen it. The UN Panel of Experts has indeed been engaged in dialogue with the companies named by them and referred some situations directly to the relevant NCPs for follow-up and monitoring. See the Final report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, UN Doc. S/2002/1146, 16 October 2002; and Final report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, UN Doc. S/2003/1027, 23 October 2003.

⁵⁶ See Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) LTD, Summary of NCP Decision, 28 August 2008.

⁵⁷ It is important to note that the previous version of the Guidelines for Multinational Enterprises contained a rudimentary provision on supply chain due diligence, stating merely that '[e]nterprises should encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of corporate conduct compatible with the Guidelines'. See OECD (2000), Chapter II, para. II.10.

⁵⁸ See <http://business-humanrights.org/>. Accessed 14 October 2015.

⁵⁹ Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) LTD, Summary of NCP Decision, 28 August 2008, paras. 51 and 62.

⁶⁰ See http://oecdwatch.org/cases/Case_114. Accessed 14 October 2015.

national legislation. The Canadian NCP, for example, has been given discretion to apply sanctions to companies that do not cooperate in the dispute settlement procedure. Under the 2014 Enhanced Corporate Social Responsibility Strategy to Strengthen Canada's Extractive Sector Abroad, companies that do not participate in a procedure before the NCP face withdrawal of advocacy support abroad by the Canadian government.⁶¹ In April 2015, the Canadian NCP applied these sanctions for the first time in a case involving a gold mine in Tibet.⁶² For the credibility of the NCP system, it would be wise for other states to follow this example. Even though the OECD Guidelines and related instruments are voluntary, OECD member states have stated their commitment to promote the guidelines. This implies that they should at least refrain from providing active economic diplomacy services to companies that clearly act in violation of the guidelines.

In addition to the NCPs as internal enforcement mechanisms, reference can also be made to enforcement mechanisms that are situated outside the OECD framework. A first such mechanism is the UN Security Council, which endorsed the OECD Guidance as a means of appraising corporate due diligence for the purposes of stopping the trade in conflict minerals from the DR Congo.⁶³ In addition to its general endorsement, the Security Council took an important step by mandating the DR Congo Sanctions Committee to take the exercise of due diligence by a company into account when deciding to place it on the sanctions list. In other words, companies operating in or sourcing from the DR Congo risk to be subjected to UN sanctions when not adhering to the approach set out in the OECD Guidance. Even though its effect is restricted to the DR Congo, this is a strong enforcement mechanism.

National legislation giving effect to the Due Diligence Guidance can be regarded as a second external enforcement mechanism. Section 1502 of the Dodd Frank Act requires companies listed on Wall street to determine whether their products contain minerals originating in the DR Congo or neighbouring countries and to report this to the Securities and Exchange Commission.⁶⁴ Even though this is merely a reporting obligation and, again, restricted to the DR Congo and surrounding countries, it does require companies to exercise some basic form of due diligence. It is therefore an important tool in enhancing due diligence efforts for the mining industry.⁶⁵ Other

⁶¹ Canada's Enhanced Corporate Social Responsibility Strategy to Strengthen Canada's Extractive Sector Abroad, 14 November 2014, pp. 12–13, <http://www.international.gc.ca/trade-agreements>.

⁶² Final Statement by the Canadian National Contact Point for the OECD Guidelines for Multinational Enterprises: Canada Tibet Committee v. China Gold International Resources, 1 April 2015.

⁶³ See UN Security Council Res. 1952 (2010), in which the SC referred to a set of guidelines developed by its Group of Experts on the DR Congo in collaboration with the OECD and to 'equivalent guidelines', thereby implicitly referring to the OECD Guidance.

⁶⁴ Dodd Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, adopted on 21 July 2010.

⁶⁵ It is relevant to note here that the US Dodd Frank Act has been criticized in the media for establishing a 'de facto embargo' on minerals from the Great Lakes Region. While it is true that an unintended by-effect of the adoption of the Dodd Frank Act is that a number of companies have taken away their business from the DR Congo, it is also true that the Act, as part of a broader international legal and political framework, has been an important driver for reforms in the DR Congo's mining sector. The different due diligence initiatives have supported the efforts of the government of the DR Congo and neighbouring countries to set up systems for the bagging and tagging of minerals and for the certification of conflict-free mines. See on this the Final Report of the Group of Experts submitted in accordance with

important home states of companies active in the extractive sector are likewise developing legislation to give effect to the OECD Guidance. These include the European Union and—non-OECD member—China.⁶⁶ These developments provide further leverage to improving human rights due diligence by companies.

