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## A CONFLICT OF DIAMONDS:

### THE KIMBERLEY PROCESS AND ZIMBABWE'S MARANGE DIAMOND FIELDS

*Julie Elizabeth Nichols\**

#### ABSTRACT

In 2003, the Kimberley Process Certification Scheme ("KPCS") entered into force as a novel approach to regulate the diamond industry and combat associated atrocities regarding "conflict diamonds." Fueled by the recent history of bloody civil wars, and graphically publicized slaughters and amputations by rebel groups funded by African diamonds, diamond-producing nations, the diamond industry's leaders and human rights groups created a process whereby "conflict diamonds" are identified and systematically excluded from the legitimate trade. However, the KPCS definition of "conflict diamond" has proved unacceptably restrictive. Diamonds from Zimbabwe's Marange fields are mined using systematic relocation, mass murdering campaigns and, recently discovered, torture camps. Yet, because Zimbabwe's "legitimate" government, not a rebel group, controls the Marange mines, the KPCS has certified these diamonds as conflict-free, fit for international trade. To stop this unacceptable situation, in which perpetrators of systematic and violent human rights abuses benefit from their crimes, the KPCS's definition of "conflict diamonds" must change. The diamond industry must support such a change by refusing to allow trade of any diamond mined through such systematic abuse. If these changes are not adopted, the United States must use all additional means, including legislative boycotts and civil suits, to stop the atrocities occurring today in Zimbabwe's Marange diamond fields.

Over the past few years, the world became quite familiar with the term "blood diamonds." Recent commercials proclaim diamond retailers who exclude the middleman offer better quality, less expensive stones that come with guarantees about their safe, blood-free origin.<sup>1</sup> When

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Valentine's Day comes around, sparkling stones with "Conflict-Free" certificates receive attention from the more conscientious consumers. Hollywood informed audiences about the atrocities of Sierra Leone's diamond-fueled civil war through Leonardo DiCaprio's 2006 movie *Blood Diamond*.<sup>2</sup> The movie ends with a conference of concerned parties seeking an end to the problem of blood diamonds. The film's conference is a reference to an actual meeting, which eventually led to the creation of the Kimberley Process Certification Scheme – and the "Conflict-Free" certificates that received so much positive attention.<sup>3</sup> The world knows now about blood diamonds and how countries have eliminated them from their stores – or so it appears on the surface.

*Blood Diamond's* final scenes depict the first meeting of what became the Kimberley Process ("KP"), the watchdog organization designed to prevent the sale of "conflict diamonds." The KP is a tri-branch organization, consisting of participating states ("Participants"), which make all official decisions, and representatives of both the diamond industry and of civil society – NGOs and activist groups – who serve as official observers.<sup>4</sup> The KP regulates aspects of the diamond industry through the Kimberley Process Certification Scheme ("KPCS"),<sup>5</sup> which is intended to eliminate conflict diamonds from the market while preserving the legitimate diamond trade.<sup>6</sup> The KPCS identifies and certifies rough diamonds that can legitimately enter the market.<sup>7</sup> It prohibits Participants from importing or exporting "conflict diamonds," which it very specifically defines,<sup>8</sup> and from trading any rough diamonds with non-participating states.<sup>9</sup> As more states join, fewer markets exist for conflict diamonds and, in theory, such stones

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International Law and Policy for their encouragement and assistance throughout the process of preparing this paper.

1. See, e.g., Diamond FAQs, THE SHANE COMPANY, <http://www.shaneco.com/Jewelry/DiamondFAQ.htm>.

2. BLOOD DIAMOND (Warner Bros. 2006).

3. KIMBERLY PROCESS, <http://www.kimberleyprocess.com:8080/web/kimberley-process/kp-basics> [hereinafter KP website].

4. See *id.*; Liz Ford, *Global Witness Quits Kimberley Process in Protest at "Diamond Laundering,"* GUARDIAN (Dec. 5, 2011), <http://www.guardian.co.uk/globaldevelopment/2011/dec/05/kimberley-process-global-witness-withdraws> [hereinafter Ford].

5. See Kimberly Process Certification Scheme, Nov. 2002 [hereinafter KPCS], available at <http://www.kimberleyprocess.com/> (follow "Documents" hyperlink; then follow "Core Documents" hyperlink; then follow "KPCS Core Document" hyperlink).

6. Jolyon Ford, *The Kimberley Process and Diamond Demand*, AFRICAN ARGUMENTS (Dec. 5, 2011), <http://africanarguments.org/2011/12/05/the-kimberley-process-and-diamond-demand-%E2%80%93-by-jolyon-ford-at-oxford-analytical/>.

7. KP Website, *supra* note 3.

8. KPCS, *supra* note 5, § I.

9. *Id.* § III(c).

will eventually no longer be sold at all.<sup>10</sup> In many ways, it has been very successful; conflict diamonds now make up less than one percent of all diamonds on the legitimate market.<sup>11</sup>

Yet that very specific definition of conflict diamond has caused a serious dilemma. According to the KPCS, "conflict diamonds" are "rough diamonds used by *rebel* movements or their allies to finance conflict aimed at undermining legitimate governments."<sup>12</sup> In Zimbabwe, there are no rebel movements campaigning to overthrow the government, therefore there can be no conflict diamonds in that country. However, diamond miners suffer gross human rights violations on a daily basis.

On August 8, 2011, the BBC program "Panorama" aired a documentary disclosing torture camps run by Zimbabwean police and military.<sup>13</sup> Witnesses described one camp, known as "Diamond Base," where police send miners who want a larger profit share or villagers caught mining for their families.<sup>14</sup> Men receive severe beatings three times a day and women are raped repeatedly.<sup>15</sup> Former paramilitary police officers describe handlers directing their dogs to maul prisoners and local doctors report frequently treating such wounds.<sup>16</sup> Apparently, these camps have been operating at least since late 2008.<sup>17</sup> Though this BBC documentary may have shocked the public, non-governmental organizations ("NGOs") that have been monitoring Zimbabwe's diamond mines for years were not even surprised.<sup>18</sup> They have been reporting similar human rights abuses since 2006.<sup>19</sup>

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10. Daniel Feldman, *Conflict Diamonds, International Trade Regulation, and the Nature of Law*, 24 U. PA. J. INT'L ECON. L. 835, 867 (2003).

11. See KP Website, *supra* note 3.

12. KPCS, *supra* note 5, § I (emphasis added).

13. See *Zimbabwe Torture Camp Discovered*, BBC NEWS (Aug. 8, 2011), <http://www.bbc.co.uk/news/world-africa-14445087>; *Victims Speaking of Massacre in Zimbabwe Diamond Fields*, BBC NEWS (Aug. 8 2011), [http://news.bbc.co.uk/panorama/hi/front\\_page/newsid\\_9557000/9557246.stm](http://news.bbc.co.uk/panorama/hi/front_page/newsid_9557000/9557246.stm).

14. Hilary Andersson, *Marange Diamond Field: Zimbabwe Torture Camp Discovered*, BBC NEWS (Aug. 8, 2011), <http://www.bbc.co.uk/news/world-africa-14377215> [hereinafter Andersson].

15. *Id.*

16. Alan Cowell, *Britain Urges Zimbabwe to Examine Diamond 'Torture Camp' Report*, N.Y. TIMES (Aug. 8, 2011), <http://www.nytimes.com/2011/08/09/world/africa/09zimbabwe.html>.

17. Andersson, *supra* note 14.

18. *Chiadzwa Torture Camps Exposed*, ZIMBABWEAN (Aug. 8, 2011) [hereinafter *Chiadzwa Torture Camp Exposed*], <http://www.thezimbabwean.co.uk/news/zimbabwe/51591/chiadzwa-torture-camps-exposed.html>.

19. *Id.*; Ford, *supra* note 4.

Thus, the situation in Zimbabwe brought the conflict diamond dilemma to a head: Zimbabwe is in compliance with the KPCS<sup>20</sup> and is yet responsible for gross human rights violations perpetrated for the sake of diamonds.

In response to Zimbabwe receiving official certification under the KPCS, the KP lost one of its most valued supporters.<sup>21</sup> In December 2011, Global Witness, an advocacy organization that helped establish the KPCS, left the coalition.<sup>22</sup> According to Annie Dunnebacke, senior campaigner for Global Witness, Zimbabwe is “the most egregious situation that we’ve seen since the Kimberley Process was launched, where diamonds have been fueling violence and human rights violations . . . and the Kimberley Process has really failed to deal with that effectively.”<sup>23</sup> A year earlier, Martin Rapaport, Chairman of the Rapaport Group and the associated Rapaport Diamond Trading Network (“RapNet”), which is the world’s largest diamond trading network, made similar statements.<sup>24</sup> He called the KP a scam and told the public that relying on KP Certificates alone does not guarantee that such diamonds have not been associated with human rights abuses.<sup>25</sup> Between them, these groups assert powerful arguments that the KP cannot, or will not, appropriately face the new realities of conflict diamonds.

Is it time to give up on the KPCS? Does Global Witness’s exit mark the end of a failed project? Or is abandoning the scheme altogether appropriate in light of its other successes? Regardless of how we answer those questions, the situation in Zimbabwe remains deeply troubling. Are these diamonds “conflict diamonds”? If not, are they not yet still covered in blood? Perhaps most importantly, notwithstanding the efficacy of the KPCS, what should the international community do with regard to these issues?

This article seeks to address these questions. The situation is extremely complex. Part I examines the KPCS in detail. It first looks at the historical context that led to the KPCS. Each branch of the KP –

20. *Zimbabwe: Official Lauds Diamond Trade*, N.Y. TIMES (Nov. 3, 2011), <http://www.nytimes.com/2011/11/03/world/africa/zimbabwe-official-lauds-diamond-trade-ruling.html?ref=diamonds>.

21. Andersson, *supra* note 14.

22. John Eligon, *Global Witness Quits Group on ‘Blood Diamonds’*, N.Y. TIMES, Dec. 6, 2011, at A5, available at <http://www.nytimes.com/2011/12/06/world/africa/global-witness-quits-group-on-blood-diamonds.html?ref=diamonds>.

23. *Id.*

24. Martin Rapaport, *Stop Buying and Selling Blood Diamonds: The Kimberley Process and World Diamond Council are a Sham*, DIAMONDS.NET (Jan. 29, 2010), <http://www.diamonds.net/News/NewsItem.aspx?ArticleID=29578>.

25. *Id.*

diamond-producing states, representatives of the diamond industry, and human rights activists – wanted this regulatory scheme for different, sometimes competing, reasons. These reasons provide insight into the KPCS's current situation. Part I continues by examining the original structure and requirements of the KPCS (subsection B) and the additions and developments it has achieved since (subsection C). Finally, subsection D illustrates some of the KP's current statistics.

Part II describes Zimbabwe and its Marange diamond fields. Initially, subsection A provides a brief description of Zimbabwe's complicated political history. This background is important to understand arguments regarding the KPCS's relation to the Marange diamonds. Part II then provides a chronology of events related to Marange – starting with the discovery in 2006 and continuing through the present.

Part III illustrates the interactions between Zimbabwe and the KP since 2006. It provides a timeline of the KP's actions and decisions through the November 3, 2011 decision to certify Marange diamonds. Additionally, Part III describes two arguments illustrating how Zimbabwe violated the KPCS.

Part IV presents two currently proposed “solutions”: to change elements of the KPCS so it can prohibit diamonds like those from Marange – diamonds that do not fit the definition of “conflict diamonds,” but cause the same harms – or to abandon the KPCS altogether and take another route to regulate the diamond industry and prevent financial gain from blood-covered diamonds.

Finally, Part V provides a brief analysis and recommendations, and Part VI presents a conclusion. There is no simple answer to this complicated problem. However, abandoning a regulatory scheme that, with all its shortcomings, has successfully prevented certain illicit diamonds from entering the market seems irresponsible. Further, as the 2012 Chair, the United States (“U.S.”) is now in a position to take a leading role and lead the KP in more constructive directions. The KPCS must learn from its own mistakes, observe other industries attempts to emulate it, and work with the diamond industry to establish additional workable compliance regulations. The KPCS failed to keep Marange diamonds off the market; yet that failure does not guarantee that it will inevitably fail forever.

## PART I: THE KIMBERLEY PROCESS CERTIFICATION SCHEME

In 2003, the KPCS entered into force as a unique<sup>26</sup> approach to regulating the diamond industry and combating associated atrocities regarding “conflict diamonds.”<sup>27</sup> Regulation of international industries – particularly the diamond industry, which has been notoriously “opaque” – is difficult and frequently unsuccessful.<sup>28</sup> However, at that particular time, with those particular players, everyone agreed on a regulatory scheme. They made compromises and though details proved more complex than ideal, the KPCS became a functional mechanism to regulate diamonds.

