

THE CHARACTERISATION,
IMPLEMENTATION, MONITORING
AND EVOLUTION OF THE KIMBERLEY
PROCESS CERTIFICATION SCHEME
(KPCS)

by

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For my three Little Princesses because they never had to endure the impact of blood diamonds staining their beautifully innocent lives

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TABLE OF CONTENTS

| | |
|--|-------------|
| TABLE OF CONTENTS..... | v |
| LIST OF ABBREVIATIONS | xvii |
| 1. Synopsis..... | xix |
| CHAPTER 1 :INTRODUCTION | 1 |
| CHAPTER 2 :BACKGROUND TO THE KIMBERLEY PROCESS CERTIFICATION SCHEME | 10 |
| 1. Introduction..... | 10 |
| 2. History of diamonds | 111 |
| 3. The diamond trade | 15 |
| 4. Conflict-free diamonds | 17 |
| 5. African blood diamonds | 19 |
| 6. Degeneration of human rights | 23 |
| 7. The role of the United Nations’ (UN) interventions..... | 25 |
| a. Angola..... | 26 |
| b. Sierra Leone | 27 |
| c. Liberia..... | 29 |
| d. The Kimberley Process Certification Scheme (The Certification Scheme) | 30 |
| 8. Conclusion | 39 |
| CHAPTER 3 :THE KIMBERLEY PROCESS CERTIFICATION SCHEME (THE ‘CERTIFICATION SCHEME’)..... | 40 |
| 1. Introduction..... | 40 |
| 2. An overview of the Certification Scheme | 41 |
| 3. Section II: The Kimberley Process Certificate | 43 |
| 4. Section III: Undertakings in respect of the international trade in rough diamonds..... | 50 |
| 5. Section IV: Internal controls (Undertakings by Participants)..... | 62 |
| a. Annex II | 63 |
| i. General Recommendations | 63 |

| | | |
|------|---|----|
| ii. | Recommendations for control over diamond mines..... | 65 |
| iii. | Recommendations for Participants with small scale diamond mining..... | 65 |
| iv. | Recommendations for rough diamond buyers, sellers and exporters..... | 66 |
| v. | Recommendations for export processes..... | 67 |
| vi. | Recommendations for import processes..... | 68 |
| vii. | Recommendations on shipments to and from free trade zones..... | 70 |
| b. | Principles of industry self-regulation..... | 70 |
| 6. | Section V: Co-operation and transparency (Annex III)..... | 72 |
| 7. | Section VI: Administrative matters to the Certification Scheme..... | 76 |
| a. | Meetings..... | 76 |
| b. | Administrative support..... | 77 |
| c. | Participation..... | 78 |
| d. | Participant measures..... | 79 |
| e. | Compliance and dispute prevention in the Certification Scheme..... | 80 |
| f. | Modifications to the Certification Scheme..... | 81 |
| g. | Review mechanism..... | 81 |
| h. | Finance..... | 82 |
| 8. | Conclusion..... | 83 |
| a. | Section I: Definitions..... | 84 |
| b. | Technological efficiency and capacity with respect to expectations of the Certification Scheme..... | 85 |
| c. | Section III: undertakings of Participants in respect of international trade of diamonds... | 85 |
| d. | Section IV..... | 86 |
| e. | Collection of data and storage..... | 86 |
| f. | Section V..... | 87 |
| g. | Section VI..... | 87 |
| 9. | Concluding remarks..... | 88 |

CHAPTER 4 :IMPLEMENTATION AND MONITORING IN THE KPCS:

HIGHLIGHTING THE 2007 ANNUAL REVIEW OF THE CERTIFICATION

| | |
|---|-----|
| SCHEME | 90 |
| 1. Introduction..... | 90 |
| 2. Background to the Third Year Review | 92 |
| a. Sources of information..... | 93 |
| b. Time frame..... | 93 |
| 3. Organisation and working of the Certification Scheme | 94 |
| a. Structures and operational methods | 95 |
| b. National laws | 95 |
| c. The Chair of the Kimberley Process | 95 |
| d. The KP Working Groups | 96 |
| e. A global, inclusive membership | 97 |
| f. Participation Committee | 97 |
| g. Compliance issues..... | 98 |
| h. Statistical non-compliance | 98 |
| i. Dispute resolution and compliance issues | 99 |
| j. Transparency..... | 99 |
| k. Websites..... | 100 |
| l. The role of observers | 101 |
| i. The diamond industry's self-regulation | 101 |
| ii. Civil society..... | 101 |
| iii. Links with international organisations | 102 |
| m. Impact of the Certification Scheme..... | 103 |
| i. Curbing production and trade in conflict diamonds..... | 103 |
| ii. The case of Côte d'Ivoire | 104 |
| 4. Infringements and responses..... | 109 |
| 5. Technical provisions and difficulties experienced | 113 |

| | | |
|-------|---|------|
| a. | Diversity in national laws and practice | 115 |
| b. | Definitions..... | 1155 |
| i. | Transit..... | 116 |
| ii. | Country of origin..... | 116 |
| iii. | Import/Export..... | 117 |
| iv. | Value | 117 |
| v. | Classification (Harmonized System codes)..... | 118 |
| vi. | The Kimberley Process Certificate | 118 |
| vii. | Technical Guideline 10 | 119 |
| viii. | Errors in filing in KP Certificates | 119 |
| ix. | Mandatory import confirmation | 120 |
| x. | Who should confirm? | 120 |
| xi. | Advance notice of shipment..... | 120 |
| xii. | Distinction between rough diamonds and powder: Technical Guideline 13 | 121 |
| c. | Diversity in national laws and practice | 121 |
| i. | Definitions..... | 122 |
| ii. | Value attached to diamond parcels..... | 122 |
| iii. | Classification..... | 122 |
| iv. | The Certificate..... | 122 |
| v. | Mandatory import confirmation | 123 |
| vi. | Distinction between rough diamonds and powder: Technical Guideline 13 | 123 |
| 6. | Operational issues..... | 124 |
| a. | Lack of import procedures | 124 |
| b. | Illegal shipments | 124 |
| c. | Inadequate annual reporting on internal controls..... | 125 |
| d. | Conflict diamond affected countries | 125 |
| e. | Ease of operation of the Certification Scheme | 126 |

| | | |
|------|--|-----|
| f. | Need for better communication | 126 |
| g. | Lack of import procedures | 127 |
| i. | Illegal shipments | 127 |
| ii. | Inadequate annual reporting on internal controls | 127 |
| iii. | Conflict diamond affected countries | 127 |
| iv. | Ease of operation of the Certification Scheme | 127 |
| v. | Need for better communication | 127 |
| 7. | The Peer Review Monitoring Mechanism (PRMM) | 128 |
| a. | Expanding the mandate of the PRMM | 129 |
| b. | Compliance | 129 |
| c. | Follow up to review visits | 130 |
| d. | Transparency of review visits | 130 |
| e. | Access of review visit reports by parties outside the KP | 131 |
| f. | The future of the APRMM | 132 |
| i. | Expanding the mandate of the PRMM | 132 |
| ii. | Compliance | 133 |
| iii. | Follow up to review visits | 133 |
| iv. | Transparency of review visits | 133 |
| v. | Access of review visit reports by parties outside the KP | 133 |
| 8. | Statistical issues of the Certification Scheme | 134 |
| a. | The WGS | 134 |
| b. | Challenges | 135 |
| c. | Country specific statistical analyses | 135 |
| d. | Timely submission of statistics | 136 |
| e. | Data quality and accuracy | 136 |
| f. | Valuation parameter | 137 |
| i. | Technical assistance | 137 |

| | | |
|------|--|-----|
| ii. | Transparency and publication | 137 |
| iii. | Website..... | 137 |
| iv. | Resources | 138 |
| 9. | Internal controls | 140 |
| a. | Artisanal and alluvial producers | 141 |
| b. | Industry self-regulation..... | 142 |
| c. | Controls on trading, cutting and polishing..... | 143 |
| d. | Standards and guidance for implementation of effective controls..... | 143 |
| 10. | Conclusion | 145 |
| a. | Organisation and working of the Certification Scheme in implementation and monitoring..... | 145 |
| b. | Infringements of the Certification Scheme | 146 |
| c. | Technical issues | 147 |
| i. | Diversity in national laws and practice | 147 |
| ii. | Lack of clarity of technical issues | 147 |
| d. | Operational issues | 148 |
| i. | Lack of import procedures | 148 |
| ii. | Illegal shipments | 148 |
| iii. | Inadequate annual reporting on internal controls..... | 148 |
| iv. | Conflict diamond affected countries | 148 |
| v. | Ease of operation of the Certification Scheme..... | 149 |
| vi. | Need for better communication..... | 149 |
| e. | PRRM | 149 |
| i. | Expanding the mandate of the PRMM..... | 149 |
| ii. | Compliance..... | 149 |
| iii. | Follow-up to review visits..... | 150 |
| iv. | Transparency of review visits | 150 |

| | |
|--|------------|
| f. Statistical issues | 150 |
| g. Internal controls | 150 |
| CHAPTER 5 :THE ROLE OF INTERNATIONAL ORGANISATIONS IN THE | |
| CERTIFICATION SCHEME..... | 152 |
| 1. Introduction..... | 152 |
| 2. The role of the UN SC and conflict diamonds (Resolutions): The Certification Scheme... | 155 |
| 3. The role of the UN GA on conflict diamonds: The Certification Scheme | 160 |
| a. UN GA Resolution 55/56..... | 161 |
| b. UN GA Resolution 56/263..... | 162 |
| c. UN GA Resolution 57/302..... | 163 |
| 4. The World Trade Organisation (WTO) | 165 |
| a. The Kimberley Process: WTO Conformity | 166 |
| b. Rules of treaty interpretation | 167 |
| c. Articles I, XI and XIII GATT 94 | 168 |
| d. Article XXI GATT 94: Security exceptions | 169 |
| e. Article XX GATT 94: General exceptions | 174 |
| f. Article VIII GATT 94 and Agreement on import licensing procedures..... | 174 |
| g. Request for a waiver under Article IX of the WTO Agreement..... | 176 |
| h. The General Council: Request for waiver in the Certification Scheme..... | 177 |
| 5. The role of regional organisations in the maintenance of international peace and security | 181 |
| a. The African Union (AU) and the African region..... | 181 |
| b. The European Union (EU) | 183 |
| c. Chapter II of the Council Regulation No 2368/2002: Import of rough diamonds into the EU | 187 |
| d. Chapter III of the Council Regulation No 2368/2002: Export of rough diamonds from the EC/ EU | 189 |

| | | |
|------|---|-----|
| 6. | Conclusion | 194 |
| a. | The UN SC..... | 194 |
| b. | The UN GA..... | 194 |
| c. | The WTO and then regional organisations | 194 |
| d. | The AU..... | 195 |
| e. | The EU | 195 |
| 7. | Summary..... | 196 |
| | PART II..... | 197 |
| | CHAPTER 6 :THE CERTIFICATION SCHEME AS A MANIFESTATION OF SOFT LAW (EVOLUTION AND CHARACTERISATION OF THE CERTIFICATION SCHEME) | 197 |
| 1. | Introduction..... | 197 |
| a. | Sources of international law..... | 197 |
| i. | Background to the sources of international law | 198 |
| ii. | Article 38 of the Statute of the International Court of Justice | 198 |
| iii. | International treaties | 199 |
| b. | International law governing treaties..... | 200 |
| i. | Parties to treaties | 200 |
| ii. | International customary law | 204 |
| iii. | General principles of law | 206 |
| iv. | Judicial decisions and text writings..... | 206 |
| 2. | UN Resolutions- a possible new source of international law? | 208 |
| a. | Introduction..... | 208 |
| b. | ‘effective and collective measures for the prevention and removal of threats to peace’ | 208 |
| c. | Resolutions of the UN GA..... | 212 |
| d. | Resolutions of the UN SC..... | 213 |
| e. | Conclusion | 214 |

| | | |
|---|---|-----|
| 3. | What type of international agreement? | 215 |
| 4. | Exploring ‘Soft law’ | 218 |
| a. | Introduction..... | 218 |
| i. | Thurer’s features of ‘soft law’ | 219 |
| ii. | Dupuy..... | 220 |
| iii. | Schreuer..... | 223 |
| iv. | Bothe | 226 |
| v. | Weil..... | 227 |
| vi. | Boyle | 228 |
| b. | Conclusion | 236 |
| 5. | Conclusion: Soft law as law | 238 |
| CHAPTER 7 : SHORTCOMINGS AND FAILINGS OF THE CERTIFICATION SCHEME.. | | |
| | | 241 |
| 1. | Introduction..... | 241 |
| a. | Section II: The KP Certificate..... | 242 |
| b. | Section VI: Administrative matters to the Certification Scheme..... | 248 |
| c. | Synopsis of problems relating to ‘capacity’ | 248 |
| d. | Accountability..... | 249 |
| i. | Section I: Definitions | 249 |
| ii. | KP: Problem Minimum requirement 2..... | 251 |
| iii. | KP: Problem Minimum requirement 9 | 252 |
| iv. | Section III: Undertakings in respect of the international trade in rough diamonds | 253 |
| v. | Trading Participants | 254 |
| vi. | Section III..... | 255 |
| vii. | Section IV: Internal controls | 256 |
| viii. | Section V | 260 |
| ix. | Recommendations | 261 |

| | | |
|--|---|-----|
| x. | Section V | 264 |
| xi. | Annex III: Statistical data..... | 265 |
| xii. | Section VI: Review mechanism | 266 |
| xiii. | Synopsis of problems relating to ‘accountability’ | 268 |
| xiv. | Concluding remarks on difficulties with the Certification Scheme: Problem identification and analysis..... | 270 |
| e. | Infringements of the Scheme | 270 |
| 2. | Legal nature of the Scheme with respect to compliance and implementation of the Scheme..... | 273 |
| 3. | Outcomes from the 2010 Seminar held on Implementation and Enforcement | 274 |
| a. | Multilateral: way forward and outcomes (first session) | 275 |
| i. | Inter-agency co-operation | 275 |
| ii. | Working Group on enforcement | 276 |
| iii. | Work Plan on enforcement..... | 276 |
| iv. | Information sharing and trust building..... | 276 |
| v. | Trust fund on enforcement | 276 |
| b. | Regional focus: way forward and outcomes | 277 |
| c. | National: way forward | 277 |
| i. | Development solutions..... | 277 |
| ii. | Governance solutions | 277 |
| iii. | Enforcement solutions..... | 278 |
| 4. | Concluding remarks..... | 280 |
| CHAPTER 8 : ... THE CERTIFICATION SCHEME: ITS APPLICABILITY IN ZIMBABWE | | 283 |
| 1. | Introduction..... | 283 |
| 2. | Human rights situation in Marange | 285 |
| a. | Move for suspension of Zimbabwe from the Certification Scheme | 285 |
| b. | Key Kimberley Process Members | 288 |

| | |
|--|------------|
| i. Namibia | 288 |
| ii. India..... | 288 |
| iii. South Africa | 289 |
| iv. Belgium | 289 |
| v. Israel..... | 289 |
| 3. Human rights violations in Marange diamond fields | 290 |
| a. Principal buyers and smuggling routes | 290 |
| b. Specific human rights abuses, corruption, and extortion by the police (November 2006 to October 2008) | 291 |
| 4. Role of the Reserve Bank of Zimbabwe..... | 293 |
| 5. Legal standards applicable to Zimbabwe’s diamond industry | 295 |
| 6. The Certification Scheme and its role in Marange | 296 |
| CHAPTER 9: SUMMARY AND CONCLUSION | 302 |
| 1. Introduction..... | 302 |
| 2. Implementation and monitoring | 305 |
| 3. Legal characterisation and the evolution of the Certification Scheme | 314 |
| 4. How the Certification Scheme attained juridical force..... | 321 |
| APPENDIX A | 328 |
| KIMBERLEY PROCESS CERTIFICATION SCHEME | 328 |
| Annex I | 336 |
| Annex II | 337 |
| Annex III..... | 339 |
| TABLE OF FIGURES..... | 340 |
| ARTICLES | 341 |
| BOOKS | 355 |
| WEBSITES..... | 361 |
| LEGISLATION AND RESOLUTIONS..... | 364 |

| | |
|---|-----|
| United Nations and other documents | 364 |
| United Nations Resolutions | 366 |
| a. United Nations General Assembly Resolutions | 366 |
| b. United Nations Security Council Resolutions | 367 |
| WTO | 369 |
| African Union | 370 |
| European Community | 371 |
| United States of America | 372 |
| Republic of South Africa | 373 |
| Zimbabwe | 374 |
| CERTIFICATION SCHEME DOCUMENTS | 375 |
| CASES | 377 |
| DOCUMENTS AND REPORTS | 380 |

LIST OF ABBREVIATIONS

| | |
|--------|--|
| ACR | African Consolidated Resources |
| AFRC | Armed Forces Revolutionary Front |
| AU | African Union |
| DDI | Diamond Development Initiative |
| EC | European Community |
| ECOWAS | United Nations and the Economic Community of West African States |
| EU | European Union |
| GATT | General Agreement on Trade Tariffs |
| GW | Global Witness |
| HS | Harmonisation System |
| HRW | Human Rights Watch |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic Social and Cultural Rights |
| ICJ | International Court of Justice |
| IDMA | International Diamond Manufacturers Association |
| ILO | International Labour Organisation |
| KP | Kimberley Process |
| KPCS | Kimberley Process Certification Scheme (Certification Scheme) |
| MMCZ | Minerals Mining Corporation of Zimbabwe |
| MNC | Multi-national corporations |
| MONUC | United Nations Mission to the DRC |
| NGOs | Non-governmental organisations |
| PAC | Partnership Africa Canada |
| PSC | Peace and Security Council |
| Review | Third Year Review |
| RoC | Republic of the Congo |
| RBZ | Reserve Bank of Zimbabwe |
| RUF | Revolutionary United Front |
| SADC | Southern African Development Community |

| | |
|---------|--|
| TARIC | Integrated Tariff of the Community (Tarif Intégré de la Communauté) and a Combined Nomenclature (CN) |
| UN | United Nations |
| UN GA | United Nations General Assembly |
| UN SC | United Nations Security Council |
| UNAMSIL | United Nations Mission in Sierra Leone |
| UNCTAD | United Nations Commission for Trade and Development |
| UNITA | National Union for the Total Independence of Angola |
| UNMIL | United Nations Mission in Liberia |
| UNOCI | United Nations Mission in Côte d'Ivoire |
| USA | United States of America |
| VC | Vienna Convention on the Law of Treaties |
| WCO | World Customs Organisation |
| WDC | World Diamond Council |
| WFDB | World Federation of Diamond Bourses |
| WGDE | Working Group of Diamond Experts |
| WGM | Working Group on Monitoring |
| WGS | Working Group on Statistics |
| WTO | World Trade Organisation |
| ZANU-PF | Zimbabwean African National Union-Patriotic Front |
| ZMDC | Zimbabwean Mining Development Corporation |

The true diamond is a hard, diaphanous perfectly transparent stone, which doth sparkle forth its glorie much like the twinckling of a glorious starre.

T Nicols *The History of Precious Stones* 1652

1. Synopsis

Diamonds have played a dual role in society since their discovery. On the one hand, they have brought smiles to the faces of many exhibiting love, beauty, wealth and brilliance. On the other hand, they have been at the heart of many conflicts. This juxtaposition has different impacts in usage. For those whom diamonds were a positively and morally accepted benefit, it did not present problems. Where diamonds spurred conflicts, it caused harm to lives and territories.

Human rights abuses became the cause of international conflicts. Humanitarian interventions appeared on the United Nations Security Council agenda. The United Nations had to address the human rights abuses and had to confront the escalation of human rights abuses. Human rights abuses reached significant proportions forcing the application of humanitarian intervention mechanisms. Control of the diamond trade industry was fast becoming an item on many international peace keeping agendas.

International organisations such as the World Trade Organisation, the International Criminal Court, the African Union, the European Union, the World Diamond Council and the United Nations have all tried to influence the diamond trade and its consequential impact upon human rights. These organisations are regulated by law, making them a preferred mechanism for establishing accountability for human rights abuse, arising from the illegal trade in rough diamonds and the maintenance of peace and security.

Pressed by the United Nations and, De Beers; NGOs; the Partnership Africa Canada and Global Witness; the World Diamond Council; and many States initiated a formalised voluntary international certification scheme for the export and import of diamonds. This

international certification scheme for the trade of rough diamonds became known as the Kimberley Process Certification Scheme.

The Kimberley Process Certification Scheme has been hailed as a milestone in the diamond trade industry. Simultaneously, the Certification Scheme has been criticised for its inefficacy in regulating the legitimate trade of rough diamonds. Whether the Certification Scheme in its present form is suitable to address the crisis in the trade of rough diamonds is central to this study. Thus, the characterisation, monitoring, implementation and evolution of the Kimberley Process Certification Scheme will be examined.

Key terms

International law; international human rights law and diamonds; human rights abuses; conflict diamonds; implementation of the KPCS; monitoring of the KPCS; characterisation of the KPCS; soft law; international trade; Kimberley Process Certification Scheme

CHAPTER 1 : INTRODUCTION

Conflict diamonds or as they are more colloquially known as ‘blood diamonds,’ have played a significant role in the international diamond trade environment. Illegally mined diamonds are sold throughout the world for two critical reasons. The first reason is that of acquisition for extrinsic value. The second reason is that conflict diamonds have been exchanged for arms and ammunition which, funded civil wars in countries such as Sierra Leone and Angola.¹ Over time, it was discovered that Liberia, albeit in mostly industrial and modest quantities held a significant portion of the diamond trade.²

The civil wars in Sierra Leone and Angola prompted the United Nations to resolve that a ‘Certificate of Origin’ should accompany the trade of all diamonds mined in Angola.³ As the problem of conflict diamonds escalated, the United Nations, civil society organisations, the World Diamond Council and many States agreed to enter into a voluntary mechanism that would serve as the basis for an international certification scheme for the trade of rough diamonds.

Known as the Kimberley Process Certification Scheme,⁴ its thrust was to ensure that Participants to the Certification Scheme attach a Kimberley Certificate to every shipment of rough diamonds. Eliminating or curbing the illicit trade of rough diamonds is the first objective of the Certification Scheme. The second objective is to protect against human rights abuses that arise from the illegal trade of rough diamonds. The Certification Scheme is confined to certifying transactions for rough diamonds. Polished and processed diamonds, as well as synthetically produced diamonds like crystals fall outside the scope of application of the Certification Scheme.

The Certification Scheme is not a treaty under international law. It is a voluntary mechanism without measures for compliance. The Certification Scheme began operation in 2003. In 2006, the Working Group to the Kimberley Process embarked on its first review of the

¹ UN GA Resolution 55/56(2000) UN Doc UN A/RES/55/56(2000).

² <http://www.globalwitness.org/library/civil-society-expresses-vote-no-confidence-conflict-diamond-scheme>. Last visited 08 July 2011.

³ <http://www.un.org/peace/africa/Diamond.html>. Last visited 08 July 2011. See also <http://www.globalwitness.org/library/why-there-should-not-be-embargo-all-angolan-diamonds>. Last visited 08 July 2011.

⁴ The Kimberley Process Certification Scheme available on www.kimberleyprocess.com; hereafter referred to as the ‘Certification Scheme’. Attached as Annex A.

implementation and monitoring of the Certification Scheme.⁵ Although commended by the Kimberley Process, the Review brought to the attention of the international diamond industry its shortcomings and failings.

The Certification Scheme as a 'scheme' is not capable of achieving its two intended objectives; namely, to curb the illicit trade of rough diamonds and to better protect human rights. The inability to achieve these two objectives forms the basis of this study.⁶ The study hypothesises that should an international certification scheme for the trade of rough diamonds be sought, it must be elevated to the level of a legally binding mechanism such as a law making treaty mechanism. Therefore, the legal characterisation, implementation, monitoring and evolution of the Kimberley Process Certification Scheme are central concerns of the study.

The study is divided into two parts. The first part addresses the Certification Scheme document and how it came about. Furthermore, the Third Year Review in implementation and monitoring is also examined. An examination of the role of international organisations such as the United Nations General Assembly (UN GA), the United Nations Security Council (UN SC) and the World Trade Organization (WTO) follows. This concludes the first part of the study.

The second part of the study considers the role of international law in the international community, focussing on the law relating to certain phenomena in the international community. These phenomena can create norms for compliance, even by actors that do not have a legal status in international law. The second part also deals with an analysis of the Certification Scheme in its present form, arising from the Third Year Review as it was reviewed in the first part of the study.

⁵ Third Year Review available at www.kimberleyprocess.com. Last visited 08 July 2011.

⁶ On efficacy of the Certification Scheme see Wallis AC 'Data mining: Lessons from the Kimberley Process for the United Nations' development of human rights norms for transnational corporations' (2005) 4/2 *Nw Univ J Int'l for Hum Rts* at 388-417 on monitoring, enforcement, redress and accountability issues; see also Holmes JD 'The Kimberley Process: Evidence of change in international law' (2006-2007) 3 *Int'l L & Mgmt Rev* at 228-232 213-232 on the Certification Scheme; see also Malamut SA 'A band aid on a machete wound: Failures of the Kimberley Process and diamond caused bloodshed in the Democratic Republic of the Congo' (2005-2006) 29 *Suffolk Transnat'l L Rev* at 40-41 on the failings of the Certification Scheme 25-52; see also Smillie I 'Loupe holes: Illicit diamonds in the Kimberley Process' (2008) *Partnership Africa Canada and Global Witness* in general.

The second part of the study is aimed at demonstrating the strengths and weaknesses of the Certification Scheme, which leads to the concluding chapter of the study. In this part, the Zimbabwean Marange situation is also addressed. The concluding chapter seeks to characterise the Certification Scheme in legal terms. The legal characterisation of the Certification Scheme is crucial in light of the international support and compliance it has received despite it not being a conventional international legal instrument.

In this first chapter, the first section will look at the history of diamonds; the diamond trade and conflict-free diamonds. The second section will study blood diamonds, or conflict diamonds, and the role of the United Nations and the Certification Scheme which will lead to a conclusion.

Following on this introductory first chapter, chapter two provides a general background to the diamond trade. Chapter two will proceed to discuss the background to the Certification Scheme itself. In addition, chapter two will provide a general background and a background to the formation of the Certification Scheme in order to understand how the Certification Scheme came about.

Understanding the Certification Scheme's origins will enable a critical understanding as to how and why the illegal trade of rough diamonds was regulated by a Certification Scheme, which is a *quasi* legal, self-regulating and voluntary mechanism as opposed to a legally binding instrument. Examination of past developments leading to the Certification Scheme will allow the study to be clear with regard to future developments.

Chapter three of the study discusses the Certification Scheme. The contents of the Certification Scheme are examined in order to highlight the strengths and weaknesses of the contents. It is important to examine the contents of the Certification Scheme, as examination will allow the study to reveal its legal nature.

In the main, the Certification Scheme may have a *quasi* legal basis in law. It is a voluntary, self regulatory initiative whose provisions may be adhered to by States and the diamond sector alike. The Certification Scheme operates on the basic premise that a Kimberley Process Certificate must accompany each shipment of rough diamonds from the point of origin to the point of destination. Participants to the Certification Scheme are expected to

fulfil particular 'requirements' in order for the Certification Scheme to have application within their respective jurisdictions. Furthermore, Participants are also expected to undertake several other measures, aimed toward the workability of the Certification Scheme.

Chapter four discusses the Third Year Review⁷ with respect to implementation and monitoring of the Certification Scheme. The Certification Scheme makes provision for a review of the implementation and monitoring to be undertaken.⁸ Participants agreed to undertake a review of the operation of the Certification Scheme three years after the same came into existence.

Other organisations such as Partnership Africa Canada have also undertaken reviews of the Certification Scheme.⁹ Chapter four does not focus on those reviews in the main. It will rather focus on the role of regional organisations in the implementation of the Certification Scheme. Chapter five will identify the shortcomings and the strong points of the Certification Scheme through an investigation of the implementation and monitoring by the Participants to the Certification Scheme. The areas of compliance and the areas of non compliance, linked to the Certification Scheme's specific provisions will also be highlighted. This will enable an understanding of how the Certification Scheme is being implemented and monitored to date.

The identification of the shortcomings and strengths of the Certification Scheme in practice, outlined in chapter five, combined with the strengths and weakness of the provisions of the Certification Scheme, in chapter three, will give a more complete picture of the overall strengths and weaknesses of the Certification Scheme.

According to the Third Year Review, the Certification Scheme is effective.¹⁰ In pronouncing on the Certification Scheme's efficacy, the Review recommended a number of actions to strengthen the Certification Scheme further. In particular, areas such as monitoring of implementation and strengthening internal controls in participating countries, as well as greater transparency in the gathering of statistical data came to the fore.

⁷ Third Year Review submitted by the *Ad Hoc* Working Group to the KP in November 2006 available at www.kimberleyprocess.com last visited 01 September 2011; see also Smillie I 'Diamond and human security' (2008) *Annual Review* at 1-24 and Smillie I 'Diamond and human security' (2009) *Annual Review* at 1-24.

⁸ Section VI(13) of the Certification Scheme.

⁹ Smillie *supra*, see also Left S 'Corrupt countries named in new survey' *Guardian* (28 August 2002) <http://www.guardian.co.uk/world/2002/aug/28/sarahleft> at 4.

¹⁰ Third Year Review at 1 in the Executive Summary and throughout the Third Year Review document.

This first three year Review focused on three major areas: firstly, the impact of the Certification Scheme on the international trade in rough diamonds, and the extent to which the Certification Scheme has been effective in preventing the flow of conflict diamonds into the legitimate trade; secondly, the technical provisions of the Certification Scheme and whether they are functioning as planned or require improvement; and thirdly, the operations of the Certification Scheme and its efficacy.