5 Contribution of the Initiatives to Stopping the Trade in Conflict Resources

The KPCS and the OECD Guidance are both instruments that have been developed to stop the trade in conflict resources. Eliminating the trade in natural resources exploited by armed groups is the sole purpose of the KPCS, while it ranks among the principal objectives of the OECD Guidance. Both instruments aim to realise this objective by introducing tracking and tracing systems that permit to identify the source of the minerals. In other words, both instruments opt for increasing transparency in the trade in natural resources as the principal means to stop trade in conflict resources.

Even though the objectives (increasing transparency) and principal approach (tracking the origin of particular natural resources) of these instruments largely coincide, their nature as well as their methods differ from each other. The KPCS is a certification scheme to be implemented primarily by the participating states and operating on the basis of a system of import and export permits. In contrast, the OECD Guidance is a risk management tool to be implemented by companies, requiring them to integrate due diligence processes into their management plans. Where the KPCS therefore primarily addresses states, requiring them to put in place a system of internal and external controls, the OECD Guidance primarily addresses companies, requiring them to put in place control systems in their corporate management plans.

A further difference relates to the methods used by the instruments to establish the origin of particular natural resources. The KPCS has developed tools to identify the origin of diamonds based on their specific characteristics. In cases of doubt regarding the origin of imported diamonds, their origin can therefore be established on the basis of a technical assessment relating to the characteristics of the diamonds themselves. This system strengthens the other mechanisms of the process, relating to internal controls and import and export permits. No such system exists yet for the

Footnote 65 continued

paragraph 5 of Security Council resolution 2136 (2014), UN Doc. S/2015/19, 12 January 2015, paras. 156–159. Even though there are still many obstacles to overcome, it is important not to give a negative value judgment of the due diligence initiatives too early, based on problems encountered in the first implementation phase.

⁶⁶ Draft Regulation of the European Parliament and of the Council setting up a Union system for supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high-risk areas, COM (2014) 111 final, 5 March 2014; and China Chamber of Commerce of Metals, Minerals and Chemicals Importers & Exporters (CCCIMC), Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains. For more information on the Chinese initiative. <http://www.oecd.org/daf/inv/mne/CCCIMC-Guidelines-Project%20Brief%20-%20EN.pdf>. Accessed 14 October 2015.

minerals covered by the OECD Guidance.⁶⁷ The Guidance therefore has to rely solely on the accuracy of supply chain due diligence, i.e. a documentary trail provided by companies throughout the supply chain allowing to trace the origin of the minerals, backed up by independent audits.⁶⁸

There are however also striking similarities between the two instruments. First of all, it is important to note that even though the two instruments have been developed through partnerships between states, companies and NGOs, they are largely state centred. The KPCS relies principally on implementation of the requirements by 'participants', i.e. diamond producing and consuming states. In addition, decisions within the scheme are also taken by participants, while the diamond industry and NGOs have observer status. The OECD Guidance, even while it is designed for implementation by companies directly, also relies to a large extent on states to promote the Guidance. Upon its approval, the OECD Council recommended that members and non-members adherent to the Declaration on Investment and Multilateral Enterprises 'actively promote the observance of the Guidance by companies', that they 'take measures to actively support the integration into corporate management systems' of the framework, and that they 'ensure the widest possible dissemination of the Guidance and its active use by other stakeholders including professional associations, financial institutions, and civil society organizations'.⁶⁹ This can be interpreted as a call upon OECD member states to adopt relevant national legislation and/or to provide their companies with the necessary direction to implement the requirements formulated by the Guidance. The reporting obligation for companies operating in or sourcing minerals from the DR Congo, as formulated in Section 1502 of the US Dodd Frank Act, is one of the most far-reaching examples of how this recommendation could be implemented.