A. *Historical Context*

An unusual combination of factors led to unlikely partners meeting in Kimberley, South Africa for a common purpose.<sup>29</sup> Diamond-producing states, mainly African, had witnessed the devastation caused by diamond-fueled wars and wanted to find a politically acceptable end – an end that did not name governments as guilty partners.<sup>30</sup> At the same time, the diamond industry, dominated by De Beers, recognized its vulnerability to bad press; if consumers associated their product with the African wars the industry was doomed.<sup>31</sup> And human rights activists and related NGOs recognized this moment as the time to act and address as many of the diamond-related human rights abuses as possible.<sup>32</sup> These partners, therefore, each had different goals for what became the KPCS.<sup>33</sup>

B. *African States*

By 2000, the African diamond-producing countries wanted peace. Wars ravaged the African continent during the 1990s and early 2000s.<sup>34</sup>

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26. Ann C. Wallis, *Data Mining: Lessons from the Kimberley Process for the United Nations Development of Human Rights Norms for Transnational Corporations*, 4 NW. U. J. INT'L HUM. RTS. 388, 390 (2005).

27. *Id.* at 388; Lesley Wexler, *Regulating Resource Curses: Institutional Design and Evolution of the Blood Diamond Regime*, 31 CARDOZO L. REV. 1717, 1721 (2010).

28. Nikos Passas & Kimberly Jones, *Commodities and Terrorist Financing: Focus on Diamonds*, 12 EUR. J. CRIM. POL'Y & RES. 1, 6 (2006).

29. See Wallis, *supra* note 26, at 388.

30. Wexler, *supra* note 27, at 1732.

31. Wallis, *supra* note 26, at 399-400.

32. *Id.* at 401.

33. See Tracey Michelle Price, *The Kimberley Process: Conflict Diamonds, WTO Obligations, and the Universality Debate*, 12 MINN. J. GLOBAL TRADE 1, 32-33 (2003).

34. Shannon K. Murphy, *Clouded Diamonds: Without Binding Arbitration and More Sophisticated Dispute Resolution Mechanisms, the Kimberley Process Will Ultimately Fail*

Fourteen African nations were at war in 1996 and, in that year alone, these “account[ed] for more than half of all war-related deaths worldwide and result[ed] in more than eight million refugees, returnees and displaced persons.”<sup>35</sup> In many countries, rebel groups opposed to the then-current governments captured resource-rich areas and used diamonds to fund their violent campaigns. By 2003, an estimated 3.7 million Africans had died in diamond-funded wars and 6.5 million people were driven from their homes.<sup>36</sup> The most widely publicized of these wars occurred in Angola, Sierra Leone, and the Democratic Republic of the Congo (“DRC”).

### C. Angola

From its independence in 1975 until 1989, Angola fought a bitter civil war to determine which of two main political parties would govern the new country.<sup>37</sup> As with many other small nations at that time, this political conflict provided a battleground for the world’s super powers to fight their Cold War.<sup>38</sup> *Movimento Popular de Libertacao de Angola* (“MPLA”), backed by the Soviet Union, effectively seized control in 1975 against *Uniao Nacional para la Independencia Total de Angola* (“UNITA”), backed by the United States.<sup>39</sup> Although today the international community recognizes MPLA as Angola’s legitimate government and the country is in a relative state of peace, UNITA still uses diamonds to purchase illegal weapons.<sup>40</sup> In the 1990s, UNITA controlled the diamond trade and diamond mines, which allowed the rebel group to

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in *Ending Conflicts Fueled by Blood Diamonds*, 11 PEPP. DISP. RESOL. L.J. 207, 209 (2011).

35. U.N. Secretary-General, *The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa: Report of the Secretary-General*, ¶ 4, U.N. Doc A/52/871-S/1998/318 (Apr. 13, 1998) [hereinafter *Causes of Conflict*]; Muna Ndulo, *The Democratization Process and Structural Adjustment in Africa*, 10 IND. J. GLOBAL LEGAL STUD. 315, 315 (2003).

36. Julie L. Fishman, *Is Diamond Smuggling Forever? The Kimberley Process Certification Scheme: The First Step Down the Long Road to Solving the Blood Diamond Trade Problem*, 13 U. MIAMI BUS. L. REV. 217, 231-32 (2005); see also Clean Diamond Trade Act of 2003, 19 U.S.C. § 3901 (2011) [hereinafter CDTA].

37. Seth A. Malamut, *A Band-Aid on a Machete Wound: The Failures of the Kimberley Process and Diamond-Caused Bloodshed in the Democratic Republic of the Congo*, 29 SUFFOLK TRANSNAT'L L. REV. 25, 29 (2005); see also *Angola*, CIA WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/ao.html> (last visited Apr. 7, 2012).

38. *Causes of Conflict*, *supra* note 35, ¶ 10; Edward R. Fluet, Comment, *Conflict Diamonds: U.S. Responsibility and Response*, 7 SAN DIEGO INT'L L.J. 103, 105 (2005).

39. Malamut, *supra* note 37, at 30; Gretchen A. Vetter, Note, *The Forgotten Million: Assessing International Human Rights Abuses in the Artisanal Diamond Mining Industry*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 733, 738 (2007).

40. Murphy, *supra* note 34, at 210.



finance the war through an estimated \$4 billion from illicit diamond sales.<sup>41</sup> Over the course of the war, 500,000 died, 3.5 million were displaced, and an additional 300,000 sought asylum in other countries.<sup>42</sup>

#### D. Sierra Leone

Some of the most prosperous diamond mines in the world funded Sierra Leone's civil war from 1991 until 2002.<sup>43</sup> The Revolutionary United Front ("RUF") relied on controlling most of the country's diamond mines to pay for its efforts to overthrow the government.<sup>44</sup> RUF's brutal atrocities – primarily amputating limbs to prevent people from mining diamonds to support the government<sup>45</sup> and burning children and other civilians alive<sup>46</sup> – eventually received enough attention to bring diamond-funded wars to the attention of the international community.<sup>47</sup> The United Nations Security Council sanctioned Sierra Leone and threatened a weapons embargo.<sup>48</sup> Eventually, the RUF was disarmed, but only after capturing five hundred UN peacekeepers<sup>49</sup> and recruiting thousands of child soldiers to fight their war.<sup>50</sup> The war killed between 50,000 and 75,000, displaced 1.5 to 2.25 million, and forced 500,000 refugees to leave Sierra Leone.<sup>51</sup> Today there are more UN peacekeeping troops patrolling Sierra Leone's diamond mines than there are in any other part of the world.<sup>52</sup>

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41. Joseph Hummel, Comment, *Diamonds Are a Smuggler's Best Friend: Regulation, Economics and Enforcement in the Global Effort to Curb the Trade in Conflict Diamonds*, 41 INT'L LAW. 1145, 1155 (2007).

42. Jamila D. Holmes, *The Kimberley Process: Evidence of Change in International Law*, 3 BYU INT'L L. & MGMT. REV. 213, 215 (2007).

43. Hummel, *supra* note 41, at 1150; Malamut, *supra* note 37, at 30-31.

44. Hummel, *supra* note 41, at 1151 ("At one time during the civil war, the RUF controlled nine-tenths of the country's diamond mines, generating between \$25 and \$125 million annually in diamond sales." (internal cites omitted)).

45. Transcript of Sorious Samura, *CNN Presents: Return to Freetown* (CNN television broadcast Dec. 23, 2001), available at <http://transcripts.cnn.com/TRANSCRIPTS/0112/23/cp.00.html>.

46. Fluet, *supra* note 38, at 106; Margo Kaplan, Comment, *Carats and Sticks: Pursuing War and Peace Through the Diamond Trade*, N.Y.U. J. INT'L L. & POL'Y 559, 571 (2003).

47. Feldman, *supra* note 10, at 840.

48. Malamut, *supra* note 37, at 31.

49. Holmes, *supra* note 42, at 215.

50. Fluet, *supra* note 38, at 106.

51. Holmes, *supra* note 42, at 215.

52. *Causes of Conflict*, *supra* note 35, ¶ 29; Murphy, *supra* note 34, at 211.

### E. *The Democratic Republic of the Congo*

The DRC provides a final example, though many more exist. In what has been coined "Africa's World War,"<sup>53</sup> an estimated 2.5 million people died in the DRC between 1999 and 2003 alone.<sup>54</sup> Many African countries have participated in this war, including Zimbabwe, Chad, Namibia, Angola, Uganda, Burundi, and Rwanda.<sup>55</sup> Approximately \$50 to \$60 million in rough diamonds are smuggled out of the country each year and continue to fund the conflict.<sup>56</sup> And the war continues today. The DRC is one of the richest countries in the world in terms of natural resources, particularly diamonds.<sup>57</sup> However, nearly eighty-five percent of Congolese diamonds are smuggled out of the country, depriving the country of *at least* \$40 million in taxes at the lowest estimates.<sup>58</sup> Moreover, more than three million people have died since 1998<sup>59</sup> and sixteen million people were reported starving in 2001.<sup>60</sup>

Each of these examples were all, at least mostly, *civil wars*, fought between rebel groups and "legitimate" governments. This was essential for the KPSC. Convincing countries to regulate their own natural resources is very challenging.<sup>61</sup> Impoverished, undeveloped nations with valuable natural resources have every incentive to sell to the highest bidder.<sup>62</sup> During the 1990s in Africa, however, only rebels set on revolution and overthrow benefited from the diamond wealth in these countries. Their governments found regulating *rebels'* use of diamond exports distinctively appealing.<sup>63</sup>

### F. *Diamond Industry*

Certain characteristics of the diamond industry, as opposed to other commodities, gave the KPSC a better chance of success than

53. Price, *supra* note 33, at 16.

54. Sally Hardcastle, *Congo Pays the Price for War*, BBC NEWS (Sept. 26, 2001), <http://news.bbc.co.uk/2/hi/business/1564653.stm>.

55. Malamut, *supra* note 37, at 32.

56. *Id.* at 32-34 (noting that the diamonds are smuggled out of the DRC and into the Republic of Congo ("ROC"), which has already established trade routes and low export taxes).

57. Fishman, *supra* note 36, at 220; Hummel, *supra* note 41, at 1156.

58. Fishman, *supra* note 36, at 220-21; Price, *supra* note 33, at 26.

59. Fishman, *supra* note 36, at 223; Paul Orogun, "Blood Diamonds" and Africa's Armed Conflicts in the Post-Cold War Era, 166 WORLD AFF. 151, 157 (2004), available at <http://www.gpia.info/files/u16/OrogunBloodDiamondsAfricasArmedConflicts.pdf>.

60. *Congo in Dire Trouble, Say Agencies*, BBC NEWS (Aug. 7, 2001), <http://news.bbc.co.uk/1/hi/world/africa/1477003.stm>.

61. Wexler, *supra* note 27, at 1733-34.

62. *See id.* at 1723.

63. *See id.* at 1733.

regulation schemes of other industries. This is initially counterintuitive; the diamond industry is historically opaque and difficult to regulate.<sup>64</sup> However, the industry was also a quasi-monopoly controlled by De Beers; convince De Beers, and the entire industry was on board.<sup>65</sup>

Diamonds are luxury items, whose value and sale depend significantly on consumer opinion.<sup>66</sup> As Holly Burkhalter, then advocacy director of Physicians for Human Rights said, the industry knows that “diamonds have no intrinsic value, and they are not rare. If the public learns to associate them with hacked-off limbs and the rape of children, the notion of diamonds as a symbol of love could evaporate forever.”<sup>67</sup> American consumers, just like the United Nations, noticed those images of children with missing limbs and began associating them with diamonds.<sup>68</sup> Furthermore, human rights NGOs – Global Witness and Partnership Africa Canada among them – threatened to tarnish the entire diamond trade if De Beers did not participate in the KPSC.<sup>69</sup> Other groups, specifically People for the Ethical Treatment of Animals (“PETA”), had recently damaged the consumer fur industry beyond repair.<sup>70</sup> De Beers recognized the very creditable threat.

Additionally, helping form the KPSC allowed De Beers to limit the definition of “conflict diamond” and maintain the untarnished label of all other diamonds. Moreover, this focus on distinguishing some diamonds from others coincided with De Beers’ new branding campaign, which specifically identified the benefits of “De Beers Diamonds.”<sup>71</sup> With the KPSC, they could add written guarantees their diamonds were

64. *Id.* at 1733-34 (citing Passas & Jones, *supra* note 28, at 6).

65. Wallis, *supra* note 26, at 400; Wexler, *supra* note 27, at 1734; Nicholas Stein, *The De Beers Story: A New Cut on an Old Monopoly*, FORTUNE, Feb. 19, 2001, at 186 (noting that, while De Beers is still a major player, its hold on the industry is slipping); Erez Yoeli, In December, Diamonds Are Forever: Empirical Evidence of Counter-Cyclical Pricing in a Durable Goods Market 13-14 (May 12, 2003) (unpublished Honors dissertation, Stanford University), available at [http://economics.stanford.edu/files/Theses/Theses\\_2003/Yoeli.pdf](http://economics.stanford.edu/files/Theses/Theses_2003/Yoeli.pdf).

66. Wexler, *supra* note 27, at 1734 n.77 (citing Stefan Kanfer, *The Last Empire: De Beers, Diamonds, and the World* 271 (1993) (stating that the first advertising campaign De Beers ran attempted to convince Americans that “the Diamond Industry . . . operates fairly and in a manner that accords with American interests.”)).