Chapter five addresses the role of international organisations in the Certification Scheme. This chapter will turn the focus to the role of international organisations towards the efficacy of the Certification Scheme. International organisations have impacted upon the Certification Scheme since before its inception. Thus, chapter five examines the impact of international organisations such as the UN SC, the UN GA and the WTO in the first part. In the second part of the chapter five, the role of regional organisations such as the EC and the AU will be studied with regard to the strides they have made with the illegal trade of rough diamonds.

Many organisations impact upon the workability of the Certification Scheme. However not all organisations will be examined in this study. The organisations, which have demonstrated the greatest impact resulting in the formation, recognition and workability of the Certification Scheme, will be examined.

An examination of the role of international organisations will show the importance of international organisations to the Certification Scheme. Consequently, the important roles of these organisations will become clearer as the Certification Scheme appears to have embarked upon normative creation. It may be speculated that a treaty based mechanism may significantly improve the long term sustainability of regulating the illegal trade of rough diamonds; thus allowing the Certification Scheme's contents to give proper effect to its initial objectives.

UN GA Resolution 55/56 established the initial mandate for the Kimberley Process in December 2000.¹¹ Resolution 55/56 called for several structural measures to regulate the

¹¹ UN GA Resolution 55/56(2000). This Resolution created the mandate for the Kimberley Process which, has been regularly renewed by the UN GA through the following UN GA Resolutions: UN Doc A/56/263(2002), UN Doc A/57/302(2003), UN Doc A/58/290(2004), UN Doc A/59/144(2004), and UN Doc A/60/182(2005). The Certification Scheme has gained important recognition from the UN SC through the UN SC Resolution 1459 UN Doc S/1459(2003). More recently the role of the Certification Scheme has been acknowledged in UN

trade of rough diamonds. It also explained the justification for the Certification Scheme, that is, to prevent the trade in conflict diamonds, which contributes to human rights crises.

The UN SC Resolutions combined with the series of UN GA Resolutions represent an important accomplishment because they reflect widespread and continued international support for the Certification Scheme by the UN. Resolutions, according to the Review also confer an important measure of legitimacy upon the Certification Scheme in their acknowledgement of the efforts of Participants and Observers.¹²

The illicit production and trade of diamonds have, in the main, fuelled conflicts in African countries, in particular, Sierra Leone, the DRC, Angola and Liberia.¹³ The escalation in conflicts, which were thought to be domestic conflicts and out of the purview of international organisations such as the UN and regional organisations such as the AU, became internationalised.¹⁴

Consequently, conflicts that became intertwined with the trade in conflict diamonds appeared on international agendas. During the Millennium Session of the UN GA the agenda included ‘The role of diamonds in fuelling conflicts’.¹⁵ The General Assembly strove to maintain a balance between conflict diamonds that ‘were a crucial factor in promoting brutal wars in parts of Africa’ and legitimate diamonds that ‘contribute to the prosperity and development elsewhere on the continent’.¹⁶

SC Resolutions 1521(2003) UN Doc S/1521(2003) on Liberia and 1643(2005) UN Doc S/1643(2005) on Côte d’Ivoire.

¹² Efrat A ‘Toward internationally regulated goods: Controlling the trade in small arms and light weapons’ (2010) 64 *International Organisation* at 106 where a group of European NGOs launched a campaign against conflict diamonds called ‘Fatal Transactions’ in the 1990s; see also Cooper N ‘Putting disarmament back in the frame’ (2006) 32 *Review of International Studies* at 368 for a positive evaluation of the Certification Scheme.

¹³ Dates as far back as 1938, see Rosenthal *Other Men’s Millions* (1968) at 45-89; see also Billon PL ‘Thriving on war: The Angolan conflict and private business’ (2001) *Review of African Political Economy* at 629-631; with regard to the DRC see Samset I ‘Conflict of interest or interests in conflict? Diamonds and wars in the DRC’ (2002) *Review of African Political Economy* at 465-470 and 476-777; see Rosenthal (1968) that diamonds have been at the heart on conflict even during the Second World War Diamond industry in wartime (1943) 129-43; see also in general Jacobson D *The price of diamonds* (1957) at 56-104.

¹⁴ See in general Mamdani M *Citizen and subject: Contemporary Africa and the legacy of late colonialism* (1996) at 56-75 and Ndegwa SN ‘Citizenship and ethnicity: An examination of two moments in Kenyan politics’ (1997) 19 *American political Science Review* at 104-120.

¹⁵ Cooper N ‘Putting disarmament back in the frame’ (2006) 32 *Review of International Studies* at 369; see also ‘A Rough Trade: The Role of Companies and Governments in the Angolan Conflict’ in Global Witness (1998)

¹⁶ Section I of the Certification Scheme.

The UN recognised that international and regional organisations have a critical role to play in trade of conflict diamonds.¹⁷ The Certification Scheme acknowledged the role of international and regional organisations. Therefore, it is important within the context of this study to examine the role of international and regional organisations as their actions are crucial to the illicit trade of conflict diamonds and the consequent human rights crises.

Chapter five will explain the roles of the UN SC, the UN GA, the WTO and finally that of regional organisations. Within regional organisations, the examples of the African and European Unions will be discussed. These organisations are examined against the background of the UN's role to ensure peace and security in the world.¹⁸ Chapter five is confined in its examination to the discussion on conflict diamonds and therefore is not intended to be a comprehensive examination of international organisations. Chapter five concludes the first part of the study.

This first part concludes the salient aspects of the Certification Scheme itself. The second part proceeds to discuss the legal theoretical framework of accountability mechanism. Chapter six examines the phenomenon of norm creation in the international arena and discusses soft law. A selection of representative authors will be examined. This chapter intends to set the framework for new norm creation in the international arena.

In the second part of the study, chapter seven proceeds to analyse the strengths and weaknesses of the Certification Scheme as highlighted by the Third Year Review. Finally, in this chapter the legal status of an international scheme for the certification of rough diamonds is discussed.

The problems identified mainly in chapters three and four are juxtaposed against the findings of this study insofar as implementation and monitoring is concerned, to ensure a full and proper analysis. Chapter seven postulates that a law making treaty mechanism for the international certification scheme would have been the more appropriate mechanism as opposed to a 'soft law' mechanism. Chapter eight will examine the diamond mining and

¹⁷ UN GA Resolution UN Doc A/55/56(2000); see Shaw TM 'Regional dimensions of conflict and peace building in contemporary Africa' (2003) 15 *J Int Dev* at 491-494.

¹⁸ Article 1 on Principles and Purposes of the UN Charter; see Brownlie I *Principles of international law* (1990) at 679-701.

production situation in the Marange region. The chapter will also examine the human rights situation in the region. The applicability of the Certification Scheme to the Marange region is very important; and must thus be examined. The Marange situation in Zimbabwe is addressed so as to examine the efficacy of the Certification Scheme in Participant countries experiencing illegal diamond mining.

Chapter nine concludes the study. It contains a conclusion. The study concludes that for bolstered efficacy, with regard to the accountability and compliance, an international certification mechanism for the illegal trade of rough diamonds has to be couched in a law making normative mechanism. The legal characterisation of the Certification Scheme in international legal terms is discussed; and its consequent use in international law.

PART I

CHAPTER 2 : BACKGROUND TO THE KIMBERLEY PROCESS CERTIFICATION SCHEME

1. Introduction

This chapter provides the background to the formation of the Certification Scheme. Furthermore, it explains how the Kimberley Process Certification Scheme came about.

In this chapter, the first part will look at the history of diamonds; the diamond trade and conflict free diamonds. The second part will provide a brief overview of blood diamonds or conflict diamonds; the role of the UN and the Certification Scheme which will lead to a conclusion.

Understanding the Certification Scheme's origins will enable a critical understanding as to how and why the illegal trade of rough diamonds has to date been regulated by a Certification Scheme, which is a quasi legal, self-regulating and voluntary mechanism as opposed to a legally binding mechanism. Examination of past developments leading to the Certification Scheme will allow the study to be clear with regard to future developments.

2. History of diamonds

Diamonds were formed between 600 million and 3 billion years ago when pressure and heat caused carbon 1,931 km below the Earth's surface to crystallise.¹ About a million years ago, erupting molten rock brought the diamonds closer to the earth's surface.² The desire for diamonds is based on the idea that diamonds are precious and rare. While diamonds may be precious, they are not rare.³ Mines in Africa, Canada and other countries abound with the stones, which are for beneficiation and mostly not for sale.⁴

As a commodity, the most attractive quality of diamonds is that they retain their purity.⁵ Diamonds are the purest and toughest substance made by nature, formed when carbon is compressed into crystals under great heat and pressure deep within the earth's mantle.⁶ Diamonds are measured in carats and judged by the four C's, namely colour, cut, carat weight and clarity.⁷ The extrinsic value of the diamond creates a desire for possession and ownership.⁸

In Sierra Leone, until the issuing of digging licenses began in February 1956, diamond digging by Africans was illegal.⁹ From the mid 1950s, the 'Diamond Rush' became international news. Approximately 30 000 diggers expanded their illegal activities in the

¹ Hoyt A *How the African diamond trade works* at www.blooddiamondaction.org. Last visited 08 July 2011; see also Keppel-Jones A *South Africa: A short history* (1975) at 77-87.

² Hoyt *supra* at 77-79.

³ Diamonds are mined in more than 20 countries in the world and more than 100 countries are involved in the diamond industry. Yet only 4 companies control 76 percent of the world's rough diamonds: De Beers Consolidated Mines Ltd, Alrosa Ltd, Rio Tinto and BHB Billiton. GAO 2002.

⁴ For an interesting position, see Allihgan *Curtain up on South Africa* (1960) at 246-250; see also De Villiers M and Hirtle S *Into Africa: A journey through the ancient empires* (1997) at 139-142; see also in general Englebort P *State legitimacy and development in Africa* (2000) at 151-157.

⁵ Nadubere DW *Africa's First World War: Mineral wealth, conflicts and wars in the Great Lakes Region* (1985) at 79-80; also see Greenhalgh P *West African diamonds 1919-1983: An economic history* (1985) at 12; see also Goredema C 'Diamonds and other precious stones in armed conflicts and law enforcement co-operation in Southern Africa' (2002) May *Institute for Security Studies ISS Paper 57*.

⁶ Green T *The world of diamonds* (1981) at 1.

⁷ There are more than 16 000 categories of diamonds varying from industrial grade to gem quality; see also SA Department of Information Fact Paper 53 (1958) at 1-7; see also in general Hornsby AH *South African diamond fields* (1874) at 45-89.

⁸ From the 1850s when the British took possession of the Kohi-noor diamond from India and handed it over to the East India Company; see generally Ward F in *Rubies and sapphires* (2003) at 120-153.

⁹ Greenhalgh *id* at 152; of interest see also Haq K and U Kirdar (eds) *Human development, adjustment and growth* (1987) at 54-76 and Olson M *The rise and decline of nations: Economic growth, stagflation and social rigidities* (1982) at 97-108; see further Gathii *Slippages in public/private in resource wars* (2010) at 21-36.

Kono district of Sierra Leone.¹⁰ Expansion continued southwards into the Bo and Kenama districts where licenses were not issued.¹¹

In South Africa, in contrast, diamond mining, production and sale are regulated by national legislation. The Department of Mineral Resources is responsible for overseeing and regulating these processes. In South Africa, more than 140 years have passed since the discovery of the Eureka diamond in 1867, which led to the birth of the modern diamond industry.¹² South Africa's diamond industry has transformed over the years, accompanied by changes in legislation, specifically amendments to the Diamonds Act,¹³ and the Diamonds Export Levy Act.¹⁴

The first diamonds found in South Africa were alluvial. By 1870, it was discovered that the blue, hard, igneous rock, later named kimberlite, is the primary source of diamonds. Later, in the early 20th century, diamonds were discovered on the seabed along the west coast of South Africa. Presently, South Africa remains a major diamond producer and diamonds are still mined from all three sources aforementioned.

Internationally, as the diamond industry grew, so did the flow of conflict diamonds. South Africa played a leading role in the creation of the Kimberley Process Certification Scheme, a joint government, industry, and civil society initiative to stem the flow of conflict diamonds.

South Africa's Diamonds Act¹⁵ led to the establishment of the South African Diamond Board in 1987 to regulate control over the possession, sale, purchase, processing and export of diamonds. However, this piece of legislation did not benefit cutters and polishers who make

¹⁰ Greenhalgh *ibid*; see also in general Van der Laan HL *The Sierre Leone diamonds: An economic study covering the years 1952-1961* (1965) 59-98; Keen D *Conflict and collusion in Sierra Leone* (2005) at 175-213 and general Hirsch JL 'Sierra Leone Diamonds and the struggle for democracy' (2001) *International Peace Academy Occasional Paper Series* at 45-87.

¹¹ Greenhalgh *id* at 154; see also Muller CF (ed) *500 Years: A history of South Africa* (1986) at 187-205; of interest see Rosenthal *Other Men's Millions* (1968) at 191; see for an interesting narrative account 189-197. These were the days in which the British traded one ox for one diamond with the local population, the very first diamond parcel left South Africa for London by means of a red flannel band, tied around the waist of a young man, with a series of pouches into which diamonds were placed.

¹² *South African Diamond Handbook and Operating Diamond Mines Directory* (2010) (Directory D7/2010) available at http://www.dmr.gov.za/Mineral_Information/New/d7.pdf. Last visited 07 September 2011 at 6.

¹³ Diamonds Act No 56 of 1986.

¹⁴ Diamonds Export Levy Act No 15 of 2007.

¹⁵ Diamonds Act.

up the first stage of value addition in SA's diamond value chain. As a result, three pieces of legislation, namely the Diamonds Amendment Act,¹⁶ the Diamonds Second Amendment Act¹⁷ and the Precious Metals Act,¹⁸ were promulgated in 2007.

The promulgation of these pieces of legislation broadened the legal mandate of the South African Diamond Board to also regulate precious metals. Subsequently, the South African Diamond Board was delisted as a public entity in March 2007 and replaced by the South African Diamond and Precious Metals Regulator.¹⁹ The objectives of the South African Diamond and Precious Metals Regulator in terms of the Diamonds Act are to:

- ensure that the diamond resources of the Republic are exploited and developed in the best interests of the people of South Africa;
- promote equitable access to, and local beneficiation of, the Republic's diamonds; and
- ensure compliance with the Kimberley Process Certification Scheme.

The Regulator's functions with regard to diamonds include:

- implementing, administering and controlling all matters relating to the purchase, sale, beneficiation, import and export of diamonds; and
- establishing diamond exchange and export centres, which shall facilitate the buying, selling, export and import of diamonds and matters connected therewith.

Whilst the former SA Diamond Board had an essentially regulatory role, the South African Diamond and Precious Metals Regulator has a promotional role as well. Through administering licenses and export approvals, the South African Diamond and Precious Metals Regulator will strive to ensure that local demand for diamonds and precious metals is catered for, and that there is growth in local beneficiation of diamonds and precious metals.

The Diamonds Second Amendment Act prohibits:

- Sale and purchase of unpolished diamonds;
- Assistance by non-licensed persons;

¹⁶ Diamonds Amendment Act No 29 of 2005.

¹⁷ Diamonds Second Amendment Act No 30 of 2005.

¹⁸ Precious Metals Act No 37 of 2005.

¹⁹ Established by section 3 of the Diamonds Act 1896 as amended in 2005.

- Processing of diamonds;
- Erection and operation of machinery; and
- Export of unpolished diamonds.

Exceptions are licensed producers, manufacturers, dealers, beneficiators, researchers and holders of permits. The Minister of Mineral Resources has the power to exempt a producer from the requirement to offer rough diamonds intended for export for sale at the Diamond Exchange and Export Centre.²⁰ This exemption also ensures that the Diamond Exchange and Export Centre is not overwhelmed with a high volume of low valued diamonds.

The diamond trade has many facets in the chain commencing from mining and culminating in retail. Understanding the chain in the diamond trade is critical to the appreciation of vulnerabilities and points of illegal interventions as well as the appropriate choices for policy, legal and regulatory frameworks.

²⁰ S 48A of the Diamonds Act 1986 as amended.

3. The diamond trade

The general principles of diamond trading must be considered. This will enable an understanding of how diamonds make their way from mines to the retail industry. The Certification Scheme regulates the various processes and role players in the diamond trade. Understanding the operation of diamond trading is essential to making an evaluation of the efficacy of the Certification Scheme.

The diamond trade is characterised by its secrecy inasmuch as it is also conducted with a particular lack of business formalities.²¹ The diamond trade has many actors that may be characterised as follows:²²

- **Miner** – he mines diamonds
- **Shop owner** – he establishes a licensed shop in the diamond mining area and supplies various miners in exchange of diamonds they produce
- **Diamond dealer** – he buys from many shop owners and/or miners
- **Diamond buyer** – he visits the diamond producing regions and buys from local diamond dealers
- **Diamond trader** – he is established in the main diamond trading centres and buys from various diamond buyers, whom he often finances
- **Diamond cutter** – he buys rough diamonds from diamond traders to cut them

²¹ See in general Schram F 'The legal aspects of the Kimberly Process' (2007) *International Peace Information Services* (2007) at 1-38.

²² Malamut 'A band aid on a machete wound' (2005-2006) at 25-29 on chain of diamond mining; see also Kaplan M 'Carats and sticks: Pursuing war and peace through the diamond trade' (2003) 35 *NYUJ Int'l L & Pol* at 570-575 on the pipeline of the diamond trade comprising of mostly miners, middlemen, rebel groups and foreign buyers; see also Ward F *Diamonds* (1998) at 30-31; see also www.blooddiamondaction.org; see also in general Miller R *The mining and production of diamonds at CDM 1945-1983* (1985) at 140-149 and Harrison JL *Law and economics* (1995) at 132-156.

- **Cut diamond wholesaler** – he buys cut diamonds from diamond cutters and supplies local retailers or jewellery manufacturers
- **Jewellery maker/wholesaler** – he makes or wholesales readymade jewellery
- **Cut diamond/jewellery retailer** – he retails to clients and the market widely

The factual course of a diamond transaction may include all, more or only some of the aforementioned intermediaries. Names of intermediaries can change but the function is retained. Some intermediaries hold more than one function. Of importance, is that most diamond business participants in the chain know each other and often conduct business on the basis of personal trust and acquaintance.²³ Thus, it is difficult for a newcomer to enter into the business.

Newcomers to the aforementioned chain of intermediaries endeavour to contact miners directly or local diamond dealers. The fear underlying entrance of the newcomer into the circle of diamond business is that one does not know whether the newcomer is able to deliver as in accordance with the agreement entered into. The newcomer may be unscrupulous or underfunded. There are no substantive guarantees. Diamonds are liquid cash.²⁴ This means that diamonds may be weighed and transformed into readily available cash in a significantly short period. The intermediaries in the chain of diamond trade will experience little difficulty brokering a deal if the conditions are favourable, even if the other contractor is a newcomer.

²³ See in general Lenzen G *The history of the diamond production and the diamond trade* (1970) at 56-78; Ward (1998) at 3-1; Herbert I *The diamond diggers: South Africa 1866 to the 1970s* (1972) at 56-58; see also Goreax L 'Conflict diamonds' (2001) *World Bank Africa Region Working Paper Series* No 13 at 2-4.

²⁴ Passas N and Jones K 'Commodities and terrorist financing: Focus on diamonds' (2006) 12 *European Journal on Criminal Policy and Research* at 9-10; see Fishman JL 'Is diamond smuggling forever? The Kimberley Process Certification Scheme: The first step down the long road to solving the blood diamond trade problem' (2004-2005) 13 *U Miami Bus LRev* at 233-240 and 217-242 on smuggling in the DRC; see in general also Needham D *The economics and politics of regulation: A behavioural approach* (1998) at 45-97 and Dimock ME *Business and government* (1957) at 141-167.

4. Conflict-free diamonds

Conflict-free diamonds are generally regarded as diamonds arising out of legitimate trade, from mining to retailing. The conflict-free diamond trade is legitimately regulated and sanctioned by an accountable government. The Certification Scheme does not define conflict-free diamonds. However, it is submitted that a conflict-free diamond may be loosely defined as a diamond that does not arise from a situation of conflict. The definition will include the trajectory of the diamond from the point of production, which is mining, to the point of final retail.

There are countries that rely on conflict-free diamond trade as an important part of their economies. In 1999, Botswana was considered the world's fastest growing economy.²⁵ Three quarters of Botswana's export profits and 45 percent of the country's government revenue are generated by the diamond industry.²⁶ Due to a legitimate diamond industry, Botswana has enjoyed a complete change from one of the world's poorest countries in 1966 to the world's most rapidly growing economy over the last 25 years.²⁷ Botswana intends to establish beneficiation rights over the diamond production and its consequent trade.²⁸

Canada also boasts a growing and exemplary diamond industry, and many other countries around the world feature legitimate diamond mines.²⁹ Conflict-free diamonds are dependent on the government and the mining corporations that are committed to operating within a legitimate diamond trading regime. When the government, mining corporations and the general population move away from operating within a legitimate diamond trading regime, the door is open for the illegal trade of diamonds; and diamonds produced by conflicts which came to be called conflict diamonds or blood diamonds.

²⁵ Official website http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/BOTSWANA_EXTN/0,,contentMDK:21820856~pagePK:141137~piPK:141127~theSitePK:322804,00.html. Last visited 08 July 2011.

²⁶ Official website http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/BOTSWANA_EXTN/0,,contentMDK:21820856~pagePK:141137~piPK:141127~theSitePK:322804,00.html. Last visited 08 July 2011.

²⁷ *Ibid*; see also Ward (1998) at 30-31 and 33-35 <http://www.mmegi.bw/index.php?sid=4&aid=14&dir=2009/September/Wednesday23>. Last visited 08 July 2011.

²⁸ <http://www.mmegi.bw/index.php?sid=4&aid=14&dir=2009/September/Wednesday23>. Last visited 08 July 2011.

²⁹ Passas and Jones *Commodities* (2006) at 9-10.

Some critics of the existing state of the African diamond trade have a propensity to concur that excluding the diamond industry would have a negative effect on many innocent people in Africa that rely on diamond mines for their livelihood.³⁰ Several post-war nations, such as Sierra Leone and Liberia, are free from the rule of illegal diamond mining organisations.³¹ In fact, in 2005 a peaceful Sierra Leone exported more than US \$142 million worth of diamonds.³² However, areas of the Ivory Coast and the eastern portion of the Democratic Republic of Congo continue to suffer at the hands of unscrupulous diamond fortune seekers.³³

Conflict-free diamond trade is not regarded as a threat or risk to human rights and regional peace. Conflict diamonds are regarded as the source of these problems. However, the trade of conflict-free diamonds is inextricably linked to conflict diamonds due to the nature of the diamond trade. The role players in the conflict-free diamond trade have therefore recognised their responsibilities in curbing conflict diamond trading in the form of the Certification Scheme.

³⁰ Sparks A *The mind of South Africa: The story of the rise and fall of apartheid* (1997) at 62-63.

³¹ *The Prosecutor v Sessay Kallon and Gaboa* SCSL-04-15-T and *The Prosecutor v Brima, Kamara and Kanu* SCSL-2004-16-A. Cases decided before the Special Court for Sierra Leone after the war; see also Woody KE 'Diamonds on the souls of her shoes: The Kimberley Process and the morality exceptions to WTO restrictions' (2006-2007) 22 *Conn. J Int'l L* at 335-336; see also Shaik-Peremanov N 'The RUF case in the Special Court for Sierra Leone' (2009) 34 *SAYIL* at 174-177.

³² <http://howstuffworks.com/framed.htm?parent=african-history/african-diamondtrade.htm&url=http://allafrica.com/stories/200612080608.html>. Last visited 08 July 2011.

³³ Third Year Review at 15-19; see Dietrich C 'Hard currency: The criminalised diamond economy of the DRC and its neighbours' (2002) *Partnership Africa Canada: Diamonds and human security project* Occasional Paper No 4 at 4-15; see Gberie L 'West Africa: Rocks in a hard place: The political economy of diamonds and regional destabilisation' (2003) *Partnership Africa Canada: Diamonds and human security project* Occasional Paper No. 9 at 2-6; see also 0061_DRC_review_visit_en[1].pdf on www.kimberleyprocess.com. Last visited 08 July 2011.

5. African blood diamonds

Africa produces the most diamonds in the world market.³⁴ The problem of conflict diamonds or blood diamonds is well documented.³⁵ Rebel groups in Sierra Leone, the Democratic Republic of the Congo, Angola and elsewhere took control of alluvial diamond mining areas in the 1990s, enabling them to engage in a protracted armed conflict.³⁶ Conflict diamonds are also a product of the vast alluvial diamond areas in Africa where diamonds are mined by artisanal, small scale diggers.³⁷ There are estimated to be 120,000 diggers in Sierra Leone, 800,000 in the Democratic Republic of Congo and many tens of thousands in Angola, Liberia, Brazil, Guyana, and Venezuela.³⁸

Blood or conflict diamonds are diamonds which are mined in areas controlled by insurgent groups, or have been mined in areas characterised by conflict. The UN defines conflict diamonds as ‘rough diamonds used by rebel movements to finance their military activities, including attempts to undermine or overthrow legitimate governments’.³⁹ The Certification

³⁴ Gathii ‘Slippages in public/private in resource wars’ (2010) at 21-36.

³⁵ See Grant J, Taylor A and Taylor I ‘Global governance and conflict diamonds’ (2004) 93 *The Kimberley Process and the quest for clean gems and the round table* Vol at 401 on how actors stimulate concern about the externalities of foreign trade. A notable example is the report of the NGO Global Witness, which raised awareness about the link between diamonds and civil wars and played an important role in the efforts to control the diamond trade see in general Global Witness ‘A rough trade’ (1998) see: http://www.globalwitness.org/media_library_detail.php0900en/a_rough_trade. ‘Conflict diamonds: Possibilities for the identification, certification and control of diamonds’ (2000) see: http://www.globalwitness.org/media_library_detail.php0860en0conflict_diamonds; see also UN Resolutions UN GA UN Doc A/RES/55/56 (2000) and UN SC UN Doc S/RES/1459(2003). Last visited 08 July 2011; see further Gathii *supra* at 21-30.

³⁶ Holmes ‘The Kimberley Process’ (2006-2007) at 215-217 on reasons for the war in Sierra Leone and the RUF’s role; see also official website <http://www.debeersgroup.com/Sustainability/Ethics/ethicalinitiatives/Diamond-Development-Initiative/>. Last visited 08 July 2011.

³⁷ Official website <http://www.debeersgroup.com/Sustainability/Ethics/ethical-initiatives/DiamondDevelopment-Initiative/>. Last visited 08 July 2011.

³⁸ Smillie I ‘Zimbabwe, diamonds and the wrong side of history’ (2009) *Partnership Africa Canada: Diamond human security project* Occasional Paper No 18 at 6-9; on Brazil see Smillie I ‘Fugitives and phantoms: The diamond exporters of Brazil’ (2006) *Partnership Africa Canada: Diamond human security project* Occasional Paper No 13; on Venezuela see Smillie I ‘The lost world: Diamond mining and smuggling in Venezuela’ (2006) *Partnership Africa Canada: Diamond human security project* Occasional Paper No 16 at 4-8; on Guyana see Smillie I ‘Triple jeopardy: Triplicate forms and triple borders: Controlling diamond exports from Guyana’ (2006) *Partnership Africa Canada: Diamond human security project* Occasional Paper No 14 at 6-11; on Guinea see Gberie L ‘Destabilising Guinea: Diamonds, Charles Taylor and the potential for wider human catastrophe’ (2001) *Partnership Africa Canada: Diamond human security project* Occasional Paper No 1 at 4-11; see also Official website <http://www.debeersgroup.com/Sustainability/Ethics/ethical-initiatives/Diamond-Development-Initiative/>. Last visited 08 July 2011.

³⁹ UN GA Resolution UN Doc A/RES/55/56(2000); see also Nabudere DW ‘Africa’s first world war: Mineral wealth, conflicts and war in the Great Lakes Region’ (2004) 8/1 *African Association of Political Science* Occasional Paper Series .

Scheme defines conflict diamonds as ‘rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments’.⁴⁰

Blood diamonds or conflict diamonds have been at the heart of many conflicts throughout Africa, either directly or indirectly.⁴¹ One of the major reasons for the existence of blood diamonds is the inherent difficulty in tracing the origin of the diamond.⁴² The easy portability of diamonds distinguishes diamonds from other valuable commodities such as copper and timber, which have also sparked conflicts.⁴³

Experts claim that the illegal sale of blood diamonds has produced billions of dollars to fund civil wars and other conflicts in various African nations, including Sierra Leone (where conflict ended in 2002), Angola, Liberia, Ivory Coast and the Democratic Republic of Congo (DRC).⁴⁴ It is argued that the people behind these civil wars and rebellions, oppose legitimate governments because of their desire to gain control over the countries’ beneficial diamond industry.⁴⁵ However, widespread insurgencies are also indicative of political, social and economic conflict causes that transcend opportunistic diamond trading interests.

During the Sierra Leonean civil war, the Revolutionary United Front (RUF) was charged with killing and often mutilating people living and working in diamond villages so as to secure control over a number of diamond mines in that country.⁴⁶ The RUF committed human rights atrocities systematically and widely throughout the territory of Sierra Leone which caused

⁴⁰ Section 1 of the Certification Scheme; see further Gathii (2010) at 21-36. Electronic copy available at <http://ssrn.com/abstract=1357349>.

⁴¹ Smillie I, Gberie L and Hazleton R ‘At the heart of the matter: Sierra Leone, diamonds and human security’ (2000) *Partnership Africa Canada: Diamond human security project* Occasional Paper at 1-6.

⁴² Third Year Review at 35.

