

Data Mining: Lessons from the Kimberley Process for the United Nations' Development of Human Rights Norms for Transnational Corporations

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I. INTRODUCTION

¶1 The Kimberley Process, officially in place for almost three years, is the product of an unprecedented assemblage of national governments, non-governmental organizations (NGOs), corporations in the diamond industry, and industry associations to establish a certification protocol for all diamonds traded globally. The process was instituted in an effort to stem the trade in illicit “conflict diamonds” that were being used to finance abusive, illegal regimes in diamond-rich countries like Angola, the Congo, and Sierra Leone.¹ Diamonds had become the currency and primary financing vehicle of rebel movements that brutalized innocent civilians.² The Kimberley Process has been hailed as a unique model because it resulted from an upwelling of action from the impacted nations and the diamond industry after significant attention was focused on these abuses by NGOs. The Kimberley Process was not a proclamation crafted in the halls of the United Nations (UN) and foisted upon states and, in turn, impacted transnational corporations without practical application or enforcement mechanisms. It was instead a movement initiated by those state governments and companies themselves, who devised and committed themselves to an executable protocol and monitoring procedures.

¶2 An analysis of the Kimberley Process is particularly timely because it has now been in existence long enough that observations about its relative success, its triumphs and pitfalls, have begun to emerge. Also, though, it can be especially instructive in another respect – with regard to a recent undertaking by the United Nations. The UN has expressed a renewed interest in the role and accountability of transnational corporations in ensuring that human rights are protected in their business activities in every state in which they operate. This focus is apparent in the UN’s April 2004 introduction and expression of support for draft Norms on Responsibilities of Transnational Corporations

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¹ *Significant Challenges Remain in Deterring Trade in Conflict Diamonds: Hearing on Illicit Diamonds, Conflict and Terrorism: The Role of U.S. Agencies in Fighting the Conflict Diamond Trade Before the Subcommittee on Oversight of Government Management, Restructuring and the District of Columbia Committee on Government Affairs, U.S. Senate, 107th Cong.* (Feb. 13, 2002) (testimony of Loren Yager, Director, International Affairs and Trade, U.S. General Accounting Office), available at <http://govt-aff.senate.gov/021302yager.pdf>.

² *Id.*

and Other Businesses (the Norms),³ the subsequent report on corporate social responsibility delivered in March 2005,⁴ and the July 2005 appointment of a Special Representative on the issue.⁵ As the Norms are developed, and presumably, the beginnings of an enforcement mechanism are discussed, the lessons from the Kimberley Process may be particularly helpful.

¶3 In the broader context, the Kimberley Process represents one model by which “soft law” norms are migrated to hard, enforceable law across international boundaries. Essentially, the Kimberley approach is to convene the key global stakeholders in the diamond trade, identify universal human rights goals for the trade and the stakeholders, devise a process by which those goals may be achieved, and pursue uniform national implementing legislation in each of the stakeholder states.⁶ Both the UN’s past efforts and its most recent foray into corporate responsibility for human rights have taken a different tack, by which the UN is the primary author of the soft law norms, advised by a representative sample of other stakeholders who have been encouraged to voluntarily adopt the UN’s recommendations, but with no implementing or enforcement mechanisms in place.⁷ As the UN undertakes the transition from purely soft law norms to more enforceable, international hard law, it may be well-served by better incorporating other constituencies early and often in the process, as the Kimberley Process has done.

¶4 But mere involvement of all stakeholders will not ensure success. The direct buy-in and responsibility for development of the process certainly has contributed to the rapid, universal acceptance of the Kimberley Process’s standards and their legitimacy. Further, the process itself, having been developed by those to whom it applies, is presumably

³ Amnesty International, Public Statement: Commission on Human Rights, 60th Session (15 March – 23 April 2004) Corporate Responsibility Breakthrough (Apr. 23, 2004), <http://web.amnesty.org/library/Index/ENGIOR410252004?open&of=ENG-393>.

⁴ U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm’n on the Promotion and Protection of Human Rights, *Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights*, ¶ 1, U.N. Doc. E/CN.4/2005/91 (Feb. 15, 2005), available at <http://daccessdds.un.org/doc/UNDOC/GEN/G05/110/27/PDF/G0511027.pdf?OpenElement>.

⁵ United Nations Department of Public Information, News and Media Division, *Secretary-General Appoints John Ruggie of United States Special Representative on Issue of Human Rights, Transnational Corporations, and Other Business Enterprises*, U.N. Doc. SG/A/934 (July 28, 2005), available at <http://www.un.org/News/Press/docs/2005/sga934.doc.htm>.

⁶ Telephone Interview with Ambassador J.D. Bindenagel, Vice President for Program, The Chicago Council on Foreign Relations (Nov. 22, 2004). Prior to joining The Chicago Council on Foreign Relations (CCFR), Ambassador Bindenagel was a US special negotiator who led the US government’s Kimberley Process negotiating team. Ambassador Bindenagel also served as US ambassador and special envoy for agreements on forced labor, insurance, art, property restitution, and Holocaust education and remembrance, during which he brokered a \$5 billion settlement with German-owned companies accused of various of these offenses during the Holocaust. The approach taken to resolve these issues represents a different international soft law-hard law transition, as the process commenced with private individuals’ lawsuits against German companies operating in the US. Ambassador Bindenagel’s team was able to broker an alternate remedy to the lawsuits, in the form of the \$5 billion settlement, which was acceptable to plaintiffs, defendant companies, and US courts, who then dismissed the suits. More information about this approach is available at <http://www.stiftung-evz.de>.

⁷ See Kenneth W. Abbott, Sonya Sceats & Duncan Snidal, *The Governance Triangle: States, Firms, NGOs and Global Business Standards* (forthcoming). Abbott et al create a “Governance Triangle” that demonstrates the Kimberley Process’s nearly equal dependence on NGOs, states, and firms (the three vertices of the triangle), while the UN Global Compact, the precursor to the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, skews more significantly to the state axis, with some dependence upon firms.

practical and workable. However, some have argued that the process relies too much upon self-policing, by both the states and the companies involved, resulting in inadequate, “toothless” monitoring and enforcement mechanisms that are fundamentally flawed and ultimately ineffectual.⁸ As the United Nations embarks upon what will likely be a protracted process of defining its role in governing corporate social responsibility, these lessons of the Kimberley Process could prove invaluable. A delicate balance must be struck between the legitimacy derived from stakeholder involvement and the need for enforcement mechanisms independent of the stakeholders themselves.

¶5 Part II of this comment will briefly address the nature of the diamond trade and the history that culminated in the creation of the Kimberley Process, the creation of the process, and its structure. The instructive qualities of the process, both successful and failed, from inception to implementation, will comprise Part III. Part IV will briefly address the UN’s past work to promote greater corporate social responsibility with regard to human rights, which have led to its most recent efforts. And Part V will suggest ways in which the successes and failures of the creation of the Kimberley Process, its structure, and its enforcement can inform the UN’s current approach to better defining and enforcing corporate social responsibility of transnational corporations.

II. THE CONFLICT DIAMOND TRADE AND DEVELOPMENT OF THE KIMBERLEY PROCESS

¶6 The unique character of diamonds and the industry surrounding their journey from mine to adornment renders them particularly amenable to illicit trade.⁹ Diamonds are highly valuable and easily concealed and transported.¹⁰ They are mined in remote areas, change hands multiple times, are intermingled with other diamonds, follow circuitous trading routes, and are accompanied by little documentation, as the trade functions more on honor and trust.¹¹ Country data on production, import, and export rates is often fraught with error and inconsistencies.¹² All of these conditions combine to make diamonds a very attractive currency for illegal transactions, be they arms deals, money laundering, or various other crimes.¹³

A. *The Conflict Diamond Trade*

¶7 The United Nations defines conflict diamonds as “diamonds that originate from areas controlled by forces or factions opposed to legitimate and internationally recognized governments, and are used to fund military action in opposition to those governments, or in contravention of the decisions of the Security Council.”¹⁴ By the 1990s, the unregulated trade of diamonds had become the primary financing vehicle for rebel groups in armed conflicts in at least three African nations – Angola, the Democratic

⁸ Press Release, Global Witness, *A Good Watchdog But Crucially Lacking In Teeth* (Nov. 29, 2001), http://www.globalwitness.org/press_releases/display2.php?id=109.

⁹ *Hearing*, *supra* note 1, at 2 (testimony of Loren Yager).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ United Nations Department of Public Information, *Conflict Diamonds: Sanctions and War* (Mar. 21, 2001), <http://www.un.org/peace/africa/Diamond.html>.

Republic of the Congo, and Sierra Leone.¹⁵ And a fourth, Liberia, was also engaged in the trade in support of the Sierra Leonean rebels.¹⁶ In each country, the rebel groups often controlled the diamond mining regions and used the proceeds to acquire weapons and wage brutal, decades-long campaigns against unarmed civilians, perpetrating killings, rapes, mutilations, and abductions into their armies or sexual slavery.¹⁷ And while the combined number of diamonds emanating from the illicit trade in these regions comprised as little as 3% and no more than 15% of all diamonds on the market, the impact on the people of these nations was immeasurably – and unacceptably – higher.¹⁸ As many as 3.7 million people ultimately lost their lives to the diamond-financed conflicts, and as many as 6.5 million were displaced,¹⁹ not to mention the untold thousands who suffered other abuses of their most fundamental rights.²⁰

B. Road to Reform

¶8 As early as 1993, and through 2001, the United Nations adopted various resolutions that imposed embargoes and sanctions on the trade of arms and diamonds from the nations of Angola, Sierra Leone, and the Democratic Republic of the Congo.²¹ Throughout this period, the Clinton Administration took an active role in calling for these sanctions, as well as sponsoring multilateral policy-making and diplomatic initiatives, holding conferences and initiating dialogues about the impacted states, and encouraging legislative change to diamond mining and marketing policies in the impacted countries.²² Nonetheless, some members of Congress spoke out against the administration for failing to take a more active role to stem the violence in the region.²³ The administration's response was that there existed no international consensus on an approach to the conflict diamond dilemma.²⁴

¶9 By 2000, the efforts of the UN, the US, and other nations had still not seen success.²⁵ Non-governmental organizations had begun to thrust the issue into the popular conscience two years earlier, when they launched a constant barrage of reports and criticism that ultimately drew the attention of diamond-producing states and companies and the global community as a whole.²⁶ In 1998, Global Witness, a London-based non-

¹⁵ Amnesty International, *The True Cost of Diamonds*, THE WIRE, Dec. 2002, <http://web.amnesty.org/web/wire.nsf/December2001print/Diamonds?OpenDocument>.

¹⁶ *Id.*

¹⁷ Amanda Bryant Banat, Note, *Solving the Problem of Conflict Diamonds in Sierra Leone: Proposed Market Theories and International Legal Requirements for Certification of Origin*, 19 ARIZ. INT'L & COMP. LAW 939, 941 (2002).

¹⁸ *Hearing*, *supra* note 1, at 7 (testimony of Loren Yager).

¹⁹ Clean Diamond Trade Act, 19 U.S.C. §3901 (2003).