67. Holly Burkhalter, *Deadly Diamonds*, LEGAL TIMES (Sept. 18, 2000), <http://www.calbaptist.edu/dskubik/diamonds.htm>.

68. Feldman, *supra* note 10, at 840-41.

69. Wexler, *supra* note 27, at 1734.

70. Feldman, *supra* note 10, at 841; Holmes, *supra* note 42, at 231; Price, *supra* note 33, at 42.

71. Donna J. Bergenstock & James M. Maskulka, *The De Beers Story: Are Diamonds Forever?*, 44 BUS. HORIZONS 37, 42 (2001); Feldman, *supra* note 10, at 866.

“conflict-free.”<sup>72</sup> Without De Beer’s participation, it is highly unlikely that the KPSC could have ever come to fruition.<sup>73</sup> De Beers controlled virtually the entire industry and knew the risk it faced. It thus concluded that some regulation, in this situation, was good for business.<sup>74</sup>

### G. Activist Groups (Civil Society)

NGOs and other human rights organizations started reporting diamond-related abuses years before they eventually convened the meeting in Kimberley. Specifically, in 1998, Global Witness released a report entitled *A Rough Trade: The Role of Companies and Governments in the Angolan Conflict*.<sup>75</sup> The report specifically accused De Beers of purchasing diamonds from Angolan rebels.<sup>76</sup> Other NGOs quickly joined the cause; a European NGO-led campaign, “Fatal Transactions Campaign,”<sup>77</sup> and Partnership Africa Canada’s *The Heart of the Matter: Sierra Leone, Diamonds and Human Security*<sup>78</sup> proved particularly persuasive.

Together these groups effectively threatened an international campaign to convince consumers that diamonds were the “physical embodiment of human rights abuses.”<sup>79</sup> PETA’s recent success enabled activists to simply note the unmistakable similarities between the two luxury items. However, unlike the fur industry, which *necessitates* killing animals, only a small percentage of the global diamond trade involved blood diamonds.<sup>80</sup> People can safely mine diamonds and overseers do not always commit abuses.<sup>81</sup> Additionally, diamonds can be a source of natural wealth for the often-impoverished nations that mine them.<sup>82</sup> Therefore, the active NGOs at the time compromised with

72. Wallis, *supra* note 26, at 400.

73. See Holmes, *supra* note 40, at 216-17.

74. Wallis, *supra* note 26, at 399-400; Wexler, *supra* note 27, at 1734-35.

75. GLOBAL WITNESS, *A ROUGH TRADE: THE ROLE OF COMPANIES AND GOVERNMENTS IN THE ANGOLOAN CONFLICT* (1998) [hereinafter *A ROUGH TRADE*], available at [http://www.globalwitness.org/sites/default/files/pdfs/A\\_Rough\\_Trade.pdf](http://www.globalwitness.org/sites/default/files/pdfs/A_Rough_Trade.pdf).

76. See Wallis, *supra* note 26, at 392.

77. *Id.*

78. IAN SMILLIE ET AL, *PARTNERSHIP AFRICA CANADA, THE HEART OF THE MATTER: SIERRA LEONE, DIAMONDS AND HUMAN SECURITY* (2000), available at [http://www.pacweb.org/Documents/diamonds\\_KP/heart\\_of\\_the\\_matter-full-2000-01eng.pdf](http://www.pacweb.org/Documents/diamonds_KP/heart_of_the_matter-full-2000-01eng.pdf).

79. Wexler, *supra* note 27, at 1737.

80. KPSC, *supra* note 5, pmb. (stating that conflict diamonds should not be allowed to “negatively affect 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”).

81. See Wexler, *supra* note 27, at 1738.

82. Fluet, *supra* note 38, at 105-06.

diamond-producing states and De Beers, and framed the issue of “conflict diamonds” such that it did not incorporate all violations committed for the stones, but took an important step in the right direction.

This compromise was essential for the KPCS. Without limiting “conflict diamonds” to a small percentage of all diamonds, De Beers would have backed out; without focusing on rebel movements’ use of diamonds, the governments would not have agreed. Yet this compromise received significant criticism over the years<sup>83</sup> and recently prevented the KP from banning Marange diamonds.

Against this complicated background, the KPSC came into being. May 2000 saw strange bedfellows cooperating to resolve the “blood diamond problem.”<sup>84</sup> In December 2000, the United Nations General Assembly unanimously voted to support the KPSC.<sup>85</sup> Two years later, on January 1, 2003, thirty-nine diamond-trading countries adopted and implemented the scheme.<sup>86</sup>

#### *H. Original KPCS Requirements*

The details of the KPCS are codified in the original document. The Preamble recognizes “the devastating impact of conflicts fuelled by trade in conflict diamonds on the peace, safety and security of people in affected countries and the systematic and gross human rights violations that have been perpetrated in such conflicts.”<sup>87</sup> The KPCS then sets out standards and a process by which rough diamonds produced in member states (Participants) are evaluated and certified.<sup>88</sup> If a shipment of rough diamonds contains a Kimberley Certificate, that certificate (theoretically) provides that the country of origin has 1) established “internal controls designed to eliminate the presence of conflict diamonds” imported to or exported from that country, enforced through domestic laws and penalties;<sup>89</sup> 2) imported and exported all rough diamonds in tamper resistant containers;<sup>90</sup> and 3) not imported or exported any rough diamonds to or from a non-Participant state.<sup>91</sup> In theory, as more Participants join the Scheme, fewer markets will

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83. See Wallis, *supra* note 26, at 388; see *infra* note 96.

84. KP Website, *supra* note 4.

85. See G.A. Res. 55/56, U.N. Doc. A/RES/55/56 (Jan. 29, 2001), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N00/562/75/PDF/N0056275.pdf?OpenElement>; Murphy, *supra* note 34, at 214.

86. Fishman, *supra* note 36, at 224-25.

87. KPCS, *supra* note 5, at 1.

88. *Id.* at 6-11.

89. *Id.* at 7.

90. *Id.* at 6.

91. *Id.*

exist for non-certified diamonds. This will decrease the value of non-certified diamonds, while preserving the legitimate diamond trade. In addition, Participants agree to make all decisions regarding participation in the KPCS and resolve all disputes that may arise by consensus.<sup>92</sup> The original document sets out the bare-bones framework of a dispute resolution process, but the details and mechanisms are vague and imprecise.<sup>93</sup>

The original KPCS was met with severe criticism at the outset. Critics focused on the vague language,<sup>94</sup> the nearly impossible requirement of complete consensus,<sup>95</sup> the gap in regulation between mine and export,<sup>96</sup> the fact that virtually all "obligations" are, in fact, voluntary,<sup>97</sup> and on the complete lack of an enforcement mechanism.<sup>98</sup> However, the greatest – and most consistent and still ongoing – criticism regards the definition of the very thing the KPCS seeks to eliminate: conflict diamonds.<sup>99</sup>

The KPCS's primary goal is to eliminate "conflict diamonds" from the market, thereby cutting the link between diamonds and the warfare they funded, while simultaneously preserving the legitimate diamond trade.<sup>100</sup> According to the KPCS, conflict diamonds are "rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments."<sup>101</sup> If particular diamonds do not meet every aspect of this definition, yet still contribute to serious human rights abuses and crimes, they are not conflict diamonds and the KPCS cannot regulate them.

92. *Id.* at 9.

93. *Id.* at 10.

94. Fluet, *supra* note 38, at 112; Murphy, *supra* note 34, at 218.

95. *The Marange Diamond Fields – an Overview*, THIS IS ZIMBABWE – SOKWANELE (Nov. 2, 2011), <http://www.sokwanele.com/thisiszimbabwe/archives/7074>.

96. Vetter, *supra* note 39, at 746.

97. Fluet, *supra* note 38, at 116; Malamut, *supra* note 37, at 47-49; Murphy, *supra* note 34, at 219-20.

98. Fishman, *supra* note 36, at 218; Holmes, *supra* note 42, at 226; Hummel, *supra* note 41, at 1164; Wallis, *supra* note 26, at 403.

99. See, e.g., Tina Muscarella Gooch, *Conflict Diamonds or Illicit Diamonds: Should the Difference Matter to the Kimberley Process Certification Scheme?*, 48 NAT. RESOURCES J. 189, 190 (2008); Vetter, *supra* note 39, at 766; Mark Kersten, *Justice and Diamonds in Zimbabwe: Saving Kimberley from Itself*, JUSTICE IN CONFLICT (Oct. 10, 2011), <http://justiceinconflict.org/2011/10/10/justice-and-diamonds-in-zimbabwe-saving-kimberley-from-itself/>.

100. KPCS, *supra* note 5, at 1-2; see also *infra* notes 192-97.

101. KPCS, *supra* note 5, at 3.

### I. KPCS Additions and Developments

The KPCS and its associated requirements have developed. Notably, the original document itself does not prohibit alterations, improvements or amendments.<sup>102</sup> Certain subsequent actions indicate the KPCS scope can expand.<sup>103</sup>

In 2004, KP members formed a new ad hoc group on Artisanal-Alluvial Production to address concerns about how local diggers operate in illicit diamond trade.<sup>104</sup> This is now an official Working Group, which also addresses concerns about the mine's environmental conditions and how this affects miners' health, matters not addressed in the original KP document.<sup>105</sup>

In addition, the KP works with both the Diamond Development Initiative ("DDI") and the Extractive Industries Transparency Initiative, to examine broader issues involving the diamond industry. The DDI aims to "address, in a comprehensive way, the political, social and economic challenges facing the artisanal diamond mining sector in order to optimize the beneficial development impact of artisanal diamond mining to miners and their communities . . ." <sup>106</sup> The Extractive Industries Transparency Initiative seeks to decrease governmental corruption and help local populations benefit from their own natural resources by publicizing government revenue figures.<sup>107</sup>

102. Wexler, *supra* note 27, at 1736-37.

103. See, e.g., *Zimbabwe Diamond Trade Under Spotlight*, VOICE OF AMERICA (Nov. 3, 2009), available at <http://www1.voanews.com/english/news/a-13-2009-11-03-voa49.html> (quoting Ian Smillie, who helped design the KPCS as saying "nobody could imagine at the beginning of this thing that human rights were going to become a problem in the diamonds fields of the countries that are members. But it is an issue and I think this is the beginning of a more mature Kimberley Process that can deal with some of the fundamental issues that consumers are concerned about.").

104. Wexler, *supra* note 27, at 1739-40; Global Witness, *Making It Work: Why the Kimberley Process Must Do More to Stop Conflict Diamonds*, GLOBAL WITNESS 15 (Nov. 2005), [http://www.globalwitness.org/sites/default/files/import/GW\\_Making\\_it\\_work.pdf](http://www.globalwitness.org/sites/default/files/import/GW_Making_it_work.pdf) [hereinafter *Making It Work*]; Global Witness & Partnership Africa Canada, *Implementing the Kimberley Process* 5 (June 2005), <http://www.globalwitness.org/sites/default/files/import/Implementing%20the%20Kimberley%20Process%20-%20June%202005.pdf> [hereinafter *Implementing the Kimberley Process*].

105. KIMBERLEY PROCESS PLENARY MEETING, GABORONE, BOTS., NOV. 6-9, 2006, FINAL COMMUNIQUÉ 1-3 (2006) [hereinafter GABORONE PLENARY COMMUNIQUÉ], available at <http://www.state.gov/documents/organization/77110.pdf>; Wexler, *supra* note 27, at 1739-40.

106. Vetter, *supra* note 39, at 759; DDI Mission Statement, *Diamond Development Initiative*, <http://www.ddiglobal.org/pages/mission.php> (last visited Apr. 11, 2011).

107. *What Is the EITI?*, EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE, <http://eiti.org/eiti> (last visited Apr. 10, 2012).

The KP works with each of these organizations and functions as a liaison between them.<sup>108</sup>

The KP also works with the World Diamond Council (“WDC”), which is one of the first two non-governmental Observers invited to participate in the KP (Global Witness was the other).<sup>109</sup> The WDC was created in 2000 to represent the diamond industry’s interests during formation of the KPCS.<sup>110</sup> Eli Izhakoff, a veteran in the diamond industry, was elected chairman and formed a broad coalition, bringing important players from national and international industry organizations, major jewelry manufacturers and retailers, mining companies, gem labs, and bank representatives to the WDC table.<sup>111</sup> In 2000, the WDC devised and utilized a system of warrantees to supplement the KP certificates.<sup>112</sup> That system requires that all diamond traders, polishers, dealers, and manufacturers confirm “[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.”<sup>113</sup> While these warrantees really parallel the KPCS requirements, the WDC requirements are directed more specifically at industry players and are intended to work in conjunction with them.<sup>114</sup>

Finally, the KP further extended its own system of monitoring compliance. Originally, the KPCS required only self-monitoring by individual participants through reports on each country’s own “relevant laws, regulations, rules, procedures and practices.”<sup>115</sup> Eventually, participants agreed to peer reviews of individual states conducted by teams including representatives from each branch of the KP.<sup>116</sup> Now, the KP periodically reviews the entire scheme as a whole group.<sup>117</sup>

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108. Wexler, *supra* note 27, at 1740.