⁴³ Schram ‘The legal aspects’ (2007) at 7-12.

⁴⁴ See in general Smillie I ‘Land grabbing and land reform: Diamonds, rubber and forests in the new Liberia’ (2007) *Partnership Africa Canada: Diamond human security project* Occasional Paper No 17 at 4-9; see also Gberie L ‘War and peace in Sierra Leone: Diamonds, corruption and the Lebanese connection’ (2002) *Partnership Africa Canada: Diamond human security project* Occasional Paper No 6 at 6-12 The diamond human security project Official website <http://geography.howstuffworks.com/africa/geography-of-congo-kinshasa.htm>. Last visited 08 July 2011; see also Vaughn J *Contemporary world issues: Conflict over natural resources A reference handbook* (2007); see further Gathii *supra* at 21-36.

⁴⁵ See in general Henkin L *How nations behave* (1986) at 304-339.

⁴⁶ Peter PJ *The Sierra Leonean tragedy: History and global dimensions* (2006) at 202-35; see also RUF case *The Prosecutor v Brima, Kamara and Kanu* SCSL-2004-16-A otherwise known as the ARFC case on the formation of ‘joint criminal enterprises’; see also Shaik-Peremanov ‘RUF case’ (2009) at 174-81.

many people to flee their homes in fear.⁴⁷ Approximately 20,000 innocent civilians suffered mutilation, an estimated 75,000 lost their lives and 2 million people fled Sierra Leone.⁴⁸ According to the NGO Human Rights Watch, diamond-fuelled conflicts such as in Sierra Leone have in total displaced millions and resulted in the deaths of more than 4 million people.⁴⁹

Diamonds in conflict areas begin their ‘commercial life’ in mines where theft, uncontrolled mining and informal management structures exist. Conflict diamonds make a brief appearance, after being transported, in cutting and polishing centres that will often manage to secure general tax and/or customs exemptions.⁵⁰ From many cutting centres around the world, diamonds will re-enter irregular freight channels taking them to informal bourses where transactions are traditionally done in cash and sealed on the basis of long standing relationships.

In conflict diamond trade circles, diamonds will, after having been traded on clandestine or informal bourses, again cross borders irregularly, finally arriving in informal and unstructured segments of diamond retail marketing that are often ill equipped to prevent and combat commercial fraud.⁵¹ Thus, the conflict diamond will pass through various unregulated and sometimes, illegal conduits before finding their way to the retailer and consumer.⁵²

Rough diamond caches are natural resources sought by rebel forces to finance arms purchases and their insurgency aspirations.⁵³ Neighbouring and other countries serve as trading and transit grounds for illicit diamonds. Once diamonds are brought to market, their origin is difficult to trace and once polished, they can no longer be identified.⁵⁴

⁴⁷ Goredema ‘Diamonds’ (2002) at 149-79; see also Efrat ‘Toward internationally regulated goods’ at 105; see also Official website <http://www.hrw.org/en/node/84262/section/7>. Last visited 08 July 2011.

⁴⁸ See the RUF case and the ARFC case; see also Efrat ‘Toward Internationally regulated goods’ (2010) at 105.

⁴⁹ Official website <http://www.hrw.org/en/node/84262/section/7>. Last visited 08 July 2011; see further Gathii ‘Slippages in public/private in resource wars’ at 21-36.

⁵⁰ Passas and Jones ‘Commodities’ (2006) at 3; Gathii *ibid.*

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ Passas and Jones *supra* at 2-3.

⁵⁴ Paes ‘Conflict diamonds’ *Hamburg African Studies* (2005) at 309.

Especially in the 1990s, governments, inter-governmental and non-governmental organisations, diamond traders, and financial institutions, arms manufacturers, social and educational institutions and other civil society players were called upon to combine their efforts, demanding the strict enforcement of sanctions and encourage peace.⁵⁵ Severe human right abuses in Sierra Leone and Angola heightened the international community's awareness for the need to sever sources of funding for the rebels in order to promote peace in those countries.

During the period of conflicts in Angola and Sierra Leone, a 2000 UN SC Report established 'that diamonds were illicitly traded to fund rebel groups, namely the National Union for the Total Independence of Angola (UNITA) and the Revolutionary United Front (RUF), both of which acted in contravention of the international community's objectives of restoring peace'.⁵⁶

The ability to turn diamonds into money characterises them as something that has been termed 'liquid cash'. According to the UN SC Report aforementioned, this ability provided the impetus for groups to commit human rights atrocities when mining and controlling diamond mining areas. The same is applicable for human rights abuses arising out of wars and conflicts funded by diamonds. Thus, the concerns over civil strife and political dissension responsible for the degeneration of States have ramified into the degeneration of human rights.

⁵⁵ Alden C and Soko M 'South Africa's economic relations with Africa: hegemony and its discontents' (2005) 43/3 *Journal of Modern African Studies* at 385; see also Bratton M 'Challenges to democratization in Africa' (2009) 7/2 *Perspectives on Politics* at 364-6; see further Gathii (2010) 'Slippages in public/private in resource wars' at 21-36.

⁵⁶ Report Document S/2000/203 presented to the UN SC; see also Harrington AR 'Facing the future: The need for and proposal for the adoption of a Kimberley Process-styled legitimacy certification system for the global gemstone market' (2009) 18 *Transnat'l L & Contemp Prob* at 353-6.

6. Degeneration of human rights⁵⁷

The propensity of diamond fuelled conflicts to cause severe human rights violations brought the trade in conflict diamonds to the attention of the international community. The World Diamond Council, formed in 2000 to combat illegal diamond trading in Africa, maintains that diamonds benefit the world in many ways. For example, approximately 10 million people worldwide are supported by the diamond industry.⁵⁸ In addition, revenue from the diamond industry is integral to the fight against HIV/AIDS in Africa.⁵⁹ In 2000, the World Bank stated that the struggle over diamonds and other mineral commodities are the main causes of civil wars globally.⁶⁰

In the 1960s and 1970s, a weak post-independence democracy in Sierra Leone became subverted.⁶¹ Economic decline and military rule followed. The rebellion that began in 1991 was characterised from the outset by brutality. The Sierra Leonean rebel forces, the RUF, hacked off hands and feet with machetes and funded its war by exploiting slave labour in diamond fields.⁶² Over 75 000 lives were claimed between 1991 and 1999 and half a million Sierra Leoneans became refugees.⁶³ Half of Sierra Leone's 4.5 million population people were displaced.⁶⁴

Rebel groups forced tens of thousands of people to work in diamond mines. The diamonds so mined made their way into the international diamond trade under dangerous conditions.⁶⁵ For years, the RUF financed their insurgency war through the illicit trade of diamonds.⁶⁶

⁵⁷ Official website <http://www.un.org/peace/africa/Diamond.html>. Last visited 08 July 2011; UN GA Resolution UN Doc A/RES/55/56(2000).

⁵⁸ Official website http://www.diamondfacts.org/facts/fact_03.html. Last visited 08 July 2011; see further Gathii 'Slippages in public/private in resource wars' (2010) at 21-36.

⁵⁹ Official website http://www.diamondfacts.org/facts/fact_03.html. Last visited 08 July 2011.

⁶⁰ Goreax 'Conflict diamonds' (2001) at 5.

⁶¹ Mostert N *Frontiers: The epic of South Africa's creation and tragedy of the Xhosa people* (1992) at 44-89; see also Smillie, Gberie and Hazleton 'At the heart of the matter' (2000) at 6-9.

⁶² At paras 52-94 of the Appeals judgment of the RUF case.

⁶³ Price TM 'Conflict diamonds, the WTO obligations and universality debate' (2003) 12/1 *Minn J Global Trade* at 12.

⁶⁴ Keen (2005) at 45-98; Kargbo MS *British foreign policy and the conflict in Sierra Leone 1991-2001*(2006) at 36-40; also see para 692 of the ARFC Appeals judgment.

⁶⁵ At paras 10 and 622 of the ARFC Appeals judgment.

⁶⁶ *Ibid*; see also in general Smillie, Gberie and Hazleton 'At the heart of the matter' (2000) at 6-9.

The RUF actually controlled diamond mining areas.⁶⁷ The RUF controlled the areas in which illegal diamond production occurred.⁶⁸ Major gain for the RUF did not come from direct participation, though particular individuals might have done so on their own account, but from taxation and control over areas.⁶⁹

Rebel groups managed through military power to impose import and export duties, license fees, transportation surcharges and direct bribes for particular officers.⁷⁰ In other words, the insurgents formed the *quasi* public infrastructure within which the diamond trade was run by experts and industry insiders. Human rights atrocities were an ongoing phenomenon. Civil society organisations, the UN and the diamond industry expressed particular concern over the abuses.⁷¹

⁶⁷ At paras 10, 15, 22, 72, 72 and 100 of the ARFC Appeals judgment.

⁶⁸ For example the Bo and Kenama districts in Sierra Leone.

⁶⁹ On command responsibility, see ICRC Commentary on Additional Protocols, Additional Protocol I, Article 86(2), para 3541; see also *Celebici* Appeal Judgment at para 237: ‘Article 87 requires parties to a conflict to impose certain duties on Commanders, including the duty in Article 87(3) to “initiate disciplinary or penal action” against subordinates or other persons under their control who have committed a breach of the Geneva Conventions or of the Protocol. That duty is limited by the terms of Article 87(3) to circumstances where the Commander “is aware” that his subordinates are going to commit or have committed such breaches. Article 87 therefore interprets Article 86(2) as far as the duties of the Commander or superior are concerned, but the criminal offence based on command responsibility is defined in Article 86(2) only’ see also *Oric* Appeal Judgment, Partially Dissenting Opinion and Declaration of Judge Liu at paras 14-21.

⁷⁰ ICRC Commentary on Additional Protocols, Additional Protocol I, Article 86(2), at para 3541; see also *Celebici* Appeal Judgment at para 237: ‘Article 87 requires parties to a conflict to impose certain duties on Commanders, including the duty in Article 87(3) to “initiate disciplinary or penal action” against subordinates or other persons under their control who have committed a breach of the Geneva Conventions or of the Protocol. That duty is limited by the terms of Article 87(3) to circumstances where the Commander “is aware” that his subordinates are going to commit or have committed such breaches. Article 87 therefore interprets Article 86(2) as far as the duties of the Commander or superior are concerned, but the criminal offence based on command responsibility is defined in Article 86(2) only’ see also *Oric* Appeal Judgment, Partially Dissenting Opinion and Declaration of Judge Liu at paras 14-21.

⁷¹ The ICCPR; The four Geneva Conventions and common Article 3 to the Geneva Conventions of 1977.

7. The role of the United Nations' (UN) interventions

On 1 December 2000, the UN GA adopted, unanimously, a milestone Resolution 55/56 on the role of diamonds in fuelling conflict, to break the link between the illicit transaction of rough diamonds and armed conflict, as a contribution to prevention and settlement of conflicts.⁷² The UN GA recognised that conflict diamonds were a crucial factor in prolonging 'brutal wars in parts of Africa, and accentuated that legitimate diamonds contribute to prosperity and development elsewhere on the continent'. In Angola and Sierra Leone, conflict diamonds had for a long time funded the rebel groups, UNITA and the RUF, both of which were acting in contravention of the international community's objectives of restoring peace in the two countries.⁷³

Against this backdrop, the international diamond industry became concerned. It recognised an urgent need for regulating the diamond trade industry. A mechanism for the tracking and controlling of rough diamonds from the country of origin to the end user was needed. Even if the diamond parcel came from a country of provenance, the parcel's journey was crucial to ensuring the legitimate trade of rough diamonds. The UN officially denounced the use of rough diamonds for sales of arms. In the case of an adoption of international sanctions against Angola in 1998, the UN SC passed Resolution 1173.⁷⁴

Resolution 1173 demanded that a Certificate of Origin must accompany each shipment of rough diamonds sold. UN SC sanctions against Angola prohibited imports of any diamonds that did not meet the Certificate of Origin muster. Later similar sanctions were placed against Sierra Leone.⁷⁵ Members of the G8 group of nations also called for an international certification regime, in recognition of the trade in conflict diamonds as being a major concern in conflict prevention. With pressure from NGOs and governments, in the main, the diamond industry gave its recognition in support of UN sanctions.⁷⁶

⁷² UN GA Resolution UN Doc A/RES/55/56(2000).

⁷³ UN SC Resolution UN Doc S/RES/1459(2003); all relevant resolutions of the Security Council to control the illicit trade in rough diamonds, including 1173 (1998) UN Doc S/RES/1173(1998), UN Doc S/RES/1306(2000), UN Doc S/RES/1343(2001), UN Doc S/RES/1385(2001), and UN Doc S/RES/1408 (2002).

⁷⁴ UN SC Resolution 1173 UN Doc S/RES/1173(1998) and UN Doc S/RES/1176(1998). See also UN Doc S/RES/864 (1993).

⁷⁵ UN SC Resolution UN Doc S/RES/1306(2000).

⁷⁶ World Diamond Council; see Harrington 'Faceting the future' (2009) at 360-3.

The conflicts in Angola and Sierra Leone, fuelled by illicit diamond smuggling, had already led to action by the UN SC.⁷⁷ Under Chapter VII of the United Nations Charter sanctions were imposed against UNITA in Angola and the Sierra Leone rebels, including a prohibition on their main source of funding illicit diamonds.⁷⁸ Diamond sanctions were also imposed against Liberia.⁷⁹

a. Angola

Following UNITA's rejection of the results of the UN's monitored election in 1992, the UN SC, acting under Chapter VII of the United Nations Charter adopted Resolution 864 in September 1993.⁸⁰ The sanctions imposed an arms embargo along with petroleum sanctions against UNITA.⁸¹ Further, it established a Sanctions Committee consisting of all the members of the Council to monitor and report on the implementation of the mandatory measures.⁸²

Following the signing of the Lusaka Protocol, UNITA refused to comply with its terms.⁸³ In response to UNITA's refusal to disarm and implement the Lusaka Protocol, the UN SC adopted Resolution 1127 in 1997.⁸⁴ The Resolution imposed mandatory travel sanctions on senior UNITA officials and their immediate family members. A year later, in 1998, the UN SC adopted Resolutions 1173 and 1778 prohibiting the direct or indirect import from Angola to their territory of all diamonds not controlled through the Certificate of Origin issued by the Government of Angola, as well as imposing financial sanctions on UNITA.⁸⁵

⁷⁷ Holmes 'The Kimberley Process' (2006-2007) at 215-7 on reasons for the war in Sierra Leone and the RUF's role; on smuggling in the DRC see Malamut 'A band aid on a machete wound' (2005-2006) at 25-9 and on smuggling at 44-6 and at 25-52.

⁷⁸ UN SC Resolution UN Doc S/RES/1306(2000) against Angola; see also Olsson O 'Diamonds are a rebel's best friend' (2006) *The World Economy* at 1338-42 on rebels in Sierra Leone, the DRC and Angola 1333-49; see also Goncalves J *Southern African perspectives: economics and politics of the Angolan conflict: the transition negotiated* No 49 (1995).

⁷⁹ UN SC Resolution UN Doc S/RES/1171(1988); see also Malamut *supra* at 35-8 on the UN SC settling conflicts through peaceful means 25-52.

⁸⁰ UN SC Resolution UN Doc S/RES/864 (1993).

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ Lusaka Protocol of 1994.

⁸⁴ UN SC Resolution UN Doc S/RES/1127(1997).

⁸⁵ UN SC Resolutions UN Doc S/RES/1173(1998) and UN Doc S/RES/1176(1998).

By Resolution 1237 in 1999, the UN SC established an independent Panel of Experts to investigate violations of UN SC sanctions against UNITA.⁸⁶ Following the publication of the Panel's report,⁸⁷ the UN SC adopted Resolution 1295 in April 2000 creating a Monitoring Mechanism.⁸⁸ Pursuant to Resolution 1295, the Panel's recommendations were taken up and a 'Monitoring Mechanism' was established to 'collect additional information and investigate any relevant leads regarding sanctions violations, with a view to enhancing the implementation of the measures imposed on UNITA'.⁸⁹

On 20 February 2001, the UN SC held an open meeting to discuss the report of the Monitoring Mechanism, which had been submitted its report to the Committee on 20 December 2000.⁹⁰ The UN SC extended the mandate of the Monitoring Mechanism for a period of three months.⁹¹

b. Sierra Leone

In July 1999, following over eight years of civil conflict, negotiations between the Government of Sierra Leone and the RUF led to the signing of the Lome Peace Agreement.⁹² Under the Lome Peace Agreement, the parties agreed to the cessation of hostilities, disarmament of all combatants and the formation of a government of national unity. The United Nations and the Economic Community of West African States (ECOWAS) helped facilitate the negotiations.

In October 1999, the UN SC passed Resolution 1270 establishing the United Nations Mission in Sierra Leone (UNAMSIL) to help create the conditions in which the parties could implement the Agreement.⁹³ Subsequently, the number of personnel was increased and tasks

⁸⁶ UN SC Resolution UN Doc S/RES/1237(1999).

⁸⁷ UN SC Resolution UN Doc S/RES/2000/203.

⁸⁸ UN SC Resolution UN Doc S/RES/1295(2000).

⁸⁹ UN SC Resolution UN Doc S/RES/1289(2000).

⁹⁰ UN SC Resolution UN Doc S/RES/125(2000).

⁹¹ UN SC Resolution UN Doc S/RES/1336(2000).

⁹² Lome Peace Agreement of 1999.

⁹³ UN SC Resolution UN Doc S/RES/1270(1999).

to be carried out by UNAMSIL adjusted by the UN SC in Resolutions 1289 and 1290 of February 2000 and of May 2000 respectively.⁹⁴

Following international concern about the role played by the illicit diamond trade in fuelling conflict in Sierra Leone, the UN SC adopted Resolution 1306 in July 2000 which imposed a ban on the direct or indirect import of rough diamonds from Sierra Leone not controlled by the government of Sierra Leone through a Certificate of Origin regime.⁹⁵ An arms embargo and selective travel ban on nongovernmental forces was already in effect.⁹⁶

In 2000, Ambassador Anwarul Karim Chowdhury, Chairman of the Security Council Committee concerning Sierra Leone, presided over the first ever exploratory public hearing.⁹⁷ The hearing was attended by representatives of interested Member States, regional organisations, non-governmental organisations, the diamond industry and other relevant experts. The hearing exposed the link between the trade in illicit Sierra Leonean diamonds and trade in arms and related material.⁹⁸ The ways and means for developing a sustainable and well regulated diamond industry in Sierra Leone were also discussed.

As called for by UN SC Resolution 1306, the Secretary General, in August 2000, established a Panel of Experts. The mandate of the Panel was to collect information on possible violations of the arms embargo and the link between trade in diamonds and trade in arms and related material.⁹⁹ Furthermore, the Panel had to consider the adequacy of air traffic control systems in the West African region for the purpose of detecting flights suspected of contravening the arms embargo.¹⁰⁰

In terms of UN SC Resolution 1306, the Panel had to report to the Security Council with observations and recommendations on ways of strengthening the arms and diamonds

⁹⁴ UN SC Resolution UN Doc S/RES/864 (1993) and S/RES/1299(2000).

⁹⁵ UN SC Resolution UN Doc S/RES/1306(2000).

⁹⁶ UN SC Resolution UN Doc S/RES/1171(1988).

⁹⁷ UN SC Resolution UN Doc S/RES/1132 (2000).

⁹⁸ Public hearing of the UN SC Committee on Sierra Leone 31 July 2000 and 1 August 2000, New York.

⁹⁹ UN SC Resolution UN Doc S/RES/1237(1999).

¹⁰⁰ *Ibid*; see also Gberie 'West Africa' (2003).

embargoes no later than 31 October 2000. The Panel submitted its report to the Security Council on 19 December 2000.¹⁰¹ In January 2001 the UN SC discussed the findings.

c. Liberia

Following the findings presented in the Sierra Leone Panel of Experts' Report 'that the illicit trade in diamonds from Sierra Leone could not be conducted without the permission and involvement of the Liberian government officials, and that the Government of Liberia was actively supporting the RUF at the highest levels,' the UN SC adopted Resolution 1343 in 2001.¹⁰²

By UN SC Resolution 1343, a new Sanctions Committee of the Security Council was established. An arms embargo was imposed again.¹⁰³ A Panel of Experts was mandated for a period of six months.¹⁰⁴ In addition, UN SC Resolution 1343 indicated that if the 'Government of Liberia did not meet the demands specified by the Security Council within two months, all States would be mandated to take the necessary measures to prevent the direct or indirect import of all rough diamonds from Liberia, whether or not such diamonds originated in Liberia', and a selective travel ban would be imposed.¹⁰⁵

To date, UN SC interventions in the area of conflict diamonds have been confined to the imposition of sanctions. Absent from the scheme of interventions are the role of regional organisations, specifically the African Union. However, regional organisations have a most important role to play in the maintenance of peace and security with regard to the illegal trade of conflict diamonds. Thus the international community realising the lack of workability of efforts of the United Nations, and roused by the work of NGOs, without the support of the regional organisations, pushed forth the agenda for an international certification scheme for the import and export of rough and conflict diamonds.

¹⁰¹ UN Document S/RES/1195(2000).

¹⁰² UN SC Resolution UN Doc S/RES/1343(2001).

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

d. The Kimberley Process Certification Scheme (The Certification Scheme)

The road to Kimberley

The issue of conflict diamonds gained momentum when Global Witness published its report in 1998. Government representatives and civil society organisations took the opportunity to deal with the crisis in Luanda and the MPLA, which the UN was attempting to address.¹⁰⁶ In 1999, the UN requested Canadian Ambassador Robert Fowler to produce a report on the possibility of sanctions that could possibly be imposed in order to end the crisis. The involvement of the UN generated significant international attention. Another report produced by Human Rights Watch in 1999 confirmed that diamonds did play a role in financing UNITA's activities. De Beers then wrote to the UN Secretary General Kofi Anan, outlining its role in Angola stating that the company adhered to the sanctions imposed against UNITA diamonds.¹⁰⁷

Also, in October 1999, non-governmental organisations in Europe and North America formed the 'Fatal Attractions' campaign. The campaign was intended for stricter practices in controlling the diamond trade and to prevent conflict diamonds from reaching the international market. De Beers announced in that year that it would stop buying Angolan diamonds. By the end of the same year, De Beers closed down all of its remaining outside buying operations and concentrated on sales from its own mines from contractual sources such as the Russian mining house, Alrosa.¹⁰⁸

In October 1999, De Beers announced that it would stop buying diamonds on the open market.¹⁰⁹ It seems likely that the closing down of De Beers' buying offices in the DRC and Guinea which were targeting diamonds from artisanal diamonds from west and central Africa were a direct result of civil society initiatives.¹¹⁰ Having been the buyer of last resort for

¹⁰⁶ Paes 'Conflict diamonds' (2005) at 314.

¹⁰⁷ Bone 'Conflict diamonds, the De Beers group and the Kimberley Process' at 130.

¹⁰⁸ *Ibid.*

¹⁰⁹ Paes *supra* at 315.

¹¹⁰ *Ibid.*

decades, De Beers had a diamond holding value of more than US\$ 4billion.¹¹¹ This enabled them to keep prices high arguably for the benefit of the industry.¹¹²

In September 2000, US Congressman Tony Hall introduced the Consumer Access to a Responsible Accounting of Trade Act (CARAT). After a visit to Sierra Leone, Hall sought a legislative solution for diamonds entering the USA from Sierra Leone.¹¹³ The CARAT Act required certificates of origin for all diamonds imported. Politicians from diamond producing nations, most notably former South African President Nelson Mandela, spoke in favour of the diamond sector, stressing the harmful impact that a comprehensive diamond embargo would have on the economies of southern African countries.¹¹⁴

In May 2000, following the joint initiative of South Africa and De Beers, a technical forum was convened in Kimberley bringing together for the first time, diamond producing countries, industry and civil society representatives, initiating a series of collective conferences known as the Kimberly Process.

In response to international concern over the illegal trade of rough diamonds, in July 2000, the World Federation of Diamond Bourses and the International Diamond Manufacturers Association issued a joint resolution in Antwerp, calling for control of diamonds as they were still bought and sold as rough diamond parcels.¹¹⁵

Eventually, the prospect of an internationally accepted system for regulating the diamond industry trade seemed more of a reality when the international community commenced serious discussions in Kimberley South Africa in May 2000, to regulate tracking rough diamonds from their point of mining into the diamond trade market.¹¹⁶

¹¹¹ 'The diamond cartel: The cartel isn't forever' in *The Economist* 15 July 2000. Available at www.economist.com/node/2921462 AUTHOR...

¹¹² *Ibid.*

¹¹³ Paes *supra* at 316.

¹¹⁴ *Ibid.*

¹¹⁵ Holmes 'The Kimberley Process' (2006-2007) at 218-20 and 213-232 on the Certification Scheme; see also official website <http://www.wfdb.com/PDFs/Statutes/Resolutions&Recommendations.pdf> at 11. Last visited 08 July 2011.

¹¹⁶ Official website <http://www.delbwa.ec.europa.eu/publications/newsletters/>. Last visited 08 July 2011.

The Kimberley Process began when Southern African diamond producing States met in Kimberley, South Africa, in May 2000, to discuss ways to bring to an end the trade in ‘conflict diamonds’.¹¹⁷ Represented at the Kimberley Process were the following States: Angola; Armenia, Australia, Bangladesh, Belarus, Botswana; Brazil; Canada; Central African Republic; China; DRC; Côte d’ Ivoire; Croatia; European Community; Ghana; Guinea; Guyana; India; Indonesia; Israel; Japan; Korea; Lao; Lebanon’ Lesotho; Liberia; Malaysia; Mauritius; Mexico; Namibia; New Zealand; Norway; Congo; Russia; Sierra Leone; Singapore; South Africa; Sri Lanka; Switzerland; Tanzania; Thailand; Togo; Turkey; Ukraine; UAE; USA; Venezuela; Vietnam and Zimbabwe and western European nations represented by the EU Member States.

Southern African diamond producing States such as Sierra Leone and transnational corporations such as De Beers sought to ensure that rough diamond purchases should stop funding conflicts in Sierra Leone and Angola.¹¹⁸

The discussion was based on the premise of formulating a mechanism that would govern and ensure the legitimate trade of rough diamonds. In this manner, it was averred that the conflict emanating from the illegal rough diamond trade would cease.

The Kimberley Process was an inclusive, worldwide consultative¹¹⁹ process of governments, industry and civil society, to devise an effective response to the problem of conflict diamonds. The ‘Certificate of Origin’ had become the mechanism that diamond producing States and transnational corporations implemented to address the problem of ‘conflict diamonds’.

The UN, as the custodian of international peace and security, recognised the need for accountability for human rights abuses and the subsequent humanitarian situations.¹²⁰ Recognition attracted the attention of the major role players in the diamond trade. Pressed by concerned parties, De Beers initiated a formalised voluntary international certification

¹¹⁷ UN GA Resolution UN Doc A/RES 55/56(2000) Governments of South Africa, Namibia, Belgium, the Russian Federation, the United Kingdom, Angola, Botswana, Canada and Switzerland hosted meetings of the Kimberley Process and UN SC Resolution UN Doc S/RES/1459 (2003).

¹¹⁸ UN SC Resolution UN Doc A/62/L.16.

¹¹⁹ Official website www.kimberleyprocess.com/. Last visited 08 July 2011.

¹²⁰ UN SC Resolution UN Doc S/RES/55/56(2000).

scheme for the export and import of diamonds, which became known as the Kimberley Process Certification Scheme.

The NGO community responded to the Kimberley initiative by creating a coalition of more than 200 partners. Thus the diamond industry inclusive of seventy organisations from diamond bourses, diamond boards and diamond mining houses formed the World Diamond Council in July of 2000.¹²¹ In December 2000, the United Nations General Assembly adopted Resolution 55/56 supporting the formation of an international certification scheme for trading in rough diamonds.¹²²

The legitimate global diamond industry needed protection from allegations of illegal diamond trading partners. As a global industry, diamond mining houses, traders and beneficiating industries established the World Diamond Council in 2000. In 2002 the World Diamond Council promoted the creation of the Certification Scheme to regulate diamond trading and keep blood diamonds from entering the legitimate diamond market.¹²³

The World Diamond Council is a coalition of diamond mining firms, trading companies and jewellery industry representatives created to engage on the issue of conflict diamonds, and to represent industry interests at Kimberley Process meetings. The objectives of the World Diamond Council are oversight functions pertinent to the development and implementation of a tracking system of rough diamonds for international trade.¹²⁴

Despite initial divergences, a final agreement was reached at Interlaken on 5 November 2002.¹²⁵ At the Interlaken Declaration of the Kimberley Process Certification Scheme for Rough Diamonds, ministers and other heads of delegations of Angola, Australia, Botswana, Brazil, Burkina Faso, Canada, Côte d' Ivoire, People's Republic of China, Cyprus, Czech Republic, Democratic Republic of Congo, the European Community, Gabon, Ghana, Guinea,

¹²¹ See www.worlddiamondcouncil.com. Last visited 01 September 2011; see also in general Koskoff DE *The diamond world* (1981) at 179-98.

¹²² UN GA Resolution UN Doc A/RES/55/56(2000).

¹²³ At official website: [www/worlddiamondcouncil.com/](http://www.worlddiamondcouncil.com/). Last visited 08 July 2011.

¹²⁴ *Ibid.*

¹²⁵ See official website of the World Diamond Council at www.worlddiamondcouncil.com/. Last visited 08 July 2011. The Interlaken Declaration comprised of states and diamond industry representations that decided to give effect to UN General Assembly Resolution 55/56 in 2000 for the formation of an international certification scheme for the trade of rough diamonds.