In addition, it is important to emphasise that both instruments are voluntary in nature and rely on commitments entered into by the participants. This is clear from the basic documents relating to the initiatives, which both formulate recommendations on measures that participants *should* take. This voluntary approach does not necessarily affect their effectiveness, since these instruments also contain mechanisms, both internal and external, to ensure adherence to their principles. These include peer review and suspension from the process (internal) and the imposition of sanctions by the UN Security Council (external) for the KPCS as well as the system of NCPs (internal) and Security Council sanctions (external) for the OECD Guidance. Furthermore, both initiatives are backed up by national legislation. For

⁶⁷ In 2014, the International Conference for the Great Lakes Region adopted a Regional Certification Mechanism that should perform these functions, but this mechanism has been developed for the Great Lakes region only.

⁶⁸ The OECD and the International Conference on the Great Lakes Region (ICGLR) have developed more refined supporting mechanisms for the Great Lakes Region, including a system of 'bagging and tagging', meaning that the minerals are checked when they leave the mine and transported in closed bags to refineries. See the OECD and ICGLR report 'Due Diligence Guidance: towards conflict-free mineral supply chains', a simplified guide for companies. <http://www.oecd.com>. See also the ICGLR certification manual, adopted in September 2014. <http://www.icglr.org>.

⁶⁹ See the Recommendation of the OECD Council on Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, adopted on 25 May 2011 (amended on 17 July 2012), Doc. C(2012)93, especially paras. 1–3.

the KPCS, this is primarily the legislation that participants adopt in order to implement the minimum standards of the scheme. For the OECD Guidance, initiatives like the US Dodd Frank Act as well as the legislation that is currently developed in the EU and China provide important incentives to companies to implement the OECD Guidance.

Both instruments therefore have mechanisms to achieve their purposes. The question that remains is whether these instruments are actually successful in stopping the trade in conflict resources. For the OECD Guidance, this is difficult to assess since there are no empirical data available yet. For the KPCS it is estimated that the trade in conflict diamonds has been reduced to approximately 1 % of total diamond sales.⁷⁰ Smuggling practices and fraud are major vulnerabilities for both instruments.⁷¹ This is especially so for the KPCS, since this system relies entirely on certificates issued by national authorities, with peer-review as the only guarantee against misconduct. The independent audit introduced by the OECD Guidance should provide guarantees to prevent fraud, but there the difficulty is that it is problematic to establish the exact origin of the minerals. In order to be truly effective, it should therefore be backed up by a certification system for minerals. Such a system has been developed for the African Great Lakes region, but it would be necessary to expand this initiative to other conflict-affected and high-risk areas.

6 Contribution of the Initiatives to Improving Natural Resources Governance in War-Torn States

The KPCS and the OECD Guidance were originally developed against the backdrop of resource-related armed conflicts, which explains their emphasis on establishing mechanisms to prevent armed groups from trading in natural resources. However, in order to effectively stop natural resources from financing armed conflicts, it is also essential to improve the overall governance of natural resources within states. In many of the armed conflicts financed by natural resources, inadequate structures for the management of natural resources provided armed groups the opportunity to gain control over natural resources.⁷² In addition, grievances over the management of natural resources are often among the root causes of these conflicts.⁷³ These grievances may relate to the effects of natural resources exploitation on the living environment of communities or to the misdistribution of the profits obtained from natural resources exploitation.⁷⁴

The current section aims to assess the substantive contribution of the KPCS and the OECD Guidance to improving the governance of natural resources in conflict-affected

⁷⁰ See <http://www.diamondfacts.org>.

⁷¹ See e.g. <http://www.kimberleyprocess.com/en/enforcement> for the KPCS; and Final report of the Group of Experts on the DR Congo submitted in accordance with paragraph 5 of Security Council resolution 2136 (2014), paras. 156–215 for due diligence in the Great Lakes Region.

⁷² Ross (2004a).

⁷³ Ross (2004b), p. 41.