109. Feldman, *supra* note 10, at 850-51.

110. See *History*, WORLD DIAMOND COUNCIL, <http://www.worlddiamondcouncil.org/about-wdc/history> (last visited Apr. 10, 2012) [hereinafter WDC Website].

111. *Id.*; Feldman, *supra* note 10, at 850.

112. See Fishman, *supra* note 36, at 227; Hummel, *supra* note 41, at 1160; *Mission Statement*, WORLD DIAMOND COUNCIL, <http://www.worlddiamondcouncil.org/aboutwdc/mission-statement> (last visited Apr. 10, 2012).

113. See THE WORLD DIAMOND COUNCIL, *THE ESSENTIAL GUIDE TO IMPLEMENTING THE KIMBERLEY PROCESS 5* (2003), available at <http://www.jvclegal.org/KimberleyProcess.pdf>.

114. Michael Maggi, *The Currency of Terrorism: An Alternative way to Combat Terrorism and End the Trade of Conflict Diamonds*, 15 PACE INT'L L. REV. 513, 533 (2003).

115. KPCS, *supra* note 5, § V(a).

116. Wexler, *supra* note 22, at 1745.

117. *Id.*



These steps expanded the initial enforcement mechanisms and demonstrate that, while steps may be small and slow, the KPCS is capable of growth and development.

### *J. Current KPCS Statistics*

Currently, forty-nine member states representing seventy-five countries (the European Union is an individual Participant) are part of the KPSC and subject to its requirements.<sup>118</sup> These Participants produce approximately 99.8 percent of all the rough diamonds in the world.<sup>119</sup> Though Africa remains the world's poorest and most underdeveloped continent,<sup>120</sup> sixty-five of the world's diamonds originate in Africa and Africa exports approximately \$8.5 billion in diamonds each year.<sup>121</sup> According to the official website – and there is only limited disagreement – the KPCS has been extremely successful at achieving its stated goal: “Diamond experts estimate that conflict diamonds now represent a fraction of one percent of the international trade in diamonds, compared to estimates of up to fifteen percent in the 1990s.”<sup>122</sup> Even Partnership Africa Canada, which frequently criticizes KP Participants' behavior, acknowledges that the diamonds the KPSC sought to eliminate are now virtually non-existent in the legitimate diamond trade.<sup>123</sup> Furthermore, the market value of non-certified, illicit diamonds has fallen.<sup>124</sup> It is difficult to argue with these numbers; so far as its stated goals (and accepted definitions) are concerned, the KPCS has been a success.

118. WORLD DIAMOND COUNCIL, *Countries Participating in the Kimberley Process*, [http://www.diamondfacts.org/pdfs/conflict/Kimberley\\_Process\\_Participants.pdf](http://www.diamondfacts.org/pdfs/conflict/Kimberley_Process_Participants.pdf) (last visited Apr. 10, 2012).

119. See Ford, *supra* note 4; KP Website, *supra* note 4.

120. See U.N. DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2011: SUSTAINABILITY AND EQUITY - A BETTER FUTURE FOR ALL, 19-20, U.N. Sales No. 11.III.B.1 (2011), available at [http://hdr.undp.org/en/media/HDR\\_2011\\_EN\\_Summary.pdf](http://hdr.undp.org/en/media/HDR_2011_EN_Summary.pdf); Mark Doyle, *Why is the African Continent Poor?*, BBC NEWS (Aug. 24, 2009), <http://news.bbc.co.uk/2/hi/africa/8215083.stm>.

121. See *Diamond Facts*, WORLD DIAMOND COUNCIL, <http://www.diamondfacts.org/facts/index.html> (last visited Apr. 10, 2012).

122. See KP Website, *supra* note 4.

123. THE DIAMONDS & HUMAN SEC. PROJECT, P'SHIP AFR. CAN., *KILLING KIMBERLEY? CONFLICT DIAMONDS AND PAPER TIGERS 3* (Josée Létourneau & Ian Smillie eds., rev. ed. 2006) [hereinafter *KILLING KIMBERLEY*], available at [http://www.pacweb.org/Documents/diamonds\\_KP/15\\_KillingKimberley\\_Revised%20Edition\\_Eng-Nov2006.pdf](http://www.pacweb.org/Documents/diamonds_KP/15_KillingKimberley_Revised%20Edition_Eng-Nov2006.pdf).

124. AD HOC WORKING GROUP ON THE REVIEW OF THE KIMBERLEY PROCESS CERTIFICATION SCHEME, *THE KIMBERLEY PROCESS CERTIFICATION SCHEME THIRD YEAR REVIEW 21* (Oct. 2006) [hereinafter *KPCS THIRD YEAR REVIEW*], available at [http://www.gjepc.org/pdf/trade\\_information/KPCS\\_3rd\\_Year\\_review\\_Final\\_report.pdf](http://www.gjepc.org/pdf/trade_information/KPCS_3rd_Year_review_Final_report.pdf).

Its greatest test, according to scholars and activists alike, was how it would handle Zimbabwe's Marange Diamonds.<sup>125</sup>

## PART II: ZIMBABWE'S MARANGE DIAMOND FIELDS

The diamonds from Marange do not fit comfortably within the KP's codified scope; no rebel group uses these diamonds to fund war. And yet, assuming the allegations are true, similar atrocities are happening today in Marange as happened during the 1990s in Sierra Leone. Furthermore, while no "rebel movement" is directly linked to the Marange diamonds, Zimbabwe's government faces significant opposition.

### A. *Zimbabwe's Political History*

A complete account of Zimbabwe's political drama over the past decades is well beyond the scope of this article. However, a brief sketch is necessary to understand the intersection between Marange and the KPCS. Zimbabwe achieved independence from Britain in 1980. Though there was initial competition, current president Robert Mugabe and his Zimbabwe African National Union ("ZANU") party maintained an uninterrupted, though violent, rule for twenty-eight years.<sup>126</sup> Following a horrific period of massacres between 1982 and 1985, ZANU and its main political opposition, the Zimbabwe African People's Union ("ZAPU"), reached an agreement, which merged the two parties, creating ZANU-PF and maintaining Mugabe's presidency.<sup>127</sup>

Zimbabwe's economy suffered catastrophic damage as President Mugabe focused on maintaining control. This triggered further opposition to ZANU-PF. The Movement for Democratic Change ("MDC"), led by Morgan Tsvangirai and established in 1999, rapidly gained support and effectively challenged President Mugabe.<sup>128</sup> The ZANU-PF government responded by further suppressing civil liberties and intimidating its way through multiple fraudulent elections.<sup>129</sup>

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125. Thierry Vircoulon, *Time to Rethink the Kimberley Process: The Zimbabwe Case*, INT'L CRISIS GRP. (Nov. 4, 2010), <http://www.crisisgroup.org/en/regions/africa/southern-africa/zimbabwe/op-eds/time-to-rethink-the-kimberley-process-the-zimbabwe-case.aspx>.

126. *Id.*

127. See *Zimbabwe Profile*, BBC NEWS (Nov. 1, 2011), <http://www.bbc.co.uk/news/world-africa-14113618>.

128. Vircoulon, *supra* note 125.

129. INT'L CRISIS GRP., AFRICA REPORT NO. 93, POST-ELECTION ZIMBABWE: WHAT NEXT? 1-2 (June 7, 2005), available at <http://www.crisisgroup.org/~media/Files/africa/southern-africa/zimbabwe/Post-Election%20Zimbabwe%20What%20Next.pdf>.

“Operation Restore Order” effectively displaced 700,000 mostly poor MDC supporters from Harare, Zimbabwe’s capital city.<sup>130</sup>

In the 2008 presidential elections, Tsvangirai received the most votes, but not enough to secure the office after the first round of Zimbabwe’s electoral process.<sup>131</sup> ZANU-PF’s response was so violent, immediate, and widespread that Tsvangirai withdrew.<sup>132</sup> However, international pressure eventually convinced the leaders to establish a transitional power-sharing agreement, in which Mugabe retained the presidency and Tsvangirai became prime minister.<sup>133</sup> Since September 15, 2008, this hotly contested and extremely controversial coalition has been Zimbabwe’s legitimate government.<sup>134</sup> Regardless of the on-going tensions between the two parties and the persistent divides, the military forces that control the Marange diamond fields technically answer to Zimbabwe’s legitimate government. Therefore, according to the KPCS and international law, Zimbabwe itself, not a particular group, controls and uses the Marange diamonds.

### B. *Discovering the Diamond Fields*

In 2006, local villagers discovered the Marange diamond fields in the Chiadzwa district near the Zimbabwe/Mozambique border.<sup>135</sup> These fields are rich with alluvial deposits, which, in total, have an estimated worth of up to U.S. \$800 billion and could be a viable source of wealth for the next 80 years.<sup>136</sup> For a country like Zimbabwe, which has suffered from a crippled economy for decades, such a find could have ushered in a new period of growth and prosperity.<sup>137</sup> Unfortunately,

130. INT’L CRISIS GRP., AFRICA REPORT NO. 122, ZIMBABWE: AN END TO THE STALEMATE? 4 (Mar. 5, 2007), available at <http://www.crisisgroup.org/~media/Files/africa/southern/africa/zimbabwe/Zimbabwe%20An%20End%20to%20the%20Stalemate.pdf>.

131. Vircoulon, *supra* note 125, at 2; *Zimbabwe: Tsvangirai Wins Parliamentary Vote*, ALLAFRICA (Aug. 25, 2008), <http://allafrica.com/stories/200808251079.html>.

132. See *Tsvangirai Withdrawal: Key Quotes*, BBC NEWS (June 23, 2008), <http://news.bbc.co.uk/2/hi/7468091.stm>.

133. Celia W. Dugger, *Zimbabwe Rivals Strike a Bargain to Share Power*, N.Y. TIMES (Sept. 12, 2008), <http://www.nytimes.com/2008/09/12/world/africa/12zimbabwe.html?em>.

134. LAUREN PLOCH, ZIMBABWE: THE TRANSITIONAL GOVERNMENT AND IMPLICATIONS FOR U.S. POLICY 2-4 (Oct. 27, 2011), available at <http://www.fas.org/spp/crs/row/RL34509.pdf>.

135. Alan Cowell, *Group Allows Limited Sale of Zimbabwe’s Diamonds*, N.Y. TIMES (July 16, 2010), <http://www.nytimes.com/2010/07/17/world/africa/17diamonds.html>; Ecologist, *Export of Zimbabwean Diamonds Threatens Ethical Jewellery Trade*, GUARDIAN (Aug. 8, 2011), <http://www.guardian.co.uk/environment/2011/aug/08/zimbabwean-diamonds-ethical-jewellery-trade>.

136. Ecologist, *supra* note 135.

137. Wexler, *supra* note 27, at 1723.

this did not happen.<sup>138</sup> Some scholars examine this fact in light of the modern economic concept of “resource curses.”<sup>139</sup> Resource curses “occur when an open market and an abundance of natural resources combine to create or exacerbate a governance problem” – such as internal conflicts.<sup>140</sup> Marange diamonds are such a curse.

The Marange fields are unique in Zimbabwe; miners reach these diamonds without complicated tools or expensive extraction methods.<sup>141</sup> Rather than give private companies exclusive rights to these fields,<sup>142</sup> the government initially opened them and unlicensed miners descended.<sup>143</sup> Between late 2006 and October 2008, police financially and physically exploited the miners; “killings, torture, beatings and harassment,”<sup>144</sup> as well as arbitrary arrests and detentions of local miners were common. By the end of this period, the police established elaborate syndicates to systematically increase the bribes they demanded from miners.<sup>145</sup> Then, in the summer of 2007, reports from Zimbabwe indicated the illegal mining was under control.<sup>146</sup>

However, tens of thousands of illegal diamond miners returned to Marange in the last months of 2008.<sup>147</sup> In October 2008, the Zimbabwean government sent in military forces – whether to combat

138. The discovery of significant alluvial diamond deposits in the Marange area of eastern Zimbabwe [Manicaland Province] in June 2006 should have been a means of salvation for the virtually bankrupt country after ten years of chaos that saw world record inflation and the nation brought to its knees. Instead, it has led to greed, corruption and exploitation on a grand scale, the use of forced labour - both adults and children - horrifying human rights abuses, brutal killings, degradation of the environment and massive enrichment of a select few; SOKWANELE, *supra* note 95, at 2.

139. See Wexler, *supra* note 27, at 1723; Kersten, *supra* note 99.

140. See Wexler, *supra* note 27, at 1718.

141. Alluvial diamonds do not require the same type of deep mines as kimberlite deposits and are significantly easier to extract. Vetter, *supra* note 39, at 742. THE DIAMONDS & HUMAN SEC. PROJECT, P'SHIP AFR. CAN., ZIMBABWE, DIAMONDS AND THE WRONG SIDE OF HISTORY 3 (Josée Létourneau & Ian Smillie eds., 2009) [hereinafter ZIMBABWE, DIAMONDS AND HISTORY], available at [http://www.pacweb.org/Documents/diamonds\\_KP/18\\_Zimbabwe-Diamonds\\_March09-Eng.pdf](http://www.pacweb.org/Documents/diamonds_KP/18_Zimbabwe-Diamonds_March09-Eng.pdf).