India, Israel, Japan, Republic of Korea, Lesotho, Malta, Mauritius, Mexico, Namibia, Norway, Philippines, Russian Federation, Sierra Leone, South Africa, Swaziland, Switzerland, Tanzania, Ukraine, United Arabs Emirates, United States of America and Zimbabwe declared their commitment to the Certification Scheme. They declared inter alia:

- That they will adopt the Certification Scheme;
- That their commitment to the launch of the Certification Scheme on 1 January 2003;
- That measures will be taken to implement the Certification Scheme consistent with international trade rules.¹²⁶

This negotiation and declaration between governments,¹²⁷ the international diamond industry represented by the World Diamond Council and civil society organisations¹²⁸ resulted in the establishment of the Certification Scheme. The Certification Scheme sets out the requirements for controlling rough diamond production and trade.¹²⁹

The Certification Scheme entered into force in 2003, when all Participant entities made firm intentions to implement its rules. The Participants declared their intention to adhere to trade under the rules established in the Certification Scheme as evidenced in the Interlaken Declaration.

At the Interlaken Declaration, the Ministers of the representative states declared the following:

- ‘1. We adopt the international certification scheme for rough diamonds developed by the Participants in the Kimberley Process and presented to us in the form of the document entitled: “Kimberley Process Certification Scheme”.
2. We remain committed to the simultaneous launch of the Certification Scheme beginning on 1 January 2003. Implementation will be based on our respective laws and internal

¹²⁶ See official website of the World Diamond Council at www.worlddiamondcouncil.com/. Last visited 08 July 2011. The Interlaken Declaration comprised of states and diamond industry representations that decided to give effect to UN General Assembly Resolution 55/56 in 2000 for the formation of an international certification scheme for the trade of rough diamonds.

¹²⁷ Governments of South Africa, Namibia, Belgium, the Russian Federation, the United Kingdom, Angola, Botswana, Canada and Switzerland hosted meetings of the Kimberley Process.

¹²⁸ Partnership for Africa Canada and Global Witness.

¹²⁹ Sections II and III of the Certification Scheme.

systems of control meeting the standards established in the Document. For applicants that decide to join after this date, the Scheme takes effect for them following notification to the Chair pursuant to Section VI, paragraph 9.

3. We will ensure that the measures taken to implement the Kimberley Process Certification Scheme for rough diamonds will be consistent with international trade rules.
4. We note with appreciation the clear intention of Cyprus, the Czech Republic, Japan, Malta, Thailand and Ukraine to become Participants of the Certification Scheme by the end of 2003.
5. We reaffirm our determination to monitor effectively the trade in rough diamonds in order to detect and to prevent trade in conflict diamonds. We consider the Kimberley Process Certification Scheme as an ongoing international process.
6. We thank the Government of South Africa for agreeing to Chair the Kimberley Process in the first year of its implementation.
7. We request our officials to review initial progress in implementation at the first formal meeting of the Participants of the Kimberley Process, to be held early in 2003.¹³⁰

The Certification Scheme is open to all countries and organisations, trading in diamonds, which are willing and able to implement its requirements.¹³¹ As of July 2011, the Certification Scheme has 49 members, representing 75 countries, with the European Union and its Member States counting as an individual Participant.¹³² Certification Scheme members account for approximately 99.8 percent of the global production of rough diamonds.¹³³ The World Diamond Council represents both the international diamond industry, and civil society organisations.¹³⁴

The meetings that culminated in the finalisation of the Kimberley Process did not endure a formal or diplomatic status. Treaty documents were neither signed nor ratified.¹³⁵ Participants to the Kimberley Process were NGOs and representatives of the diamond industry alike, which are entities without legislative authority.

The Certification Scheme imposes extensive requirements on its members to enable them to certify shipments of rough diamonds as ‘conflict-free’ and prevent conflict diamonds from

¹³⁰ Interlaken Declaration of 5 November 2002.

¹³¹ Of the ‘Certificate of Origin’.

¹³² Angola; Armenia; Australia; Bangladesh; Belarus; Botswana; Brazil; Canada; Central African Republic; China; DRC; Côte d’Ivoire; Croatia; European Community; Ghana; Guinea; Guyana; India; Indonesia; Israel; Japan; Korea; Lao; Lebanon; Lesotho; Liberia; Malaysia; Mauritius; Mexico; Namibia; New Zealand; Norway; Congo; Russia; Sierra Leone; Singapore; South Africa; Sri Lanka; Switzerland; Tanzania; Thailand; Togo; Turkey; Ukraine; UAE; USA; Venezuela; Vietnam and Zimbabwe.

¹³³ Official website www.kimberleyprocess.com. Last visited 08 July 2011.

¹³⁴ *Ibid.*

¹³⁵ Feldman DL ‘Conflict diamonds, international trade regulation, and the nature of law’ (2003) 24/4 *U Pa J Int’l Econ Law* at 856-60.

entering legitimate trade. In the terms of the Certification Scheme, Participants must meet ‘minimum requirements’¹³⁶ and must put in place ‘national legislation and institutions;’ export, import and internal controls; and also commit to transparency and the exchange of statistical data regarding the trade of rough diamonds.

The Certification Scheme is chaired through rotation by Participant countries. Thus far, South Africa, Canada, Russia, Botswana, the European Community have chaired the Certification Scheme, and India was the Chair in 2008.¹³⁷ Namibia chaired the Kimberley Process in 2010.¹³⁸ The Democratic Republic of the Congo is the current Chair for 2011.

Certification Scheme participating countries, the diamond industry and civil society observers assemble twice a year at intersessional and plenary meetings, as well as in working groups and committees that meet on a regular basis.¹³⁹ Implementation should be monitored through review visits, by annual reports as well as by regular exchange and analysis of statistical data.¹⁴⁰

In its Preamble, the Certification Scheme posits the notion that the legitimate trade of conflict free diamonds underpins the realisation and protection of human rights.¹⁴¹ When human rights abuses reach a particular scale within a state, the state itself is placed in jeopardy, risking the invocation of international humanitarian interventions.¹⁴²

Once the Certification Scheme had come into existence, the UN SC in June 2004 sent a team of inspectors and experts to the DRC.¹⁴³ The team reported and concluded that the DRC was exporting diamonds at a rate 100 times greater than its estimated production. Further, they concluded upon analysis that the DRC was exporting diamonds which were smuggled

¹³⁶ Annex I to the Certification Scheme.

¹³⁷ Paes ‘Conflict diamonds’ (2005) at 315.

¹³⁸ *Ibid.*

¹³⁹ Section VI of the Certification Scheme.

¹⁴⁰ Section VI 13(b) and 14 of the Certification Scheme.

¹⁴¹ Preamble to the Certification Scheme.

¹⁴² Specifically the invocation of the Geneva Conventions and Common Article 3 to the Geneva Conventions; see Ku J and Nzelibe J ‘Do international criminal tribunals deter or exacerbate humanitarian atrocities’ (2006) 84/4 *Wash U LRev* in general; see also McDonald A ‘The year in review’ (2006) 9 *Yearbook of international humanitarian law* at 255-73.

¹⁴³ UN SC Resolutions: UN Doc S/RES/1522(2004), UN Doc S/RES/1533(2004), UN Doc S/RES/1555(2004), UN Doc S/RES/1565(2004).

illegally into the country in violation of the Certification Scheme. Consequently, the DRC was suspended from the Certification Scheme; which meant that its diamonds were prohibited from legitimate trade in the international markets.

At the same time, presidential executive orders in the United States declared a national emergency to restrict the import of rough diamonds from Sierra Leone.¹⁴⁴ This was followed by similar restrictions against Liberia. The United States Congress also reacted with the Clean Diamond Trade Act, which requires annual reviews of the standards, practices and procedures of any entity in the United States that issues Kimberley Process certificates for the export of rough diamonds.¹⁴⁵

Many non-governmental stakeholders such as Amnesty International and Global Witness embarked on lobby and information awareness campaigns regarding the illegal trade of rough diamonds when the diamond industry through the World Diamond Council failed to deliver on its promises.¹⁴⁶ Human rights groups such as Amnesty International and Global Witness called on governments to regulate Kimberley Process countries, to ensure that the diamonds being imported and exported are completely conflict-free.¹⁴⁷

Nevertheless, some NGOs continue to fear a resurgence of diamond conflict. According to Amnesty International, the Certification Scheme simply left too many loupe holes through which diamonds can be smuggled.¹⁴⁸ The international community reacted to the problem of blood diamonds entering legitimate diamond trade markets with a certification process. However, there are drawbacks in this process causing some commentators to say that it should have been reformed already in its infancy.¹⁴⁹

The UN continues to intervene despite the presence of the Certification Scheme. Interventions demonstrate the lack of capabilities for the implementation of the Certification Scheme. At the heart of this problem is the fact that the Certification Scheme lacks the force

¹⁴⁴ US Congress Executive Order 13194 (2001).

¹⁴⁵ The response of the US with the passing of the *Clean Diamond Trade Act* 117 Statute 631.

¹⁴⁶ Haufler V 'The Kimberley Process, club goods and public enforcement of a private regime' (2009) at 91-6; see also Partnership Africa Canada and Global Witness.

¹⁴⁷ See in general Smillie 'Loupe holes' (2008) at 3-7.

¹⁴⁸ Price 'Conflict diamonds' (2003) at 4.

¹⁴⁹ Harrington 'Faceting the future' (2009) at 356.

of law. It is a voluntary mechanism with little consensus from those countries that are most affected by conflict and conflict diamonds.

The Certification Scheme does not prevent rough diamonds from being smuggled from countries in a state of conflict to Participant countries and then passed off as legitimate diamonds for trade purposes.¹⁵⁰ The UN and the United States government released reports as recently as 2006 stating that approximately US \$23 million worth of Ivory Coast diamonds were smuggled into trade and distributed as legitimately mined diamonds.¹⁵¹

¹⁵⁰ Smillie, Gberie and Hazleton 'At the heart of the matter' (2000); see also Malamut 'A band aid on a machete wound' (2005-2006) on smuggling at 25-9.

¹⁵¹ Federal Register /Vol 72, No 169 / Friday, August 31, 2007 /Notices.

8. Conclusion

The diamond trade, at first glance appears to be a simple transaction between diamond buyers and willing diamond sellers. The Kimberley meeting, in 2002, drew on the certification system the UN required of Angola in its Resolutions.

The Security Council and the WTO too, strongly endorsed the Certification Scheme.¹⁵² These endorsements recognised the extraordinary humanitarian nature of this issue and the impact of conflicts fuelled by trade in conflict diamonds on the peace, safety and security of people in affected countries and the systematic and gross human rights violations that have been perpetrated in such conflicts.¹⁵³

The international community opted for a self-regulatory, voluntary Certification Scheme as opposed to a legally binding document, albeit the international concern over the illegal trade of rough diamonds and the human rights abuses.

Having discussed the background to the Certification Scheme, it will be necessary to provide an overview and a discussion of the Certification Scheme's contents in the next chapter.

¹⁵² UN GA Resolution UN Doc A/RES/1459(2003).

¹⁵³ Third Year Review at 14.

CHAPTER 3 : THE KIMBERLEY PROCESS CERTIFICATION SCHEME (THE ‘CERTIFICATION SCHEME’)

1. Introduction

In this chapter, the content of the Certification Scheme will be discussed in detail. It is intended to provide an understanding of the contents of the Certification Scheme. There are difficulties with certain parts of the Certification Scheme. It is a voluntary, self-regulatory initiative, whose provisions may be complied with by States and the diamond sector.

The Certification Scheme was formed in an effort to address two major objectives namely the curbing or elimination of the illegal trade of rough diamonds; and the resultant human rights crises.

The Certification Scheme operates on the basic premise that each shipment of rough diamonds must be accompanied by a Kimberley Process Certificate from the point of origin to the point of destination. Participants to the Certification Scheme are expected to fulfil particular ‘requirements’ in order for the Certification Scheme to have application within their respective jurisdictions. Furthermore, Participants are also expected to undertake several other measures aimed toward the workability of the Certification Scheme.

The chapter will begin with an overview of the Certification Scheme and then proceed to discuss the various parts of the Certification Scheme. The structure of this chapter will largely follow the structure of the Certification Scheme document. The last part of this study will examine critically the legal nature of the Certification Scheme and the strengths and weaknesses of the Certification Scheme’s provisions.

2. An overview of the Certification Scheme

The Certification Scheme presently comprises 75 Participants. As mentioned above, the Certification Scheme is a voluntary mechanism. Participants voluntarily take part in the Certification Scheme. The Certification Scheme is not a treaty in its formation.

Participants to the Certification Scheme may only engage in the legal trade of rough diamonds with other Participants who have also met the ‘minimum requirements of the Certification Scheme’.¹ International shipments of rough diamonds must be accompanied by a Kimberley Certificate guaranteeing that they are conflict-free.² The Kimberley Certificate is the driving mechanism of the Certification Scheme.

The Certification Scheme is housed and administered by the Kimberley Process which elects a Chair every year.³ The Chair presides and hosts the Kimberley Process during this period. The Certification Scheme has a website which provides information to the public regarding its activities. Working groups and committees are the hub of the Certification Scheme.⁴

The UN SC and the UN GA, and many organisations such as the WTO support the Certification Scheme as has been observed.⁵ However, the Certification Scheme is not a UN document, nor is the Kimberley Process a UN agency.

The Certification Scheme document comprises a preamble and six sections with three annexes which form part of the sections. Section I of the Certification Scheme provides for definitions. Section II of the Certification Scheme deals with the actual ‘Kimberley Process Certificate’. A ‘Kimberley Process Certificate’ must accompany each shipment⁶ of export of rough diamonds. Section III addresses the Participant’s undertakings in respect of the international trade in rough diamonds. A ‘Kimberley Process Certificate’ is defined by the

¹ Section II Annex I of the Certification Scheme.

² Section II of the Certification Scheme; see also Gooch TM ‘Conflict diamonds or illicit diamonds: Should the difference matter to the Kimberley Process Certification Scheme?’ (2008) 48 *Natural Resources Journal* 190-4.

³ Section VI of the Certification Scheme.

⁴ Section VI of the Certification Scheme.

⁵ Grant *et al* ‘Global governance’ (2004) at 375-85 on how actors stimulate concern about the externalities of foreign trade.

⁶ Section 1 of the Certification Scheme defines a ‘shipment’ as one or more parcels that are physically imported or exported.

Certification Scheme as ‘a forgery resistant document with a particular format which identifies a shipment of rough diamonds as being in compliance with the requirements of the Certification Scheme’.⁷

In Section IV, the duties of Participants to the Certification Scheme outlined. Participants must undertake particular ‘internal control systems’ for the export of rough diamonds.⁸ Section V addresses the issues of cooperation and transparency between Participants to the Certification Scheme. Section VI of the Certification Scheme deals with administrative matters pertinent to the Kimberley Process. Section VI also contains three annexes, namely Annex I, Annex II and Annex III.

⁷ Section 1 of the Certification Scheme defines a ‘shipment’ as one or more parcels that are physically imported or exported.

⁸ ‘Conflict diamonds means rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments, as described in relevant UN SC Resolutions insofar as they remain in effect, or in other similar UN SC resolutions which may be adopted in the future, and as understood and recognized in UN GA Resolution UN Doc A/55/56(2000), or in other similar UN GA Resolutions which may be adopted in future’. Section 1 of the Certification Scheme.

3. Section II: The Kimberley Process Certificate

Having shown the background and the overview of the Certification Scheme the author will now proceed to examine the Certificate which must accompany every shipment of rough diamonds from one Participant to another.⁹ Issuance of Certificates is at the heart of legitimising the trade in rough and or conflict diamonds.

This is an example of the Kimberly Process Certificate which has been used in Liberia. The Kimberley Process Certificate has certain minimum requirements which must appear on it



Figure 1

A copy of the Kimberley Process Certificate used by the Republic of Liberia. Source: www.kimberlyprocess.com. Also, displayed is an ‘Import confirmation’ document.

⁹ Section 1 of the Certification Scheme defines a ‘shipment’ as one or more parcels that are physically imported or exported and Section II (a).

This is a specimen copy of the Kimberley Process Certificate which is used by the European Community Member States when importing and exporting rough diamonds. It must contain the importer's and exporter's details, the value of the rough diamonds in carats and the monetary value of in US Dollars.

Specimen Community Kimberley Process Certificate.



THE EUROPEAN COMMUNITY
KIMBERLEY PROCESS CERTIFICATE

Unique Number:
Alpha-2 country code, ISO 3166-1
Issuing Community authority:
The rough diamonds in this shipment have been handled in accordance with the provisions of the Kimberley Process international certification scheme for rough diamonds.
Country of Origin: Number of Parcels:
Exporter. Name:.....
Address:.....
Importer. Name:.....
Address

| | Carat | Value (US\$) |
|---------|-------|--------------|
| 7102.10 | | |
| 7102.21 | | |
| 7102.31 | | |

Issued on :/..../.... Expires on/..../....

Signature / Stamp of Community authority

It is hereby verified that the content of the container accompanying Kimberley Process Certificate of the Community no corresponds with said certificate.

Importing authority:..... Date

IMPORT CONFIRMATION

This is to certify that the rough diamonds accompanied by Community certificate No were imported into and verified in compliance with the Kimberley Certification Scheme for Rough Diamonds. Copy of certificate to accompany Confirmation.
Date of receipt by importing authority
Importing authority:

Date Signature

Figure 2

Specimen Community Kimberley Process Certificate. Source: www.kimberleyprocess.com

In the absence of a Certificate, shipments of rough diamonds may not take place.¹⁰ Therefore Participants are expected to comply fully with the requirements of drafting and issuing a Certificate in order to ensure the trade of their diamonds. Section II describes the duties of

¹⁰ Section II of the Certification Scheme.

Participants with respect to the Certificate which must accompany each shipment of rough diamonds for export.¹¹

Each shipment must have a specifically numbered and government validated certificate that promises the shipment does not contain conflict diamonds.¹² Each Participant should ensure that a Certificate accompanies every shipment of rough diamonds in keeping with the minimum standards¹³ and minimum requirements¹⁴ of the Certification Scheme. ‘Participant,’ in terms of the Certification Scheme means a regional economic integration organisation or a State for which the Certification Scheme is effective.¹⁵

Regional economic integration organisation means an organisation comprised of sovereign States that have transferred competence to that organisation in respect of matters governed by the Certification Scheme.¹⁶ The EC, as an entity, which has been granted competence for matters governed by the Certification Scheme is considered to fall within the ambit of this definition. As such, the EC has passed a Council Regulation for the implementation of the Certification Scheme.¹⁷

The EC Council Regulation 2368 of 2002 allows for a margin of appreciation. Thus the individual states party to the EU may formulate country specific legislation which is in keeping with the overall thrust of the implementation of the Certification Scheme.

The Certification Scheme grants Participants discretion to establish additional characteristics for their own certificates as long as Participants inform all other Participants of the features of the Certificate through the Chair for the purposes of validation.¹⁸

¹¹ Section II(a) of the Certification Scheme defines an export as follows: “‘Export’ is defined as the physical leaving/taking out of any part of the geographical territory of a Participant’.

¹² Section IV of the Certification Scheme. Section 1 of the Certification Scheme defines conflict diamonds as follows: ‘rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments, as described in relevant UN SC Resolutions insofar as they remain in effect, or in other similar UN SC Resolutions which may be adopted in the future, and as understood and recognised in the UN GA Resolution UN Doc A/55/56(2000), or in any other similar UN GA Resolutions which may be adopted in future’.

¹³ In accordance with Section IV of the Certification Scheme and Section 1(a) of the Certification Scheme.

¹⁴ As set out in Annex I of the Certification Scheme Section II(b) and Section IV of the Certification Scheme.

¹⁵ Section I of the Certification Scheme.

¹⁶ *Ibid.*

¹⁷ EC Council Regulation No 2368 of 2002.

¹⁸ Sections 1(c) and (d) as set out in Annex 1 of the Certification Scheme.

Section II of the Certification Scheme sets out the duties of Participants¹⁹ with respect to the issue of the Certificate. Firstly, all international rough diamond²⁰ shipments²¹ must be traded in tamperproof boxes and accompanied by a forgery-proof Certificate which states that the rough diamonds are conflict-free. Tamper proof boxes must necessarily be of such a quality that they are rendered incapable of manipulation by any unscrupulous parties. The nature and measure of a tamper proof box is not defined by the Certification Scheme. The construction of such boxes rests within the discretion of the Participants.

Particular parcels should constitute a certain weight. Shipment parcels, it is submitted, which are prepared for export purposes, may be subjected to changes without prior consent of the Exporting Authority.²² Thus, the roles of the Exporting and Importing Authorities are crucial to ensuring that the correct carat weight parcels as declared are duly inspected.²³

Section II of the Certification Scheme, in the main, deals with the actual 'Kimberley process Certificate'. Each Participant should ensure that a Certificate will accompany each shipment or export of rough diamonds. The process for issuing such Certificates must meet the minimum standards of the Certification Scheme.²⁴ These minimum standards are set out in Annex I.²⁵ A Certificate is to contain a minimum of fourteen requirements. They are as follows:

¹⁹ 'Participant' means 'a state or a regional economic integration organisation for which the Scheme is effective.' Section 1 of the Certification Scheme; see also Boeck FB 'Domesticating diamonds and dollars: Identity, expenditure and sharing in Southwestern Zaire 1984-1997' (1998) 29 *Development and change* at 778-810.

²⁰ A 'diamond' is defined as 'a natural mineral consisting essentially of pure crystallised carbon in the isometric system, with a hardness on the Mohs (scratch) scale of 10, a specific gravity of approximately 3.52 and a refractive index of 2.42.' Section I of the Certification Scheme. A diamond is accorded the minimal criteria necessary for trade. The Certification Scheme defines 'rough diamonds' to mean 'diamonds that are unworked or simply sawn, cleaved or bruted and fall under the Relevant Harmonised Commodity Description and Coding System 7102.10, 7102.21 and 7102.31'. Rough diamonds are diamonds which have been mined with a specific value. Section I of the Certification Scheme.

²¹ The term 'shipment' means 'one or more parcels that are physically imported or exported'. Section 1 of the Certification Scheme.

²² An 'exporting authority' is defined as 'the authority(ies) or body(ies) designated by a Participant from whose territory a shipment of rough diamonds is leaving, and which are authorised to validate the Kimberley Process Certificate'. Section 1 of the Certification Scheme.

²³ An 'importing authority' means 'the authority(ies) or body(ies) designated by a Participant into whose territory a shipment of rough diamonds is imported to conduct all import formalities and particularly the verification of accompanying Kimberley Process Certificates'. Section 1. Importing and exporting authorities are those entities appointed by the Participant State.

²⁴ Section II (b) of the Certification Scheme.

²⁵ Section VI (22) Annex I (A) of the Certification Scheme sets out the minimum standards which a Certificate should contain.

- ‘1 Each Certificate *should* bear the title “Kimberley Process Certificate” and the following statement: “The rough diamonds in this shipment have been handled in accordance with the provisions of the Kimberley Process Certification Scheme for rough diamonds” (emphasis added).
- 2 Country of origin for shipment of parcels of unmixed (ie from the same origin).’²⁶

The Certification Scheme defines ‘country of origin’ as ‘the country where a shipment of rough diamonds has been mined or extracted’.²⁷ Pursuant to the Certification Scheme ‘parcel means one or more diamonds that are packed together and that are not individualized’.²⁸

- ‘1 Certificates *may* be issued in any language, *provided* that an *English* translation is incorporated (emphasis added).’

Difficulties arise with regard to the Certificate being translated into English. Not all countries are able to readily have Certificates translated into English. Time taken for translation may impede trade, which might encourage expeditious illegal trading.

- ‘1 Unique numbering with the Alpha 2 country code, according to ISO 3166-1.
- 2 The Certificate *is to be* “tamper and forgery resistant” (emphasis added).’

The Certification Scheme does not provide guidelines as to how the Certificate is supposed to be ‘tamper and forgery resistant’. Again, the Participants must address this matter in their own capacities. Discretion is permissible in direct correlation with the capabilities of Participants.

- ‘1 The Certificate *is to* contain a “date of issuance” (emphasis added).
- 2 The Certificate *is to* contain a “date of expiry” (emphasis added).
- 3 The Certificate *is to* contain the details of its “issuing authority” (emphasis added).
- 4 The Certificate *is to* contain the “identification of exporter and importer” (emphasis added).’

Problems may arise when the details of the exporter must be noted.

- ‘1 The Certificate *is to* contain the “carat weight/mass” of the rough diamonds intended for shipment (emphasis added).

²⁶ The Certification Scheme defines ‘Country of origin’ means the country where a shipment of rough diamonds has been mined or extracted.

²⁷ Section II (b) and Section I of the Certification Scheme.

²⁸ *Ibid.*

- 2 The Certificate *is to* contain the monetary value of the rough diamonds in US dollars (emphasis added).
- 3 The Certificate *is to* contain the number of parcels of rough diamonds in a shipment²⁹ (emphasis added).
- 4 The Certificate *is to* contain a “Relevant Harmonised Commodity Description and Coding System” (emphasis added).
- 5 The Certificate *is to* be “validated” by exporting authority³⁰ (emphasis added).’

The Certification Scheme defines an ‘exporting authority’ as ‘the authority(ies) or body(ies) designated by a Participant from whose territory a shipment of rough diamonds is leaving, and which are authorised to validate the Kimberley Process Certificate’. The Certification Scheme assumes that all countries, including diamond producing countries will have a legally sound export controlling infrastructure.

In terms of Annex I(B), if a Certificate contains the above stated minimum requirements, optional elements may also be included.³¹ The inclusion of Optional Certificate Elements is at the discretion of the Participant.³² Firstly, Participants may at their discretion establish additional characteristics for their own Certificates, for example their form, additional data or security elements.³³ Secondly, Participants may include the ‘quality characteristics’ of the rough diamonds in the shipment of rough diamonds.³⁴

Finally, Participants may include a recommended import confirmation part that should contain the following elements: country of destination; identification of importer; carat/weight and value in US Dollars; a ‘Relevant Harmonised Commodity Description and Coding System; date of receipt by the importing authority and ‘Authentication by Importing Authority’.³⁵

²⁹ The Certification Scheme in Section 1 defines a ‘parcel’ to mean one or more diamonds that are packed together and that are not individualised. The Scheme defines a ‘parcel of mixed origin’ as a parcel that contains rough diamonds from two or more countries of origin, mixed together.

³⁰ The Certification Scheme in Section 1 defines ‘exporting authority’ as ‘the authority(ies) or body(ies) designated by a Participant from whose territory a shipment of rough diamonds is leaving, and which are authorised to validate the Kimberley Process Certificate’.

³¹ Section VI of the Certification Scheme.

³² Section VI Annex I (B) of the Certification Scheme.

³³ Section II(c) of the Certification Scheme.

³⁴ Section VI (22) Annex I(B) of the Certification Scheme.

³⁵ Section VI (22) Annex I(B) of the Certification Scheme.

The Certification Scheme also makes provisions for a Participant to follow optional procedures when transporting shipments of rough diamonds.³⁶ A Participant may pursuant to Annex I(C), transport rough diamonds in transparent security bags. Participants may also replicate the unique Certificate number on the container. Finally, a Participant should ensure that it notifies all other Participants through the Chair of the Certification Scheme, of the features of its Certificate as specified in Annex I, for purposes of validation.³⁷ Notification to the Chair of the Certification Scheme concludes the actual issuance of the Certificate.

Problems exist with some definitions such as ‘Participants’ and ‘rough diamonds’. Drafting and issuing of Certificates have complexities in the 14 minimum requirements. Problems also exist with respect to the Importing and Exporting Authorities, which will be discussed later in the study.

³⁶ Section VI (22) Annex I(C) of the Certification Scheme.

³⁷ Section II(d) of the Certification Scheme.

4. Section III: Undertakings in respect of the international trade in rough diamonds

Having shown the background to the Certification Scheme and the overview of the Certification Scheme and the Certificate of the Certification Scheme, this part of the chapter will examine the undertakings of Participants in respect of international trade in rough diamonds. Pursuant to the Certification Scheme, Section III deals with undertakings of transit Participants. In other words, the undertakings of Participants through whose territory a shipment of rough diamonds pass en route to the final importing Participant is addressed in Section III.

When entering into the international trade of rough diamonds, each Participant ‘should require that each shipment of rough diamonds exported to a Participant is accompanied by a duly validated Certificate’ as discussed above.³⁸ The recipient Participant, that is the Participant, who imports a shipment of rough diamonds, requires a duly validated Certificate from the exporting Participant.³⁹

The Certificate must meet the 14 minimum requirements as discussed above. The Certificate must accompany the shipment of rough diamonds.⁴⁰ This means that the shipment will not be accepted into the country of import without the validated Certificate. By implication, it is noted that the Certificate and the shipment of rough diamonds must be physically together.

The reason for the Certificate accompanying the shipment is to prevent instances of illegal activities. The recipient or the import Participant should ensure that confirmation of the receipt of the shipment is sent expeditiously to the relevant Exporting Authority.⁴¹ So the importer must ensure that upon receipt of the shipment of rough diamonds and the Certificate, a confirmation of receipt is sent as soon as is possible to the country of export.

Here, the Certification Scheme intended that the shipment of rough diamond is not intercepted by any third party and that it arrives at the intended destination. Thus, to avoid any interception or illegal activities, the importing Participant must confirm that the shipment

³⁸ See Section III(a) of the Certification Scheme. A Certificate is valid if it complies with the minimum requirements set out in Section II read in conjunction with Section VI(22) Annex I(A). Section III(a).

³⁹ Section III(a) of the Certification Scheme.