²⁰ Amnesty International, Conflict Diamonds, http://web.amnesty.org/pages/ec-diamonds-action_2-eng (last visited Oct. 31, 2004).

²¹ See United Nations, *supra* note 14.

²² Nicholas Cook, *Diamonds and Conflict: Policy Proposals and Background*, in DIAMONDS AND CONFLICT 1, 19-20 (Arthur V. Levy ed., 2003).

²³ *Id.* at 20-21.

²⁴ *Id.*

²⁵ Michael Fleshman, "Conflict Diamonds" Evade UN Sanctions, AFR. RECOVERY, Dec. 15, 2001, at 15, <http://www.un.org/ecosocdev/geninfo/afrec/vol15no4/154diam.htm>.

²⁶ INGRID J. TAMM, DIAMONDS IN PEACE AND WAR: SEVERING THE CONFLICT -DIAMOND CONNECTION at 22 (World Peace Found. Reports No. 30, 2002).

governmental organization that focused upon the linkage between the exploitation of natural resources and human rights, released a report titled *A Rough Trade: The Role of Companies and Governments in the Angolan Conflict*.²⁷ Among other allegations, the report implicated De Beers in buying diamonds from Angolan rebel groups in order to maintain market stability.²⁸ De Beers is the acknowledged juggernaut of the diamond industry – selling 85% to 90% of all diamonds worldwide throughout most of the twentieth century.²⁹ The NGO activity spurred others to act as well. In 1999, US Congressman Tony Hall introduced a bill into Congress (the Consumer Access to Responsible Accounting of Trade, or CARAT Act) requiring that every diamond valued at greater than \$100 that entered the United States be accompanied by a certificate of origin.³⁰ The bill was unsuccessful.³¹

¶10 The NGO drumbeat persisted. In October 1999, four European human rights organizations launched a campaign titled the “Fatal Transactions Campaign,” again highlighting conflict diamond sales in Angola, and in Sierra Leone and Liberia as well.³² The group called again for the diamond industry, particularly De Beers, to take a more significant role in curbing this trade.³³ Within days of the report’s release, De Beers first announced that it had placed an embargo on all diamond purchases from Angola, and then that it was ceasing diamond purchases from the outside market altogether.³⁴ Shortly thereafter, in January 2000, Partnership Africa Canada, another active NGO advocating appropriate extraction and use of natural resources in Africa, released a report titled *The Heart of the Matter: Sierra Leone, Diamonds and Human Security*.³⁵

¶11 In March 2000, the NGOs’ assertions were corroborated by a UN Security Council report on the status of UN sanctions against the Angolan rebel group UNITA.³⁶ Commonly called the Fowler Report for then-Canadian Ambassador to the UN Robert R. Fowler, who chaired the sanctions committee, the *Report of the Panel of Experts on Violations of Security Council Sanctions Against UNITA* clearly illustrated the connection between the illicit diamond trade and the conflict in Angola,³⁷ legitimizing and expanding the concerns that had been instigated by the NGOs.³⁸ The Fowler Report is widely regarded as the seminal UN document that confirmed the NGOs’ claims and focused the UN’s, and indeed, the world’s, attention on the conflict-diamond connection.

²⁷ *Id.*

²⁸ *Id.* at 22-23.

²⁹ Nicholas Stein, *The De Beers Story: A New Cut on an Old Monopoly*, FORTUNE, Feb. 19, 2001, at 186.

³⁰ Daniel L. Feldman, *Conflict Diamonds, International Trade Regulation, and the Nature of Law*, 24 U. PA. INT’L BUS. L. 835, 845-46 (2003).

³¹ *Id.*

³² TAMM, *supra* note 26, at 23.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Chairman of the Security Council Committee Established Pursuant to Resolution 864 (1993) Concerning the Situation in Angola, *Letter Dated 10 March 2000 from the Chairman of the Security Council Committee Established Pursuant to Resolution 864 (1993) Concerning the Situation in Angola Addressed to the President of the Security Council*, U.N. Doc. S/2000/203 (2000), available at <http://odslogin-dds-ny.un.org/doc/UNDOC/GEN/N00/335/64/img/N0033564.pdf?OpenElement>.

³⁷ *Id.*

³⁸ Cook, *supra* note 22, at 5.

¶12 In the early summer of 2000, Amnesty International and World Vision organized a small protest including Congressman Tony Hall outside Cartier's Fifth Avenue store in New York.³⁹ Congressman Hall revamped and reintroduced his CARAT Act in September of that year, to no avail.⁴⁰ In October, he introduced a new bill titled the Conflict Diamonds Elimination Act, a compromise bill between the diamond industry and NGOs.⁴¹ Again, the bill did not pass, but Hall's persistence kept the issue active and on the agenda.⁴² As pressures mounted from all sides and the prospect of a potentially crippling consumer backlash and boycott became more real, companies engaged in the diamond trade and industry associations quickly took notice.⁴³

C. Negotiating the Kimberley Process

¶13 The opportunity was ripe for a unique assemblage of international players to come together in hopes of halting the illegal trade of conflict diamonds - the exasperated diamond-producing African nations, looking to quell the decades of violence and salvage the diamond trade; companies engaged in the diamond trade and the industry associations who represented them, fearing an NGO-driven boycott and the potential collapse of the industry; and over 70 NGOs, who had themselves originally focused public attention on the matter.⁴⁴

¶14 In May 2000, African diamond-producing nations came together in Kimberley, South Africa to attempt to devise a remedy.⁴⁵ In July, at the 29th World Diamond Congress, the International Diamond Manufacturers' Association and the World Federation of Diamond Bourses issued a joint, "zero tolerance" resolution on conflict diamonds, by which they created the World Diamond Council to represent the interests of all aspects of the diamond industry in the work to eliminate conflict diamonds.⁴⁶ By December 2000, the United Nations General Assembly had adopted General Assembly Resolution 55/56, requesting the development of an international certification scheme for rough diamonds.⁴⁷ Forty-eight states sponsored the resolution, and it was unanimously adopted without a vote.⁴⁸ This resolution imposed a timeline on the process, with the UN requesting a report by December 2001.⁴⁹ It also signaled the involvement of more national governments.⁵⁰

³⁹ Feldman, *supra* note 30, at 848.

⁴⁰ Tracey Michelle Price, *The Kimberley Process: Conflict Diamonds, WTO Obligations, and the Universality Debate*, 12 MINN. J. GLOBAL TRADE 1, 44 (2003).

⁴¹ *Id.* at 45.

⁴² *Id.* at 44-45.

⁴³ *Id.* at 32-33.

⁴⁴ *Id.*

⁴⁵ *Hearing, supra* note 1, at 5 (testimony of Loren Yager).

⁴⁶ WORLD DIAMOND COUNCIL, *THE ESSENTIAL GUIDE TO IMPLEMENTING THE KIMBERLEY PROCESS* 11-12 (2003), <http://www.worlddiamondcouncil.com/wdcbk.pdf>.

⁴⁷ TAMM, *supra* note 26, at 18.

⁴⁸ *Id.* at 19. Press Release, General Assembly, General Assembly Urges Finalization of International Certification Scheme for Rough Diamonds, U.N. Doc. GA/10011 (Mar. 13, 2002), *available at* <http://www.un.org/News/Press/docs/2002/GA10011.doc.htm>.

⁴⁹ TAMM, *supra* note 26, at 19.

⁵⁰ *Id.*

- ¶15 In February 2001, the expanded group of Kimberley Process participants, now including diamond importing and processing nations and the World Diamond Council in addition to diamond producers, met in Namibia to establish the Kimberley Process Task Force and lay out a roadmap for meeting the December 2001 reporting deadline.⁵¹ The group was also in constant consultation with NGOs,⁵² who continued to apply consistent pressure on the process. In fact, that same month, a coalition of seven NGOs issued a report card on the Kimberley Process, effectively giving them an “A” for effort, but an “F” for effectiveness in their ability to meet the UN’s call for a workable and transparent process.⁵³
- ¶16 At the same time, the US was still actively engaged in the issue. One of the last acts of the Clinton Administration on conflict diamonds was the White House Diamonds Conference, titled *Technologies for Identification and Certification*, hosted by the White House Office of Science and Technology Assessment on January 10, 2001.⁵⁴ Over 150 engineers, scientists, policy makers, and representatives of NGOs and the global diamond industry discussed the technical identification methods for determining the origin of rough diamonds, the feasibility of an origin certification program, and related policy concerns.⁵⁵ When the Bush Administration came into power, it essentially adopted many of the same tactics that had been in force under Clinton. Over the two presidents’ terms, executive orders were issued to implement UN sanctions banning importation of diamonds from Angola, Sierra Leone, and Liberia.⁵⁶
- ¶17 Legislators continued to attempt to enact legislation restricting the conflict diamond trade with the US. In the fall of 2001, two distinct bills were put forth in the House and Senate, each of which was called the Clean Diamond Trade Act, and each of which attempted to make improvements to prior bills.⁵⁷
- ¶18 But the conflict diamond issue took on even greater importance when on November 2, 2001, less than two months after the September 11th attacks, the *Washington Post* broke a story connecting financing of Al Qaeda with conflict diamonds.⁵⁸ Shortly thereafter, on November 28, the House passed the most recent version of the bill.⁵⁹ But the Senate did not do so before the November recess.⁶⁰
- ¶19 Following the initial meeting in February 2001, five subsequent meetings of the Kimberley Process were held in international capitals.⁶¹ At the conclusion of the final meeting before the original UN reporting deadline, on November 29, 2001 in Gaborone, Botswana, representatives released a working document detailing a series of guidelines

⁵¹ Kimberley Process Meeting and Technical Workshop, Windhoek, Namibia, 13-16 February 2001, Final Communiqué (2001), http://www.kimberleyprocess.com:8080/site/www_docs/plenary_meetings19/9windhoek_final_communique.pdf.

⁵² *Id.*

⁵³ Price, *supra* note 40, at 35.

⁵⁴ The conference was sponsored in concert with the National Security Council, the State Department, the National Science Foundation, and the Treasury Department. Cook, *supra* note 22, at 5.

⁵⁵ *Id.*

⁵⁶ Price, *supra* note 40, at 43.

⁵⁷ *Id.* at 45-46.

⁵⁸ DOUGLAS FARAH, BLOOD FROM STONES, 59-60 (2004).

⁵⁹ Price, *supra* note 40, at 46.

⁶⁰ *Id.* at 47.