142. African Consolidated Resources (“ACR”), British company, initially received exclusive rights to the fields, but the Zimbabwe government revoked ACR’s license when they realized the extent of the Marange field’s value. See Vircoulon, *supra* note 125, at 2.

143. Vircoulon, *supra* note 125, at 2 (stating this discovery “unleashed a diamond rush of 15,000 to 20,000 unlicensed artisanal miners and uncontrolled smuggling”).

144. HUMAN RIGHTS WATCH, DIAMONDS IN THE ROUGH: HUMAN RIGHTS ABUSES IN THE MARANGE DIAMOND FIELDS OF ZIMBABWE 19 (2009) [hereinafter DIAMONDS IN THE ROUGH]. Critics regularly claim that reports from this type of organization is biased, however newspaper articles (many cited below) suggest that much of this report is accurate.

145. *Id.* at 21; Wexler, *supra* note 27, at 1770.

146. See Vircoulon, *supra* note 125, at 2.

147. DIAMONDS IN THE ROUGH, *supra* note 144, at 27.

the existing lawlessness or as a reward for dedication to Mugabe is debated.<sup>148</sup> The military initiated “Operation Hakudzokwi” (No Return) on October 27, 2008.<sup>149</sup> Within three weeks, army helicopters and soldiers shot miners and villagers indiscriminately in an attempt to clear the area.<sup>150</sup> The operation ended with more than 200 dead.<sup>151</sup> Military forces smuggled diamonds, generally through Mozambique (a non-KP Participant),<sup>152</sup> and utilized forced child labor.<sup>153</sup>

### C. Marange Today

The abuses continue.<sup>154</sup> In addition to the BBC reports of torture camps,<sup>155</sup> the military forces, still in Marange,<sup>156</sup> are allegedly involved in illegal digging, trading, and smuggling.<sup>157</sup> Local Focal Point (“LFP”), a group established by the KP’s Working Group on Monitoring to independently monitor Zimbabwe, reported that security guards protecting the Mbada mine in Marange set dogs on illegal miners, children, and elderly villagers between August and October, 2011.<sup>158</sup> In response to the November announcement that KP officially lifted its ban on Zimbabwe,<sup>159</sup> Shamiso Mtisi, Coordinator of LFP, stated “[t]his deal only reinforces the perception that there is no limit to how far the KP is prepared to go in lowering the ethical bar on Marange . . . . Given the chance to keep Zimbabwe to its previous commitments, the KP has

148. *Id.* at 29; Wexler, *supra* note 27, at 1770.

149. Vircoulon, *supra* note 125, at 2.

150. DIAMONDS IN THE ROUGH, *supra* note 144, at 30-34; Nokuthula Sibanda, *Zimbabwe: Harare Denies Diamond Field Abuses*, RELIEFWEB (June 30, 2009), <http://reliefweb.int/node/315325>.

151. Vircoulon, *supra* note 125, at 2.

152. *Zimbabwe: End Repression in Marange Diamond Fields*, HUMAN RIGHTS WATCH (June 26, 2009), <http://www.hrw.org/news/2009/06/26/zimbabwe-end-repression-marange-diamond-fields>.

153. David Smith, *Children Forced to Mine Zimbabwe Diamonds*, GUARDIAN (June 26, 2009), <http://www.guardian.co.uk/world/2009/jun/26/zimbabwe-diamonds-children-mugabe> (“It is estimated that up to 300 children continue to work for soldiers in the diamond fields.”).

154. Veneranda Langa, *Mbada Diamonds Guards Brutalise Villagers: Report*, NEWS DAY (Nov. 7, 2011), <http://www.newsday.co.zw/article/2011-11-07-mbada-diamonds-guards-brutalise-villagers-report>.

155. *See supra* notes 1-17.

156. Despite agreeing to withdraw all troops under the Joint Working Agreement. Vircoulon, *supra* note 125, at 4.

157. Langa, *supra* note 154.

158. *Id.*; *Marange Diamonds: Zimbabwe Denies ‘Torture Camp’*, BBC NEWS (Aug. 9, 2011), <http://www.bbc.co.uk/news/world-africa-14468116> [hereinafter *Marange Diamonds*].

159. *See Zimbabwe: Official Lauds Diamond Trade Ruling*, *supra* note 20.

shown itself incapable of doing the right thing.”<sup>160</sup> Human rights abuses in Marange have decreased.<sup>161</sup> However, a reduction that leaves abuses such as these in place is decidedly insufficient.

### PART III: ZIMBABWE'S CERTIFICATION STATUS

Human rights activists immediately reported the first abuses and the KP responded.<sup>162</sup> Their responses never satisfied the activists, however. They consistently argued the KP could and should do more. Yet, the steps the KP took and its eventual decision in November clearly indicate that the KP does not believe it has any authority to regulate the Marange diamonds.

#### A. KPCS Reactions – A Timeline

Human rights groups directly associated with the KP began documenting the situation at Marange as early as 2006.<sup>163</sup> Zimbabwe denied any misconduct.<sup>164</sup> The KP responded with limited action: a peer review visit in June 2007 indicated Zimbabwe had sufficiently implemented KPCS minimum requirements and the abuse accusations were not mentioned.<sup>165</sup> The following year, KP expressed “growing concerns” about the Marange fields and recommended additional monitoring.<sup>166</sup>

160. *Civil Society Activists Criticise Diamond Deal*, SADOCC (Nov. 2, 2011), <http://www.sadocc.at/news/2011/2011-232.shtml>.

161. Langa, *supra* note 154.

162. See Ecologist, *supra* note 135.

163. Wexler, *supra* note 27, at 1771; *Zimbabwe and its Diamonds: Forever Dirty*, *ECONOMIST* (June 30, 2011), <http://www.economist.com/node/18898238>.

164. Edahn Golan, *KP Meeting: Renewed Calls for Improvements in Monitoring as KP Fails Where it's Critical*, *IDEX* (June 25, 2009), [http://www.idexonline.com/portal\\_FullNews.asp?id=32542](http://www.idexonline.com/portal_FullNews.asp?id=32542); *Marange Diamonds*, *supra* note 158.

165. [T]hrough a dedicated and comprehensive effort, the Government of Zimbabwe has managed to bring th[e] situation under control in the first half of 2007 . . . . It is the view of the review team that the overall structure of the implementation of the [KPCS] appears to be working in a satisfactory manner in Zimbabwe, and, in general, meets the minimum requirements of the KPCS. Kimberley Process, Review Visit, Zimb., May 29-June 1, 2007, Summary of the Report of the KP Review Visit to Zimbabwe 2, available at [http://www.kimberleyprocess.com/web/kimberleyprocess/annualreports;jsessionid=471ACC601453D3FDB607AE56637E5D11?p\\_p\\_id=110\\_INSTANCE\\_7D811n2qTtI3&p\\_p\\_lifecycle=0&p\\_p\\_state=normal&p\\_p\\_mode=view&p\\_p\\_col\\_id=column2&p\\_p\\_col\\_count=2&\\_110\\_INSTANCE\\_7D811n2qTtI3\\_struts\\_action=%2Fdocument\\_library\\_display%2Fview\\_file\\_entry&\\_110\\_INSTANCE\\_7D811n2qTtI3\\_redirect=http%3A%2F%2Fwww.kimberleyprocess.com%2Fweb%2Fkimberley-process%2Fannualreports%3Bjsessionid%3D471ACC601453D3FDB607AE56637E5D11%3Fp\\_p\\_id%3D110\\_INSTANCE\\_7D811n2qTtI3%26p\\_p\\_lifecycle%3D0%26p\\_p\\_state%3Dnormal%26p\\_p\\_mode%3Dview%26p\\_p\\_col\\_id%3Dcolumn-2%26p\\_p\\_col\\_count%3D2&\\_110\\_INSTANCE\\_7D811n2qTtI3\\_fileEntryId=17256](http://www.kimberleyprocess.com/web/kimberleyprocess/annualreports;jsessionid=471ACC601453D3FDB607AE56637E5D11?p_p_id=110_INSTANCE_7D811n2qTtI3&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&p_p_col_id=column2&p_p_col_count=2&_110_INSTANCE_7D811n2qTtI3_struts_action=%2Fdocument_library_display%2Fview_file_entry&_110_INSTANCE_7D811n2qTtI3_redirect=http%3A%2F%2Fwww.kimberleyprocess.com%2Fweb%2Fkimberley-process%2Fannualreports%3Bjsessionid%3D471ACC601453D3FDB607AE56637E5D11%3Fp_p_id%3D110_INSTANCE_7D811n2qTtI3%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3Dcolumn-2%26p_p_col_count%3D2&_110_INSTANCE_7D811n2qTtI3_fileEntryId=17256).

166. Wexler, *supra* note 27, at 1771.

In June 2009, a review mission to Zimbabwe reported that it was not compliant.<sup>167</sup> Their report recommended suspension and declared that Zimbabwe must withdraw its army and immediately suspend all illegal mining and sales.<sup>168</sup> At the November 2009 KP plenary meeting, Zimbabwe and other Participants agreed on a Joint Work Plan.<sup>169</sup> Under this plan, Zimbabwe agreed to a ban on their exports until monitors were in place and the government had demonstrated progress.<sup>170</sup> Progress was insufficient.

In 2010, a special monitor visited Zimbabwe and the Marange fields twice. At the plenary meeting that June, the monitor reported Zimbabwe was compliant, but the vote to adopt the report's recommendation ended in a stalemate.<sup>171</sup> The group agreed to meet again the following month in Russia. Following that meeting, KP authorized two sales of Marange diamonds.<sup>172</sup> These sales involved 900,000 carats of diamonds worth \$72 million and were met with disapproval from the United States, European Union, Canada and Australia.<sup>173</sup> No real progress occurred during the following year. Then, on June 23, 2011, Mr. Mathieu Yamba, the then-KP Chair announced that Zimbabwe could sell from two specific mines in Marange and that others would soon follow.<sup>174</sup> Representatives of every NGO present walked out of the meeting in protest.<sup>175</sup> The United States and other Western countries declared the decision invalid because it was not unanimous.<sup>176</sup> While this led to confusion, even from

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167. Sebastien Berger & Peta Thornycroft, *Mugabe Escapes a Blood Diamond Ban*, DAILY TELEGRAPH (U.K.), Nov. 6, 2009, at 21.

168. Vircoulon, *supra* note 125, at 4.

169. KIMBERLEY PROCESS, JOINT WORK PLAN: ZIMBABWE 1 (Nov. 5, 2009), available at <http://www.state.gov/documents/organization/133851.pdf> [hereinafter JOINT WORK PLAN]; Celia W. Dugger, *Group Won't Suspend Zimbabwe on Mining Abuses*, N.Y. TIMES (Nov. 6, 2009), <http://www.nytimes.com/2009/11/07/world/africa/07zimbabwe.html>.

170. Vircoulon, *supra* note 125, at 4; *Zim Won't Export Marange Diamonds*, FIN. GAZETTE (Zimb.) (Nov. 13, 2009), <http://www.financialgazette.co.zw/top-stories/2081-zim-wont-export-marange-diamonds.html>.

171. Arthur Bright, *Zimbabwe Restarts Diamond Sales Amid 'Blood Diamond' Accusations*, CHRISTIAN SCI. MONITOR (Aug. 12, 2010), <http://www.csmonitor.com/World/terrorism-security/2010/0812/Zimbabwe-restarts-diamond-sales-amid-blood-diamond-accusations>.

172. *Id.*

173. *Id.*

174. Chair's Notice of 23 June 2011 on the Zimbabwe Issue, in 35 OTHER FACETS Aug. 2011, at 2, available at <http://www.pacweb.org/Documents/Other-Facets/OF35-eng.pdf>.

175. Statement by Charmian Gooch, Founding Dir., Global Witness (June 27, 2011), available at <http://www.globalwitness.org/library/global-witness-founding-director%E2%80%99s-statement-ngo-coalition-walk-out-kimberley-process>; Kersten, *supra* note 99.

176. Statement by Catherine Ashton, High Representative of the Union for Foreign Affairs & Sec. Pol'y (Nov. 1, 2011), available at <http://appablog.wordpress.com/2011/11>

Zimbabwe's finance minister, Tendai Biti,<sup>177</sup> more Zimbabwe diamonds entered the market. Finally, on November 3, 2011, the KP's ban on Marange diamonds was officially lifted – Marange diamond fields are now certified and part of the legitimate diamond trade.<sup>178</sup>

### B. Possible Violations

Zimbabwe's actions may have violated the KPCS in two distinct ways. The first involves its failure to comply with the procedural requirements of the Scheme. The second directly addresses the abuses committed to obtain these stones. This second argument can proceed in either of two ways – 1) by forcing Marange diamonds into the existing definition or 2) by relying on the underlying principles behind the KPCS.