⁴⁰ *Ibid.*

⁴¹ Section III(b) of the Certification Scheme.

indeed did arrive at its intended destination. This principle is also in keeping with requirements that may arise from the law of contract.⁴²

At minimum, the confirmation should refer to the Certificate number, the number of parcels, the carat weight and the details of the exporter.⁴³ The importing Participant requires that the original Certificate be readily accessible for a period of no less than three years.⁴⁴ Thus the country of import should have in place mechanisms to ensure storage and verification facilities for a period of three years. This may be problematic as not all Participants will be in a position to put into place adequate storage and verification facilities.

Storage and verification facilities imply that the country of import puts these mechanisms into place prior to becoming a Participant to the Certification Scheme. It may be that the drafters of the Certification Scheme had two possible intentions with this particular part of the Certification Scheme. Firstly, the drafters of the Certification Scheme intended that rough diamonds should be traceable. Secondly, the drafters of the Certification Scheme intended that the relationship between exporters and importers may be secured.

Further, the importing Participant should ensure that no shipment of rough diamonds is imported from or exported to a non-Participant.⁴⁵ Section III of the Certification Scheme demands that the trade of rough diamonds be confined to Participants of the Certification Scheme. Only Participants may trade rough diamonds with each other.

Parties and states who have not signed the Certification Scheme are prohibited from trading with Participants to the Certification Scheme. To date there are 75 Participants to the Certification Scheme, including the Member States of the EU. The Certification Scheme may encounter problems with regard to trading partners as there are between 192 to 196 States in the world today.⁴⁶ Presently 192 states have signed the UN Charter.⁴⁷

⁴² Nagel CJ *et al Commercial law* (2006) at 45-7.

⁴³ Section III(b) of the Certification Scheme.

⁴⁴ *Ibid.* The Certification Scheme defines 'import' to mean the physical entering/bringing into any part of the geographical territory of a Participant. The Scheme defines and 'importing authority' as the authority(ies) or body(ies) designated by a Participant into whose territory a shipment of rough diamonds is imported to conduct all import formalities and particularly the verification of accompanying Kimberley Process Certificates.

⁴⁵ Section III(c) of the Certification Scheme.

⁴⁶ www.un.org; the number of states which are recognised by the UN differ due to the legal recognition of a state. The recognition is dependent on a given territory meeting particular requirements in international law.

Section III further states that ‘each Participant should when embarking on trading rough diamonds on the international level, recognise that Participants whose territory shipments pass through are not required to meet the requirement of producing a duly validated Certificate’.⁴⁸ According to the Certification Scheme ‘transit means the physical passage across the territory of a Participant or a non-Participant, with or without transshipment, warehousing or change in mode of transport, when such passage is only a portion of a complete journey beginning and terminating beyond the frontier of the Participant or non-Participant across whose territory a shipment passes’.⁴⁹

Little difficulty arises when the shipment passes through the territory of a Participant to the Certification Scheme. However, concern arises when the shipment and Certificate pass through the territory of a non-Participant to the Certification Scheme. A shipment destined for international trade may have to pass through the country of a non-Participant state or region. Furthermore, the Certification Scheme’s definition allows for the shipment to be warehoused, or to change the mode of transport from air to water or rail or road. Thirdly, the passage of the shipment may be on the territory of a non-Participant through any part of its journey en route to its final destination.

Whether the shipment is safe and remains intact together with the Certificate arises from the goodwill or comity of the non-Participant state. Further, the transit non-Participant State is not required to comply with the minimum requirements for the issuance of the duly validated Certificate or with the Certification Scheme itself.⁵⁰

According to the Certification Scheme, the last two of requirements of a ‘duly validated Certificate and the number of parcels, carat weight, Certificate number and details of importer and exporter’⁵¹ are waived provided that the import and export authorities of the

⁴⁷ *Ibid.*

⁴⁸ The Certification Scheme in Section 1 defines ‘transit’ as the physical passage across the territory of a Participant or a non Participant, with or without transshipment, warehousing or change in mode of transport, when such passage is only a portion of a complete journey beginning and terminating beyond the frontier of the Participant or non-Participant across whose territory a shipment passes.

⁴⁹ Section III(c) of the Certification Scheme.

⁵⁰ Section II(a) of the Certification Scheme provides as follows: ‘a Kimberley Process Certificate (hereafter referred to as the Certificate) accompanies each shipment of rough diamonds on export;’ and Section II(b) of the Certification Scheme provides as follows: ‘its processes for issuing Certificates meet the minimum standards of the Kimberley Process as set out in Section IV ...’ respectively.

⁵¹ Section III(a) and (b) of the Certification Scheme.

Participant through whose territory a shipment passes, together ensure that the shipment leaves its territory in an identical state as it entered its territory.⁵²

This means that the shipment must not be opened or tampered with.⁵³ This too, may prove difficult to implement as the importing and exporting authorities may not be in a position to evade interception. Issues of bribery and corruption are inadequately addressed in this context. Hence difficulties exist with regard to the definition of ‘transit’ and the transit of shipments of rough diamonds through territories of non-Participants to the Certification Scheme in particular.

Having examined the background to the Certification Scheme and the overview of the Certification Scheme and the Certificate of the Certification Scheme, and the undertakings of Participants with regard to international trade, shipments of rough diamonds in transit in particular, this chapter proceeds to discuss the internal controls the Certification Scheme sets out for Participants.

⁵² Section III(d) of the Certification Scheme.

⁵³ *Ibid.*

| Annual Global Summary: 2010 Production, Imports, Exports and KPC Counts | | | | | | | | | | | |
|---|----------------|---------------------|------------|----------------|---------------------|------------|----------------|---------------------|------------|------------|--------|
| Summary Report | | | | | | | | | | | |
| Country Name | Production | | | Import | | | Export | | | KPC Counts | |
| | Volume, cts | Value, US\$ | US\$ / cts | Volume, cts | Value, US\$ | US\$ / cts | Volume, cts | Value, US\$ | US\$ / cts | Import | Export |
| Angola | 8,362,139.06 | \$976,318,204.86 | \$116.75 | 0.00 | \$0.00 | \$0.00 | 7,170,727.93 | \$824,376,765.41 | \$114.96 | 0 | 137 |
| Armenia | 0.00 | \$0.00 | \$0.00 | 537,502.88 | \$60,322,519.00 | \$112.23 | 378,640.20 | \$19,867,899.38 | \$52.47 | 177 | 37 |
| Australia | 9,976,154.50 | \$251,722,189.57 | \$25.23 | 55,793.95 | \$10,877,333.09 | \$194.96 | 9,903,543.57 | \$251,899,466.90 | \$25.44 | 81 | 117 |
| Bangladesh | 0.00 | \$0.00 | \$0.00 | 605.95 | \$57,927.93 | \$95.60 | 0.00 | \$0.00 | \$0.00 | 2 | 0 |
| Belarus | 0.00 | \$0.00 | \$0.00 | 110,736.98 | \$48,866,854.68 | \$441.29 | 40,825.03 | \$12,699,928.86 | \$311.08 | 53 | 16 |
| Botswana | 22,018,000.00 | \$2,586,396,620.00 | \$117.47 | 663,645.72 | \$617,451,592.74 | \$930.39 | 23,744,706.11 | \$2,880,494,918.24 | \$121.31 | 190 | 231 |
| Brazil | 25,394.00 | \$1,400,000.00 | \$55.13 | 21,747.37 | \$382,705.79 | \$17.60 | 20,037.49 | \$3,253,593.02 | \$162.38 | 12 | 18 |
| Canada | 11,804,095.00 | \$2,305,388,014.70 | \$195.30 | 697,995.63 | \$193,026,954.02 | \$276.54 | 12,183,839.07 | \$2,406,809,092.19 | \$197.54 | 287 | 237 |
| Central African Republic | 301,557.62 | \$48,892,376.57 | \$162.13 | 0.00 | \$0.00 | \$0.00 | 1,103,910.05 | \$48,892,376.56 | \$44.29 | 0 | 63 |
| China, People's Republic of | 17,227.15 | \$380,000.00 | \$16.25 | 18,026,178.59 | \$2,023,125,669.21 | \$112.23 | 12,565,704.61 | \$972,110,925.70 | \$77.36 | 3,301 | 1,650 |
| Congo, Democratic Republic of | 20,166,230.14 | \$174,281,769.00 | \$8.64 | 0.00 | \$0.00 | \$0.00 | 16,963,396.77 | \$294,041,914.16 | \$17.33 | 0 | 766 |
| Congo, Republic of | 381,242.12 | \$4,743,155.00 | \$12.44 | 0.00 | \$0.00 | \$0.00 | 408,745.30 | \$5,713,885.00 | \$13.98 | 0 | 23 |
| Cote D'Ivoire *** | 0.00 | \$0.00 | \$0.00 | 0.00 | \$0.00 | \$0.00 | 0.00 | \$0.00 | \$0.00 | 0 | 0 |
| Croatia | 0.00 | \$0.00 | \$0.00 | 107.94 | \$3,639.53 | \$33.72 | 0.00 | \$0.00 | \$0.00 | 1 | 0 |
| European Community | 0.00 | \$0.00 | \$0.00 | 141,764,333.47 | \$13,593,330,697.96 | \$95.89 | 155,665,354.32 | \$14,313,776,853.70 | \$91.95 | 9,489 | 29,585 |
| Ghana | 333,627.00 | \$11,535,534.00 | \$34.58 | 0.00 | \$0.00 | \$0.00 | 328,834.91 | \$11,952,137.59 | \$36.35 | 0 | 78 |
| Guinea | 374,096.26 | \$27,950,657.01 | \$74.72 | 0.00 | \$0.00 | \$0.00 | 361,851.61 | \$26,831,709.78 | \$74.15 | 0 | 135 |
| Guyana | 46,377.61 | \$7,310,680.14 | \$157.63 | 0.00 | \$0.00 | \$0.00 | 46,377.61 | \$7,310,680.21 | \$157.63 | 0 | 34 |
| India | 18,084.41 | \$3,347,186.82 | \$185.09 | 165,219,029.62 | \$11,234,792,996.71 | \$68.00 | 32,993,161.45 | \$967,808,804.49 | \$29.33 | 22,536 | 2,466 |
| Indonesia | 0.00 | \$0.00 | \$0.00 | 0.00 | \$0.00 | \$0.00 | 0.00 | \$0.00 | \$0.00 | 0 | 0 |
| Israel | 0.00 | \$0.00 | \$0.00 | 26,746,358.59 | \$4,429,406,464.03 | \$165.61 | 24,446,644.57 | \$3,739,304,368.88 | \$152.96 | 8,908 | 5,646 |
| Japan | 0.00 | \$0.00 | \$0.00 | 318,006.28 | \$39,870,603.52 | \$125.38 | 89,998.79 | \$33,777,269.72 | \$375.31 | 513 | 263 |
| Korea, Republic of | 0.00 | \$0.00 | \$0.00 | 66,998.72 | \$2,004,495.43 | \$29.92 | 3,807.21 | \$109,333.92 | \$28.72 | 142 | 14 |
| Laos | 0.00 | \$0.00 | \$0.00 | 108,775.17 | \$16,269,087.96 | \$149.57 | 14,757.27 | \$889,912.08 | \$67.08 | 40 | 30 |
| Lebanon | 0.00 | \$0.00 | \$0.00 | 775,398.75 | \$120,228,794.68 | \$155.05 | 848,918.04 | \$117,230,846.72 | \$138.09 | 85 | 48 |
| Lesotho | 108,827.24 | \$197,699,207.38 | \$1,816.63 | 937.01 | \$62,227.00 | \$66.41 | 102,062.79 | \$184,174,819.37 | \$1,804.52 | 1 | 15 |
| Liberia | 26,590.89 | \$15,954,534.00 | \$600.00 | 993.10 | \$230,959.00 | \$234.52 | 21,056.63 | \$15,430,168.15 | \$732.79 | 0 | 68 |
| Malaysia | 0.00 | \$0.00 | \$0.00 | 0.00 | \$0.00 | \$0.00 | 0.00 | \$0.00 | \$0.00 | 0 | 0 |
| Mauritius | 0.00 | \$0.00 | \$0.00 | 50,616.04 | \$40,937,974.19 | \$808.79 | 682.83 | \$192,184.22 | \$281.45 | 60 | 18 |
| Mexico | 0.00 | \$0.00 | \$0.00 | 15,329.79 | \$472,305.26 | \$30.81 | 2,441.70 | \$85,107.97 | \$34.86 | 60 | 38 |
| Namibia | 1,692,579.30 | \$744,004,429.95 | \$439.57 | 179,980.50 | \$191,655,587.53 | \$1,064.87 | 1,525,703.21 | \$708,371,563.21 | \$464.29 | 79 | 86 |
| New Zealand | 0.00 | \$0.00 | \$0.00 | 66.58 | \$9,421.99 | \$141.51 | 0.00 | \$0.00 | \$0.00 | 15 | 0 |
| Norway | 0.00 | \$0.00 | \$0.00 | 17.33 | \$1,020.00 | \$58.86 | 0.00 | \$0.00 | \$0.00 | 3 | 0 |
| Russian Federation | 34,856,600.00 | \$2,382,290,100.00 | \$68.35 | 79,828.89 | \$61,097,547.71 | \$765.36 | 40,406,312.58 | \$2,781,093,151.05 | \$68.83 | 37 | 1,864 |
| Sierra Leone | 437,516.09 | \$105,062,932.98 | \$242.42 | 1,410.27 | \$1,895,684.60 | \$1,344.20 | 550,395.89 | \$129,652,640.74 | \$235.56 | 9 | 263 |
| Singapore | 0.00 | \$0.00 | \$0.00 | 4,082.90 | \$386,911.46 | \$94.76 | 4,077.34 | \$385,405.75 | \$94.52 | 7 | 3 |
| South Africa | 13,668,495.82 | \$1,799,519,465.21 | \$131.65 | 400,055.50 | \$314,073,509.97 | \$785.07 | 3,757,277.37 | \$709,215,680.43 | \$188.76 | 190 | 781 |
| Sri Lanka | 0.00 | \$0.00 | \$0.00 | 590,263.90 | \$260,454,134.59 | \$441.25 | 371,139.81 | \$97,852,934.90 | \$263.66 | 385 | 293 |
| Switzerland | 0.00 | \$0.00 | \$0.00 | 9,783,234.37 | \$1,393,109,116.77 | \$142.40 | 9,621,061.49 | \$1,615,057,190.20 | \$167.87 | 640 | 565 |
| Tanzania | 70,753.46 | \$13,142,495.01 | \$185.75 | 0.00 | \$0.00 | \$0.00 | 79,747.78 | \$13,369,823.10 | \$167.65 | 0 | 81 |
| Thailand | 0.00 | \$0.00 | \$0.00 | 1,330,459.39 | \$381,069,484.60 | \$286.42 | 812,439.79 | \$191,256,865.93 | \$235.41 | 1,017 | 773 |
| Togo | 96.16 | \$10,582.32 | \$110.05 | 0.00 | \$0.00 | \$0.00 | 0.00 | \$0.00 | \$0.00 | 0 | 0 |
| Turkey | 0.00 | \$0.00 | \$0.00 | 18,071.59 | \$205,249.00 | \$11.36 | 0.00 | \$0.00 | \$0.00 | 7 | 0 |
| Ukraine | 0.00 | \$0.00 | \$0.00 | 25,890.83 | \$5,619,851.38 | \$217.06 | 256.74 | \$37,234.97 | \$145.03 | 43 | 6 |
| United Arab Emirates | 0.00 | \$0.00 | \$0.00 | 43,487,841.51 | \$2,057,529,451.87 | \$47.33 | 46,604,843.44 | \$3,542,920,009.21 | \$76.02 | 1,748 | 3,754 |
| United States of America | 0.00 | \$0.00 | \$0.00 | 2,504,317.01 | \$651,558,502.92 | \$260.17 | 2,305,984.30 | \$363,426,434.28 | \$157.60 | 1,378 | 1,576 |
| Venezuela ** | 0.00 | \$0.00 | \$0.00 | 0.00 | \$0.00 | \$0.00 | 0.00 | \$0.00 | \$0.00 | 0 | 0 |
| Vietnam | 0.00 | \$0.00 | \$0.00 | 127,019.68 | \$25,006,809.98 | \$196.87 | 15,308.16 | \$50,620.38 | \$3.31 | 30 | 16 |
| Zimbabwe | 8,435,234.02 | \$339,751,797.27 | \$40.28 | 5,062.72 | \$11,077.10 | \$2.19 | 8,424,384.40 | \$320,237,120.49 | \$38.01 | 2 | 51 |
| Chinese Taipei * | 0.00 | \$0.00 | \$0.00 | 61,419.24 | \$2,587,333.62 | \$42.13 | 6,988.46 | \$409,015.65 | \$58.53 | 107 | 28 |
| Totals | 133,120,897.65 | \$11,998,001,931.79 | \$90.13 | 413,760,053.76 | \$37,777,992,506.82 | \$91.30 | 413,895,946.62 | \$37,612,470,642.51 | \$90.87 | 51,645 | 51,863 |

*The Rough Diamond trading entity of Chinese Taipei has also met the minimum requirements of the KPCS.

7/28/2011

**Venezuela has voluntarily suspended exports and imports of rough diamonds until further notice. Venezuela did not report Production statistics during 2010.

***Cote D'Ivoire is currently under UN sanctions and is not trading in rough diamonds.

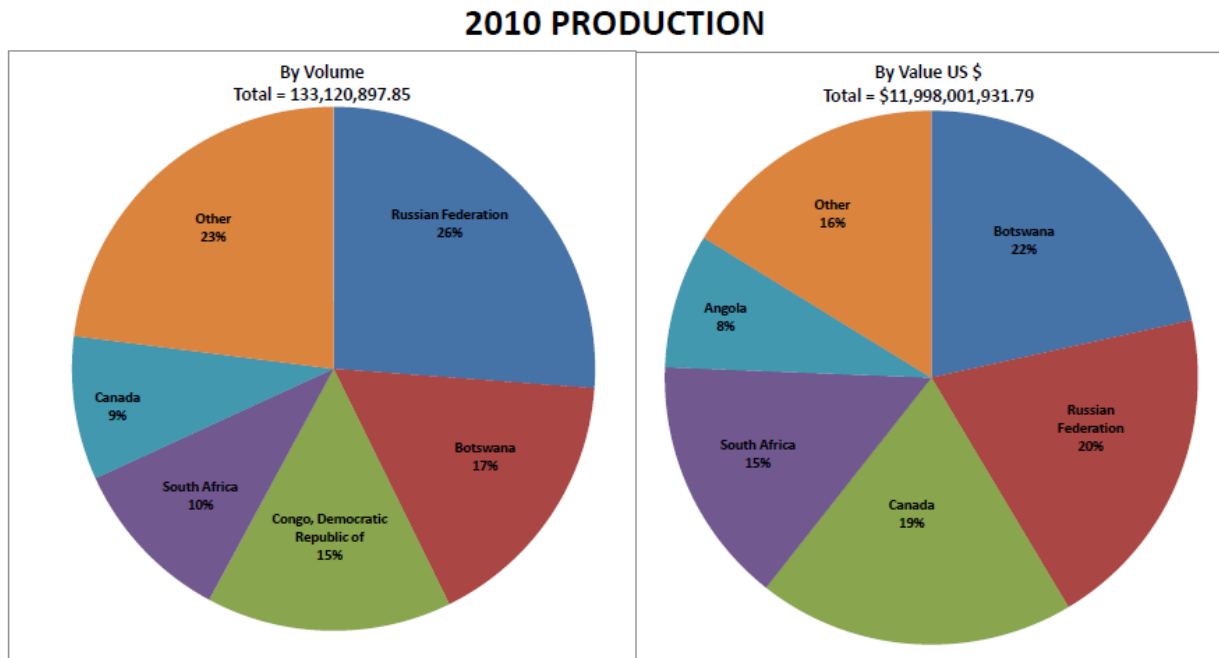
Source: Kimberley Process Certification Scheme

Figure 3

The Rough Diamond trading entity of Chinese Taipei has also met minimum requirements of the KPCS6/1/2011

Source: Kimberley Process Certification Scheme at www.kimberleyprocess.com

The diagram shows the volume of diamonds produced *vis-a-vis* the value. By far, Botswana and the Russian Federation dominate the market production value in 2010.



7/28/2011

Source: Kimberley Process Certification Scheme

Figure 4: Global production of diamonds 2010 at www.kimberleyprocess.com

This diagram shows the volume of imports *vis-a-vis* the value of the imports. Although India dominates the rough diamond import market in terms of volume, the EC is the biggest importer of rough diamonds followed by India.

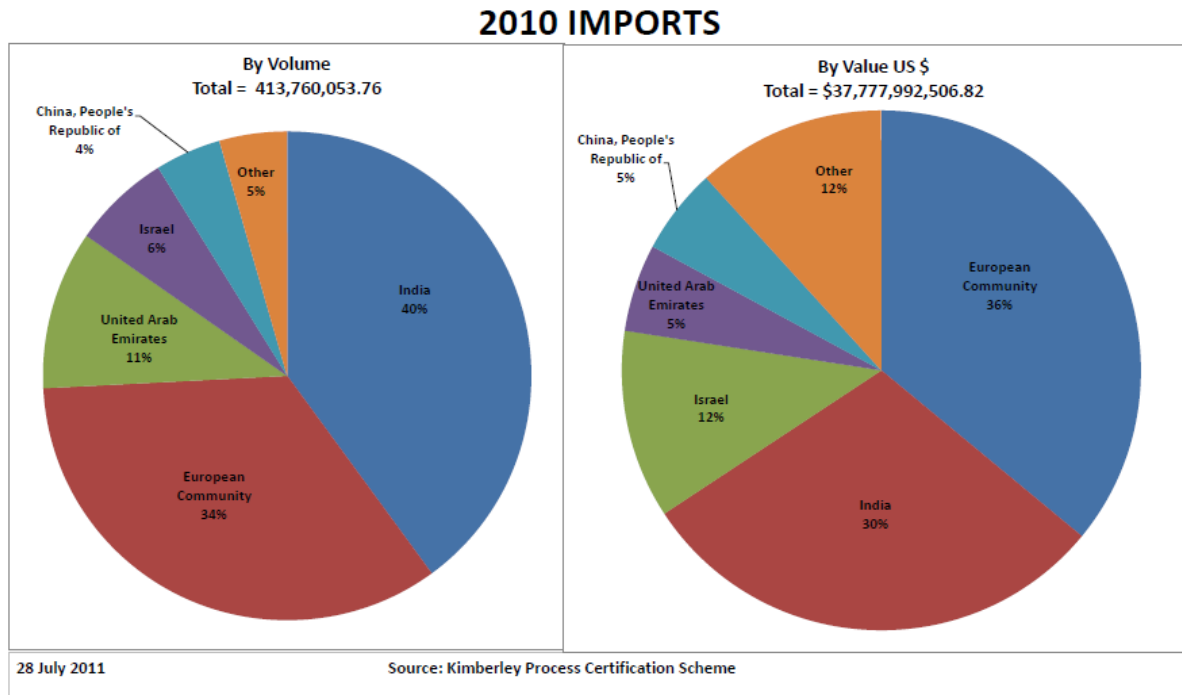


Figure 5: Import of rough diamond parcels compliant with the Certification Scheme requirements for the year 2010 at www.kimberleyprocess.com

This diagram shows the imports by volume *vis-a-vis* the value of rough diamonds exported. The EU remains the largest importer (as per previous diagram) and exporter of rough diamonds in the international trade of rough diamonds.

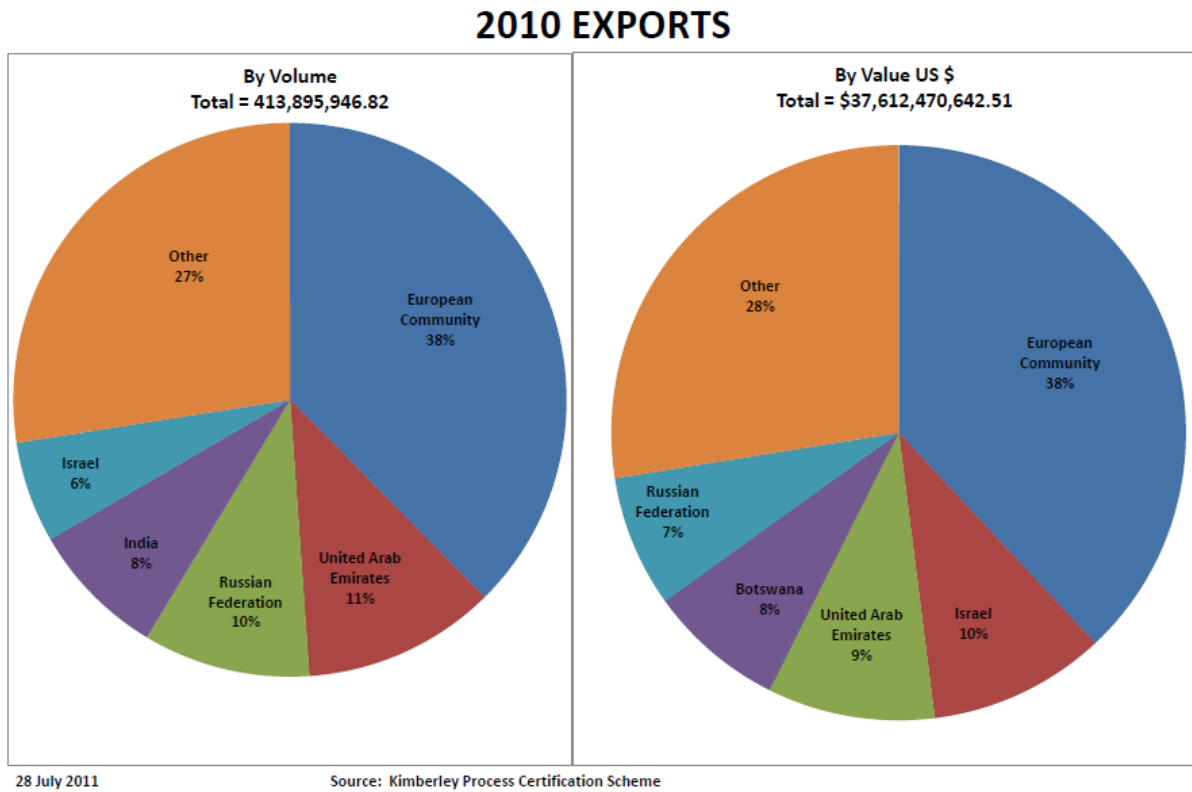
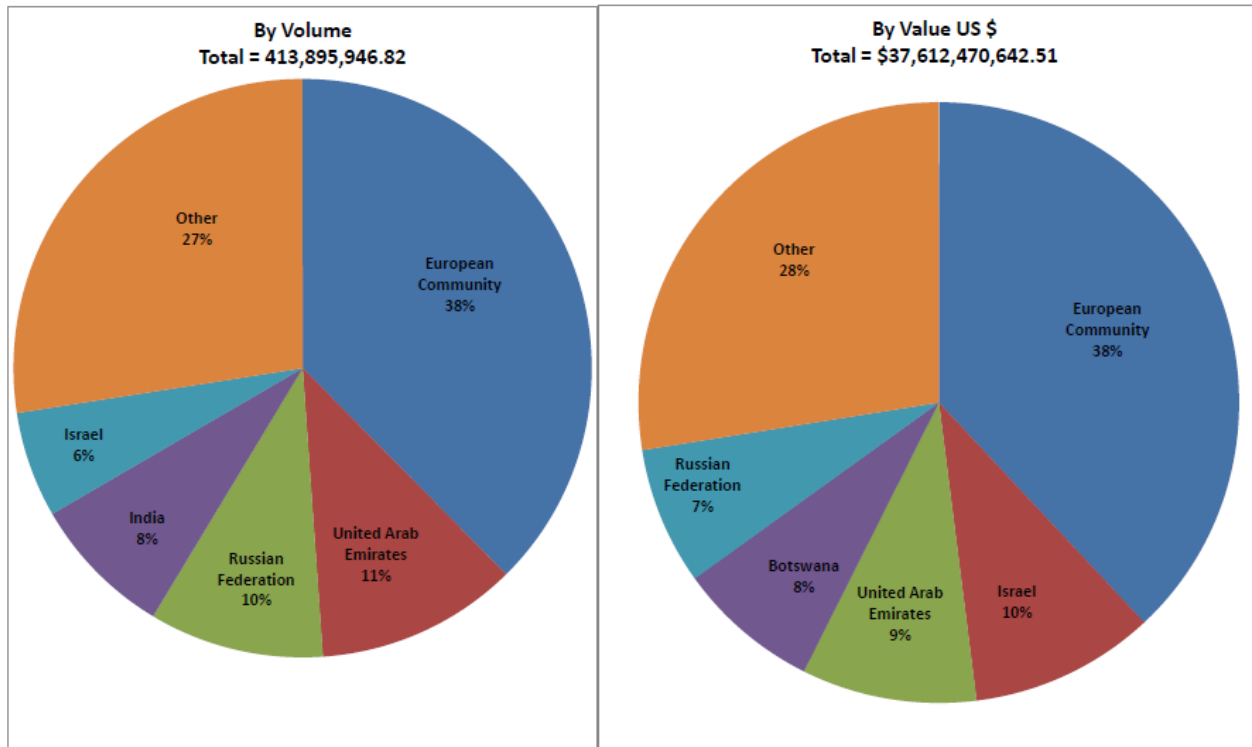


Figure 6: Import of rough diamond parcels compliant with the Certification Scheme requirements for the year 2011 at www.kimberlyprocess.com

This diagram for late 2010 demonstrates that the EC continues to be the main exporter of rough diamonds in the international diamond trade.

2010 EXPORTS



28 July 2011

Source: Kimberley Process Certification Scheme

Figure 7: Export of rough diamond parcels compliant with the Certification Scheme requirements for the year 2010 at www.kimberleyprocess.com

This diagram shows that the EU also complies with the issuance of Kimberley Certificates. This is the case despite the fact that Botswana and the Russian Federation are the biggest diamond producers (please see earlier diagram).