⁶¹ TAMM, *supra* note 26, at 20-21.

by which each participating state would be governed.⁶² The report designated the end of 2002 as the deadline by which the certification process would be fully implemented, encouraging those who could do so immediately to begin issuing certificates, and all others to do so no later than June 2002.⁶³ Ultimately, however, the report was not introduced and discussed at the UN General Assembly until March 2002.⁶⁴ During the intervening period, many who found fault with the guidelines and questioned their potential effectiveness spoke out.⁶⁵ Among them was the Director of International Affairs and Trade of the General Accounting Office, who gave testimony before a Senate subcommittee in February 2002 entitled “Significant Challenges Remain in Deterring Trade in Conflict Diamonds”.⁶⁶ Nonetheless, on March 13, 2002 the United Nations General Assembly, after reviewing the November 2001 working document of the Kimberley Process, passed Resolution 56/263 expressing support for it.⁶⁷ Five days later, on March 18, concerned that the bill passed by the House was significantly weakened, Senators Durbin, Feingold and DeWine introduced yet another version of the Clean Diamond Trade Act. Ultimately, however, it did not pass either.⁶⁸

¶20 That summer, the US asked Ambassador JD Bindenagel to step in and “close the deal,” effectively to help accelerate the ratification and implementation of the Kimberley Process after its long and rocky period of false starts.⁶⁹ Finally, in November 2002 the Kimberley Process assembled again and actually ratified the Kimberley Process Certification Scheme (KPCS).⁷⁰ Fifty-two nations ratified and adopted the protocol,⁷¹ with an anticipated compliance date of January 2003.⁷² On January 28, 2003, the UN Security Council issued a resolution ratifying the Certification Scheme.⁷³ But at the April 2003 plenary meeting, the deadline for meeting membership requirements was extended again until July of that year.⁷⁴ Finally, it was decided that those not qualifying by August 31, 2003 would be banned from trading in rough diamonds until they put appropriate enacting legislation in place.⁷⁵

¶21 In response to the final adoption of the Kimberley Process, the US again attempted to pass implementing legislation.⁷⁶ Given the prior barriers to passage, the Bush Administration felt it would be most effective in the short-run to pursue an executive

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Margo Kaplan, Note, *Carats and Sticks: Pursuing War and Peace Through the Diamond Trade*, 35 N.Y.U. J. INT’L L. & POL. 559, 588 (2003).

⁶⁵ Price, *supra* note 40, at 35.

⁶⁶ *Hearing*, *supra* note 1 (testimony of Loren Yager).

⁶⁷ Kaplan, *supra* note 64, at 589.

⁶⁸ Price, *supra* note 40, at 47.

⁶⁹ Bindenagel, *supra* note 6.

⁷⁰ WORLD DIAMOND COUNCIL, *supra* note 46, at 1.

⁷¹ *Id.*

⁷² Kaplan, *supra* note 64, at 589.

⁷³ S.C. Res. 1459, U.N. Doc. S/RES/1459(2003) (Jan. 28, 2003), available at <http://ods-dds-un.un.org/doc/UNDOC/GEN/N03/227/58/PDF/N0322758.pdf?OpenElement>.

⁷⁴ Kaplan, *supra* note 64, at 589.

⁷⁵ Kimberley Process Chair’s Notice: End of Tolerance Period in the Kimberley Process (July 31, 2003), http://www.kimberleyprocess.com:8080/site/www_docs/chairs6/chair%27s_notice-_31_july_2003_-_end_of_tolerance_period.pdf.

⁷⁶ Bindenagel, *supra* note 6.

order ratifying and adopting the Kimberley Process, and did so on January 1, 2003.⁷⁷ Ultimately, implementing legislation, titled the Clean Diamond Trade Act, was passed unanimously in the House and Senate, and signed into law by President Bush on April 25, 2003.⁷⁸ On May 15, 2003, the World Trade Organization granted a waiver to 11 member states excusing them from violations of certain articles of the General Agreement on Tariffs and Trade (GATT) with respect to measures necessary to “prohibit the import [or export] of rough diamonds to [or from] non-participants in the Kimberley Process Certification Scheme consistent with the Kimberley Process Certification Scheme.”⁷⁹ The waiver was made retroactive to January 1, 2003, and lasts until December 31, 2006.⁸⁰

D. *The Kimberley Process*

¶22 At the most basic level, the Kimberley Process Certification Scheme requires that all shipments of rough diamonds being either exported internationally from their source, or re-exported internationally, must be transported in a tamper-resistant container and accompanied by a Kimberley Process Certificate validated by the government.⁸¹ That shipment can only be exported to another participating country in the process, and no uncertified shipments will be permitted into participating countries.⁸²

¶23 After the point of export of the rough diamonds, however, diamonds are only subject to the voluntary System of Warranties originally devised by the World Diamond Council.⁸³ This system requires all other traders in diamonds, from the rough diamond importers to in-country traders, polishers, dealers, and manufacturers, to adhere to a warranty system by which the invoice for the diamonds is printed with the following language: “The 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.”⁸⁴

¶24 The system of warranties is undergirded by several key commitments, including: 1) to limit trade only to those companies that include the required warranty on their invoices, 2) to avoid buying any diamonds originating in non-participant countries or from unknown or suspect suppliers, 3) to avoid purchasing diamonds from sources found through due process to have violated government regulations governing conflict diamonds, 4) to avoid buying diamonds from any region that is under an advisory from a governmental authority stating that conflict diamonds have originated there, 5) to refrain from knowingly engaging in the purchase or sale of conflict diamonds or assisting others

⁷⁷ *Id.*

⁷⁸ Clean Diamond Trade Act, 19 U.S.C. §3901 (2003).

⁷⁹ Joost Pauwelyn, *WTO Compassion or Superiority Complex?: What to Make of the WTO Waiver for “Conflict Diamonds”*, 24 MICH. J. INT’L L. 1177, 1178 (2003); World Trade Organization, *Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds, Decision of May 15, 2003*, WT/L/518 (2003). The 11 states are Australia, Brazil, Canada, Israel, Japan, Korea, Philippines, Sierra Leone, Thailand, United Arab Emirates, and United States.

⁸⁰ World Trade Organization, *supra* note 79.

⁸¹ WORLD DIAMOND COUNCIL, *supra* note 46, at 1-2.

⁸² *Id.*

⁸³ *Id.* at 12.

⁸⁴ *Id.* at 5.

in doing so, and 6) to ensure that all company employees engaged in the diamond trade are well informed of the resolutions and government regulations governing the trade.⁸⁵

¶25

While each participant in the process is expected to maintain auditable records of warranties received and issued, and risks expulsion from diamond industry institutions for failure to comply with the above tenets or the warranty system itself, the process post-export is almost entirely self-governed, and few other constraints exist.⁸⁶ Diamonds from multiple shipments may be intermixed, and the actual Kimberley certificate is not required to follow them.⁸⁷ Further, the end-use retailers are not even required to provide the above-quoted warranty directly to consumers.⁸⁸ Rather, they need only inform their suppliers that they require a warranty from them, and keep those warranties for at least five years.⁸⁹

¶26

The Kimberley Process participant group is uniquely structured, in that the World Diamond Council and NGOs Global Witness and Partnership Africa Canada serve equally with participant nations on several of the working groups and committees overseen by the Chair.⁹⁰ As of June 2005, a total of 67 countries, including all of the major diamond trading and producing countries, were participants in the Kimberley Process and had established national export/import controls for keeping out conflict diamonds.⁹¹ The current Kimberley Chair is Russia.⁹² The three Working Groups are Monitoring, Statistics, and Diamond Experts, while the two Committees are Participation and Selection.⁹³ The entire group meets in plenary session once annually in October.⁹⁴ The UN General Assembly consistently invites the Kimberley Process Chair country's Permanent Representative to the United Nations to report on the progress of

⁸⁵ *Id.* at 2-3.

⁸⁶ *Id.* at 2-8.

⁸⁷ *Id.* at 2-8.

⁸⁸ *Id.* at 2-8.

⁸⁹ *Id.* at 2-8.

⁹⁰ Kimberley Process, Kimberley Structure, <http://www.kimberleyprocess.com:8080/site/?name=structure&PHPSESSID=c41de38ba0531684be038095ec851ee6> (last visited Oct. 2, 2005).

⁹¹ GLOBAL WITNESS, IMPLEMENTING THE KIMBERLEY PROCESS: 5 YEARS ON – HOW EFFECTIVE IS THE KIMBERLEY PROCESS AND WHAT MORE NEEDS TO BE DONE? at 1 (June 2005), <http://www.globalwitness.org/reports/show.php/en.00074.html>.

⁹² Kimberley Process, <http://www.kimberleyprocess.com:8080/site/?name=home> (last visited October 2, 2005).

⁹³ The Working Group on Monitoring, tasked with overseeing and assessing the implementation of the KPCS, is chaired by the European Community with assistance from Israel. Members of the committee include seven nations, the World Diamond Council, and the two most outspoken NGOs throughout the process – Global Witness and Partnership Africa Canada. The Working Group on Statistics, responsible for ensuring timely reporting and analysis on statistical data regarding the diamond trade, is chaired by Canada, with assistance from South Africa. Seven participant country members and Partnership Africa Canada comprise the Working Group's members. The Diamond Experts Working Group is tasked with devising solutions to technical problems encountered in the implementation of KPCS. It is headed by the World Diamond Council with membership of seven nations and Partnership Africa Canada. The Participation Committee assists the Chair in handling the admission of new participants, and is chaired by Canada with Botswana as Vice-Chair, nine participant nation members, the World Diamond Council, and Global Witness/Partnership Africa Canada. And finally, the Selection Committee assesses the credentials of candidates for Vice Chair, who will succeed the Chair in its duties the following year. This committee is chaired by Russia (the current Chair of the Kimberley Process), with assistance from Botswana (the 2006 Chair of the Kimberley Process), and participation from twelve other participant nations. Kimberley Process, *supra* note 90.

⁹⁴ *Id.*

implementing the KPCS to the Assembly at its annual session.⁹⁵ The 2004 report by then-Chair Canada prompted a December draft resolution reaffirming the General Assembly's support for the KPCS.⁹⁶

III. SUCCESSES AND IMPROVEMENT OPPORTUNITIES FOR THE KIMBERLEY PROCESS

¶27 The unprecedented nature and fledgling success of the Kimberley Process leads inevitably to questions about what sparked it, how it evolved, and whether it will truly succeed. Both achievements and flaws of the development process, the protocol itself, and its implementation can be instructive in understanding how the force of the complex entanglement of international bodies, non-governmental organizations, and world governments may be brought to bear to ultimately hold corporations responsible for the impact that they have on human rights issues. Several aspects of the diamond trade and this particular conflict render the Kimberley Process unique and difficult to replicate, yet others can be quite instructive.

A. *Positive Attributes of the Kimberley Process*

1. Inception

¶28 Perhaps the most striking quality of the Kimberley Process is that it exists at all. On its face, the process seems to have materialized spontaneously from diamond-producing countries' and companies' grave concern for the plight of the people victimized by conflict diamonds – hardly a common occurrence. But the constant, strident call of NGOs was more likely the true catalyst for action. The 1998 Global Witness report launched a barrage of unceasing reports and campaigns – at least one per year sponsored by as many as six different NGOs - that culminated in a protest, albeit small, in front of one of the world's most prestigious jewelry retailers in New York City.⁹⁷ Even after Kimberley Process meetings commenced, the NGO community reacted quickly to begin to influence the development of a certification process - a coalition of 73 NGOs organized the Campaign to Eliminate Conflict Diamonds, launched on Valentine's Day 2001, to encourage meaningful implementing legislation in the US that it hoped would spur international adoption of stringent certification measures in the Kimberley Process.⁹⁸

¶29 Even now, a hallmark of the Kimberley Process is that Partnership Africa Canada and Global Witness remain intimately involved, serving on Working Groups and participating in negotiating sessions. Because the sessions are not open to the media,

⁹⁵ Permanent Representative of Canada to the United Nations, *Letter Dated 24 November 2004 from the Permanent Representative of Canada to the United Nations Addressed to the President of the General Assembly*, U.N. Doc. A/59/590 (Nov. 29, 2004), available at <http://documents-dds-ny.un.org/doc/UNDOC/GEN/N04/626/72/pdf/N0462672.pdf?OpenElement>; General Assembly [GAOR], *Draft Resolution, The Role of Diamonds in Fueling Conflict: Breaking the Link Between the Illicit Transaction of Rough Diamonds and Armed Conflict as a Contribution to Prevention and Settlement of Conflicts*, ¶ 11, U.N. Doc. A/59/L.46 (Dec. 8, 2004), available at <http://documents-dds-ny.un.org/doc/UNDOC/LTD/N04/639/65/pdf/N0463965.pdf?OpenElement>.