### C. Exporting to Non-Participant State

KPCS Participants must meet certain minimal requirements to remain in compliance and legally participate in the legitimate diamond trade. Zimbabwe violated many of these basic requirements.

Zimbabwe diamonds arrive in Mozambique daily.<sup>179</sup> Mozambique neither produces diamonds itself, nor is a member of the KPCS.<sup>180</sup> In Vila de Manica, just across the eastern Zimbabwe border, the illegal diamond trade flourishes with the complicity of both Zimbabwean and Mozambican officials.<sup>181</sup> A Mozambican man living in Zimbabwe freely admitted to a reporter that he walks across the border nearly every day

/01/statement-by-the-spokesperson-of-high-representative-catherine-ashton-on-the-agreement-reached-in-kimberley-process-regarding-marange-diamonds/; *Zimbabwe: Rampant Abuses in Marange Diamond Fields*, HUMAN RIGHTS WATCH (Aug. 30, 2011), <http://www.hrw.org/news/2011/08/30/zimbabwe-rampant-abuses-marange-diamond-fields>; Ecologist, *supra* note 135.

177. Celia W. Dugger, *Zimbabwe Diamond Exports Approved Over Objections*, N.Y. TIMES (June 24, 2011), <http://www.nytimes.com/2011/06/25/world/africa/25zimbabwe.html>.

178. *Zimbabwe: Official Lauds Diamond Trade Ruling*, *supra* note 20.

179. See Murphy, *supra* note 34, at 222; Cletus Mushanawani, *Zimbabwe: Mozambique's Diamond Capital*, HERALD (July 14, 2010), <http://allafrica.com/stories/201007140397.html>; Vircoulon, *supra* note 125.

180. Participants, KIMBERLEY PROCESS, <http://www.kimberleyprocess.com/web/kimberley-process/kp-participants> (last visited Apr. 7, 2012).

181. Alex Bell, *Zimbabwe: Army Leading Smuggling Operations Out of Chiadzwa*, SW RADIO AFR. (London) (July 26, 2010), <http://allafrica.com/stories/201007261469.html>; Sarah Childress, *Diamond Trade Finds Regulatory Loophole in Mozambique*, WALL ST. J. (Nov. 6, 2009), <http://online.wsj.com/article/SB125738837197329995.html>; Tamas S. Kiss, *Illicit Trade Zimbabwean Blood Diamond Trade Continues*, BUDAPEST REP. (Aug. 4, 2010), <http://www.budapestreport.com/2010/08/04/illicit-trade-zimbabwean-blood-diamond-trade-continues/>; Vircoulon, *supra* note 125, at C.



to sell diamonds to Lebanese buyers.<sup>182</sup> Traders from Israel, Somalia, Nigeria, and Guinea reportedly make a great living in Manica, another border town in Mozambique.<sup>183</sup>

The KPCS explicitly states that Participants cannot export to non-Participants.<sup>184</sup> The complications surrounding the KPCS definition of “conflict diamond” is irrelevant here because the KPCS bans exportation of *all* “rough diamonds,” which includes any “diamonds that are unworked or simply sawn, cleaved or bruted . . .”<sup>185</sup> Furthermore, the Zimbabwe diamonds arrive in Mozambique carried in pockets without a valid KPCS certificate and clearly not in any type of “tamper-resistant containers.”<sup>186</sup> Zimbabwe thereby violated sections II(a) and IV(c) as well.<sup>187</sup>

These facts are not in dispute; they are not even discussed. Undoubtedly, the issue of human rights violations is more important and more pressing.<sup>188</sup> Yet, these procedural violations are clear and far less controversial. It might have been easy for the KP to justify its ban on Marange diamonds in light of these violations. Of course, KP Chair Yamba declared Zimbabwe in compliance and the ban is now entirely lifted.<sup>189</sup> Furthermore, Zimbabwe argued that it complied with the Joint Work Plan and other *requirements* under the KPCS.<sup>190</sup> Any further *recommendations* by the KP are just that – unenforceable recommendations, which Zimbabwe is under no legal obligation to fulfill. However, the ban could be re-imposed and the United States

182. Childress, *supra* note 181.

183. *Id.*

184. KPCS, *supra* note 5, § III(c).

185. *Id.* § I.

186. *Id.* §§ II(a), IV(c).

187. *Id.*

188. Although KP investigators themselves have argued that this type of smuggling operation creates illicit trading routes, which undermines the security of legitimate international trading. See Wexler, *supra* note 27, at 1770-71 (citing Celia W. Dugger, *War Against Diamond Smuggling Is on the Line*, INT’L HERALD TRIB., Nov. 5, 2009, at 2 (quoting a confidential Kimberley Process report)).

189. See *Zimbabwe: Official Lauds Diamond Trade Ruling*, *supra* note 20.

190. Summary of the Report of the KP Review Visit to Zimbabwe, Kimberly Process (May 29 - June 1, 2007), available at [http://www.kimberleyprocess.com/web/kimberley-process/annualreports?p\\_p\\_id=110\\_INSTANCE\\_7D811n2qTtI3&p\\_p\\_lifecycle=0&p\\_p\\_stt e=normal&p\\_p\\_mode=view&p\\_p\\_col\\_id=column2&p\\_p\\_col\\_count=2&\\_110\\_INSTANCE\\_7D811n2qTtI3\\_struts\\_action=%2Fdocument\\_library\\_display%2Fview\\_file\\_entry&\\_110\\_INSTANCE\\_7D811n2qTtI3\\_redirect=http%3A%2F%2Fwww.kimberleyprocess.com%2Fweb%2Fkimberley-process%2Fannualreports%3Fp\\_p\\_id%3D110\\_INSTANCE\\_7D811n2qTtI3%26p\\_p\\_lifecycle%3D0%26p\\_p\\_state%3Dnormal%26p\\_p\\_mode%3Dview%26p\\_p\\_col\\_id%3Dcolumn2%26p\\_p\\_col\\_count%3D2&\\_110\\_INSTANCE\\_7D811n2qTtI3\\_fileEntryId=17256](http://www.kimberleyprocess.com/web/kimberley-process/annualreports?p_p_id=110_INSTANCE_7D811n2qTtI3&p_p_lifecycle=0&p_p_stt e=normal&p_p_mode=view&p_p_col_id=column2&p_p_col_count=2&_110_INSTANCE_7D811n2qTtI3_struts_action=%2Fdocument_library_display%2Fview_file_entry&_110_INSTANCE_7D811n2qTtI3_redirect=http%3A%2F%2Fwww.kimberleyprocess.com%2Fweb%2Fkimberley-process%2Fannualreports%3Fp_p_id%3D110_INSTANCE_7D811n2qTtI3%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3Dcolumn2%26p_p_col_count%3D2&_110_INSTANCE_7D811n2qTtI3_fileEntryId=17256).

took over the Chair in 2012.<sup>191</sup> This presents a prime opportunity for the United States to act on its stated disgust over economically motivated human rights violations.

#### *D. Human Rights Violations*

While Zimbabwe is violating some technical KPCS requirements, the bigger concern is obviously the human rights abuses that facilitate the trade of Marange stones. Scholars and activists have presented two different arguments as to how these abusive acts violate the KPCS. The primary issue is whether Marange diamonds can be excluded from trade under the KPCS. The only such diamonds are “conflict diamonds.” As stated above, the KPCS definition of conflict diamonds is “rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments . . . .”<sup>192</sup> Since no rebel groups use Marange diamonds to fund conflicts against state governments, Zimbabwe and now the KP insist that Marange diamonds *cannot be* conflict diamonds.<sup>193</sup>

This result is profoundly unsettling. How can diamonds obtained through child labor, torture, and murder *not* be blood diamonds?

#### *E. Marange Diamonds as KPCS Conflict Diamonds*

Recognizing the difficulty in actually changing the definition of “conflict diamonds,” some seek to fit the situation in Zimbabwe into a “typical” KPCS violation so the KP can exclude Marange diamonds from the market. They avoid the rebel concern all together and argue that while these diamonds may not be undermining a particular government, the fact that illicit smuggling leads to illegal trade channels threatens the security of international trading itself.<sup>194</sup> The response: these are still not conflict diamonds.

A more crafty and ambitious argument involves Zimbabwe’s prolonged political instability. According to this line of reasoning, Zimbabwe’s legitimate government is the coalition government formed in 2008, when Tsvangirai became prime minister.<sup>195</sup> Many reports indicate that the troops controlling Marange are loyal to Mugabe alone

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191. Ford, *supra* note 6; Jeff Miller, *U.S. to Chair Kimberley Process in 2012*, RAPAPORT (Nov. 3, 2011), <http://www.diamonds.net/news/NewsItem.aspx?ArticleID=37698>.

192. KPCS, *supra* note 5, § I.

193. Wexler, *supra* note 27, at 1770.

194. See Celia W. Dugger, *Africa’s Diamond Trade Under Scrutiny*, N.Y. TIMES (Nov. 3, 2009), <http://www.nytimes.com/2009/11/04/world/africa/04zimbabwe.html>; Dugger, *supra* note 188, at 2.

195. See Ecologist, *supra* note 135.

and want the coalition government to fail.<sup>196</sup> Since these troops run the torture camps and smuggle diamonds into Mozambique, some argue they qualify as “rebels” looking to overthrow the coalition government.<sup>197</sup>

While this argument is appealing for those who want the KPCS to solve the problem of Marange diamonds, it is clearly a very far stretch. Rebels do not try to overthrow a government by ensuring that the president of nearly thirty-two years remains in power. This twists the definitions of “rebel” and “undermine” to an extent that would cause even most lawyers to shake their heads. Pretending that a definition covers more than it does only leads to confusion and further denial. This is not the way to prove that Marange diamonds should be banned.

#### F. KPCS Principles

The KPCS contains more than narrow definitions. The document and the process it developed explicitly acknowledge the “systematic and gross human rights violations that have been perpetrated” in conflicts fueled by conflict diamonds.<sup>198</sup> The aim of the KP “is to exclude conflict diamonds from international markets and to prevent diamond-fuelled wars;”<sup>199</sup> “[a]t its core, the KP is about stopping human rights abuse linked to diamonds.”<sup>200</sup> At the KP meeting in June 2011, President of the World Diamond Council, Eli Izhakoff stated that the KP was “about humanity, not politics”<sup>201</sup> and urged all Participants to return to that core principle:

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196. See Eddie Cross, *Does Zim Qualify for Kimberley Process?*, ZIM. INDEP. (Nov. 10, 2011), <http://www.theindependent.co.zw/opinion/33071-does-zim-qualify-for-kimberley-process.html>; Dugger, *supra* note 177 (noting that “civic groups and leaders in Mr. Biti’s party are deeply concerned that the military, still entrenched in the Marange diamond fields and loyal to Mr. Mugabe, will use diamond profits to finance a campaign of violence against the Movement for Democratic Change in elections that seem likely to be held next year.”); Bruce Loudon, *Robert Mugabe’s Bloody Regime Set in Stone*, AUSTRALIAN (Nov. 16, 2011), <http://www.theaustralian.com.au/news/world/robert-mugabes-bloody-regime-set-in-stone/story-e6frg6ux-1226195986532> (“Mugabe’s murderous army has become part of the exploration and selling process. The army is pivotal to keeping Mugabe, and his successor, in power.”); see also Smith, *supra* note 153.

197. See Cowell, *supra* note 16.

198. KPCS, *supra* note 5, pmb1.

199. GLOBAL WITNESS, RETURN OF THE BLOOD DIAMOND 5 (2010), available at <http://www.globalwitness.org/library/return-blood-diamond-deadly-race-control-zimbabwe-s-new-found-diamond-wealth>.

200. SOKWANELE, *supra* note 95, at 10.

201. *KP is About Humanity Not Politics WDC President Tells Meeting in Kinshasa*, MARKET DIRECT (June 20, 2011), available at <http://www.mdirect-business.com/content/kimberley-process-about-humanity-not-politics-wdc-president-tells-meeting-kinshasa>.

At its core, the Kimberley Process is about protecting the right of communities and individuals to derive properly deserved benefit from natural resources. . . . First and foremost, the Kimberley Process caters to the fundamental needs of millions of ordinary men, women and children living in developing areas, where diamonds are mined and processed.

. . . [W]hile we will not agree on everything, we . . . are firmly committed to a trade in diamonds that is not tainted by conflict . . .<sup>202</sup>

In the end, it should not matter what precise definition we use, the Marange diamonds are covered in blood and should not be in the market.

Unfortunately, while those who support the KP's authority to ban Marange diamonds convincingly argue that the principle at issue is the connection between diamonds and human rights abuses, the Preamble's principles each reference "conflict diamonds" as defined within the document.<sup>203</sup> The human rights activists and NGOs who helped create this unique and impressive tool had to compromise and draw the lines around "conflict diamonds" closely enough to gain the support of diamond-producing nations and De Beers.<sup>204</sup> We are now seeing the full cost of that compromise.

#### PART IV: ADDRESSING THE DILEMMA

Zimbabwe's Marange diamonds present a dilemma: they are associated with precisely the type of violent conduct that triggered the KPCS, yet they do not fit the well-established and politically defensible definition. To get around the dilemma, we must either change the definition or turn to a different mechanism that is not so limited.