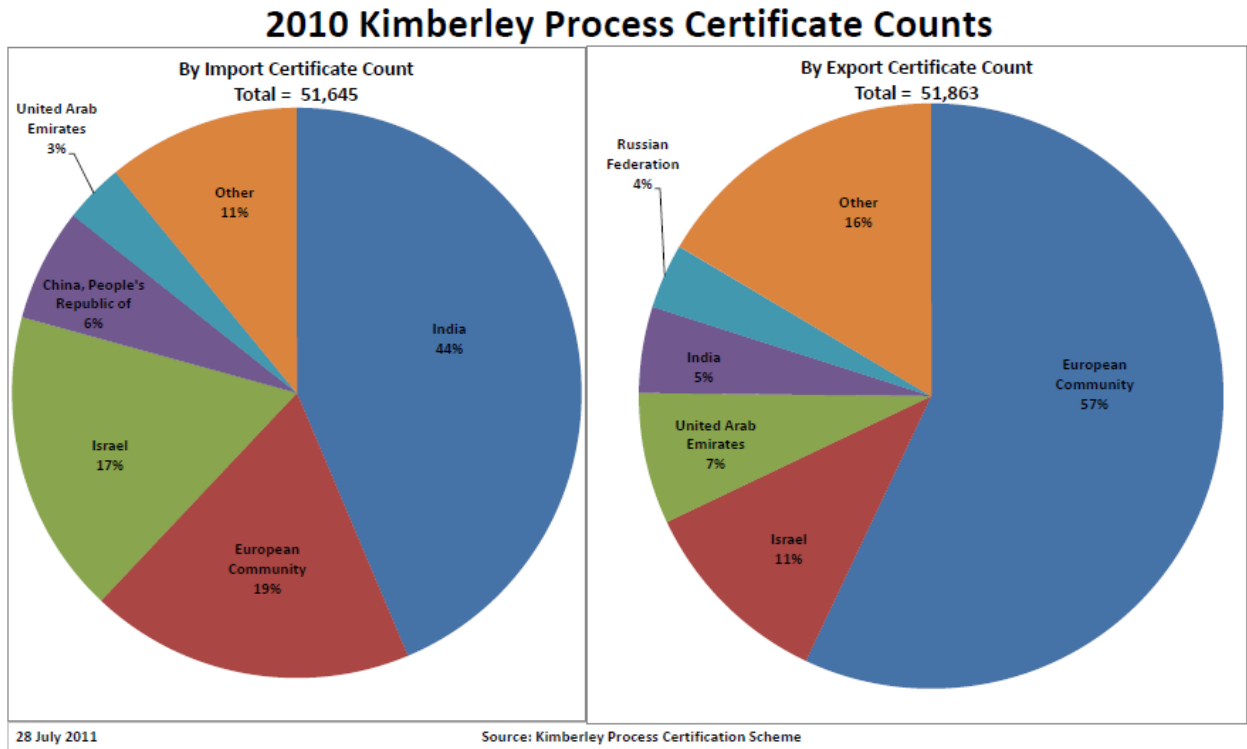


Figure 8: Kimberley Process Certificate counts for year 2010 at www.kimberleyprocess.com

The table encapsulates the diagrammatic representations of production, import and export of rough diamonds. It also shows the number of KP Certificates issued in compliance with the Certification Scheme. The actual values as recorded by the KP are also shown. It must be borne in mind that the production, import and export figures are those recorded by the KP Chairs and Working Groups.

Annual Global Summary: 2010

| Production In Carats | | |
|-------------------------------|-----------------------|----------------|
| Country Name | Volume, cts | Percent |
| Russian Federation | 34,856,600.00 | 26.18% |
| Botswana | 22,018,000.00 | 16.54% |
| Congo, Democratic Republic of | 20,166,220.14 | 15.15% |
| South Africa | 13,668,495.82 | 10.27% |
| Canada | 11,804,095.00 | 8.87% |
| Other | 30,607,486.89 | 22.99% |
| Total | 133,120,897.85 | 100.00% |

| Production in Value US \$ | | |
|---------------------------|----------------------------|----------------|
| Country Name | Value US \$ | Percent |
| Botswana | \$2,586,396,620.00 | 21.56% |
| Russian Federation | \$2,382,290,100.00 | 19.86% |
| Canada | \$2,305,388,014.70 | 19.21% |
| South Africa | \$1,799,519,465.21 | 15.00% |
| Angola | \$976,318,204.86 | 8.14% |
| Other | \$1,948,089,527.02 | 16.24% |
| Total | \$11,998,001,931.79 | 100.00% |

| Imports in Carats | | |
|-----------------------------|-----------------------|----------------|
| Country Name | Volume, cts | Percent |
| India | 165,219,029.62 | 39.93% |
| European Community | 141,764,333.47 | 34.26% |
| United Arab Emirates | 43,467,841.51 | 10.51% |
| Israel | 26,746,358.59 | 6.46% |
| China, People's Republic of | 18,026,178.59 | 4.36% |
| Other | 18,536,311.98 | 4.48% |
| Total | 413,760,053.76 | 100.00% |

| Imports in Value US \$ | | |
|--------------------------|----------------------------|----------------|
| Country Name | Value US \$ | Percent |
| European Community | \$13,593,330,697.97 | 35.96% |
| India | \$11,234,792,996.71 | 29.74% |
| Israel | \$4,429,406,464.03 | 11.72% |
| United Arab Emirates | \$2,057,529,451.87 | 5.45% |
| China, People's Republic | \$2,023,125,669.21 | 5.36% |
| Other | \$4,439,807,227.03 | 11.75% |
| Total | \$37,777,992,506.82 | 100.00% |

| Exports in Carats | | |
|----------------------|-----------------------|----------------|
| Country Name | Volume, cts | Percent |
| European Community | 155,665,354.32 | 37.61% |
| United Arab Emirates | 46,604,843.44 | 11.26% |
| Russian Federation | 40,406,312.58 | 9.76% |
| India | 32,993,161.45 | 7.97% |
| Israel | 24,446,644.57 | 5.91% |
| Other | 113,779,630.46 | 27.49% |
| Total | 413,895,946.82 | 100.00% |

| Exports in Value US \$ | | |
|------------------------|----------------------------|----------------|
| Country Name | Value US \$ | Percent |
| European Community | \$14,313,776,853.70 | 38.06% |
| Israel | \$3,739,304,368.88 | 9.94% |
| United Arab Emirates | \$3,542,920,009.21 | 9.42% |
| Botswana | \$2,880,494,918.24 | 7.66% |
| Russian Federation | \$2,781,093,151.05 | 7.39% |
| Other | \$10,354,881,341.43 | 27.53% |
| Total | \$37,612,470,642.51 | 100.00% |

| KPC Counts Imports | | |
|-----------------------------|---------------|----------------|
| Country Name | KPC Counts | Percent |
| India | 22,536 | 43.64% |
| European Community | 9,489 | 18.39% |
| Israel | 8,908 | 17.25% |
| China, People's Republic of | 3,301 | 6.39% |
| United Arab Emirates | 1,748 | 3.38% |
| Other | 5,653 | 10.95% |
| Total | 51,645 | 100.00% |

| KPC Counts Exports | | |
|----------------------|---------------|----------------|
| Country Name | KPC Counts | Percent |
| European Community | 29,585 | 57.04% |
| Israel | 5,646 | 10.89% |
| United Arab Emirates | 3,754 | 7.24% |
| India | 2,466 | 4.75% |
| Russian Federation | 1,864 | 3.59% |
| Other | 8,548 | 16.48% |
| Total | 51,863 | 100.00% |

28-Jul-11

Source: Kimberley Process Certification Scheme

Table: Annual global summary for 2010.

5. Section IV: Internal controls (Undertakings by Participants)

The Certification Scheme states that Participants have particular undertakings with regard to internal controls. Section IV of the Certification Scheme deals with these undertakings. Participants should undertake to establish particular internal control systems for the export of rough diamonds. Firstly, 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’.⁵⁴

A few components must be in place in order to establish a ‘body’ of a ‘system of internal controls’. Intrinsic to the system of internal controls is that each Participant should designate an ‘Importing and an Exporting Authority’.⁵⁵ In furtherance of establishing a body of internal systems of control, Participants should ensure that rough diamonds are imported and exported in tamper resistant containers.⁵⁶ Fourthly, each Participant should 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.⁵⁷ This will require passing national legislation as the Certification Scheme is a voluntary mechanism and not a legal mechanism.

Pursuant to the Certification Scheme, each Participant should collect and maintain relevant official production, import and export data, and collate and exchange such data in accordance with the provisions of Section V.⁵⁸ Again data collection entails the presence of technological facilities and information storage facilities for data collection and record keeping purposes.

This may prove problematic for those Participants that lack technologically advanced administrative capabilities. Finally, each Participant when establishing a system of internal

⁵⁴ Section IV(a) of the Certification Scheme; see in general also Smillie, Gberie and Hazleton ‘At the heart of the matter’ (2000).

⁵⁵ Section IV(b) of the Certification Scheme.

⁵⁶ Section IV(c) of the Certification Scheme.

⁵⁷ Section IV(d) of the Certification Scheme.

⁵⁸ Section IV(e) of the Certification Scheme; Smillie I ‘Killing Kimberley? Conflict diamonds and paper tigers’ (2006) *Partnership Africa Canada: Diamonds and human security project* Occasional Paper Series No 15 at 4-5.

controls, takes into account, where appropriate, the further options and recommendations for internal controls as elaborated in Annex II.⁵⁹

a. Annex II

Annex II makes six different types of recommendations for a system of internal controls. In total twenty six recommendations are made to Participants. They are general recommendations; recommendations for control over diamond mines; recommendations for Participants with small scale diamond mining; recommendations for rough diamond buyers, sellers and exporters; recommendations for export processes; recommendations for import processes and recommendations on shipments to and from free trade zones. Within the Certification Scheme ‘free trade zones’ is defined as ‘means a part of the territory of a Participant where any goods introduced are generally regarded, insofar as import duties and taxes are concerned, as being outside the customs territory’.⁶⁰

Each of the six groups of recommendations will be dealt with in turn.

i. General Recommendations

The Certification Scheme makes eight ‘General Recommendations’. Participants may elect to follow through with recommendations. The first General Recommendations make provision for Participants, at their discretion, to appoint an official to coordinate implementation of the Certification Scheme.⁶¹ In the implementation of the Certification Scheme, the Certification Scheme encourages information⁶² and data to be housed on a computer data base and the sending of electronic messages.⁶³

Participants are encouraged to transmit and receive electronic messages in order to support the Certification Scheme.⁶⁴ Further Participants that produce diamonds are encouraged to

⁵⁹ Section IV(f) of the Certification Scheme.

⁶⁰ Section I of the Certification Scheme.

⁶¹ General Recommendation 1 Annex II of the Certification Scheme.

⁶² As identified in Annex III of the Certification Scheme.

⁶³ General Recommendations 2, 3 and 4 Annex II of the Certification Scheme.

⁶⁴ General Recommendation 4 Annex II of the Certification Scheme.

identify areas of rebel diamond mining activities.⁶⁵ Participants are further encouraged to share this information with other Participants to the Certification Scheme.⁶⁶ State Participants that have rebel groups suspected of mining diamonds within their territories should also make such information available to other Participants.⁶⁷ Information should be updated on a regular basis.⁶⁸

If the purposes of the Certification Scheme are contravened by individuals or companies who have been convicted, Participants are encouraged to disclose the names of convicted and contravening individuals or companies.⁶⁹ Disclosure should be made to all other Participants through the Chair.⁷⁰

Furthermore, Participants are encouraged to ensure that all cash purchases of rough diamonds follow the trajectory of a legally acceptable purchase and sale transaction.⁷¹ The transaction should include all the factors necessary for the conclusion of a legally valid sale, including but not limited to routing through official banking channels.⁷² All of the facets to the transaction should be supported by verifiable documentation.⁷³

In accordance with the Certification Scheme, Participants that produce diamonds should analyse their diamond production under the headings of ‘Characteristics of diamonds produced’ and ‘Actual production’.⁷⁴

The General Recommendations have been found to be commendable by the Kimberley Process. However, the workability of the General Recommendations may be problematic. For example, the collection and storage of data is not realistically a recommendation that countries afflicted by the worse levels of poverty and lacking in critical skills and technology

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ General Recommendation 6 Annex II of the Certification Scheme.

⁷⁰ *Ibid.*

⁷¹ General Recommendation 7 Annex II of the Certification Scheme.

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ General Recommendation 8 Annex II of the Certification Scheme.

may be able to implement in their national systems. Issues such as infrastructural constraints and lack of finances should be taken into account.

ii. Recommendations for control over diamond mines

The Certification Scheme also provides for ‘Recommendations for the Control over Diamond Mines’ which is an aspect pivotal to tracing the course of a rough diamond. In so doing, the Certification Scheme encourages Participants to ensure that all diamond mines within their control are licensed.⁷⁵ Permission for diamond mining will thus depend on the licence status of a given mine. If a diamond mine is not licensed, then it will be prohibited from mining diamonds.⁷⁶

‘Security standards’ was another issue which concerned the Certification Scheme drafters.⁷⁷ Provision is made for prospecting and mining companies to maintain effective security standards. Effective security standards are aimed at ensuring that conflict diamonds do not enter the legitimate rough diamond production sphere.⁷⁸

Control over diamond mines is intricate and demanding. Unless the Certification Scheme is able to provide standards for security procedures their implementation, as well as technical assistance to diamond producing countries, these Recommendations will remain problematic to implement.

iii. Recommendations for Participants with small scale diamond mining

Provision is made in the Kimberley Process for ‘Participants with small scale diamond mining’ within their territories.⁷⁹ Artisanal and informal diamond miners⁸⁰ should hold

⁷⁵ General Recommendation 9 Annex II of the Certification Scheme.

⁷⁶ *Ibid*; see studies on Sierra Leone, the DRC and Angola in Smillie I ‘Rich man, poor man. Development diamonds and poverty diamonds: The potential for change in the artisanal alluvial diamond fields of Africa’ (2004) *Partnership Africa Canada: Diamonds and human security project* at 8-9.

⁷⁷ General Recommendation 9 Annex II of the Certification Scheme.

⁷⁸ *Ibid*.

⁷⁹ Recommendations 11 and 12 Annex II of the Certification Scheme.

licenses prior to embarking on mining initiatives.⁸¹ Only those artisanal and informal diamond miners who are licence bearers will be permitted to engage in diamond mining.⁸²

Therefore, artisanal and informal diamond miners who do not possess licences, by virtue of a Participant, declining an application for a diamond mining license, will be prohibited from mining. At minimum the licensing records should contain the name, address, nationality and or residence status and the area authorised for diamond mining purposes.⁸³

Indeed, the role of the artisanal or informal diamond miner is important and all too often detrimental to the diamond industry. More especially, it is frustrating attempts at curbing the illegal international trade in rough diamonds. However, most diamond producing countries experience difficulties in locating artisanal miners. In instances where they are located, there is little trust, which prevents co-operation by the miners or individual diggers. Here too, the Recommendations are problematic and implementation remains dependent on the attainment of certain development standards that are absent in many countries.

iv. Recommendations for rough diamond buyers, sellers and exporters

‘Recommendations for Rough Diamond Buyers, Sellers and Exporters’ cover two important facets to the purchasing and sale of rough diamonds. Licensing and registering and information storage are central to these Recommendations.⁸⁴ These Recommendations are exclusively intended for the purchase and sale of rough diamonds.

In the first instance, all diamond buyers, sellers and exporters and their agents as well as courier companies involved in transporting rough diamonds should be registered and licensed by a Participant’s relevant authorities.⁸⁵ In this manner the diamond trade chain is secured.

⁸⁰ The Certification Scheme does not define ‘artisanal miners’; see also see studies on Sierra Leone, the DRC and Angola in Smillie; see also General Recommendation 9 Annex II of the Certification Scheme; see studies on Sierra Leone, the DRC and Angola in Smillie ‘Rich man, poor man’ (2004) at 8-9.

⁸¹ Recommendation 11 Annex II of the Certification Scheme; see also see studies on Sierra Leone, the DRC and Angola in Smillie ‘Rich man, poor man’ (2004) at 8-10.

⁸² Recommendation 11 Annex II of the Certification Scheme.

⁸³ Recommendation 12 Annex II of the Certification Scheme.

⁸⁴ Recommendations 13, 14, 15 and 16 Annex II of the Certification Scheme.

⁸⁵ Recommendation 13 Annex II of the Certification Scheme; on smuggling and Venezuela see Smillie ‘The lost world’ (2006) at 7-9; see also Gberie ‘War and peace in Sierra Leone’ (2002) at 10-11.

However, it is submitted that not all buyers, sellers or even exporters will be registered or licensed. Diamonds which leave a geographical region in a diplomatic case or the hand luggage of an air borne traveller or an informal trader crossing borders that for many hundreds of kilometres are open and unguarded, remain mostly undetected.

In the second instance, all licensing records should contain at minimum, the name, address, and nationality and or residence status of the buyer, seller, exporter, agents and courier companies involved in transporting the rough diamonds.⁸⁶ The Certification Scheme expects all rough diamond buyers, sellers and exporters to be legally obliged to maintain records of their daily business for a period of five years.⁸⁷

Daily records should include buying, selling or exporting records listing names of buyers or selling clients, their license number and the amount and value of diamonds sold, exported or purchased.⁸⁸ Daily records must be stored on a computer data base.⁸⁹ Once more, the problem with regard to a frequent lack of technological capacities and lack of critical skills presents itself.

Recommendations for buyers and sellers are detailed. Recommendations must however be realistic. The Recommendations made by the Certification Scheme present concerns over issuance of licences. Nor are all buyers and sellers willing to comply with legal requirements. Small scale buyers enter and exit the diamond industry at a fast pace. Thus, these Recommendations appear to be intended primarily for large scale buyers and sellers. This is a major concern which will be addressed in the final chapter of this study.

v. Recommendations for export processes

The Certification Scheme accommodates diamond export processes in its ‘Recommendations for Export Processes’. When intending an export of a rough diamond shipment, the exporter should submit the same to the relevant Exporting Authority.⁹⁰ Prior to validating a

⁸⁶ Recommendation 14 Annex II of the Certification Scheme.

⁸⁷ Recommendation 15 Annex II of the Certification Scheme.

⁸⁸ *Ibid.*

⁸⁹ Recommendation 16 Annex II of the Certification Scheme.

⁹⁰ Recommendation 17 Annex II of the Certification Scheme.

Certificate, the Exporting Authority is encouraged to make particular requests to the exporter.⁹¹ Of note, the Exporting Authority may request an exporter to declare the status of the rough diamond shipment.⁹² In this manner, the exporter must declare that the rough shipment of diamonds for export purposes is indeed conflict-free.⁹³

When an exporter intends to export a rough shipment of diamonds after receipt of the Certificate, the diamonds should be sealed in a ‘tamper-proof container’ together with the original Certificate or a duly authorised copy.⁹⁴ If a copy of the Certificate is utilised, then the Certificate must be duly certified as a true copy of the original.⁹⁵

Intrinsic to the export process is the duty of the exporter. The Certification Scheme recommends that the relevant Exporting Authority should convey a meticulous electronic message, which must be recorded on a computer database,⁹⁶ to the intended Importing Authority.⁹⁷ Thus, the electronic message should contain information on the carat weight, value, country of origin or provenance, importer and the serial number of the Certificate.⁹⁸

Again, little cognisance has been granted to the technological gap between Participants as aforestated. Also, the clarity of questions which the Exporting Authority must pose to the exporter is uncertain. Thus, the workability of these Recommendations is debatable.

vi. Recommendations for import processes

As with the exporting processes, so too does the Kimberley Process contain recommendations for import processes. These recommendations are made under ‘Recommendations for Import Processes’. When an importer intends to import a shipment of rough diamonds into his country of business, or residence, the Importing Authority of that

⁹¹ Recommendation 18 Annex II; see also on Brazilian exporters, see Smillie ‘Fugitives and phantoms’ (2006) at 6-9; also see on Guyana see Smillie ‘Triple jeopardy’ (2006) at 4-6.

⁹² Recommendation 18 Annex II of the Certification Scheme.

⁹³ *Ibid.*

⁹⁴ *Ibid.* Recommendation 19 Annex II of the Certification Scheme.

⁹⁵ *Ibid.*

⁹⁶ Recommendation 20 Annex II of the Certification Scheme.

⁹⁷ Recommendation 19 Annex II of the Certification Scheme.

⁹⁸ *Ibid.*

country should have been sent an electronic message either before or upon the arrival of the shipment.⁹⁹

Just as the exporter needs to furnish information to the Exporting Authority, so too should the importing authority be informed regarding particular granularities of the shipment. The details within the electronic message should contain details about the carat weight, value, country or origin or provenance, exporter and serial number of the Kimberley Process Certificate.¹⁰⁰ Exchange of this information permits proper correlation between the Exporting and Importing Authorities.

Upon arrival in the country of import, the Importing Authority should verify that the seals and the container have not been tampered with.¹⁰¹ Apart from inspection of the shipment, the Importing Authority should further verify that the details declared on the Certificate are indeed correct.¹⁰² After validation of the Certificate against the electronic message earlier received, the Importing Authority should proceed to open the container to inspect its contents.

Inspection is undertaken so as to ensure that the details on the Certificate correspond with the contents of the container.¹⁰³ All details of the imported rough diamond shipment should be recorded on a computer data base.¹⁰⁴ In the instance of a request, or where it is applicable, the Importing Authority should send the 'return slip' or 'import confirmation coupon' to the Exporting Authority.¹⁰⁵ The issue of technological capacity arises again.

Export of rough diamond shipments is more often than not to countries which possess the technological and legal prowess to maintain and uphold the Recommendations aforesated.

⁹⁹ Recommendation 21 Annex II of the Certification Scheme.

¹⁰⁰ Recommendation No 21 of the Certification Scheme.

¹⁰¹ Recommendation No 22 of the Certification Scheme.

¹⁰² Recommendation No 22 of the Certification Scheme.

¹⁰³ Recommendation No 23 of the Certification Scheme .

¹⁰⁴ Recommendation No 25 of the Certification Scheme.

¹⁰⁵ Recommendation No 24 of the Certification Scheme.

vii. Recommendations on shipments to and from free trade zones

Rough diamond shipments which are intended for import or export to and from free trade zones will be governed by the relevant import and export authorities of Participants. As such, the authorities designated by the Participants must undertake this process of trade. The Certification Scheme defines ‘free trade zones’ as ‘... a part of the territory of the Participant where any goods introduced are generally regarded, insofar as import duties and taxes are concerned, as being outside the customs territory ...’.¹⁰⁶

b. Principles of industry self-regulation

The Certification Scheme is a voluntary process.¹⁰⁷ Participants enter into the Certification Scheme with the understanding that the commitment is underpinned by moral and ethical norms and standards.¹⁰⁸ The commitment is to ensure that conflict or blood diamonds do not enter the arena of trade domestically or internationally must be evidenced by Participants fulfilling the Certification Scheme’s requirements. Blood diamonds should not be the subject of trade at any level. A voluntary system of self-regulation is spelt out in the Preamble of the Certification Scheme.

The voluntary system is underpinned by a system of warranties.¹⁰⁹ Warranties are enforced through the verification of the status of rough diamonds by independent auditors of individual companies and supported by internal penalties as set by the industry.¹¹⁰ ‘Internal penalties’ are, however, not accorded a clear definition within the document of the Certification Scheme. Internal penalties will be imposed in the hope that such systems will help facilitate the ‘full traceability of rough diamonds by government authorities’.¹¹¹

¹⁰⁶ Section I of the Certification Scheme; see also Schulze HCAW ‘The free trade zone programmes of Namibia and Mauritius and the latest developments in Europe: Lessons for South Africa’ (1999) 32 *CILSA* at 198-200.

¹⁰⁷ Preamble to the Certification Scheme; see also on the principle of ‘self regulation’ Harrington ‘Faceting the future’ (2009) at 361.

¹⁰⁸ Preamble to the Certification Scheme.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

In essence the system is a mechanism geared toward accountability and transparency in the shipment of rough diamonds. Penalties, to date have been confined to exclusion or suspension from participating in the Certification Scheme.¹¹²

Having indicated some of the weaknesses and also the strengths of the Certificate of the Certification Scheme and the undertakings by Participants and the internal controls undertaken by Participants, this chapter will proceed to consider the co-operation and transparency undertakings by Participants in the Certification Scheme.

¹¹² For example the DRC; see Samset 'Conflict of interest' (2002) at 465-70 and 476-7.

6. Section V: Co-operation and transparency (Annex III)

Having discussed Sections I, III and IV of the Certification Scheme, Section V must be considered. It is necessary for the study to investigate the issues of co-operation and transparency.

Section V of the Certification Scheme deals with co-operation and transparency between Participants to the Certification Scheme. Participants should co-operate with each other to ensure that shipments of rough diamonds are conflict-free. The Certification Scheme attempts to create co-operation between the Participants anticipating transparency.

The hope is that effective checks and balances would result in the desired level of accountability. In so doing Participants must necessarily ‘comply’ with the contents of the Certification Scheme. Participants should share with each other, through the Chair of the Kimberley Process, particular information.¹¹³

Furthermore, Participants should provide information, which identifies their designated authorities or bodies responsible for implementing the provisions of the Certification Scheme.¹¹⁴ Each Participant should provide to other Participants, information, preferably in electronic format, on its relevant laws, regulations, rules, procedures and practices, and update that information as required.¹¹⁵ Information provided should include a synopsis in English of the essential content of this information.¹¹⁶

It is submitted that the Certification Scheme, although not a treaty or agreement between Participants, in creating a system of peer review amongst Participants is nevertheless akin to a legally binding agreement. Conceptually, this is problematic for Participants. Of particular importance is the fact that the Certification Scheme makes provision for the reporting of other Participants whose domestic legislation is not in keeping with the ‘provisions’ of the

¹¹³ Section V(a) of the Certification Scheme.

¹¹⁴ *Ibid.*

¹¹⁵ Section V(a) of the Certification Scheme.

¹¹⁶ *Ibid.*

Certification Scheme.¹¹⁷ The fact that the information pertaining to laws, regulations and procedures should be provided in English is detrimental to other non-English Participants.

Participants should compile and make available to all other Participants statistical data in line with the principles set out in Annex III.¹¹⁸ Annex III deals with the matters of statistics and commercially sensitive information. The Certification Scheme recognises that reliable and comparable data on the production and the international trade in rough diamonds are an essential tool for the effective implementation of the Certification Scheme.¹¹⁹

In particular the data is necessary for identifying any irregularities or anomalies which may indicate that conflict diamonds are entering the legitimate trade.¹²⁰ Therefore Participants are strongly encouraged to support the six principles identified by the Certification Scheme's Annex III, taking into account the need to protect commercially sensitive information.¹²¹

Pursuant to the six Principles of Annex III, firstly Participants are encouraged to maintain records for activities of import and export undertaken within a period of two months.¹²² Records of rough diamond exports and imports, including the number of Certificates issued must be made available to other Participants.¹²³ Also, the information must be published in a standardised format based on quarterly aggregate statistics including the country of origin of rough diamond shipments; their provenance where possible; their carat weight and value under the relevant Harmonised Commodity Description and Coding System (HS) classifications.¹²⁴

In the event that a Participant is unable to publish these statistics it should notify the Chair immediately.¹²⁵ Participants are also encouraged to collect and publish statistics taking into account the existing national practices regarding data collection.¹²⁶ In addition, Participants

¹¹⁷ Harrington 'Faceting the future' (2009) at 412-3 on 'Internal controls' and its revision.

¹¹⁸ Section V(b) of the Certification Scheme.

¹¹⁹ Annex III of the Certification Scheme.

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² Principle (a) Annex III of the Certification Scheme.

¹²³ *Ibid.*

¹²⁴ Principle (b) of Annex III of the Certification Scheme.

¹²⁵ Principle (c) of Annex III of the Certification Scheme.

¹²⁶ Principle (d) of Annex III of the Certification Scheme.

are encouraged to make statistics available to intergovernmental bodies or to any other appropriate mechanism identified by any other Participant.¹²⁷

Primarily two reasons underpin sharing of statistics. Firstly, the statistics relating to imports and exports of rough diamond shipments should be compiled and published on a quarterly basis.¹²⁸ Secondly, statistics relating to the production of rough diamonds should be compiled and published on a semi-annual basis.¹²⁹

Statistics may also be made available by Participants to interested third parties for the purposes of analysis.¹³⁰ Statistical information pertinent to the international trade in and production of rough diamonds which have been compiled and published may be considered for discussion at the Plenary Meetings.¹³¹ The objective of the discussion is, ideally, to support the ‘effective implementation of the Certification Scheme’.¹³² This concludes the Principles contained in Annex III.

Participants are encouraged to share and exchange the required information on a regular basis. Other relevant information should include information on self-assessment so as to arrive at the best practice in given circumstances.¹³³ Annex III also encourages Participants to consider, favourably, requests from other Participants for assistance to improve the functioning of the Certification Scheme within their territories.¹³⁴

Participants should inform another Participant through the Chair if it considers that the laws, regulations, rules, procedures or practices of that other Participant do not ensure the absence of conflict diamonds in the exports of that other Participant.¹³⁵

Sixthly, Participants should cooperate with other Participants to attempt to resolve problems which may arise from unintentional circumstances and, which could lead to non-fulfilment of

¹²⁷ Principle (e) of Annex III of the Certification Scheme.

¹²⁸ Principle (e) of Annex III of the Certification Scheme.

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

¹³¹ Principle (f) of Annex III of the Certification Scheme.

¹³² *Ibid.*

¹³³ Section V(c) of the Certification Scheme.