⁹⁶ GAOR, *supra* note 95.

⁹⁷ Feldman, *supra* note 30, at 848.

⁹⁸ TAMM, *supra* note 26, at 25.

these NGOs disseminate their results to the public. And they continue to hold the process and its participants accountable as well – constantly outlining opportunities for improvement through reports, surveys, and studies.

¶30 The NGOs' own enforcement mechanism remains the threat of a consumer boycott. The groups recognize that the legitimate diamond trade is vital to the rehabilitation and survival of the impacted areas and many others like them, and as long as they are satisfied that the process is progressing, they have deliberately avoided large-scale consumer boycotts and mass media campaigns that could ruin the entire industry.⁹⁹ In addition to protecting the legitimate diamond trade, though, there is also a delicate symbiosis between the governed businesses and the participating NGOs. The NGOs recognize that their continued close involvement with the process will ensure it maintains momentum toward full implementation and further improvements, so they are likely reluctant to take drastic activist measures like boycotts that could undermine their participation and ultimately result in the process's breakdown. At the same time, though, the specter of ruin posed by consumer boycotts and mass media campaigns is sufficiently compelling to keep the diamond industry on the path of progress. Hence, these tactics remain the most powerful weapons in the NGO arsenal in the event that progress stalls or support begins to waver.

¶31 But surely NGO pressure alone cannot be credited with the creation of this unprecedented monitoring mechanism. In fact, the groups have only engaged here in the same tactics that they have honed over decades, and not all of their campaigns have enjoyed nearly the same international attention and success. So another unique quality must be at play – the vulnerability of the target companies. To be sure, the threat of a boycott of the diamond industry, and the inevitable taint that would ensue, was likely sufficient to encourage participation by the industry. But the ease of that participation may be attributable to a few key factors.

¶32 First, the diamond industry is particularly unique in that, like the fur industry that had been crippled by consumer protest before it, it is founded on a luxury item the intrinsic value of which derives from consumers' perceptions of its intangible qualities.¹⁰⁰ As soon as those intangible qualities are tainted, the value of the product is irrevocably undermined. Further, the retail market for diamonds was heavily concentrated in a single location, the United States,¹⁰¹ and therefore easily accessible by NGOs for inciting a

⁹⁹ *Id.* at 25.

¹⁰⁰ Price, *supra* note 40, at 42.

¹⁰¹ "U.S. diamond market demand is the largest in the world." Cook, *supra* note 22, at 3. Within the Harmonized Tariff Schedule (HTS) categories identified in the Kimberley Process, the US imported 6.18 million carats worth \$611 million in 1998, 7.42 million carats worth \$755 million in 1999, 4.92 million carats worth \$816 million in 2000, 3.39 million carats worth \$597 million in 2001, 3.13 million carats worth \$608 million in 2002, 3.81 million carats worth \$776 million in 2003, and 2.54 million carats worth \$598 million in the first nine months of 2004 (January-September, compared to 3.01 million carats worth \$563 million in the same period of 2003). Calculated from data available on United States International Trade Commission, *Interactive Tariff and Trade Web*, <http://dataweb.usitc.gov/> (last visited Nov. 22, 2004). The included categories are HTS 7102.10 (diamonds, unsorted), 7102.21 (diamonds, industrial, unworked or simply sawn, cleaved or bruted), and 7102.31 (diamonds, nonindustrial, unworked or simply sawn, cleaved or bruted). KIMBERLEY PROCESS, THE KIMBERLEY PROCESS CERTIFICATION SCHEME at 4, <http://www.kimberleyprocess.com:8080/site/content/KPCS.pdf> (last visited Oct. 31, 2004). In the first quarter of 2003 (January-May), the US's diamond imports from Belgium (through which 85% of the world's diamonds pass) were larger than any other nation. Antwerp World Diamond Center Trade Statistics, http://www.hrd.be/productservices/import_export_services/trade_statistics.aspx (last visited Nov.

boycott, as well as particularly threatening to the diamond industry's survival were consumer backlash to take hold. Additionally, conflict diamonds are believed to represent at most 15% of the global diamond trade.¹⁰² Accordingly, there was little risk of a significant loss in revenues to any single participant in the diamond production pipeline if these diamonds were effectively removed from the trade.

¶33 And finally, De Beers wields enormous power in the industry. Despite the fact that the diamond industry is comprised of a complex maze of multiple companies throughout the pipeline, it is unquestionably dominated by the South African conglomerate.¹⁰³ And De Beers therefore bore not only a significant risk were a consumer boycott to take hold, but also had other financial reasons that could prove an embrace of the certification process particularly fruitful. De Beers had founded its influence in the market on a strategy of buying up and stockpiling rough diamonds in order to match market output to demand and maintain artificially high prices for the stones.¹⁰⁴ Removing conflict diamonds from the trade would constrain the market and present De Beers an opportunity to begin to unload some of its \$4 billion stockpile without diluting prices.¹⁰⁵

¶34 Further, the company's ability to leverage its existing stockpile coupled with its control of 65% of the rough diamond trade allowed De Beers to extract itself altogether from the "outside" market – the 35% it did not control – including from contentious Angola.¹⁰⁶ And finally, De Beers was able to announce in May 2000 that it would provide written guarantees of the legitimacy of its diamonds.¹⁰⁷ Accordingly, De Beers stood to gain from the institution of a certification process and the elimination of conflict diamonds from the trade. These advantages likely proved influential in the diamond industry's creation of its own representative to the Kimberley Process, the World Diamond Council, and the WDC's subsequent, seminal participation in the process's development.

2. Self-Initiated and Self-Policed

¶35 Certainly, too, it must be argued that other positive qualities emanate from a self-initiated commitment to reform, namely legitimacy, practicality, and adherence. This is particularly applicable in the instance of the Kimberley Process, because virtually all players in all aspects of the process, from national government to transnational corporation to international governing body to non-governmental organization, were intimately involved in its development. Hence, the logistical aspects of the certification and warranty schemes are presumably practically achievable by the diamond industry and the participant governments, as they designed them themselves. Similarly, with the voluntary development and end-to-end ownership of the process comes some measure of buy-in and legitimacy, which likely translates into improved adherence and enforcement.

20, 2004); *Conflict Diamonds: Hearing Before the Subcommittee on Trade of the Committee on Ways and Means House of Representatives*, 107th Cong. 5 (2001) (statement of Congressman Crane).

¹⁰² *Hearing, supra* note 1, at 7 (testimony of Loren Yager).

¹⁰³ Stein, *supra* note 29.

¹⁰⁴ TAMM, *supra* note 26, at 24-25.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 24.

¶36 Hence, the Kimberley Process grew not from a unilateral UN mandate, but from an organic interplay of pressures in the world community. After years of UN sanctions in the region had proven unsuccessful, NGOs imposed significant pressure on the industry, which for various reasons was particularly vulnerable to that pressure, and the UN, US, and ultimately the WTO consistently validated the approach taken to alleviate the problem.

B. Perceived Flaws and Areas of Improvement for the Process

1. Timing to Implementation

¶37 Certainly, however, this approach is not without its problems. First, the timing to implementation, in light of the unique nature of this situation, was too protracted.¹⁰⁸ As tentative peace accords have been reached in all four impacted regions, the threat of conflict diamonds has already begun to wane.¹⁰⁹ This is not to say that the Kimberley Process cannot be a valuable tool for quelling more traditional smuggling, illicit trade, and potential terrorist financing. But the human rights implications are diminished, and the greatest potential impact of the process in preventing atrocities and saving lives lost. Arguably, while implementation of the scheme may have been rapid in the context of the timing of typical human rights movements, it simply took too long for the world community to react to the failed UN sanctions, and even after the Kimberley Process was underway, discord and disagreement caused significant delays in its implementation. What was to be ready for implementation by the beginning of 2002 was not truly in place until July of 2003, over three years after the initial meeting in Kimberley, South Africa, and five years after news of conflict diamonds' existence was first broken by Global Witness.

2. Waning and Splintered Interest

¶38 The harms of having missed the window of opportunity for maximum impact are compounded by perceptions that because the worst of the conflicts may be over, the Kimberley Process is somehow complete and successful. Perhaps most alarming are statements to that effect from the October 2004 World Diamond Congress.¹¹⁰ Unlike the past several years in which the conflict diamond issue dominated the annual Congress, the focus was instead upon the threat that manufactured stones posed to the legitimate diamond market, and an announcement of a major initiative to defend the natural diamond in the marketplace.¹¹¹

¹⁰⁸ Certainly, in the broader context of the typical timing of human rights movements, the move from recognition of the issue to implementation of a global solution was rapid, but under the specific circumstances, the process still did not move quickly enough to achieve maximum effectiveness.

¹⁰⁹ Global Witness, *Rich Man, Poor Man* (Oct. 2004), <http://www.globalwitness.org/reports/show.php/en.00064.html>.

¹¹⁰ The World Diamond Congress was first held in 1947. It serves as the "forum for the two most important representative organizations in the diamond business, the World Federation of Diamond Bourses (WFDB) and the International Diamond Manufacturers Association (IDMA)." World Federation of Diamond Bourses, *Final Preparations Being Made in New York City for 31st World Diamond Congress Starting Oct. 17* (Oct. 5, 2004), <http://www.worldfed.com/website/newsletter/World%20Diamond%20Congress.doc>.

¹¹¹ Professional Jeweler, *Consumer Confidence Focus of World Diamond Congress* (Oct. 22, 2004),

¶39 Conflict diamond issues were only discussed at the instigation of Amnesty International and Global Witness, who had been invited to the meeting to present findings and concerns resulting from their most recent studies of Kimberley Process implementation.¹¹² In response to their presentation, Schmuell Schnitzer, president of the World Federation of Diamond Bourses, stated that ““Our 23 affiliated bourses have agreed there is no problem implementing the Kimberley Process. All members are fully able to comply with the Process. . . . It is impossible, simply impossible, for conflict diamonds to sneak through.””¹¹³ Newly elected president of the International Diamond Manufacturers Association Jeffrey Fischer then asserted ““We see conflict in Africa down, and as such the Kimberley Process has largely accomplished its goal.””¹¹⁴ In light of the very findings being presented by Amnesty and Global Witness regarding the paucity of effective internal controls and the failure of diamond retailers to successfully implement and communicate the system of warranties, these statements seem misguided at best. While the WDC also adopted a resolution encouraging the continued implementation of and compliance with the Kimberley Process Certification Scheme and the system of warranties, the leaders’ statements bespeak their true impressions of the urgency of this issue.