##### A. *Change the Definition*

Diamonds other than conflict diamonds, as defined by the KPCS, cause serious problems.<sup>205</sup> Zimbabwe proves that government-controlled diamonds can come with as much spilled blood as the rebel-controlled variety. Moreover, the conflicts these diamonds fuel and their associated human rights abuses are not the only harms connected to diamonds. Diamonds are regularly undeclared for tax evasion, stolen, used for money laundering, smuggled, and used to fund

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202. *Id.*

203. KPCS, *supra* note 5, pmb1.

204. See *Zimbabwe: Official Lauds Diamond Trade Ruling*, *supra* note 20.

205. Passas & Jones, *supra* note 28, at 6.

terrorism<sup>206</sup> and other crimes.<sup>207</sup> Diamonds that are technically conflict diamonds make up only a very small portion of all illicit diamond trading; other illicit diamonds do not receive sufficient attention.<sup>208</sup>

With only minor alterations to its document, the KPCS could change this; substitute the word “illicit” for “conflict,” and neither Marange diamonds nor the massive diamond frauds in Brazil and Guyana, for example, could have the KP stamp of approval.<sup>209</sup> Yet simple in theory does not mean simple in practice. Expecting one regulatory system to manage all diamond-related crimes in the world, especially one with so many additional challenges,<sup>210</sup> is unrealistic – not to mention the political resistance that would face such a proposal. But expecting it to regulate all blood-covered diamonds may not be. As other scholars and activists have argued, conflict diamonds should be defined as “all those diamonds that come from areas where diamond mining is based on the systematic violation of human rights.”<sup>211</sup>

Yet, some KP Participants argue that the system “was designed only to halt conflict diamonds and not the wider problem of illicit diamonds.”<sup>212</sup> They are likely unwilling to accept even the narrower definition change that would condemn violent abuses to acquire diamonds, regardless of the perpetrator. And yet, virtually all of the internal African conflicts that led to the KPCS are over.<sup>213</sup> Today’s “rebel movements” are unlikely to aim only at overthrowing individual governments; large-scale terrorism has greater appeal. So, what do we do? Wait for some old-school rebels to grab some diamonds?

### B. *Change the Tool*

Or do we develop a new tool for a new reality? Do we admit the KPCS has run its course, or acknowledge it was useful only in terms of its original limited scope? The activists and NGOs themselves are split. And if we do abandon the KPCS, where do we next turn our attention? Global Witness now claims that the diamond industry itself is the

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206. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-06-978, CONFLICT DIAMONDS: AGENCY ACTIONS NEEDED TO ENHANCE IMPLEMENTATION OF THE CLEAN DIAMOND TRADE ACT 2 (2006) [hereinafter GAO Report], available at <http://www.gao.gov/assets/260/251699.pdf>.

207. Gooch, *supra* note 99, at 190-92; Passas & Jones, *supra* note 28, at 7.

208. Passas & Jones, *supra* note 28, at 6.

209. KILLING KIMBERLEY, *supra* note 123.

210. See *supra* notes 91-96.

211. LUNDAS - THE STONES OF DEATH: ANGOLA’S DEADLY DIAMONDS: HUMAN RIGHTS ABUSES IN THE LUNDA PROVINCES, 2004 18 (Rui Falcao de Campos & Rafael Marques, eds. 2005) [hereinafter STONES OF DEATH], available at <http://www.medico.de/media/lundas--the-stones-of-death-angolas-deadly-diamond.pdf>; Wexler, *supra* note 27, at 1771.

212. Gooch, *supra* note 99, at 203.

213. Hummel, *supra* note 41, at 1167.

greatest hope for addressing these human rights violations; multinational corporate compliance regulations must eliminate the current abusive practices. While this is undeniably accurate, there are also other legal actions that the United States, strengthened by its position as the new KP Chair, could utilize.

### C. *Multinational Corporate Compliance*

Global Witness, one of the KPCS's founders, publicly declared the system ineffective.<sup>214</sup> Ms. Dunnebacke of Global Witness, stated that traders and dealers simply hide behind the KP, do not actually check the sources of their diamonds, and that the KP has simply failed to handle the situation at Marange.<sup>215</sup> Dunnebacke and Global Witness now believe the solution to the problems of the diamond trade lie within the industry itself: the focus must now be on requiring businesses and companies to conduct business less abusively.<sup>216</sup>

This tactic fits with a relatively recent United Nations ("UN") trend to focus efforts on codifying expectations for international corporate social responsibility.<sup>217</sup> In 1999, the UN's Global Compact became the official initiative, actively encouraging corporations to volunteer to help develop, adopt and implement principles of corporate social responsibility.<sup>218</sup> The Global Compact's Ten Principles received universal consensus and address appropriate corporate behavior in the areas of human rights, labor, the environment, and anti-corruption.<sup>219</sup> Principles 1 and 2 discuss human rights: "Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and Principle 2: make sure that they are not complicit in human rights abuses."

Additionally important, two reports focused further attention on developing comprehensive norms and positive obligations of corporations with regards to human rights: the 2005 *Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and Related Business*

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214. Eligon, *supra* note 22.

215. *Id.*

216. Message from Founding Director Charmian Gooch, Global Witness, Why We Are Leaving the Kimberley Process (Dec. 5, 2011), available at <http://www.globalwitness.org/library/why-we-are-leaving-kimberley-process-message-global-witness-founding-director-charmian-gooch>; Simon Allison, *Zimbabwe: Kimberley Process – Flawless it is Not*, ALLAFRICA (Dec. 6, 2011), <http://allafrica.com/stories/201112070600.html>; Ford, *supra* note 6.

217. See, e.g., Wallis, *supra* note 26, at 410-11.

218. UNITED NATIONS GLOBAL COMPACT, <http://www.unglobalcompact.org/index.html> (last visited May 7, 2012).

219. *Id.*

*Enterprises with Regard to Human Rights*<sup>220</sup> and the 2010 *Ruggie Report on Business and Human Rights*.<sup>221</sup> These reports strive to direct all corporations to use acceptable practices and also directly refer to international human rights instruments, thereby creating “a stronger and more widely accepted basis of human rights responsibilities generally, and a jus cogens basis regarding some human rights.”<sup>222</sup> As such, multinational corporations such as De Beers and others in the diamond industry have both the duty to refrain from activities that could violate human rights and to actively promote such rights.<sup>223</sup> As these norms develop further, and more corporations accept them, the force of international law will, in time, make such practices enforceable.

Yet they will only be enforceable to the extent that other UN declarations are enforceable or to the extent of voluntary compliance. Though Dunnebacke correctly states that diamond companies must monitor their product, and UN instruments exist to encourage this behavior, international regulation of multinational corporations still lacks a good compliance track record. Ironically, shortly after it was established, the KPCS was applauded as a new and different attempt at increasing international corporate responsibility for human rights.<sup>224</sup> Unlike prior (and subsequent) UN forays into corporate responsibility, the KPCS incorporated multiple constituencies into the process early and actively.<sup>225</sup> Further, the WDC’s warrantee system designed to regulate the gems once they reach industry representatives is specifically intended to involve the corporate entities in such compliance.<sup>226</sup> If traders and dealers currently hide behind the KPCS, they probably hide behind the warrantee system as well.<sup>227</sup> And if they

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220. U.N. High Comm’r on Human Rights, Subcomm. on Protection & Promotion of Human Rights, Report on the Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights, U.N. Doc E/CN.4/2005/91; ESCOR, 61st Sess. (Feb. 15, 2005), available at <http://www.ohchr.org/EN/Issues/Business/Pages/Reports.aspx>.

221. James Harrison, *2010 Ruggie Report on Business and Human Rights*, INT’L L. OBSERVER (Apr. 29, 2010), <http://internationallawobserver.eu/2010/04/29/2010-ruggie-report-on-business-and-human-rights/>.

222. Surya Deva, Comment, *UN’s Human Rights Norms for Transnational Corporations and Other Business Enterprises: An Imperfect Step in the Right Direction?*, 10 ILSA J INT’L & COMP. L. 493, 498 (2004).

223. Wallis, *supra* note 26, at 413.

224. *Id.* at 389; Allison, *supra* note 216 (discussing the certification programs of the oil, petroleum, and other mineral industries); Ford, *supra* note 6 (“The KP was seen as the flagship in a new generation of hybrid regulatory efforts.”).

225. Ford, *supra* note 6.

226. See WDC WEBSITE, *supra* note 110, at 11-12.

227. The warrantees were proving unsuccessful even in 2004. Press Release, Amnesty Int’l, Conflict Diamonds: Jewellers Keeping Consumers in the Dark (Oct. 18, 2004),

do that, what will prevent them from doing the same with a different, voluntary, and toothless mechanism?

Moreover, the degree of leverage NGOs had over the diamond industry when the KPCS formed has diminished. Neither the political will nor the industry fear that existed in 2000 exists today.<sup>228</sup> The United States is no longer the primary diamond purchaser on the market as it was eleven years ago;<sup>229</sup> the controversial sales of Marange diamonds in the summer of 2010 prove that India and China are more than willing to purchase any diamonds the United States boycotts.<sup>230</sup>

International corporate compliance and social responsibility is vital to the success and sustainability of our society and its resources – both human and non-human alike. It is a necessary tool for ending diamond related abuses. However, it is not sufficient.

#### D. *United States Laws and Policies*

It is time we look to other available tools to supplement, but not replace, the KPCS and international corporate compliance. In January 2012, the United States took over the rotating chair of the KP. This may prove the best chance for the KPCS and for addressing diamond related human rights abuses in general.<sup>231</sup> The United States initially condemned the violence in Zimbabwe,<sup>232</sup> disclaimed KP's authorization for the 2010 sales and advised consumers to boycott the gems. Unfortunately, its silence following lifting the ban casts doubt on its stance. Yet, the opportunity still exists.

Current U.S. legislation could stem the flow of bloody diamonds and punish those who trade them. For example, the Alien Tort Statute ("ATS"), originally passed in 1789, allows non-American citizens to sue "for a tort only, committed in violation of the law of nations or treaty of

available at <http://www.amnesty.org/es/library/asset/POL30/038/2004/es/9f6b2886-faa9-11dd-b6c4-73b1aa157d32/pol300382004en.pdf>.

228. Wallis, *supra* note 26, at 401.

229. *Id.* at 399-400. In 2005, the United States still "[a]ccount[ed] for over half of global diamond retail sales," though this number had already decreased. Fluet, *supra* note 38, at 113.

230. See Jason Moyo, *MDC Wants Marange Nationalized*, MAIL & GUARDIAN ONLINE (Nov. 25, 2011), <http://mg.co.za/article/2011-11-25-mdc-wants-marange-nationalised>.

231. Miller, *supra* note 191.

232. *Diamond Revenue Should Be Supported By New Legal Framework, Zim Officials Say*, ISRAELI DIAMOND INDUS. (Dec. 20, 2011), <http://www.israelidiamond.co.il/english/News.aspx?boneID=918&objID=10361>; Yoliswa Dube, *Year 2012 Expected to Present Better Opportunities for Zimbabweans*, CHRONICLE (Jan. 11, 2012), [http://www.chronicle.co.zw/index.php?option=com\\_content&view=article&id=28735:year-2012-expected-to-present-better-opportunities-for-zimbabweans&catid=39:opinion-a-analysis&Itemid=132](http://www.chronicle.co.zw/index.php?option=com_content&view=article&id=28735:year-2012-expected-to-present-better-opportunities-for-zimbabweans&catid=39:opinion-a-analysis&Itemid=132).



the United States.”<sup>233</sup> Although debates regarding the ATS are still prevalent, this statute provides a cause of action in U.S. courts for a narrow set of claims asserting a violation of the law of nations.<sup>234</sup> While this set of claims was originally extremely limited, it is expanding. Most relevant here, in *Filartiga v. Pena-Irala*, the Second Circuit concluded that the right to be free from torture was proscribed by the law of nations.<sup>235</sup> The victims of the Diamond Base torture camps, therefore, could possibly bring a cause of action against their torturers under the ATS.<sup>236</sup>

Furthermore, the United States has experience enacting legislation to harshly sanction countries that participate in trade the United States disfavors. For example, the Iran and Libya Sanctions Act of 1996 (ILSA) authorized the President to penalize foreign companies, individuals and sometimes nations trading with Iran or Libya, because the United States deemed these nations sponsor terrorism.<sup>237</sup> Additionally, the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (Helms-Burton Act)<sup>238</sup> sanctioned corporations who maintained specific trading relations with Cuba. The Act’s stated goal was to encourage a democratic Cuban government and was aimed at preventing other countries from trading with Cuba until it created such a government.<sup>239</sup>

Each of these Acts has critics and complications, but each, and the lessons they hopefully taught, could provide the stricter enforcement of clean diamond norms.<sup>240</sup> The United States should not go out and sanction countries at will; yet in the current environment of relatively weak international enforcement, domestic nations with the power and

233. 28 U.S.C. § 1350 (2006); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712-13 (2004).