¹³⁴ Section V(d) of the Certification Scheme.

¹³⁵ Section V(e) of the Certification Scheme.

the minimum requirements for the issuance or acceptance of the Certificates.¹³⁶ Participants should inform all other Participants of the essence of the problems encountered and of desirable solutions.¹³⁷ Finally, Participants should encourage, through their relevant authorities, closer co-operation between law enforcement agencies and between customs agencies of Participants.¹³⁸

These Principles are guidelines, which Participants elect to abide by. In the instance that a Participant elects not to abide by Annex III's Principles, problems may arise in relation to other Participants. Participants have come to regard the Certification Scheme as a so-called 'binding' instrument despite its voluntary nature.

It must be noted that Recommendations, like the Certification Scheme itself, do not have the force of law. Recommendations may or may not be adopted by the Participants. In the absence of adoption, there is no legal sanction. However, it seems that if Participants adopt the Recommendations will assist Participants significantly; as this will enable uniformity of rules within the diamond trading industry.

The Certification Scheme assumes that all Participants have in place suitable technical structures and personnel with specialised expertise and knowledge. It is doubtful that this is the case with all Participants. Having examined co-operation and transparency, this study must necessarily investigate administrative matters pertaining to the Certification Scheme.

¹³⁶ Section V(f) of the Certification Scheme.

¹³⁷ *Ibid.*

¹³⁸ Section V(g) of the Certification Scheme.

7. Section VI: Administrative matters to the Certification Scheme

This part of the chapter will explain the ‘requirements’ of the Certification Scheme and will highlight the weaknesses and strengths of the administrative matters of the Certification Scheme. The administrative matters of the Certification Scheme show where the Certification Scheme is actually ‘housed’. Unlike most international instruments, the instrument of the Certification Scheme is not located in any specific place. Instead, it is ‘hosted’ by different State Participants each year.

Section VI addresses administrative matters within the purview of the Certification Scheme. The section deals with meetings, administrative support, participation, Participant measures, compliance and dispute prevention, modifications and review mechanisms. Essentially, housekeeping matters are given due attention in Section VI. Each will be addressed in turn.

a. Meetings

Participants and Observers should meet in Plenary annually or as Participants may deem necessary, in order to discuss the effectiveness of the Certification Scheme.¹³⁹ The Certification Scheme defines ‘observers’ as ‘a representative of civil society, the diamond industry, international organisations and non-participating governments are invited to take part in Plenary meetings’.¹⁴⁰

The host country should facilitate entry formalities for those attending such meetings.¹⁴¹ The host country must therefore make the necessary arrangements for visas, accommodation and such related issues pertinent to travel. At the end of each Plenary meeting, a Chair would be elected to preside over all Plenary meetings. *Ad hoc* working groups and other subsidiary bodies, which might be formed, may also be decided.¹⁴² Participants should reach decisions by consensus. In the event that consensus proves to be impossible, the Chair is to conduct consultations with the Participants.¹⁴³ Holding meetings to discuss the efficacy of the

¹³⁹ Section VI(a)(1) of the Certification Scheme.

¹⁴⁰ Section I of the Certification Scheme.

¹⁴¹ Section VI(a)(3) of the Certification Scheme.

¹⁴² Section VI(a)(4) of the Certification Scheme.

¹⁴³ Section VI(a)(5) of the Certification Scheme.

Certification Scheme is important as this will aid the development of Certification Scheme initiatives

The efficacy of the Certification Scheme may focus on different regions and or countries. Participants should adopt Rules of Procedure for such meetings at the first Plenary meeting.¹⁴⁴ At best, these rules of procedure should be in pre-emptive in response to the prevailing conditions of application of the Certification Scheme.

Meetings should be held in the country where the Chair is located, unless a Participant or an international organisation offers to host a meeting and this offer has been accepted.¹⁴⁵ Decisions should be reached through consensus. This is problematic with 75 Participants to the Certification Scheme.

b. Administrative support

For the effective administration of the Certification Scheme, administrative support is essential. The modalities and functions of that support should be discussed at the first Plenary meeting, following endorsement by the UN General Assembly.¹⁴⁶ Support may differ from year to year depending on the Chair or host country of the Certification Scheme. Administrative support may include a variety of functions, amongst others, the following functions:¹⁴⁷

- ‘(a) to serve as a channel of communication, information sharing and consultation between the Participants with regard to matters provided for in this Document;¹⁴⁸
- (b) to maintain and make available for the use of all Participants a collection of those laws, regulations, rules, procedures, practices and statistics notified pursuant to Section V;¹⁴⁹
- (c) to prepare documents and provide administrative support for Plenary and working group meetings;¹⁵⁰ and
- (d) to undertake such additional responsibilities as the Plenary meetings, or any working group delegated by Plenary meetings, may instruct.’¹⁵¹

¹⁴⁴ Section VI(a)(2) of the Certification Scheme.

¹⁴⁵ Section VI(a)(3) of the Certification Scheme.

¹⁴⁶ Section VI(6) of the Certification Scheme.

¹⁴⁷ Section VI(7) of the Certification Scheme.

¹⁴⁸ Section VI(7)(a) of the Certification Scheme.

¹⁴⁹ Section VI(7)(b) of the Certification Scheme.

¹⁵⁰ Section VI(7)(c) of the Certification Scheme.

As may be seen, administrative support is very important to the operation of the Certification Scheme as it impacts upon its workability. The Administration of the Certification Scheme enables communication, sharing of information, preparation of documents and many other responsibilities. This means that the administration must be efficient so as to ensure the proper and optimal functioning of the Certification Scheme. Whether all country Chairs will be able to provide a proper administration is doubtful, considering the vast income and developmental disparities between the Participant States.¹⁵²

c. Participation

Participation in the Certification Scheme is open on a global, non-discriminatory basis to all Applicants willing and able to fulfil the requirements of that Certification Scheme.¹⁵³ Any applicant wishing to participate in the Certification Scheme should signify its interest by notifying the Chair through diplomatic channels.¹⁵⁴ This notification should include the information set forth in paragraph (a) of Section V and be circulated to all Participants within one month.¹⁵⁵ Participants intending to invite representatives of civil society, the diamond industry, non-participating governments and international organisations to participate in Plenary meetings as Observers must also comply with this requirement.¹⁵⁶

The only requirement for participating in the Certification Scheme is that interested parties should notify the Chair through diplomatic channels. Usually legally binding and policy agreements are communicated through diplomatic channels.¹⁵⁷ The Certification Scheme, in making such a request, at this juncture seems akin to a legally binding mechanism as opposed to a voluntary measure.

¹⁵¹ Section VI(7)(d) of the Certification Scheme.

¹⁵² GDP data utilised by the Scheme to illustrate its use is not made public. Therefore, the author is unable to access this information.

¹⁵³ Section VI(8) of the Certification Scheme.

¹⁵⁴ Section VI(9) of the Certification Scheme.

¹⁵⁵ *Ibid.*

¹⁵⁶ Section VI(10) of the Certification Scheme.

¹⁵⁷ Articles 11-13 of the Vienna Convention.

d. Participant measures

Participants are to prepare, and make available to other Participants, in advance of annual Plenary meetings of the Kimberley Process, information as stipulated in paragraph (a) of Section V outlining how the requirements of the Certification Scheme are being implemented within their respective jurisdictions.¹⁵⁸ The agenda of annual Plenary meetings is to include an item where information as stipulated in paragraph (a) of Section V is reviewed and Participants can provide further details of their respective systems at the request of the Plenary.¹⁵⁹

Where further clarification is needed, Participants at Plenary meetings, upon recommendation by the Chair, can identify and decide on additional verification measures to be undertaken.¹⁶⁰ Such measures are to be implemented in accordance with applicable national and international law.¹⁶¹ These could include, but need not be limited to measures such as:¹⁶²

- ‘A requesting additional information and clarification from Participants;¹⁶³ and
- B review missions by other Participants or their representatives where there are credible indications of significant non-compliance with the Certification Scheme.’¹⁶⁴

Participants should conduct review missions in an analytical, expert and impartial manner with the consent of the Participant concerned.¹⁶⁵ The size, composition, terms of reference and time-frame of these missions should be based on the circumstances and be established by the Chair with the consent of the Participant concerned and in consultation with all Participants.¹⁶⁶

¹⁵⁸ Section VI(8) and Section VI(11) of the Certification Scheme.

¹⁵⁹ Section VI(12) of the Certification Scheme.

¹⁶⁰ Section VI(13) of the Certification Scheme.

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

¹⁶³ Section VI(13)(a) of the Certification Scheme.

¹⁶⁴ Section VI(13)(b) of the Certification Scheme.

¹⁶⁵ Section VI(14) of the Certification Scheme; several Review Missions have been undertaken to date commencing before the operation of the Certification Scheme.

¹⁶⁶ Section VI(14) of the Certification Scheme. Unfortunately, not all review missions are made available for public reading.

A report on the results of compliance verification measures should be forwarded to the Chair and to the Participant concerned within three weeks of completion of the mission.¹⁶⁷ Any comments from that Participant as well as the report are to be posted on the restricted access section of an official Certification Scheme website no later than three weeks after the submission of the report to the Participant concerned.¹⁶⁸ Participants and Observers should make every effort to observe strict confidentiality regarding the issue and the discussions relating to any compliance matter.¹⁶⁹

Indeed, it is disconcerting that the Certification Scheme requests information from Participants, which involve such advanced technological, analytical and other skills. Not all Participants, especially the major diamond producing countries of Africa will be in a position to meet this request.

e. Compliance and dispute prevention in the Certification Scheme

In the event that an issue regarding compliance by a Participant or any other issue regarding the implementation of the Certification Scheme arises, any concerned Participant may inform the Chair, who is to inform all Participants without delay about the said concern and enter into dialogue on how to address the concern.¹⁷⁰ The Certification Scheme advocates constructive dialogue. Participants and Observers should make every effort to observe strict confidentiality regarding the issue and the discussions relating to any compliance matter.¹⁷¹

The compliance and dispute prevention of the Certification Scheme falls within the responsibility of a rotating Chair. This is problematic. The rotating Chair is housed within the country itself. Administrative matters, differing legal regimes and usual business practices arising from cultural norms are some of the issues which may prove difficult for the rotating Chair to address.

¹⁶⁷ Section VI(15) of the Certification Scheme.

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*

¹⁷⁰ Section VI(16) of the Certification Scheme; see Ku and Nzelibe 'Criminal tribunals' (2006) at 35-36.

¹⁷¹ *Ibid.*

f. Modifications to the Certification Scheme

The Certification Scheme document may be modified by consensus of the Participants.¹⁷² Modifications may be proposed by any Participant.¹⁷³ Proposals for modifications should be sent in writing to the Chair, at least ninety days before the next Plenary meeting, unless otherwise agreed.¹⁷⁴ The Chair should circulate any proposed modification expeditiously to all Participants and Observers and place it on the agenda of the next annual Plenary meeting.¹⁷⁵

g. Review mechanism

Participants intend that the Certification Scheme should be subject to periodic review, to allow Participants to conduct a thorough analysis of all elements contained in the scheme.¹⁷⁶ The review should also include consideration of the continuing requirement for such a scheme, in view of the perception of the Participants, and of international organisations, in particular the UN, of the continued threat posed at that time by conflict diamonds.¹⁷⁷

The first review should take place no later than three years after the effective starting date of the Certification Scheme.¹⁷⁸ The review meeting should normally coincide with the annual Plenary meeting, unless otherwise agreed.¹⁷⁹ The Third Year Review was undertaken in 2006 and was published in 2007.

The Certification Scheme was established at the Ministerial Meeting on the Kimberley Process Certification Scheme for Rough Diamonds in Interlaken on 5 November 2002.¹⁸⁰ Since then a review was commissioned annually. Reviews are of crucial importance as they

¹⁷² Section VI(17) of the Certification Scheme.

¹⁷³ Section VI(18) of the Certification Scheme.

¹⁷⁴ *Ibid.*

¹⁷⁵ Section VI(16) with Section VI(19) of the Certification Scheme.

¹⁷⁶ Section VI (20) of the Certification Scheme.

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*

¹⁷⁹ Section VI(20) of the Certification Scheme.

¹⁸⁰ Section VI(21) of the Certification Scheme.

are indicators of the efficacy of the Certification Scheme's contents and the Participants' commitments.

h. Finance

The Kimberley Process does not have a funding mechanism in order to sustain its activities. Review missions and the work of the WGS have been funded by civil society organisations such as Partnership Africa Canada. Sometimes, states have contributed to the Kimberly Process for ad hoc activities. However, there is no permanent budget to which Participants contribute.

8. Conclusion

Having shown the background to the Certification Scheme, the overview of the Certification Scheme, the Certificate of the Certification Scheme, the undertakings by Participants, co-operation and transparency with regard to Certification Scheme and administrative matters to the Certification Scheme, it is necessary to highlight some of the major difficulties of the Certification Scheme's contents.

The Kimberley Certificate is the driving mechanism of the Certification Scheme. The UN SC and the UN GA, and other organisations such as the WTO support the Certification Scheme as has been aforementioned. However, the Certification Scheme is not a UN document which could claim the formal force of law like most UN documents seeking to address specific situations.

There are significant problems with the wording of the Certification Scheme. Words such as 'should' and phrases like '... is to ...' are problematic when dealing with a Certification Scheme of such importance. The problems of the Certification Scheme may be addressed in three categories: the legality of the Certification Scheme; the technological efficiency of Participants as well as definitions of the Certification Scheme. At this point the problems will be summarised for further interrogation in the chapter six.

The Certification Scheme is a voluntary mechanism with no apparent force of law. However the contents of the Certification Scheme in some salient instances, as will be mentioned below, represent the format of legal documents. Specifically, the Certification Scheme appears to aspire to that of a treaty formation. It is nevertheless a voluntary and self-regulatory initiative whose provisions are strongly encouraged to be complied with by the UN and other international organisations, and in the case of the EC, obliged to do so by states passing enabling legislation in the diamond sector.

The Certification Scheme was formed in an effort to address two major objectives, namely the curbing of the illegal trade of rough diamonds and thereby the elimination of one of the main contributing factors to severe human rights abuses. The extent to which a voluntary scheme in general, and more specifically the Certification Scheme, can achieve such objectives is one of the central objectives in this study.

However, the ability of the Certification Scheme to achieve its objectives cannot be determined only through an analysis of the contents of the Certification Scheme. The practical implementation and monitoring of the Certification Scheme must also be investigated. So too, must the role of international organisations and the role of international law be examined.

The Certification Scheme operates on the basic premise that each shipment of rough diamonds must be accompanied by a Kimberley Process Certificate from the point of origin to the point of destination. Participants to the Certification Scheme are expected to fulfil particular ‘requirements’ in order for the Certification Scheme to have application within their respective jurisdictions.

The Certification Scheme comprises 49 Participants. Of these, 49 are actually Participants as the EU acts as single Participant to the Certification Scheme. Many Participants have agreed to implement the requirements of the Certification Scheme into their domestic systems. Notably, these Participants are the EU countries. Most Participants have not yet fully implemented the Certification Scheme due to various technological difficulties and problems which exist with the definitions aspect of the Certification Scheme.

a. Section I: Definitions

Problems exist with some definitions such as ‘Transshipment’.

To start with, the definition of ‘Transshipment’ is indicative of many difficulties. Firstly a shipment destined for international trade may pass through the country of a non-Participant State or region. Secondly, the Certification Scheme’s definition allows for the shipment to be warehoused, or to change the mode of transport from air to water. Thirdly, the passage of the shipment may be on the territory of a non-Participant through any part of its journey en route to its final destination. Participants should ensure that the shipment leaves its territory in an identical state as it entered its territory. This too, is problematic as the importing and exporting authorities may not be in a position to evade interception.

Therefore, the definition, as it is presently couched does not present difficulties in form and language. However, the problems may arise during the actual physical transshipment of parcels of rough diamonds.

b. Technological efficiency and capacity with respect to expectations of the Certification Scheme

Difficulties arise with regard to the Certificate being translated into English. Not all countries are able to readily have Certificates translated into English. Further, the Certification Scheme does not provide guidelines as to how the Certificate is supposed to be ‘tamper and forgery resistant’. The Participants must address this matter in their own capacities. Problems arise when the details of the exporter must be noted. These details are not readily and easily available in most diamond producing nations.

Drafting and issuing of Certificates have complexities contained in the fourteen minimum requirements. Problems also exist with respect to the Importing and Exporting Authorities. The next part of this chapter will address undertakings of Participants in respect of international trade in rough diamonds.

c. Section III: undertakings of Participants in respect of international trade of diamonds

At minimum, the confirmation should refer to the Certificate number, the number of parcels, the carat weight and the details of the exporter. The importing Participant requires that the original Certificate be readily accessible for a period of no less than three years. Section III (b) of the Certification Scheme defines ‘import’ to mean the physical entering/bringing into any part of the geographical territory of a Participant.

Thus the countries of import and export should have in place mechanisms to ensure storage and verification facilities for a period of three years. This may be problematic as not all Participants will be in a position to put into place and maintain storage and verification facilities. Not all buyers and sellers are on record with the official coordinating offices responsible for the implementation of the Certification Scheme. Moreover, the lack of

technological capacities as aforementioned is another obstacle, as not all Participants are in a position to store data electronically.

d. Section IV

It must be borne in mind that the General Recommendations are commendable indeed. However, the workability of the General Recommendations in practical terms may become problematic. For example, the collection and storage of data is not realistically a recommendation that countries afflicted by poverty and backward technology may be able to implement readily in their national systems. Infrastructural constraints, lack of finances and other factors must be considered; and the Certification Scheme should have considered the need for technological capacities and the provision of technical assistance.

Indeed, the role of the artisanal or informal diamond miner is important to the diamond industry, most especially in curbing the illegal international trade in rough diamonds. However, most diamond producing countries experience difficulties in locating artisanal miners. In instances where they are located, there is little trust which prevents co-operation.

e. Collection of data and storage

The problems so far indicated may undermine the efficacy of the Certification Scheme. The Certification Scheme, in mandating Participants to collect, share and make available information and statistics through electronic and written documented systems demands that Participants have structures in place which will enable collection and analysis of statistics.

The Certification Scheme assumes that all Participants have in place these structures that require personnel to have specialised expertise and knowledge. It is doubtful that this is the case with all Participants.

f. Section V

Of particular importance is the fact that the Certification Scheme makes provision for the reporting of other Participants whose domestic legislation is not in keeping with the ‘provisions’ of the Certification Scheme. The fact that the information pertaining to laws, regulations and procedures should be provided in English is detrimental to other non-English Participants.

g. Section VI

Administrative support is important to the operation of the Certification Scheme as it impacts upon its workability.¹⁸¹ This means that the administration must be efficient so as to ensure the proper and optimal functioning of the Certification Scheme. Whether all country Chairs will be equally able to provide a proper administration is debatable.

Compliance and dispute prevention of the Certification Scheme falls within the responsibility of a rotating Chair. This is problematic, as it only provides for an embryonic dispute prevention and dispute resolution process.

¹⁸¹ Harrington ‘Faceting the future’ (2009) at 414.

9. Concluding remarks

Matters pertaining to the Certificate are intrinsically difficult. The same is applicable to internal controls, co-operation and transparency and the administrative matters relating to the Certification Scheme.

Although EC countries have experienced seemingly negligible practical difficulties in implementing the contents of the Certification Scheme, this is not the case with regard to smaller and less developed countries, especially in Africa.

Due to the non-legal nature of the Certification Scheme, it is difficult to make use of the term 'provisions' as this term is normally confined to legal documents and treaties. The Certification Scheme is a voluntary mechanism, which means that Participants to the Certification Scheme are not legally obliged to follow through with the contents of the Certification Scheme. As will be seen later in this study, non-compliance with the contents of the Certification Scheme has attendant consequences. Therefore the Certification Scheme operates akin to a treaty or a contract mechanism.

At the time of drafting of the Certification Scheme, the international community wished to have an international certification scheme in place, whose notion was taken from the UN SC's sanctions against Sierra Leone, the DRC and Angola. The Certification Scheme could possibly have been reduced to a legally binding document. Rather, and for obvious reasons of expediency, the Certification Scheme drafters opted for a voluntary non-legally binding mechanism.

In the main the Certification Scheme's efforts are commendable. The drafters of the Certification Scheme appear to have been pre-emptive in their construction of the contents. However, there remains a significant doubt regarding the realistic implementation of the Certification Scheme in light of differing Participants.

No two countries are alike in their commitment to the Certification Scheme. African countries remain amongst the largest diamond producing nations globally.¹⁸² Countries such as Sierra Leone and Liberia are in the wake of recovery from conflicts. This means that such states are not sufficiently equipped to meet the deliverables of the Certification Scheme. Countries such as the DRC and Cote d'Ivoire have made this problem public at the Kimberley meetings.

¹⁸² The DRC; Botswana; Republic of South Africa and Angola. Official statistics from KP website at <https://kimberleyprocessstatistics.org/static/pdfs/AnnualCharts/2009Charts.pdf>. Last visited 08 July 2011.

CHAPTER 4 : IMPLEMENTATION AND MONITORING IN THE KPCS: HIGHLIGHTING THE 2007 ANNUAL REVIEW OF THE CERTIFICATION SCHEME

1. Introduction

The study will proceed, in this chapter, to provide an introduction to the Certification Scheme's implementation and monitoring in accordance with the Annual Review 2006 published in 2007.¹

The Certification Scheme makes provision for review of the implementation and monitoring to be undertaken.² Participants agreed to undertake a review of the operation of the Certification Scheme three years after the same came into existence. Other organisations such as a Partnership Africa Canada, have also undertaken reviews of the Certification Scheme.³ This chapter does not focus on those reviews in the main. They have been consulted for this study. As such they will be utilised throughout for the purposes of completion.

According to the findings of the 2006 Third Year Review,⁴ the Certification Scheme is effective.⁵ In recognising the Certification Scheme's efficacy, the Review recommended a number of actions to further strengthen the Certification Scheme. In particular, areas such as monitoring of implementation and strengthening internal controls in participating countries, as well as greater transparency in the gathering of statistical data came to the fore.

A significant body of information regarding the implementation of the technical requirements of the Certification Scheme is available.⁶ The information indicates that the minimum requirements of the Certification Scheme have been implemented in Participant countries at the level of legislation or other acts and regulations.⁷

¹ On the Kimberley Process website at www.kimberleyprocess.com. Last visited 08 July 2011.

² Section VI(20) of the Certification Scheme.

³ Smillie I 'Diamond and human security' (2008) *Annual Review* and Smillie I 'Diamond and human security' (2009) *Annual Review*.

⁴ The Review was submitted by the *ad hoc* working Group in November 2006.

⁵ Third Year Review at 1 with regard to all aspects of the Certification Scheme.

⁶ 31 review visits, two review missions and three expert missions carried out by the KP since the inception of the Certification Scheme, as of July 2006, as well as the annual reports submitted by Participants on their implementation of the Certification Scheme in 2003, 2004 and 2005, and Participants' responses to the Review Questionnaire. On the Kimberley Process website at www.kimberleyprocess.com. Last visited 08 July 2011.

⁷ Third Year Review at 5, 12 and 34-35.

This first Third Year Review focused on three major areas: firstly, the impact of the Certification Scheme on the international trade in rough diamonds, and the extent to which the Certification Scheme has been effective in preventing the flow of conflict diamonds into the legitimate trade; secondly, the technical provisions of the Certification Scheme and whether they are functioning as planned or require improvement; and thirdly, the operations of the Certification Scheme and its efficacy.

2. Background to the Third Year Review

The mandate for the Review arose from the Certification Scheme document.⁸ Review is intended to allow Participants to conduct a thorough analysis of all elements contained in the Certification Scheme document. A ‘Review Working Group’ undertook the review.⁹ Following consultations, the composition of the Working Group consisted of the following members: Australia, China, European Community, India, Israel, Russian Federation, Sierra Leone, South Africa, United States, World Diamond Council, and Partnership Africa Canada and Global Witness.¹⁰

Terms of reference for the Working Group arose from ‘The Moscow Plenary’.¹¹ Acting upon its mandate, the *ad hoc* Working Group reviewed the efficacy of implementing different elements contained in the Certification Scheme, the impact of the Certification Scheme and the efficacy of its organisation and working methods.¹² The Review includes recommendations and implications of the suggested course of action in comparison to benefits of the Certification Scheme.

The Moscow Plenary outlined in detail the criteria for the Review under the following major headings: Impact, Technical Provisions of the Certification Scheme, and Organisation and Working Methods.¹³ These detailed criteria formed the basis for the questionnaire, which was distributed to all Participants, Observers and interested international organisations.¹⁴

⁸ Section VI, Paragraph 20 of the Certification Scheme, which provides for a review of the Scheme after three years. ‘Participants intend that the Certification Scheme should be subject to periodic review. The review should also include consideration of the continuing requirement for such a Scheme, in view of the perception of the Participants, and of international organisations, particular the United Nations, of the continued threat posed at that time by conflict diamonds ...’

⁹ At the Gataineau Plenary in 2004, Canada was selected to chair an *ad hoc* Working Group, to include also the Kimberley Process Chair and Vice Chair, as well as the Chairs of the Kimberley Process Working Groups and Committees, and a representative group of Participants with equitable geographic balance as well as industry and civil society representation.

¹⁰ Third Year Review at 9.

¹¹ Moscow Plenary at Final Communiqué Kimberley Process Plenary Meeting Moscow, the Russian Federation, 15-17 November 2005. Available on Kimberley Process website. Doc 0016_Moscow_2005_final_communique-en[1].pdf. Last visited 01 September 2011.

¹² Kimberley Process Certification Scheme Questionnaire to the Participants available on www.kimberleyprocess.com. Last visited 01 September 2011.

¹³ Moscow Plenary at Final Communiqué Kimberley Process Plenary Meeting Moscow, the Russian Federation, 15-17 November 2005. Available on Kimberley Process website. Doc 0016_Moscow_2005_final_communique-en[1].pdf. Last visited 01 September 2011.

¹⁴ Kimberley Process Certification Scheme Questionnaire to the Participants available on www.kimberleyprocess.com. Last visited 01 September 2011.

a. Sources of information

The Chair of the *ad hoc* Working Group was instructed by the rotating Chair to separately seek input from all Participants, Observers and interested international organisations from the Kimberley Process Working Groups and Committees.¹⁵ Information was also drawn from other Kimberley Process documents, submissions related to the Kimberley Process and the diamond industry from other interested parties and interviews with representatives of NGOs, governments and industry.¹⁶ It must be borne in mind that the Review was pursuant to a questionnaire issued by the Working Group to all Participants. This questionnaire was sent to all Kimberley Process Participants, Observers, and other interested parties; including the United Nations, United Nations Development Programme, the World Bank and the International Monetary Fund.

b. Time frame

The *ad hoc* Working Group was instructed to prepare a report and recommendations on the review of the Certification Scheme, in consultation with Kimberley Process Participants and Observers which was presented in 2006, following the detailed work-plan set out by the Moscow Plenary.

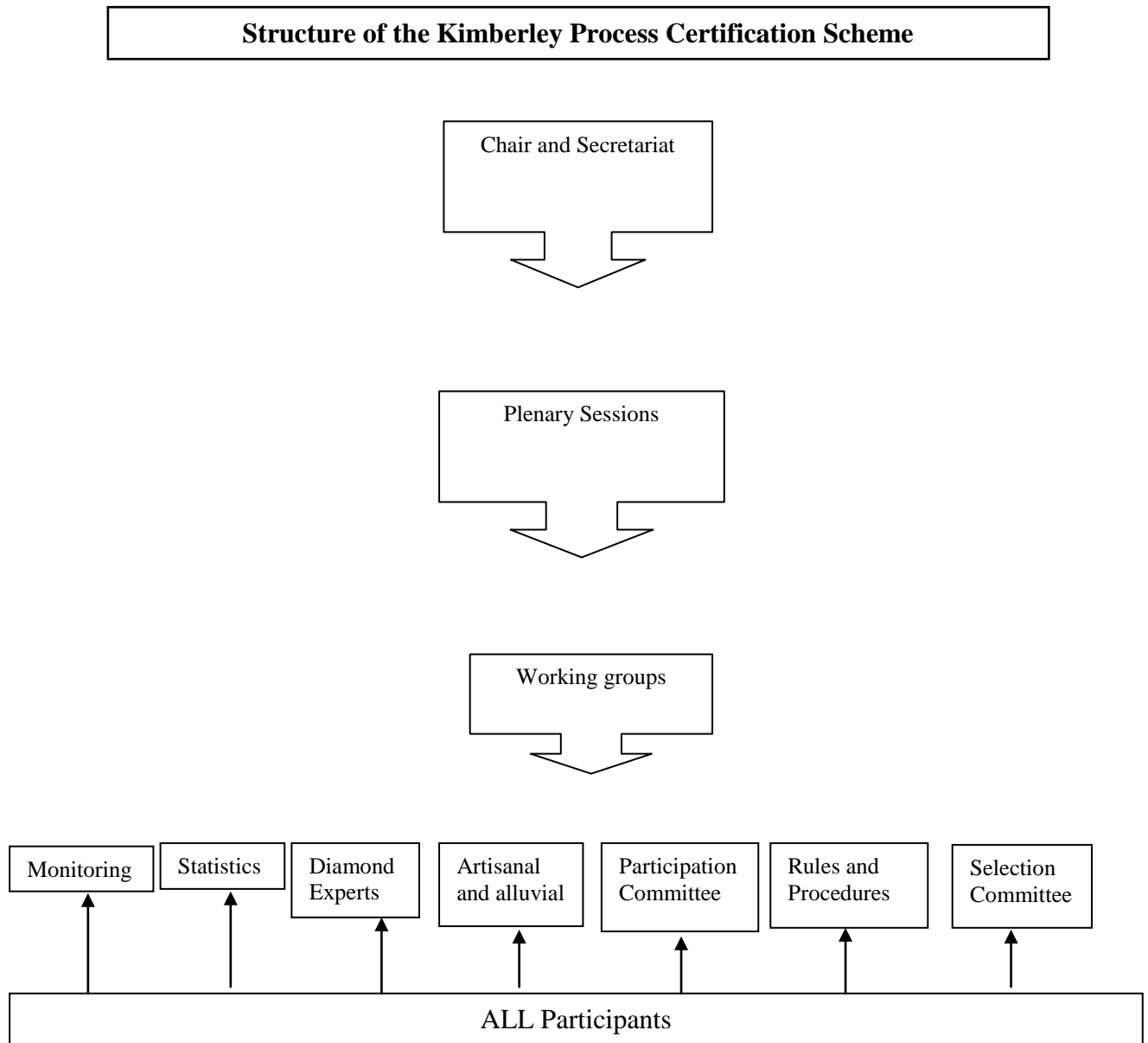
Having considered the context within which the Review ensued, the organisation of the Certification Scheme can now be examined. Thus the chapter is organised in six parts: organisation and working of the Certification Scheme; infringements and responses; technical provisions and difficulties experienced with implementation and monitoring; operational issues with implementation and monitoring; and the Peer Review Monitoring Mechanism (PRMM); statistical issues of the Certification Scheme and; finally internal controls.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

3. Organisation and working of the Certification Scheme

This is a diagrammatic representation of the organisation and working of the Kimberley Process Certification Scheme.



a. Structures and operational methods

Implementation of the Certification Scheme requirements is carried out by its Participants under national law pursuant to the requirements of the Certification Scheme.¹⁷ The duties of the Chair, and the working bodies of the Kimberley Process, have been allocated by consensual decisions of Plenary to Participants and Observers volunteering for such roles.¹⁸

Under structures and operational methods, the following will be discussed as matters for implementation: national laws; the Chair of the Certification Scheme; the KP Working Groups; a global inclusive partnership; and Participation Committees; compliance issues and statistical non-compliance. These are the factors which the Review took into account.

b. National laws

Firstly, Participant countries are expected to implement the provisions of the Certification Scheme into their respective jurisdictions. Secondly, Participant countries are expected to ensure that they adhere to the contents of the Certification Scheme in their relations with other Participants. Non-state Participants must ensure that the content of the Certification Scheme is included in their regulations and policies.¹⁹

c. The Chair of the Kimberley Process

The position of Chair of the Certification Scheme is essential to its operation. The Chair (which rotates each year among Certification Scheme Participant countries) oversees the various operations of the Certification Scheme.²⁰ The Chair's duties are extensive and may be expanded as requested. Duties range from hosting, organising, and preparing the agenda for

¹⁷ Section IV of the Certification Scheme.