¶40 Even the NGO community’s vigilance seems to be waning, and its focus fragmenting. In past years, the annual plenary meeting of the Kimberley Process has been followed by a flurry of press releases and opinion statements from the leading NGOs offering a critique of the meetings, progress, and outstanding opportunities for improvement. After the October 2004 plenary meeting, Global Witness issued one press release offering a brief analysis, but the websites of the other two major NGOs in the process, Amnesty International and Partnership Africa Canada, showed nothing.¹¹⁵ Coupled with the WDC’s shift away from a focus on the issue, this inaction by the NGOs demonstrates a dangerous loss of a sense of urgency and interest in two of the most vital groups to keeping the Kimberley Process on track – the NGOs and the diamond industry.

¶41 With regard to the NGOs, this waning interest may be both explained and compounded by a seeming intimation that the Kimberley Process alone may not provide an adequate framework to solve all of the problems arising from the diamond trade. While NGO reporting on the diamond trade has picked up again, it is with a more fragmented focus – not merely criticism and recommendations for the Kimberley Process, but introduction of new initiatives,¹¹⁶ calls for the United Nations to continue

<http://www.professionaljeweler.com/archives/news/2004/102204story.html>.

¹¹² These findings will be presented and discussed in detail later in the paper.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Confirmed through visits and searches on www.amnesty.org, www.pacweb.org, and www.globalwitness.org on Nov. 23, 2004.

¹¹⁶ “The Diamond Development Initiative emerges from a recognition that the underlying problems of Africa’s alluvial diamond operations and its estimated one million artisanal miners lie beyond the KPCS, and have not yet been addressed.” The Diamond Development Initiative is a separate, multilateral partnership involving several of the same companies, NGOs, governments and development agencies originally committed to the Kimberley Process. It intends to devise and integrate various initiatives to assist artisanal miners, with an initial meeting slated to occur in Africa in October or November 2005. Press Release, Global Witness, Diamond Development Initiative Begins (Aug. 17, 2005), http://www.globalwitness.org/press_releases/display2.php?id=305.

sanctions and other more traditional means of forced compliance,¹¹⁷ and news of violence and illicit activity stemming from regions far outside the original three culprit countries.¹¹⁸ This diversion from the initial focus could prove detrimental to the ultimate effectiveness of the Kimberley Process as a comprehensive scheme.

3. Self-Governance

¶42 Moreover, the self-governance that is the hallmark of the process's development may well prove its Achilles' heel. Since its inception, this single attribute has been blamed by NGOs and others for a panoply of issues encountered by the process. In his February 2002 testimony, the Director of International Affairs and Trade of the General Accounting Office found that lack of accountability was the primary problem with the Kimberley Process, stating that "[w]ithout effective accountability, the certification scheme may provide the appearance of control while still allowing conflict diamonds to enter the legitimate diamond trade and, as a result, continue to fuel conflict."¹¹⁹

¶43 Among the GAO's primary areas of concern for the scheme stemming from its ethos of voluntary participation and self-governance are: 1) adoption of the Scheme's recommended internal controls is entirely optional and the expectation is that each participant will create appropriate internal controls voluntarily at the national level; 2) after the initial rough diamond certification, the remainder of the diamond pipeline is governed only by voluntary participation in the chain of warranties, which is entirely self-regulated and self-monitored; 3) several issues exist with regard to consistency, documentation, and dissemination of statistical data; and 4) monitoring is based upon one participant's request that another participant be reviewed, the participant in question must consent to a review mission, no guidelines exist for self-assessments, no monitoring scheme exists for the system of warranties, and no external audit exists.¹²⁰ Based upon these findings, the GAO recommended that "the Secretary of State in consultation with the relevant government agencies work with Kimberley Process participants to develop better controls including a reasonable control environment, risk assessment, internal controls, information-sharing, and monitoring."¹²¹ Follow-up research and analysis by

¹¹⁷ "While the [National Transitional Government of Liberia] has passed the appropriate laws and regulations to implement and enforce the certification scheme required for acceptance into the Kimberley process, and passed laws and regulations to maintain dissuasive and proportional penalties for transgressions, there is currently no capacity to enforce the laws or prosecute any infringements rendering the laws cosmetic. It is critical that the Security Council maintains diamond sanctions." Global Witness, Open Letter to the UN Security Council, Regarding Conflict Resources and Peacekeeping in Liberia and the Democratic Republic of Congo (DRC) (Mar. 18, 2005), *available at* <http://www.globalwitness.org/reports/index.php?section=diamonds>.

¹¹⁸ "... the massacre of 29 diamond diggers on the Roosevelt Indian Reserve in the remote Rondônia rainforest in 2004 attracted international media attention and demonstrated that conflict diamonds are by no means restricted to Africa." PARTNERSHIP AFRICA CANADA, THE FAILURE OF GOOD INTENTIONS: FRAUD, THEFT AND MURDER IN THE BRAZILIAN DIAMOND INDUSTRY at 1 (May 2005), http://www.pacweb.org/e/images/stories/brazil%20report%20_final_electronic%20version.pdf. Brazil is a member of the KPCS.

¹¹⁹ The report proceeds to recommend that the Kimberley Process govern itself like an organization, and encourages the adoption of five key control elements – control environment, risk assessment, control activities, information and communications, and monitoring. *Hearing, supra* note 1, at 11-16 (testimony of Loren Yager).

¹²⁰ *Hearing, supra* note 1, at 11-16 (testimony of Loren Yager).

¹²¹ General Accounting Office, *United States General Accounting Office Report to Congressional*

the GAO for a November 2003 report on terrorists' alternative financing mechanisms confirmed that these weaknesses remained and could be exploited by terrorist financiers.¹²²

¶44 NGOs have consistently echoed these concerns. While the Kimberley Process had made some strides by the October 2003 plenary meeting, instituting requirements that all participants report annually on their implementation efforts and conduct voluntary review visits, particularly when there is suspicion of non-compliance by a participant country,¹²³ the NGO community, joined by the World Diamond Council and governments of the United States, South Africa, Canada, Israel, and the European Commission, still considers regular, impartial monitoring the only scheme that could truly legitimize the process.¹²⁴ While the Kimberley Process has still not gone that far, NGOs did acknowledge, in response to the October 2004 plenary, that some progress had been made in the establishment of a peer review system by which a significant number of countries had already been reviewed.¹²⁵ But they focused their attention upon another issue emanating from self-governance: "the lack of action to improve the collection and analysis of rough diamond production and trade statistics," imploring the process to implement the rough diamond database system that had been agreed over two years before.¹²⁶

¶45 Four recent developments speak to each of the four flaws highlighted by the GAO and echoed consistently by NGOs and others. In anticipation of the 2004 plenary meeting of the Kimberley Process, Global Witness and Partnership Africa Canada released a report surveying the relative successes of a selection of eight participant countries in implementing internal controls.¹²⁷ In the spring and summer of 2004, Global Witness and Amnesty International conducted surveys of diamond retailers to discern whether the Kimberley Process Certification Scheme had truly taken hold at the endpoint of the diamond pipeline, demonstrating flaws in the system of warranties and its voluntary nature.¹²⁸ In October 2004, Global Witness reported that Russia, slated to be

Requesters: Critical Issues Remain in Deterring Conflict Diamond Trade at 22 (June 2002), GAO-02-678, <http://www.gao.gov/cgi-bin/getrpt?GAO-02-678>.

¹²² General Accounting Office, *United States General Accounting Office Report to Congressional Requesters: Terrorist Financing: U.S. Agencies Should Systematically Assess Terrorists' Use of Alternative Financing Mechanisms* at 30 (Nov. 2003), GAO-04-163, <http://www.gao.gov/new.items/d04163.pdf>.

¹²³ Global Witness released a statement in April 2003, after the first plenary meeting of the Kimberley Process Certification Scheme, expressing concerns about the failure to establish "a regular, effective monitoring mechanism to assess over time all national diamond control systems and meet the threshold of trust and credibility that consumers want." Press Release, Global Witness, Kimberley Process Still In Process (Apr. 30, 2003), http://www.globalwitness.org/press_releases/display2.php?id=193. The NGO community followed up on these concerns at the October 2003 plenary meeting, presenting the meeting with the Diamond Pledge, a petition of 6,000 signatures calling on the Kimberley Process to implement independent, regular monitoring of all participant countries. The original KPCS had called for mandatory review of all participant countries at four-year intervals. Other concerns expressed by Global Witness at the April 2003 meeting included membership criteria, participant coordination, participant failure to pass and enforce implementing legislation domestically, and accurate statistical reporting. *Id.*

¹²⁴ Amnesty International, *supra* note 15.

¹²⁵ Press Release, Global Witness, Progress and Setbacks at Kimberley Process Plenary (Oct. 29, 2004), http://www.globalwitness.org/press_releases/display2.php?id=258.

¹²⁶ *Id.*

¹²⁷ Global Witness, *The Key to Kimberley: Internal Diamond Controls* (Oct. 2004), <http://www.globalwitness.org/reports/show.php/en.00063.html>.

¹²⁸ Global Witness and Amnesty International, *Déjà Vu: Diamond Industry Still Failing to Deliver on*

the next Chair of the Kimberley Process, had still yet to provide any statistics about its own diamond trade.¹²⁹ And in July 2004 came the first demonstration of the Kimberley Process's monitoring and enforcement capabilities, as it removed the Republic of Congo from participation in the process after a review of their diamond trade practices,¹³⁰ prompting the country to institute new legislation and better internal controls.¹³¹ In combination, these recent findings demonstrate that while there has been marginal progress, underlying substantive issues remain to be improved.

i) *Voluntary Internal Controls*

¶46 Global Witness and Partnership Africa Canada analyzed the implementing legislation and internal controls of eight Kimberley Process participants - Ghana, Angola, the Democratic Republic of the Congo, the European Union, Belgium, the United Kingdom, Canada, and the United States - to discern distinctive models and best practices.¹³² It is important to note that each of these has introduced elaborate schemes for ensuring a clean diamond trade, so the study does not begin to address the host of participant nations that have not instituted any internal controls.¹³³

¶47 The study found that while noble efforts had been made, and often very complex systems were envisioned, on the whole there remained opportunities for improvement.¹³⁴ The overarching issue is that “[g]overnmental controls at the point of export in these countries are in place, but there are almost no controls one or two transactions back into the system,” according to Global Witness representative Corinna Gilfillan.¹³⁵ The Belgian system was found to be the most complete and comprehensive, but was not yet fully implemented and operational.¹³⁶ The systems of the United States, Britain, and Canada were faulted for having weak or non-existent government audit procedures for companies in the trade.¹³⁷

¶48 But particularly lacking were the systems of Angola and the Democratic Republic of the Congo, two centers of conflict diamond activity and the only two major exporters of rough diamonds in the study. With regard to Angola, the study found that “[t]here is, at present, no assurance that Angola's internal controls prevent diamonds from leaving or entering the country illegally.”¹³⁸ And with regard to the Democratic Republic of the Congo, the report stated that:

Promises (Oct. 2004),

[http://web.amnesty.org/library/pdf/POL340082004ENGLISH/\\$File/POL3400804.pdf](http://web.amnesty.org/library/pdf/POL340082004ENGLISH/$File/POL3400804.pdf).