⁷⁴ Ibid.

states. A first issue of concern in this respect is the extent to which the instruments actually address malpractices by the domestic government. It is relevant to note here that the scope of the instruments differs in important respects. Both instruments aim to eliminate the trade in particular natural resources that contribute to financing or fuelling armed conflicts. The overall purpose of the KPCS is limited in this respect to stopping the trade in diamonds by armed groups and their allies. In other words, the KPCS does not cover the trade in diamonds by abusive governments. In contrast, the stated objective of the OECD Guidance is much broader. It includes the elimination of the trade in natural resources that contribute to financing or fuelling armed conflicts, while it also seeks to reduce the contribution of the covered minerals to severe human rights abuses and the commission of international crimes, without specifying the source of the violations. In other words, the OECD Guidance would cover incidents like the one in Zimbabwe, where government security forces committed severe human rights violations in order to secure the diamond mines, an incident that has seriously reduced the credibility of the KPCS. From this perspective, the OECD Guidance's contribution to improving the governance of natural resources within states is potentially greater. It does not only address the challenges posed by armed groups undermining the government's position, but also abuses committed by the government itself.

In addition, it is relevant to assess the contribution of the instruments to promoting sustainable and inclusive management of natural resources in light of the legal framework set out in Sect. 2 of this article. As regards sustainability, the answer can be very short. Neither of the instruments contains measures aimed at protecting the environment. This is largely due to their limited objectives, i.e. stopping the trade in conflict diamonds for the KPCS and preventing companies from violating human rights and contributing to armed conflicts for the OECD Guidance. However, from the perspective of addressing grievances related to environmental pollution and degradation, it is a missed opportunity.

The question of whether these instruments promote inclusive natural resources management can best be assessed by looking at the methods employed by the KPCS and the OECD Guidance to enhance external transparency for citizens.⁷⁵ For the OECD Guidance these include a requirement for companies to ensure that all taxes, fees and royalties are paid to the government and that they are disclosed in accordance with the principles formulated by the Extractive Industry Transparency Initiative (EITI), a voluntary instrument that aims to eliminate corruption in the extractive sectors. In addition, the OECD Guidance requires companies to submit their administration to an independent audit and to publish their due diligence policy as part of their annual report. The KPCS does not contain such requirements, but it does require participating states to report on the volume of their diamond trade. Indirectly, this requirement permits the general public to obtain knowledge of government revenues from the diamond industry. Arguably, data on the volume of trade in the natural resources covered by these instruments may help to start national processes aimed at increasing accountability for governments. Furthermore, the

⁷⁵ A distinction can be made between external transparency (towards external actors) and internal transparency (towards those actors that are actively engaged in the initiative). For a useful categorisation of transparency, see OECD (2012).

active participation of NGOs in the process ensures a degree of public scrutiny, not in the least because these NGOs directly inform the general public of irregularities in the process. Both instruments therefore contribute in their own way to promoting inclusive natural resources management. They do this notably by providing information to citizens, which may ultimately enhance accountability. Although modest, this in itself is a useful contribution to improving the governance of natural resources within states.

7 Concluding Remarks

This article set out to answer two questions: which mechanisms do the KPCS and the OECD Guidance establish to stop the trade in conflict resources; and to what extent do they contribute to improving the governance of natural resources as a tool for the prevention of new conflicts? In relation to the first question, it is important to emphasise that this article does not consider these instruments as the solution to all problems related to conflict resources. Clearly they are not. The objectives of both instruments are limited and their implementation is fraught with difficulties. Nevertheless, the purpose of this article was principally to focus on their merits and to examine what these instruments can do.

This article demonstrated that both instruments establish mechanisms allowing to trace the origin of minerals. Whereas the KPCS relies principally on certificates issued by state authorities for exported diamonds, the OECD Guidance relies on a documentary trail provided by companies throughout the supply chain. This article further argued that, even though the KPCS and the OECD Guidance do not impose legally binding obligations upon their participants, there are both internal and external possibilities to enforce these instruments, implying that they are strongly embedded in a broader legal and policy framework.

It is furthermore relevant to note that both instruments aim to enhance transparency in the supply chain. Whereas the KPCS focuses only on the first part of the supply chain, i.e. the trade in rough diamonds, the OECD Guidance covers the whole supply chain, from mines to consumer products. Both instruments contain measures that contribute to improving public administration of the proceeds of natural resources, notably by increasing transparency in payments. In this way, the instruments indirectly contribute to improving the governance of natural resources in conflict regions and reflect a growing consensus on how these natural resources should be managed, at least for the purposes of conflict resolution. In this way, the KPCS and the OECD Guidance can be regarded as part of broader developments both in international law and politics towards more transparent and inclusive natural resources management.

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