234. *Sosa*, 542 U.S. at 712-13.

235. *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980).

236. There are additional requirements under the ATS, but going into such detail is beyond the scope of this paper. Furthermore, the Supreme Court recently heard oral arguments in *Shell Petroleum N.V. v. Kiobel*, 132 S. Ct. 472 (2011), *cert. denied*, 132 S. Ct. 248. On March 5, 2012, the Court ordered re-argument and additional briefs on the issue of whether the ATS allows U.S. courts to hear lawsuits for violations of international law committed on foreign soil. If the Court determines that such jurisdiction does not exist, this would obviously prevent the type of civil suit that could so benefit victims of human rights abuses at Marange. However, at the time of writing this article, the Court has not made such a ruling. Raising public awareness about the benefits the ATS could provide for enforcing human rights is now even more important.

237. Iran and Libya Sanctions Act of 1996, 50 U.S.C. § 1701 (2006) [hereinafter ILSA]. See Fluet, *supra* note 38, at 120.

238. Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, 22 U.S.C. § 6021 (2006) [hereinafter Helms-Burton Act].

239. *Id.* § 6021(11); see also Fluet, *supra* note 38, at 121

240. See Fluet, *supra* note 38, at 119-24.

legal ability to combat the generally disregarded horrific violence in Zimbabwe have the responsibility to take action. Given the United States' role in the KP, its continuing – though weakened – importance in the diamond market, and its relationships with members of the diamond industry, it is time to take a greater stand against the Marange atrocities.

#### PART V: ACTION STEPS TOWARD A SOLUTION

Inaction and implied inability are no longer acceptable. By adopting the following suggestions, important players in the international effort to regulate diamond-related atrocities could both eliminate the dilemma in Zimbabwe and direct international attention on actually putting an end to such atrocities.

First, the Kimberley Process, the World Diamond Council and the United States must each make public statements regarding their views on the relationship between diamonds and human rights. Quite simply, using systematic human rights abuses to mine or trade diamonds is unacceptable. Each of these three bodies must then take decisive steps to support this statement.

##### A. *The Kimberley Process*

At least two influential groups have publically declared that it is time to abandon the KPCS. As detailed above, both Global Witness and RapNet pulled out of the KP, citing Zimbabwe as final proof that the KP is unable to address human rights violations related to diamonds.<sup>241</sup> Though neither group suggests disassembling the organization, both believe that it is now incapable of handling today's true diamond conflicts.

However, good arguments also exist for giving the KPCS an overhaul and one final chance. Importantly, growing amounts of evidence support the contention that illicit diamond sales help finance global terrorism.<sup>242</sup> Leveraging and highlighting this evidence could trigger the political will needed to make the necessary reforms. The spokesman for the European Union's High Representative for Foreign Affairs and Security Policy wrote that the KP "may not be a perfect

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241. Andersson, *supra* note 14; Rapaport, *supra* note 24.

242. "In early November 2001, the Washington Post broke the story that conflict diamonds helped finance Al Qaeda . . . ." Feldman, *supra* note 10, at 853; Fluet, *supra* note 38, at 103-04; Hummel, *supra* note 41, at 1158; Vetter, *supra* note 39, at 737; Ian Smillie, *Motherhood, Apple Pie & False Teeth: Corporate Social Responsibility in the Diamond Industry*, DIAMONDS AND HUMAN SECURITY PROJECT 4-5 (June 2003), available at <http://www.globalpolicy.org/security/natres/diamonds/2003/0603-pac.pdf>; Maggi, *supra* note 114, at 536-37.

instrument, but it is the best we have, and therefore all parties, including civil society, should work to make it effective.”<sup>243</sup> Achieving this will require a significant overhaul involving changes to both substantive and procedural aspects of the KPCS.

First, the KP must change the definition of conflict diamonds. The original definition no longer accurately describes the realities of today’s diamond conflict. As described above, the KP could change the definition in a number of different ways, reflecting varying degrees of how comprehensively it wants to address diamond-related crime. For now, the KPCS should continue to regulate only conflict diamonds. Based on today’s diamond conflicts, a conflict diamond should now be any diamond that comes “from areas where mining is based on the systematic violation of human rights.”<sup>244</sup> If at some later date the KP decides it can address all illicit diamonds, it can add that provision then.

Second, the KP must regain credibility. To do so, it must be truly accountable for ensuring that it identifies all conflict diamonds, as newly defined. It must also acknowledge the need to allow Participant states’ governments some degree of protection.

The KP should adopt a more quasi-judicial structure. The KP investigative teams, which already act as fact-finders and submit reports to the KP, should be responsible for making specific findings of fact. In order for the KP to identify certain stones as conflict diamonds, it should be required to make a specific finding that systematic human rights violations are occurring with reference to specific mines. Only after such a finding should KPCS certification be denied. Whether or not the KP agrees with the investigation team’s finding will still require a consensus decision. This will clearly cause some of the same concerns and challenges that currently exist. However, by becoming more accountable for identifying systematic human rights violations in the diamond context, and making specific findings of this nature, any KP Participant who does not vote to ban diamonds from mines operating with systematic human rights abuses will become the focus of international pressure. Additionally, the KP should develop some form of appeals mechanism, through which the owner of the identified mine can object to the finding and be fairly heard.

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243. Eligon, *supra* note 22.

244. STONES OF DEATH, *supra* note 211. Martin Rapaport’s definition of “blood diamonds” is also acceptable: “Blood diamonds are diamonds involved in murder, mutilation, rape or forced servitude.” Rapaport, *supra* note 24.

*B. The World Diamond Council*

At the end of January 2010, Martin Rapaport, Chairman of the Rapaport Group, resigned from the WDC. He explained his reasons in a letter to the WDC and in an article published immediately following his resignation. He specifically cites WDC's support of KP actions regarding Marange and points to the difference between his group's definition of blood diamonds and the KP's definition of conflict diamonds as the cause of the problem:

To understand how this could happen, we must define "blood diamonds" and compare our definition to the KP definition of "conflict diamonds."

**Rapaport definition:** "*Blood diamonds are diamonds involved in murder, mutilation, rape or forced servitude.*"

**KP definition:** "*Conflict diamonds means rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments, as described in relevant United Nations Security Council (UNSC) resolutions insofar as they remain in effect, or in other similar UNSC resolutions which may be adopted in the future, and as understood and recognised in United Nations General Assembly (UNGA) Resolution 55/56, or in other similar UNGA resolutions which may be adopted in future . . .*"<sup>245</sup>

Rapaport recognized the fact that the KP definition of conflict diamonds does not address human rights violations and does not include all diamonds included under his definition blood diamonds – such as those from Marange.<sup>246</sup> Later, following the KP announcement in November 2011 that Marange diamonds were certified, RapNet informed its 6,750 members that it had banned all trade of Marange diamonds.<sup>247</sup> As stated above, RapNet is the world's largest diamond trading network and it will now publically suspend, expel, and name any company who violates the boycott of Marange diamonds.<sup>248</sup>

The rest of the WDC needs to follow Rapaport and RapNet's lead. The diamond industry, represented by WDC, must consider their consumers; the average person who purchases a diamond is not interested in legal technicalities. While not every customer considers

245. Rapaport, *supra* note 24.

246. *Id.*

247. Taurai Mangudhla, *Rapaport Tightens Screws on Zim Diamond Trade*, DAILY NEWS (N.Z.) (Dec. 30, 2011), <http://www.dailynews.co.zw/index.php/business/35business/6237-rapaport-tightens-screws-on-zim-diamond-trade.html>.

248. *Id.*

human rights when purchasing a diamond, those who do will identify with Rapaport's definition and not the KP's. Such conscientious customers will not support the idea that diamonds mined through forced labor, murder, and rape are "Conflict-Free." By banning all such diamonds from the legitimate trade, regardless of KP certification, the WDC could demonstrate its commitment to truly responsible business. As the green movement before it, customers will prove that responsible business practices that take a stand against human rights violations make good business sense.

To further this type of practice, the WDC must take an active role in implementing effective corporate compliance measures in all its members. The current system of WDC warrantees is insufficient. The RapNet and the Responsible Jewellery Council ("RJC"), an international non-profit organization with over 350 member companies, each have corporate compliance structures and more effective identification and certification procedures to ensure the ethical quality of their companies and products.<sup>249</sup> By working with these organizations, and others like Global Witness who are committed to corporate compliance and ethical trade, the WDC could become a leader in the field, ensure that blood diamonds are truly excluded from the market, and increase profits for its members all at the same time.

### *C. The United States*

The United States is currently in a position to take the lead in combating blood diamonds. As chair of the KP, the U.S. should propose an amendment to change the definition of conflict diamonds. This would show that the U.S. is not just paying "lip service" to the notion that people should not profit from inflicting serious human rights abuses. Additionally, the U.S. should take additional steps to follow and support RapNet's ban on Marange diamonds. While it is true that a U.S. boycott would no longer have the same impact it once would have, it would still have significant repercussions and serve as a powerful statement.

The U.S. must also take advantage of the existing laws that could influence those responsible for the atrocities in Zimbabwe. Recognizing the fact that it would be difficult, the U.S. should turn its attention to finding an appropriate way to bring a case under the Alien Tort Statute. As noted previously, the U.S. Supreme Court just recently

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249. See RESPONSIBLE JEWELLERY COUNCIL, <http://www.responsiblejewellery.com/> (last visited Apr. 28, 2012).

heard oral arguments on a case involving the ATS.<sup>250</sup> A suit brought against perpetrators of human rights violations in Zimbabwe, with public support from the U.S. government, would send the message that the U.S. firmly believes that such crimes are unacceptable, even in the name of profit, and that it is willing to hold people accountable for such actions.

Each of these proposed solutions presents significant difficulties of their own. Politics, policy, international relations and money will all pose obstacles to the effective implementation and enforcement of each of these suggestions. To deny this reality is naïve. And yet, to let them become paralyzing is unacceptable. It is just as unrealistic, and far more irresponsible, to wait around for a group of power-hungry rebels to steal some Marange diamonds.

#### PART VI: CONCLUSION

The “idealist’s” understanding of symbolic value and the “realist’s” insistence on effective practicalities are trapped within the conscientious International Human Rights lawyer. These competing perspectives crash together in Zimbabwe. We do not want to see powerful symbols of cooperation, such as the Kimberley Process, abandoned simply because they are not as practically effective as we had hoped. Yet, we need practical solutions. Global Witness pulled out of the KP not because its absence will change KP’s behavior, but because of the symbolism of a founding member deserting a project it now calls ineffective. If more organizations follow suit, it may well prove a symbolic gesture with fatal consequences for the KPCS.

A comprehensive approach to ending diamond-fueled violence and destruction requires a multilateral approach.<sup>251</sup> Both the KP and the WDC should participate in that approach, but each is running out of time to prove their willingness to address the diamond conflicts of the 21st century. Both organizations must strengthen their policies with regard to diamonds mined through human rights abuses. The new U.S. Chair must push to amend the definition of conflict diamonds to that

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250. See discussion of *Kiobel*, *supra* note 236. *Kiobel* involves a group of twelve Nigerians who brought suit under the ATS against Royal Dutch Petroleum Company seeking damages and other relief for the company’s assistance and complicity in torture, extrajudicial executions, and other violations of international law committed by the Nigerian government. Originally, the main issue in the case was whether corporations were immune from tort liability for such violations. Given the recent order for re-argument, however, the primary issue will now focus on whether the ATS grants jurisdiction for U.S. courts to hear cases involving violations of international law that occurred outside of the territorial United States.

251. Fluet, *supra* note 38, at 124.

stated above: “all those gems that come from areas where mining is based on the systematic violation of human rights.”<sup>252</sup>

The WDC should adopt RapNet’s definition of blood diamonds and publically recognize that any diamond involved in rape, murder, or other human rights violations simply is not “Conflict-Free.” Additionally, the U.S. should both use its existing law and develop new elements to increase the pressure on those who seek to benefit from illicit diamond trade. While the ATS currently stands on a threshold, waiting to see whether or not the U.S. Supreme Court strips it of its intended scope, public opinion can still exert real power. If, in the upcoming term, the Court determines that the ATS only provides jurisdiction for U.S. courts to hear cases involving tortious violations of international law occurring on American soil, then Congress must take active steps to pass new legislation that would allow for U.S. civil suits to condemn actions such as those in Marange.

The Kimberley Process Certification Scheme is far from perfect, but if we abandon every tool that does not provide all the solutions we hope for, the time and energy spent creating them may have been wasted. Giving up is not the answer; adapting and incorporating new mechanisms may be. The Kimberley Process and the World Diamond Council have one final opportunity to prove to the world that they are concerned with *all* violent human rights abuses perpetrated in the name of diamonds. If they cannot do this, then they should remain committed only to preventing rebel forces from using diamonds to fund civil war. And they should say as much. Lying to customers and the international community by claiming that the Kimberley Process ensures honestly conflict-free diamonds is unacceptable. The hypocrisy must end, one way or another. The conflict of diamonds is complicated, but it is a conflict we can overcome.

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252. STONES OF DEATH, *supra* note 211.