¹²⁹ Press Release, Global Witness, Progress on Conflict Diamonds Compromised by Lack of Russian Statistics (Oct. 21, 2004), http://www.globalwitness.org/press_releases/display2.php?id=256.

¹³⁰ Press Release, Global Witness, The Kimberley Process Gets Some Teeth (July 9, 2004), http://www.globalwitness.org/press_releases/display2.php?id=248.

¹³¹ Ketan Tanna, *Congo (Brazzaville) Initiates Diamond Reform* (Aug. 12, 2004), <http://www.diamonds.net/news/newsitem.asp?num=10170>.

¹³² Global Witness, *supra* note 127, at 2.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Press Release, Global Witness, Weak Controls and “Poverty Diamonds,” (Oct. 22, 2004), http://www.globalwitness.org/press_releases/display2.php?id=257.

¹³⁶ Global Witness, *supra* note 127, at 12-14.

¹³⁷ Global Witness, *supra* note 135.

¹³⁸ Global Witness, *supra* note 127, at 7.

[i]n practice . . . given the lack of control over the *négociant*/middleman link of the chain, and the almost complete absence of information about diggers, there is little knowledge of where the diamonds entering the chain at the *comptoir* level originate, or even, potentially whether they were mined in the DRC, other than through physical identification of the stones.¹³⁹

¶49 Ultimately, in addition to a series of recommendations regarding continuous strengthening and funding of government oversight bodies and closure of loopholes in those countries supporting primarily artisanal alluvial mines,¹⁴⁰ the study made the following three recommendations for all participant countries that import and trade diamonds: 1) mandate random, independent government inspections of diamond importing, trading, and manufacturing companies to ensure compliance with the Kimberley Process; 2) require companies to develop internal management schemes that ensure that self-regulation is operating effectively and perform random reviews of company audits for accuracy and completeness; and 3) introduce a legally binding protocol to support systems of self-regulation.¹⁴¹ While it is somewhat heartening that several nations have made concerted efforts to institute significant controls, these findings bear out the overarching concerns expressed by NGOs and others with regard to voluntary implementation of internal controls and self-governance.

ii) *System of Warranties*

¶50 In 2004, Amnesty International and Global Witness launched a global survey of over 800 jewelry retailers and suppliers in nine countries to discern their commitment to and implementation of the voluntary system of warranties.¹⁴² In October 2004, they released preliminary results of the United Kingdom and United States portions of the survey, comprised of letters to 85 major diamond jewelry retailers and visits to 579 stores.¹⁴³ Fewer than 20% of those who responded in writing “provided a meaningful account of their policy,”¹⁴⁴ while only 42% of retailers visited in-store were “able to give consumers meaningful assurances that diamonds are conflict free.”¹⁴⁵

¶51 Amnesty and Global Witness concluded from these and other findings that the voluntary system of warranties is not succeeding, and that retailers and suppliers are not

¹³⁹ “Artisanal miners, known as ‘creusers’, sell diamonds on to middlemen, known as ‘trafficans’ or ‘négociants’, who then sell to the licensed exporters or ‘comptoirs’.” *Id.* at 9, 11.

¹⁴⁰ The Government of South Africa defines artisanal mining as “small-scale mining involving the extraction of minerals with the simplest of tools, on a subsistence level,” and alluvial diamonds “result from millions of years of erosion on some kimberlites [volcanic pipes], and the spreading of diamonds by rivers over vast geographic areas.” Global Witness, *supra* note 109, at 3, 8. This type of mining is a primary source of diamonds in Sierra Leone, Angola, and the Democratic Republic of the Congo, and is now the focus with regard to establishing sustainable economic development for the vast majority of individual, independent miners in these countries. Global Witness, *supra* note 127.

¹⁴¹ Global Witness, *supra* note 127, at 2-3.

¹⁴² Press Release, Amnesty International, Conflict Diamonds: Jewellers Keeping Consumers in the Dark (Oct. 18, 2004), <http://web.amnesty.org/library/Index/ENGPOL300382004>.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

taking it seriously enough.¹⁴⁶ The findings were presented to the October 2004 World Diamond Congress, along with recommendations that industry bodies devise a common standard to verify compliance with the voluntary system of warranties and retailers' commitments to institute policies and educate employees accordingly.¹⁴⁷ As discussed above, the outcome of the presentation at the WDC was no more than a resolution encouraging members to continue to implement the system of warranties and educate their employees accordingly.¹⁴⁸

¶52 The NGOs also made several recommendations to participant governments, including improved monitoring and rigorous auditing, and the diamond retail sector itself, including strict application of the system of warranties and supplier selection, written assurances to customers, education and training on conflict diamonds and the KPCS as a condition of employment, and proactive lobbying of peers within the industry for adoption of these tactics.¹⁴⁹ These findings and recommendations echo a report by Global Witness on the results of the broader survey, released in March 2004.¹⁵⁰ The studies indicate that the Kimberley Process's significant reliance on the voluntary system of warranties for protecting the entire diamond pipeline post-export of rough diamonds may be misplaced, insufficient, and fundamentally flawed.

iii) *Statistical Reporting*

¶53 In October 2004, Global Witness first brought attention to another issue exemplary of one of the primary concerns plaguing the Kimberley Process – statistical reporting.¹⁵¹ Many countries' statistical data submissions are significantly delayed and use different reporting methodologies, which makes for “comparative statistical inaccuracy.”¹⁵² Several participant countries either submit their statistics late or not at all, without any penalty, despite the fact that statistical reporting is a fundamental element of Kimberley Process membership and compliance.¹⁵³ And others, among them Canada and the US, the largest consumer of diamond jewelry in the world, do not record any data from Kimberley Process certificates because they have other trade data recording procedures in place, rendering it impossible to make accurate comparisons across participants.¹⁵⁴

¶54 Particularly troubling is Russia's longstanding refusal to submit any statistics at all,¹⁵⁵ despite the fact that it is one of the world's largest diamond producers, it has been a significant participant in the Kimberley Process almost since its inception, and it is the current Chair of the Kimberley Process.¹⁵⁶ At the 2004 plenary meeting of the KPCS, Russia explained that the submission of its statistics “had been delayed for internal administrative reasons,” and claimed that it would provide the necessary statistical

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Professional Jeweler, *supra* note 111.

¹⁴⁹ Global Witness and Amnesty International, *supra* note 128, at 5.

¹⁵⁰ Global Witness, Broken Vows: Exposing the “Loupe” Holes in the Diamond Industry's Efforts to Prevent the Trade in Conflict Diamonds (Mar. 2004) <http://www.globalwitness.org/reports/show.php/en.00050.html>.

¹⁵¹ Global Witness, *supra* note 129.

¹⁵² *Id.*

¹⁵³ GLOBAL WITNESS, *supra* note 91 at 3.

¹⁵⁴ *Id.* at 3-4.

¹⁵⁵ Global Witness, *supra* note 129.

¹⁵⁶ Kimberley Process, *supra* note 90.

reports by December 31, 2004.¹⁵⁷ This eleventh hour compliance with the KPCS's statistical reporting requirements hardly left time for the body to remove Russia as 2005 Chair had the statistical reports yielded any alarming discoveries. The failure to enforce the process's reporting requirements on one of the largest, high-profile producers who soon became tasked with enforcing the process itself is demonstrative of a significant shortcoming in the process's framework, mandate, and enforcement of consistent and accurate statistical reporting, which can ultimately undermine meaningful enforcement of the process as a whole.

¶155 The 2004 plenary made some attempts at improvements to the flawed statistical reporting process.¹⁵⁸ Yet these essentially amounted to a change in the expiration of statistical data, a request that the Working Group on Statistics study how national reporting mechanisms constrain KPCS reporting for a report to be delivered at the 2005 plenary, and a request that the Working Group on Statistics and the Working Group on Diamond Experts work together to study and propose ways to harmonize the different valuation techniques for rough diamonds that generate statistical discrepancies.¹⁵⁹ As discussed above, Global Witness and Partnership Africa Canada found these minor measures to be a dereliction of responsibility, stating that “[t]he lack of progress on statistics jeopardizes the credibility of the KPCS and robs it of an essential tool in the fight against conflict diamonds.”¹⁶⁰

iv) *Monitoring/Enforcement Mechanism*

¶156 Both the consequences of the failure to mandate the true implementation and enforcement of internal controls and the mettle of the existing monitoring system were bolstered in July 2004, when the Kimberley Process expelled the Republic of Congo¹⁶¹ as a participant.¹⁶² Like the Russian problem, this incident is particularly demonstrative of the importance of consistent, accurate, and meaningful statistics and reporting mechanisms. While the Republic of Congo was admitted to the process in 2003 because it had passed regulations intended to implement the process's minimum requirements, the focus at the time had only been on whether criteria were met on paper, not in actual practice. Due to concern that the country's rough diamond exports greatly exceeded its production capacity potential, the Kimberley Process launched a review mission to the Republic of Congo in May 2004, spearheaded by South Africa.¹⁶³

¶157 The mission determined that the Republic of Congo's controls were “inadequate, poorly enforced, and therefore unable to prevent conflict diamonds from entering the legitimate diamond trade.”¹⁶⁴ The mission's findings confirmed well-documented

¹⁵⁷ The Kimberley Process, Final Communiqué: Kimberley Process Plenary Meeting, Gatineau, Canada (Oct. 29, 2004) <http://www.kimberleyprocess.com:8080/site/?name=documents>.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ Global Witness, *supra* note 125.

¹⁶¹ As distinguished from the Democratic Republic of the Congo, which remains a participant in good standing in the Kimberley Process. News Release, Kimberley Process, Kimberley Process Removes the Republic of Congo from the List of Participants (July 9, 2004), <http://www.kimberleyprocess.org>. The two nations are separated by an uncertain boundary in the Congo River. U.S. CENTRAL INTELLIGENCE AGENCY, CIA WORLD FACT BOOK (Oct. 19, 2004), <http://www.cia.gov/cia/publications/factbook/geos/cg.html>.

¹⁶² Global Witness, *supra* note 130.

¹⁶³ Kimberley Process, *supra* note 161.

¹⁶⁴ Global Witness, *supra* note 130.

evidence of the [Republic of Congo]’s role as a center for rampant diamond smuggling.”¹⁶⁵ In fact, investigators found that the Republic of Congo’s official diamond exports exceeded production by 100%, for which the authorities in the country could make no explanation.¹⁶⁶ This resulted in a finding that insufficient controls existed to ensure that Kimberley Process Certificates were only being produced for diamonds legitimately mined in the country, and not those smuggled in from elsewhere.¹⁶⁷

¶58 Global Witness, the World Diamond Council, and others were inspired by this historic action, which prompted an encouraging response from the Republic of Congo within a month.¹⁶⁸ The country announced reforms including improved controls and organization at mines, stricter controls on dealers, and improved trading methods.¹⁶⁹ This situation, while demonstrative of the process’s ability to enforce its goals, ultimately begs more questions than it answers. It remains to be seen whether the changes instituted by the government will be sufficient, what process the Kimberley group will follow to determine whether improvement has been significant enough to warrant re-admittance, and what follow-on monitoring will be employed to prevent such transgressions in future.¹⁷⁰

¶59 The KPCS demonstrated additional progress in the realm of monitoring and enforcement at the 2004 plenary.¹⁷¹ In particular, the peer review system adopted at the prior year’s plenary had actually been put into action.¹⁷² Eight participants had already hosted review visits and another seven were slated to do so before the end of 2004.¹⁷³ Thirty-three participants had already invited review visits, and the plenary encouraged the remaining ten to follow suit.¹⁷⁴

¶60 As of June 2005, Global Witness reported that there were eight outstanding participants that had yet to volunteer to receive a review visit: Bulgaria, China, Croatia, Korea, Laos, Namibia, Thailand and Venezuela.¹⁷⁵ Of these, Namibia and China are of particular concern, as Namibia is the only major diamond producer who has yet to volunteer for a review visit, and China’s burgeoning diamond market is expected to be huge.¹⁷⁶ Additionally, Global Witness implored the KPCS to conduct a first-time review of all participants by the end of 2006, establish a six-month follow-up process to ensure

¹⁶⁵ *Id.*

¹⁶⁶ World Diamond Council, World Diamond Council Endorses Historic Decision By Kimberley Process Chair, <http://www.worlddiamondcouncil.com/> (last visited Oct. 31, 2004).

¹⁶⁷ Kimberley Process, *supra* note 161.

¹⁶⁸ Tanna, *supra* note 131.

¹⁶⁹ *Id.*

¹⁷⁰ Admittedly, this will be an uphill climb, as the country is undergoing significant political upheaval after having adopted a new constitution in 2002 and embarked upon the process of completely rebuilding its political parties and governmental system after years of conflict. US Department of State, Background Note: Republic of the Congo, <http://www.state.gov/r/pa/ei/bgn/2825.htm> (last visited Nov. 21, 2004).

¹⁷¹ The Kimberley Process, *supra* note 157. In an apparent expansion of its mandate, the plenary also commissioned the Working Group on Monitoring to establish an ad hoc sub-group to address issues facing alluvial producers. While not directly related to conflict diamonds, the plight and poverty of individual artisanal miners continues to be a destabilizing force in Africa, as was observed in a Global Witness Report likely presented at the plenary. Global Witness, *supra* note 109.

¹⁷² The Kimberley Process, *supra* note 157.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ GLOBAL WITNESS, *supra* note 91 at 4.

¹⁷⁶ *Id.*

recommendations are implemented, require participants to report back to the plenary session on progress, make all review reports public, and devise a system of internal country controls that ensure all rough diamonds exported are conflict-free.¹⁷⁷ Until meaningful observations and actual sanctions emerge from these invitation-only peer reviews, they will not be fully legitimized as valid enforcement mechanisms.

¶61 These observations culminate to render a portrait of an imperfect process – one whose pride in self-governance may also prove its downfall.¹⁷⁸ Each of the learnings, both positive and negative, from inception to implementation, may prove instructive to other attempts by the international community to enforce corporate responsibility for human rights.

IV. THE UN'S RECENT FOCUS ON CORPORATE RESPONSIBILITY FOR HUMAN RIGHTS

A. *History of Corporate Social Responsibility in the International Context*

¶62 The triumphs and pitfalls of the Kimberley Process's inception, ratification, and implementation can be particularly instructive in light of the UN's recently renewed effort to enforce transnational corporations' responsibility for sustaining human rights where they operate. The foundation of corporate responsibility for human rights, as well as the modern conception of human rights generally, is based in the Universal Declaration of Human Rights.¹⁷⁹ While aimed at states, the Declaration is arguably rendered applicable to businesses as well through its appeal to "every organ of society" to uphold human rights.¹⁸⁰ In the 1970s and 1980s, the UN attempted unsuccessfully to draft international codes of conduct for businesses. At the same time, other international organizations began to codify an expectation of corporate social responsibility, including the Organization for Economic Cooperation and Development's (OECD) Guidelines for Multinational Enterprises in 1976, and the International Labor Organization's (ILO) 1977 Tripartite Declaration of Principles Concerning Multinational Enterprises.¹⁸¹

¶63 These efforts spurred a rash of voluntary, internal corporate codes of conduct throughout the 1980s and 1990s.¹⁸² But not until 1999 did the UN truly codify its expectations for corporate social responsibility in the Global Compact, an initiative encouraging corporations to voluntarily participate in a network of UN agencies, governments, labor, NGOs, and other companies to adopt and implement ten principles of corporate social responsibility, the first two of which deal with human rights:

¹⁷⁷ *Id.* at 4-5.

¹⁷⁸ It is difficult to assess whether any other system, implemented through the United Nations or other more traditional channels, might have been more successful. This question warrants further comparative study with other, similar attempts (e.g., UN sanctions on Libya, worldwide restrictions on trade of ivory, etc.).

¹⁷⁹ Douglas Cassel, *Human Rights and Business Responsibilities in the Global Market Place*, 11 BUS. ETHICS QTLY. 2, 261 (2001).

¹⁸⁰ AMNESTY INTERNATIONAL, *THE UN HUMAN RIGHTS NORMS FOR BUSINESS: TOWARDS LEGAL ACCOUNTABILITY* at 5 (2004), [http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/IOR420022004ENGLISH/\\$File/IOR4200204.pdf](http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/IOR420022004ENGLISH/$File/IOR4200204.pdf).

¹⁸¹ David Weissbrodt & Muria Kruger, *Current Development: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 A.J.I.L. 901, 902-03 (2003).

¹⁸² Amnesty International, *supra* note 180 at 5.

Principle 1

Businesses should support and respect the protection of internationally proclaimed human rights within their sphere of influence.

Principle 2

Businesses should ensure that their own operations are not complicit in human rights abuses.¹⁸³

B. Development of the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights

¶64 But even before the announcement of the Global Compact, in 1997 the UN Sub-Commission on the Promotion and Protection of Human Rights commissioned a study on the issue of transnational corporations and human rights, which resulted in the establishment of the Working Group on the Working Methods and Activities of Transnational Corporations in the following year.¹⁸⁴ This Group was tasked with a three-year study of the “working methods and activities of transnational corporations,” which culminated in March 2001 in a seminar organized by the Office of the UN High Commissioner for Human Rights, attended by NGOs, representatives of corporations and unions, scholars, and members of the Working Group.¹⁸⁵ The Working Group had not yet completed its mandate, so its work was extended for three more years in August 2001.¹⁸⁶ This renewed mandate included authority to draft norms.¹⁸⁷ The Working Group presented a draft of the norms in 2002, and met with NGOs in March 2003, incorporating their suggestions and those of the larger Sub-Commission into the draft that they ultimately submitted to the Sub-Commission later that year for approval.¹⁸⁸ The Sub-Commission deliberated on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights and approved them on August 13, 2003.¹⁸⁹

¶65 In April 2004, the larger Human Rights Commission commissioned the High Commissioner on Human Rights to prepare a report “setting out the scope and legal status of all existing initiatives and standards on business responsibilities with regard to human rights, including the UN Norms for Business,” the results of which were presented at the Commission’s 61st session one year later.¹⁹⁰ The 2005 *Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights* (the 2005 Report) incorporates the involvement and input of a wide array of stakeholders in the

¹⁸³ LEARNING TO TALK 11-12 (Malcolm McIntosh, Sandra Waddock & Georg Kell eds., 2004).

¹⁸⁴ Weissbrodt, *supra* note 181, at 903-06.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ Amnesty International, *supra* note 3; ECOSOC, *supra* note 4.

process regarding existing initiatives and standards governing transnational corporations and human rights, their scope and legal status, and other issues of concern.¹⁹¹

¶66 The presentation of the 2005 Report culminated in the appointment of Professor John Ruggie as Special Representative for human rights and transnational corporations and other business enterprises, pursuant to United Nations Commission for Human Rights resolution 2005/69.¹⁹² Ruggie, one of the primary architects of the Global Compact and most recently the Special Adviser to the Secretary-General on the Global Compact, is tasked with “identifying and clarifying standards of corporate responsibility and accountability with regard to human rights”, and is expected to produce an interim report for the 62nd session of the Human Rights Commission in 2006 and a final report in 2007.¹⁹³

C. *Defining Characteristics of the Norms*

¶67 The Norms, already being tested by a group of leading businesses called the Business Leaders Initiative on Human Rights,¹⁹⁴ are distinctive from past efforts in several important respects and represent the first attempt by the UN to define an enforceable, mandatory framework for corporate responsibility expressly for human rights.¹⁹⁵

¶68 Perhaps the most striking and important aspect of the Norms is the expansive, comprehensive nature of the rights that are encompassed. According to Amnesty International, “[t]he Norms are the most comprehensive statement of standards and rules relevant to companies in relation to human rights,” superceding individual companies’ codes of conduct, industry-wide standards, and even other international organizations’ guidelines (like the OECD, the ILO, and the Global Compact), which have typically been much more general.¹⁹⁶ The incorporated rights include: non-discrimination; protection of civilians and laws of war; use of security forces; workers’ rights; corruption, consumer protection, and human rights; economic, social, and cultural rights; human rights and the environment; and indigenous people’s rights.¹⁹⁷

¶69 The second distinguishing characteristic of the Norms is that they may be considered the central repository for the most thorough and stringent expectations of corporations with regard to human rights.¹⁹⁸ Not only do the Norms provide a singular platform from which all businesses should operate, but they also refer to each of the

¹⁹¹ Amnesty International, *Economic Globalization and Human Rights: Corporate Responsibility Breakthrough at the UN Human Rights Commission* (Apr. 20, 2004), <http://web.amnesty.org/pages/ec-unnorms-eng>; ECOSOC, *supra* note 4, ¶ 3.

¹⁹² United Nations Department of Public Information, *supra* note 5.

¹⁹³ *Id.*

¹⁹⁴ The Business Leaders Initiative on Human Rights is a three-year program the focus of which is to develop actionable tools for businesses to implement positive human rights practices, using concepts from the Global Compact and the Norms. The current members are ABB Ltd, Barclays plc, MTV Networks Europe, National Grid plc, Novartis Foundation for Sustainable Development, Novo Nordisk, The Body Shop International plc, Hewlett-Packard Company, Statoil and Gap Inc. Business Leaders Initiative on Human Rights, <http://www.blihr.org/index.htm> (last visited Oct. 2, 2005).

¹⁹⁵ *Id.*

¹⁹⁶ Amnesty International, *Outline of a Submission by Amnesty International Under Decision 2004/116* (2004), <http://web.amnesty.org/pages/ec-outlineofsubmission-eng>.

¹⁹⁷ Amnesty International, *supra* note 180 at 9-11.

¹⁹⁸ Amnesty International, *supra* note 196.

various international human rights instruments deemed to govern their behavior, providing “a stronger and more widely accepted basis of human rights responsibility generally, and a *jus cogens* basis regarding some human rights.”¹⁹⁹ Additionally, the Norms detail positive, as well as negative, obligations. That is, corporations are not only expected to refrain from activities that could infringe human rights, they also have an affirmative duty to promote human rights in the world.²⁰⁰ These detailed standards, enhanced expectations, and points of reference provide a roadmap for businesses to comply with the Norms.

¶70 The greater expectations for corporate responsibility bespeak a need for enhanced enforcement mechanisms, which the Norms also anticipate.²⁰¹ These enhanced mechanisms are particularly unique in the realm of corporate social responsibility. Rather than a merely voluntary experiment, the Norms intend to be fully nonvoluntary, and enforceable via a variety of mechanisms, from the businesses themselves to international intergovernmental organizations, the United Nations, state governments, NGOs, labor unions, trade associations, and the individual consumer or investor.²⁰² In particular, companies are expected to adopt and enforce their own internal rules in keeping with the Norms.²⁰³ Additionally, the Norms indicate that businesses will be subjected to periodic audit and review processes.²⁰⁴ They also incorporate a requirement of reparations to those harmed, reflecting a true intent toward accountability.²⁰⁵

¶71 These unique characteristics of the Norms demonstrate a new level of commitment by the UN to shift from soft, normative guidelines to “hard law” - an actionable, enforceable mechanism for monitoring and enforcing corporations’ commitments to human rights. As such, the UN is embarking upon uncharted territory with regard to truly imposing social responsibility on transnational corporations, and other methodologies that have done this somewhat successfully, like the Kimberley Process, should be consulted to discern best practices and improvement opportunities. Several hypotheses for lessons from the Kimberley Process to the Norms are articulated here for further exploration and research.

V. INSTRUCTIVE ELEMENTS FROM THE KIMBERLEY PROCESS TO THE UN’S EFFORTS²⁰⁶

A. *Positive Qualities*

¶72 An important advantage of the Kimberley Process has been the involvement, from the outset, of key stakeholders as owners of the process. Not only has this allowed the Kimberley Process to leverage the relative strengths of each constituency, but it has also ensured legitimacy and buy-in to the certification scheme and system of warranties by the

¹⁹⁹ Surya Deva, *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).

²⁰⁰ Amnesty International, *supra* note 180 at 8.

²⁰¹ Weissbrodt, *supra* note 181, at 913-21.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ Note that this is a finite set of hypotheses based only upon learnings from the Kimberley Process before completion of the 2005 Report, which provides a more comprehensive set of observations and recommendations regarding the Norms. ECOSOC, *supra* note 4.

participant states and companies. Further, the process itself is likely more practicable because it was devised by the very groups who it governs. Accordingly, in the Norms effort, the UN must attempt to actively engage not a select few of the stakeholders, but the entire transnational business and NGO communities and all of the UN member states.²⁰⁷ Admittedly, this is a lofty goal, compounded by the fact that the UN may have difficulty recreating the same organic upwelling of support that can be derived from activism on a single issue like conflict diamonds. Nonetheless, functioning with the goal of maximizing stakeholder participation will likely allow the UN to more quickly reach critical mass of each of these stakeholder groups such that the process will gain legitimacy in the eyes of all it will ultimately govern.

¶73 Additionally, because this undertaking is so significant and unprecedented, it will be imperative to have the direct involvement of those the Norms will govern in determining their structure, that they may be an enforceable and functional instrument. And buy-in and commitment from key stakeholders will also be an important means of mitigating the inevitable weariness that can lead to distraction and abandonment of the process, the beginnings of which are now being observed in the Kimberley Process.

¶74 Along the lines of gaining legitimacy and buy-in from key stakeholders, the UN has held unprecedented meetings. In March 2004, the UN convened the first ever meeting of national stock exchanges with corporate social responsibility experts, attended by heads and senior officials from Deutsche Borse, Nasdaq, Canada, Italy, Istanbul, Jakarta, Shanghai, and Brazil.²⁰⁸ Earlier that year, the UN had hosted a similar meeting with financial analysts from 40 leading companies, including BNP Paribas, UBS, and Goldman Sachs.²⁰⁹ Additionally, while the Norms are an important evolution of the Global Compact, the compact has not been abandoned, and the first Global Compact Leaders Summit was held in June 2004, at which politicians, corporate, and civic leaders convened.²¹⁰ And perhaps most impressive is the long and diverse list of key stakeholders who were invited to participate in the 2005 Report and ultimately did so.²¹¹ The hope would be that the UN can engage this entire constituency in proactive pursuit and implementation of the Norms going forward. Between tapping into its existing pool of committed participants in the Global Compact and reaching out to these new constituencies who would inevitably be impacted by the Norms, the UN is on its way to building a winning coalition of key stakeholders.

²⁰⁷ This goal is also among the key conclusions posited by the 2005 Report: “. . . there is a need, through the Commission, for continued dialogue and consultation among all stakeholders on the question of business and human rights. . . there is a particular need to consider ways to include more effectively the views and opinions of States and stakeholders from developing countries.” ECOSOC, *supra* note 4, ¶ 52.

²⁰⁸ Mark Turner, *Stock Exchanges Join UN Social Forum*, THE FINANCIAL TIMES, Mar. 24, 2004, at 7.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ Stakeholders invited to provide input to the 2005 Report included (the number from each group who actually provided input noted in parentheses) all members and observer States of the Commission (26), 33 transnational corporations (21, including all of the Business Leaders Initiative on Human Rights participants), four employer associations (8), two employee associations (1), 12 intergovernmental organizations and UN organizations (6), 28 NGOs (27), and seven treaty bodies (2) (16 additional stakeholders also provided input). ECOSOC, *supra* note 4, Annex I.

B. Improvement Opportunities

¶75 But two key issues plague both the Kimberley Process and the Norms: voluntariness of internal controls and insufficiency of enforcement mechanisms. While the Norms represent a significant evolution from the purely voluntary credos of years past like the Global Compact, they nonetheless do not yet go far enough to be a truly enforceable instrument. This is perhaps best demonstrated by the issues that the Kimberley Process has encountered with regard to voluntariness and self-governance.

1. Voluntary Internal Controls

¶76 Just as the Kimberley Process anticipates that national governments will take it upon themselves to enact implementing legislation and create internal controls to enforce both the KPCS and the system of warranties, the Norms seem to presume that states will establish the requisite legal framework to enforce corporations' compliance with human rights standards.²¹² With regard to the responsibility of states to enforce the many obligations delineated for corporations, the Norms simply state "States should establish and reinforce the necessary legal and administrative framework for ensuring that the norms and other relevant national and international laws are implemented by transnational corporations and other business enterprises."²¹³ But just as the Kimberley Process's statements that each participant should "establish a system of internal controls designed to eliminate the presence of conflict diamonds from shipments of rough diamonds imported into and exported from its territory,"²¹⁴ and "as required, amend or enact appropriate laws or regulations to implement and enforce the Certification Scheme and to maintain dissuasive and proportional penalties for transgressions,"²¹⁵ proved insufficient to force truly actionable legislation and controls, even among participant states that made significant efforts, such broad and vague terms are simply insufficient.

¶77 In fact, while imprecise, the Kimberley Process guidelines are actually more refined than those in the Norms, particularly in light of the broad scope that the Norms will encompass compared to the relatively finite scope of the Kimberley Process. Because it must address so much, this larger scope makes it that much more difficult to draft specific wording providing explicit guidelines for the creation and passage of implementing legislation. Also, the Norms are in an earlier stage of development than the Kimberley Process, so their language is understandably unrefined. Nonetheless, a vital aspect of their evolution from mere recommendations to enforceable, hard law will be making this language much more specific, comprehensive, and direct.

¶78 Remarkably, the very same recommendations that emerged from the Global Witness/Amnesty International study of the internal controls of eight nations in the Kimberley Process could be equally instructive here: 1) mandate random, independent government audits and inspections of corporate human rights policies and enforcement thereof; 2) require companies to develop internal management schemes that ensure that self-regulation is operating effectively and perform random reviews of company audits

²¹² Deva, *supra* note 199, at 518-19.

²¹³ Amnesty International, *supra* note 180 at 5.

²¹⁴ Kimberley Process, *supra* note 101, at 7.

²¹⁵ *Id.*

for accuracy and completeness; and 3) introduce a legally binding protocol to support systems of self-regulation.²¹⁶

2. Monitoring/Enforcement Mechanism

¶79 Equally vital to the effective implementation of either instrument is a functional enforcement mechanism. At present, while the Norms express recognition of the importance of a viable enforcement mechanism through discussion of various possible monitoring and verification schemes, no single scheme is designated and fully developed. In fact, the Sub-Commission's commentary asks that other UN bodies "develop additional techniques for implementing and monitoring these Norms."²¹⁷ Accordingly, were the Norms adopted today in their present state and an attempt made to implement them, true enforcement would be virtually impossible.²¹⁸

¶80 Here again, the experiences of the Kimberley Process can be uniquely informative. Recognizing the destabilizing impact of a failed enforcement mechanism, NGOs constantly lobbied for the strictest possible monitoring vehicle the diverse Kimberley Process could support. While NGOs are still unhappy with its current incarnation, the monitoring mechanism did prove somewhat successful in the 2004 expulsion of the Republic of Congo for its failure to meet the minimum standards of the process. The existing Kimberley Process monitoring mechanism may not itself be a model to be implemented by the UN to enforce the Norms, but the process by which it was devised, with constant, unrelenting pressure from NGOs and a return to the issue over several years, is demonstrative of a similar effort that parties to the Norms will likely have to undertake.

VI. CONCLUSION

¶81 Certainly, there are significant differences that exist between the Kimberley Process and the UN's broader effort to define norms governing corporate responsibility for human rights. Perhaps the most obvious of these is their scope and scale. The Kimberley Process was devised to address a very specific human rights issue, while the Norms seek to define a system of standards and an enforcement mechanism that could be used universally with regard to any corporation's acts that may impinge upon human rights.

¶82 Hence, perhaps the best approach for the UN is to codify the successful aspects and improvement opportunities of a process like the Kimberley Process – one that will mandate, facilitate, and legitimize early on a system by which the impacted industries and governments devise a way to police themselves, while ensuring that the control and self-policing mechanisms are buttressed by the force of the United Nations as oversight body so that self-governance has follow-through. Perhaps there is even a mutually beneficial middle road by which the United Nations provides the underlying principles and

²¹⁶ See Global Witness, *supra* note 127, at 2-3. Abbott et al discuss several other governance mechanisms that warrant comparison with the Kimberley Process with regard to these criteria, among them the auditing systems of the Fair Labor Association and the Workers Rights Consortium, in particular. Abbott, *supra* note 7.

²¹⁷ Deva, *supra* note 199, at 519-20.

²¹⁸ *Id.*

framework for corporate social responsibility; individual industry/issue groups, like those centered on conflict diamonds, flesh out those principles into actionable tactics unique to their needs; and ultimate accountability rests with an independent, back-end monitoring mechanism that leverages the existing capabilities of the United Nations.