¹⁸ Third Year Review at 61.

¹⁹ To date State Participants are: Angola, Armenia, Australia, Bangladesh, Belarus, Botswana, Brazil, Canada, Central African Republic, People's Republic of China, Côte d' Ivoire, Croatia, European Community, Ghana, Guinea, Guyana, India, Indonesia, Israel, Japan, Republic of Korea, Republic of Lao, Lebanon, Lesotho, Liberia, Malaysia, Mauritius, Mexico, Namibia, New Zealand, Norway, Republic of the Congo, Russian Federation, Sierra Leone, South Africa, Singapore, Sri Lanka, Switzerland, Tanzania, Thailand, Togo, Turkey, Ukraine, UAE, United States of America, Venezuela, Vietnam and Zimbabwe.

²⁰ Third Year Review at 62.

the annual Intercessional and Plenary meetings; to communicating regularly with Participants, Observers, Chairs of the Working Groups, prospective Participants, and others on Certification Scheme matters; to retaining and circulating Certification Scheme documents and addenda.²¹

d. The KP Working Groups

In general, the 2007 Review states that the Working Groups have enjoyed effective working relations among themselves, with successive Chairs and between Working Groups. The four main Kimberley Process Working Groups are: Working Group on Statistics, Working Group of Diamond Experts, Working Group on Monitoring, and the Participation Committee. In terms of the Review, it can be difficult for those who are not Working Group members to be aware of all the activities of the Working Groups. Chairs should be reminded of the need to place minutes of teleconferences and meetings on the Certification Scheme's website.²²

All decisions of the Certification Scheme are taken by Plenary. They are not taken by the Working Groups. Thus, the Review suggested that compilation of Certification Scheme decisions should be aimed at making it easier to follow recommendations and requirements as not all Participants are represented on all the Working Groups.²³ Physical meetings are held twice per year. For example the Intercessional and Plenary meetings, electronic communications, and teleconferences have served the Working Groups and Committees well in terms of their respective mandates.²⁴

However, some Participants were found to have failed to provide updated contact information following administrative, legislative, and/or personnel changes within their government agencies.²⁵ Omissions hinder effective communication, which is addressed by the Review in its Recommendation.²⁶ Some members of the various Working Groups have noted that time zone differences had made some teleconferences difficult to plan and execute. This is a valid concern, the Review noted, which is difficult to remedy.

²¹ Third Year Review at 63.

²² Third Year Review at 64.

²³ *Ibid.*

²⁴ Third Year Review at 65.

²⁵ Third Year Review at 65.

²⁶ Third Year Review in Recommendation No 10.

e. A global, inclusive membership

The Certification Scheme has remained open on a global, non-discriminatory basis to all countries and regional economic integration organisations willing and able to fulfill its requirements. Membership at the time of the Review stood at 74 Participants, the 25 EU Member States being represented by the EU as one Participant. These comprise the vast majority of all States interested in the trade in rough diamonds, including small and larger alluvial producers, industrial producers and trading and polishing and cutting centres, the diamond trade is represented by the World Diamond Council and civil society by Global Witness and Partnership Africa Canada.²⁷

f. Participation Committee

The Participation Committee was established in 2003.²⁸ It is responsible for assessing whether or not a Participant is in compliance with the minimum standards of the Certification Scheme. As such, it is the body that decides who can join the Certification Scheme, and who should be expelled for non-compliance. Its Terms of Reference detail its importance to the Certification Scheme.²⁹ They were revised at the Gataineau Plenary of 2004, and again at the Moscow Plenary of 2005.

Application for membership to the Certification Scheme falls within the purview of the Participation Committee. The Terms of Reference of the Participation Committee require that it considers applications for membership in an expeditious manner (within 30 days), and this has generally been followed.³⁰ During that time, the Committee should set out clearly the basis on which further inquiry is to be made, such as through expert missions or provision of additional information or studies.³¹

²⁷ A variety of international organisations participate on an *ad hoc* basis.

²⁸ The Participation Committee includes both civil society and industry Observers, and is required by its Terms of Reference to have appropriate geographical balance and the necessary expertise. It is chaired for a one year term by the former KP Chair. Its membership includes the Vice Chair of the KP.

²⁹ Third Year Review at 66.

³⁰ Third Year Review at 66.

³¹ *Ibid.*

The Review stated that applications for membership to the Certification Scheme should be judged not only on paper credentials but also on the reports of expert missions sent specifically to assess an applicant's capacity to implement the Certification Scheme's minimum requirements, where appropriate. Applicants should be made aware of the developments in Certification Scheme rules and practices since the original Certification Scheme document.³²

g. Compliance issues

Compliance means that Participants adhere to the minimum standards of the Certification Scheme.³³ The Participation Committee, in accordance with its Terms of Reference, must consider any relevant information submitted to it by the Working Group on Monitoring regarding compliance by a Participant.³⁴ It then determines whether, in its view, the Participant in question remains able and willing to meet the minimum requirements of the Certification Scheme.³⁵

If the Participation Committee finds that the Participant no longer meets the minimum requirements, it must notify the Chair in writing of the reasons for its conclusion; and may include a set of recommendations. In order to assist the Participation Committee further in its assessment of an applicant's ability to meet the Certification Scheme's compliance standards, the Review suggested that the Participation Committee should draw up a list of questions on the objectives of the applicant in joining the Certification Scheme, as well as listing the tasks required and mandatory documents and data to be submitted.

h. Statistical non-compliance

The collection and analysis of statistics is an important tool in the Certification Scheme's efforts to uncover sources and flows of conflict diamonds and illicit diamonds.³⁶ Although

³² *Ibid.*

³³ Third Year Review at 67.

³⁴ *Ibid.*

³⁵ The Certification Scheme's minimum standards are defined in Sections II, III, IV, and V, and Annexes I, II, and III.

³⁶ Third Year Review at 67.

progress on the issue of statistical non-compliance has been made since 2003, several Participants continue to submit their statistical reports after due dates.³⁷ As a result, the Participation Committee developed specific guidelines together with the Working Group on Statistics to deal with the issue of statistical non-reporting.³⁸ Procedures agreed to at the Moscow Plenary have improved the timeliness of statistical reporting according to the Review.

i. Dispute resolution and compliance issues

According to the Certification Scheme document, disputes are to be communicated to the Chair, ‘who is to inform all Participants without delay about the said concern and enter into dialogue on how to address it’.³⁹ The Chair also informs relevant observers about the dispute or concern, and Participants and observers are expected to treat the matter with strict confidentiality.⁴⁰

The Chair is responsible for mediating disputes, whether procedural or substantive in nature. By general consensus, mediation is perceived to have strengthened the Certification Scheme by showing it has ‘teeth’.⁴¹ To date, all other disputes have been handled informally by the Chair or by Working Groups within the terms of their mandate. Exclusion from the Certification Scheme, as suggested by the Review, should only be considered in the most serious cases of non-compliance, where the maintenance of a Participant inside the Certification Scheme would seriously jeopardise the integrity of the Certification Scheme.⁴²

j. Transparency

The Kimberley Process strives to be transparent.⁴³ However, it is concerned with balancing transparency and necessary confidentiality, as in the case, for example, of security

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ Section IV at para 16 of the Certification Scheme document.

⁴⁰ Third Year Review at 70.

⁴¹ *Ibid.*

⁴² Third Year Review at 70.

⁴³ Section V of the Certification Scheme.

requirements when dealing with politically sensitive and or commercially valuable information relating to the trade in rough diamonds, or information that is *sub judice*.⁴⁴ In its outreach to the public, the Certification Scheme's principal communication tool is its general website.

k. Websites

The Certification Scheme has two websites: the Rough Diamonds Statistics website⁴⁵ and the general website. The Rough Diamond Statistics website⁴⁶ is an internal tool for the collection of statistics and other related information relating to the trade in rough diamonds, which is operated, maintained and paid for by the Chair of the Working Group on Statistics.⁴⁷ According to the Review, statistical and related information could be published on the Statistics website in an area to be accessed by the public, or made available through a link to the general website.⁴⁸

With regard to the website, the responsibility to operate and maintain rests with the Chair.⁴⁹ The site has both a 'members only' section and a public section. The public section includes information on the background of the Certification Scheme, its structure, and selected documents. Critics claim,⁵⁰ correctly, that it does not include all the key Certification Scheme documents, such as national legislation relating to the Certification Scheme, or annual reports or, the full peer review reports, only summaries of those reports; that documents are not posted consistently or in a timely fashion; and that there is no obvious point of contact listed to request further information.⁵¹ The Review suggested that the Certification Scheme should make available on the public site all documents concerning the Certification Scheme that do not have confidentiality implications.⁵²

⁴⁴ Third Year Review at 71.

⁴⁵ Not available for public access at www.kimberelyprocess.com. Last visited 08 July 2011.

⁴⁶ *Ibid.*

⁴⁷ Third Year Review at 71.

⁴⁸ *Ibid.*

⁴⁹ Section VI(15) of the Certification Scheme.

⁵⁰ NGOs Partnership Africa Canada and Global Witness undertook studies to the contrary which will not be canvassed in this study.

⁵¹ Third Year Review at 72.

⁵² Partnership for Africa Canada and Global Witness 'Implementing the KP 5 years on' (2005) at 3-9.

To date, this suggestion has not been fully implemented. Minimum information is made available for public access.

I. The role of observers

i. The diamond industry's self-regulation

In October 2002, the International Diamond Manufacturers Association (IDMA) and the World Federation of Diamond Bourses (WFDB) created a voluntary system of self regulation, which required its members to sign a System of Warranties and a Code of Conduct.⁵³ The System of Warranties is supposed to guarantee the provenance of diamonds and certify that the diamonds sold are conflict-free.

While the System of Warranties and its Code of Conduct are voluntary, they require the expulsion of members who violated the system, and publication of their names.⁵⁴ They also require members to work with governments to publicise various pieces of information in support of the Certification Scheme and to 'assist and provide technical support regarding government regulations and trade resolutions restricting the trade in conflict diamonds to all legitimate parties in need of such information or expertise'.⁵⁵

ii. Civil society

Since the origin of the process at Kimberley in 2000, civil society representatives have played an essential role in motivating the Certification Scheme, in negotiating its establishment, and in its operation.⁵⁶ As active Observers of the process, NGOs such as Partnership Africa Canada and Global Witness continue to keep the issue of conflict diamonds in the public domain. They continue to champion other diamond-related activities such as the Diamond Development Initiative (DDI), which De Beers founded.⁵⁷

⁵³ Third Year Review at 75.

⁵⁴ *Ibid.*

⁵⁵ Third Year Review at 75; see also on advantages and disadvantages of regulation. Mistelis LA 'Regulatory aspects: Globalisation; harmonisation, legal transplants and law reform: Some fundamental observations' (2000) 34/3 *Int'l L* at 1059-60.

⁵⁶ Third Year Review at 75.

⁵⁷ *Ibid.*

The Review recommended that the Certification Scheme should cooperate with representatives of civil society, including at local levels, to promote effective Certification Scheme implementation, especially in those countries that have weak systems, limited capacity and or have been affected by conflict diamonds.⁵⁸

iii. Links with international organisations

The Certification Scheme's involvement with international organisations dates back to the UN GA Resolution 55/56 of December 2000, when the UN GA endorsed the Kimberley Process and urged the implementation of its Certification Scheme as soon as possible.

Since then, links with international organisations have been maintained, as shown by the participation in this Review by the World Bank, the International Monetary Fund and by UN Missions serving in the DRC (MONUC), Sierra Leone (UNAMSIL), Côte d'Ivoire (UNOCI) and Liberia (UNMIL).⁵⁹ The World Bank and IMF have attended KP Plenary meetings.

The Certification Scheme's Chairs have worked with the UN Security Council Sanctions Committee on Liberia and Côte d'Ivoire.⁶⁰ Increasingly, Participants are calling for a closer working relationship with international organisations, which have activities that are relevant to diamond production and trade.⁶¹

⁵⁸ *Ibid.*

⁵⁹ Third Year Review at 4 and 13.

⁶⁰ Third Year Review at 75.

⁶¹ International organisations include the United Nations Development Programme, international financial institutions like the World Bank and other multilateral development banks, and the UN Secretariat; see also in general Hopkins K 'Assessing the world's response to Apartheid: An historical account of international law and its part in the South African transformation' (2002) 10 *Univ of Miami Int and Comparative Law LR* at 65.

m. Impact of the Certification Scheme

i. Curbing production and trade in conflict diamonds

According to the Review, it is difficult to quantify the exact impact of the Certification Scheme in curbing the illicit production and trade of diamonds in countries affected by conflict diamonds, as well as on the international diamond trade.⁶²

Given the difficulties posed by attempts to regulate an international trade of such complexity, added to the problems posed by artisanal mining, porous borders, lack of infrastructure and the nature of the illicit trade itself, as it exists today the Certification Scheme cannot completely control the entire trade.⁶³ According to the Review, there is near unanimous agreement on the effectiveness of the Certification Scheme in responding to its UN mandate.⁶⁴ The majority of Participant countries agreed that they were making significant progress in meeting the requirements of the Certification Scheme. The DRC and the RoC expressed concerns over technological and logistical infrastructure within their respective national systems.

Côte d'Ivoire also disagreed, stating that the Certification Scheme 'has not effectively responded to the mandate given by the relevant UN GA resolution to combat the threat of conflict diamonds. It stated that despite the implementation of the Certification Scheme, Ivorian diamonds have been sold to the international market without any sanctions for those involved in that trade'.⁶⁵ In 2005 the Certification Scheme began monitoring the illicit production of diamonds in the north of the country.

The UN Panel of Experts on Côte d'Ivoire subsequently confirmed the production and trade of conflict diamonds from Côte d'Ivoire.⁶⁶ The Certification Scheme adopted a nine point resolution in November 2005, with detailed provisions.⁶⁷ The Chair reported to the

⁶² Third Year Review at 75-80.

⁶³ Third Year Review at 17.

⁶⁴ *Ibid*; see also Goldman HB 'Between a RoC and a hard place: The Republic of the Congo's illicit trade in diamonds and efforts to break the cycle of corruption' (2008-2009) 30 *U Pa J Int'l L* at 362-3.

⁶⁵ Côte d'Ivoire: Submission for the 2006 Review of the Certification Scheme (March 2006) at 2.

⁶⁶ Third Year Review at 18.

⁶⁷ *Ibid*.

Intercessional in June 2006 on progress implementing these requirements.⁶⁸ Unfortunately, these actions have not stopped Ivorian diamonds from reaching the international diamond market without a certificate of origin.

ii. The case of Côte d'Ivoire

Rebels control two of Côte d'Ivoire's main diamond-mining areas, Bobi- Seguela and Tortiya, which are estimated to produce 200,000 carats per year.⁶⁹ From the beginning of the Certification Scheme, Côte d'Ivoire has suspended the issuance of Certificates and prohibited the export of rough diamonds from its territory through the issuance of Ministerial decree no 0070/mme/dm of 19 November 2002, following the hostilities of 18 September 2002. At the same time, Liberian conflict diamonds continued to seep into the international market, at a rate of between 100,000 and 400,000 carats per year.⁷⁰

The expert mission in March 2005 found that, while potential production could be in the range of 100,000 to 400,000 carats per year, only a small proportion of mining sites were being worked.⁷¹ Specifically, the mission report noted that 'during 2004, UN sanctions and Liberian Government actions appear to have reduced visible artisanal mining activity that had held the potential to circumvent sanctions from 16 to three mining operations'.⁷² Whereas the Certification Scheme could not prove that diamonds are produced in Liberia, it did state that Liberia was a conduit state for diamond smuggling. The situation in Côte d'Ivoire is one where the territory is also being used for conduit diamond smuggling. Also, it is a diamond producing state.

Like in Liberia, the Certification Scheme took a number of steps to objectively analyse the situation in Côte d'Ivoire. In April 2005, the Review states that the past Chair went to Côte d'Ivoire as special envoy of then Chair, Russia. This resulted in a report from the Chair to the

⁶⁸ *Ibid*; On the lack of efficacy of the Certification Scheme, see Fluet ER 'Conflict diamonds: US responsibility and response' (2004-2005) 7 *San Diego Int'l LJ* at 111-13 and 103-24.

⁶⁹ *Ibid*.

⁷⁰ On the assumption that Liberian production can be valued at somewhere around US\$100/ct, this would be equivalent to ongoing annual production of somewhere in the region of 140,000 cts. Kimberley Process Working Group on Monitoring: Submission for the 2006 Review of the KPCS (February 2006) at 2.

⁷¹ The UN Panel of Experts on Liberia, in its report of November 2005, estimated current Liberian production to be in the region of about US\$1.2 million per month.

⁷² Third Year Review at 18.

UN SC that alerted the international community to the issue. Subsequently, the UN SC nominated a diamond expert to the Panel of Experts on Côte d'Ivoire.⁷³

Investigations conducted by the UN Panel of Experts on Côte d'Ivoire suggested that there are a number of exit routes for Ivorian diamonds in both the north and south of the country, and smuggling routes operating through countries outside the Certification Scheme.⁷⁴ Other routes may have involved Ivorian production being laundered through Participants in breach of the Certification Scheme's rules.⁷⁵ The Chair gave an interim report on implementation of the resolution in the June 2006 Gaborone Intercessional.⁷⁶

Experts on Côte d'Ivoire in April 2006 were tasked to assess the extent of conflict diamond production in the northern part of the country under rebel Forces Nouvelles control.⁷⁷ All Participants in the region (Ghana, Guinea, Sierra Leone, Togo) agreed to record the quality characteristics of their exports in accordance the Certification Scheme, an optional measure with a view to identifying occasions where Côte d'Ivoire diamonds could be brought into the legitimate rough diamond trade.⁷⁸

The Gaborone Resolution aforementioned also requires Participants to report to the Chair any incoming shipments of rough diamonds which they suspect of containing diamonds of Côte d'Ivoire origin. Further, the Gaborone Resolution provided that Participants must institute appropriate action against any of their nationals or companies found to be involved in the production of diamonds in Côte d'Ivoire or in the trade in such diamonds.⁷⁹ Representative organisations of the international diamond industry were requested the full cooperation of all

⁷³ On the lack of efficacy of the Certification Scheme, see Fluet 'Conflict diamonds' (2004-2005) at 111-3.

⁷⁴ Third Year Review at 18.

⁷⁵ *Ibid.*

⁷⁶ At paras 1 and 4 of the Moscow Resolution, and at para 12 of UN GA Resolution UN Doc A/UN/SCR 1643 (2005), KP experts participated in a joint field trip to Côte d'Ivoire with the UN Panel 'Resolution adopted by the Kimberley Process Plenary meeting, Moscow, 15-17 November 2005, on the subject of illicit diamond production in Côte d'Ivoire'.

⁷⁷ At paras 1 and 4 of the Moscow Resolution, and para 12 of UN GA Resolution UN Doc A/UN/SCR 1643 (2005), KP experts participated in a joint field trip to Côte d'Ivoire with the UN Panel 'Resolution adopted by the Kimberley Process Plenary meeting, Moscow, 15-17 November 2005, on the subject of illicit diamond production in Côte d'Ivoire' at 17-25.

⁷⁸ Third Year Review at 17-20.

⁷⁹ Third Year Review at 20.

sections of the international diamond industry in ensuring that rough diamonds produced in Côte d'Ivoire cannot be introduced into the legitimate trade.⁸⁰

Despite greater international awareness of the problem of conflict diamonds created by the Kimberley Process, the trade in conflict diamonds has not yet been totally eradicated.⁸¹ In terms of the Review, the Côte d'Ivoire situation demonstrates the need for vigilance on the part of all Participants and Observers concerning the threat of conflict diamonds.⁸² Whilst accurate statistics on the current production and trading of conflict diamonds, in terms of the Review, are very difficult to determine, all available data suggest that the major proportion of the international trade in rough diamonds is carried out within the Certification Scheme.⁸³

While the peer review mechanism does not by itself yield a detailed quantitative assessment of the percentage of the trade covered by the Certification Scheme, the reports of review visits do show general developments. The review visits carried out to date to the DRC, Sierra Leone and Angola together with the statistical reports and responses to the questionnaires from these Participants, point to substantial increases in the proportion of diamonds exported through official channels as a result of Certification Scheme implementation, alongside other factors such as overall stabilisation of the countries in question and the implementation of peace agreements.⁸⁴

In addition to review visits, the KP WGM carried out *ad hoc* monitoring activities on Liberia and Côte d'Ivoire.⁸⁵ These two countries were subjected to UN embargos on their diamond exports.⁸⁶ The Review Report specified 'during 2004, UN sanctions and Liberian Government actions appear to have reduced visible artisanal mining activity that had held the potential to circumvent sanctions, from 16 to 3 mining operations'.⁸⁷ The UN Panel of Experts on Liberia, in its report of November 2005, estimated Liberian production to be in

⁸⁰ *Ibid.*

⁸¹ *Ibid.* On the lack of efficacy of the Certification Scheme, see Fluet 'Conflict diamonds' (2004-2005) at 111-113; see also Holmes 'The Kimberley Process' (2006-2007) at 222-8 on the Certification Scheme.

⁸² Third Year Review at 18-20.

⁸³ Third Year Review at 20.

⁸⁴ Third Year Review 17-20; see Africa Research Bulletin 'Commodities' (2007) for Sierra Leone, Angola and the DRC on diamonds and their rate of production; see also Smillie 'Killing Kimberley' (2006) at 6-15.

⁸⁵ Third Year Review at 17-20.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

the region of about US\$1.2 million per month.⁸⁸ It is likely that at least a significant proportion of this production is reaching world markets by various routes.⁸⁹

In summary, ten key problem areas may be identified with the organisation of the Certification Scheme with regard to implementation and monitoring. Firstly, the Working Group assumes a working knowledge of the Participants as regards the Certification Scheme. Under structures and operational methods, the following will be discussed as matters for implementation: national laws; the Chair of the Certification Scheme; the KP Working Groups; a global inclusive partnership; and Participation Committees; compliance issues and statistical non compliance. These are the factors which the Review took into account. The organisation of the Certification Scheme for implementation and monitoring presents problems.

Firstly, the Review assumes that Participants have implemented the Certification Scheme into their respective jurisdictions. Secondly, Participant countries are expected to ensure that they adhere to the contents of the Certification Scheme in their relations with other Participants. Non- state Participants must ensure that the content of the Certification Scheme are included in their regulations and policies. With regards to the Chair, the Certification Scheme assumes that Chairs undertake to fulfil all their duties imposed by the Kimberley Process.

Thirdly, pertinent to the four Working Groups, not all Participants are aware of the activities of all working Groups. The four main Kimberley Process Working Groups are: Working Group on Statistics, Working Group of Diamond Experts, Working Group on Monitoring, and the Participation Committee. In terms of the Review, it can be difficult for those who are not Working Group members to be aware of all the activities of the Working Groups. Some Participants have failed to timeously submit data to the WG which hampers their work. Some members of the various Working Groups have noted that time-zone differences have made some teleconferences difficult to plan and execute.

Fourthly, the Participation Committee is responsible for assessing whether or not a Participant is in compliance with the minimum standards of the Certification Scheme. As such, it is the body that decides who can join the Certification Scheme, and who should be

⁸⁸ *Ibid.*

⁸⁹ Third Year Review at 21.

expelled for non-compliance. Its Terms of Reference detail its importance to the Certification Scheme. They were revised at the Gataineau Plenary of 2004, and again at the Moscow Plenary of 2005.

Fifthly, compliance means that Participants adhere to the minimum standards of the Certification Scheme. Sixthly, the Participation Committee, in accordance with its Terms of Reference, must consider any relevant information submitted to it by the Working Group on Monitoring regarding compliance by a Participant. It then determines whether, in its view, the Participant in question remains able and willing to meet the minimum requirements of the Certification Scheme.⁹⁰

Seventhly, the issue of dispute resolution and compliance is dealt with by the Chair. This is problematic due to the rotation of the Chair. Moreover the Chair is a Participant to the Certification Scheme. The next issue of transparency affects the efficacy of the Certification Scheme. In the same vein is the matter of websites which was also not sufficiently addressed in the Review.

Tenthly, the role of observers comprises three aspects: the diamond industry self-regulation; civil society and links with international organisations. All three aspects presented problems in the Review.

Finally, with respect to the true impact of the Certification Scheme, in curbing the production and trade in conflict diamonds, Côte d'Ivoire made its important submissions, already referred to. The submissions by Côte d'Ivoire reflected the lack of practical workability of the Certification Scheme.

Against the background of the organisation of the Certification Scheme, and its implementation and monitoring, it is now necessary to investigate the 'infringements' of the Certification Scheme and the responses by the Kimberley Process.

⁹⁰ The Certification Scheme's minimum standards are defined in Sections II, III, IV, and V, and Annexes I, II, and III.

4. Infringements and responses

This chapter will proceed to discuss the Review's findings in regard to infringements of the Certification Scheme and the responses rendered with regard to the same.

Understanding the infringements will enable the study to determine the weaknesses and strengths of the Certification Scheme in practice. The efficacy of the Certification Scheme may also be measured in terms of the number of reported cases of infringement in relation to the number of cases that are pursued through the judicial channels of respective Participants.⁹¹ This, according to the Review, provides evidence that the Certification Scheme is being enforced in Participant countries.

With respect to the Review Questionnaires, nearly half of the Participants reported no cases of Certification Scheme infringement.⁹² Among the Participants that did report instances of infringement on their questionnaires, the number of cases ranged most commonly from one to five. For example, the Review stated that since the implementation of national legislation in January 2003, Canada recorded five cases of infringement, resulting in one conviction, two forfeitures, and two cases still under investigation.⁹³

Three Participants reported more than five cases of infringement on their questionnaires: Australia recorded eight, Sierra Leone recorded 16, and the EC recorded 26.⁹⁴ In each country, the cases were investigated in conjunction with customs officials and in accordance with national legislative provisions and judicial procedures.⁹⁵

⁹¹ Third Year Review at 22; see Fishman 'Is diamond smuggling forever' (2004-2005) at 217-42 on why the Certification Scheme is not effective.

⁹² China, India, Israel, Japan, the Russian Federation, and the United States did not report cases of infringement on their KP Review Questionnaires, despite having mentioned such cases in their 2003 and/or 2004 Annual Reports. For example, US authorities seized four rough diamond shipments in 2004. Brazil and Venezuela did not submit a response to the KP Review Questionnaires.

⁹³ Third Year Review at 22; see Smillie I 'Fire in the ice: Benefits, protection and regulation in the Canadian diamond industry' (2002) *Partnership Africa Canada: Diamonds and human security project* Occasional Paper No 2 at 10-15 where Canada is cited as an example.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

The responses of Participants to instances of infringements varied from case to case. The vast majority of cases led to the seizure of the parcel or shipment of rough diamonds in question.⁹⁶ Some parcels of rough diamonds were returned to the exporting country while others were forwarded to the intended recipient pending receipt of proper documentation.⁹⁷

Several cases led to the imposition of fines and the commencement of criminal proceedings following police investigations and other judicial instruments.⁹⁸ Reporting seizures and cases of infringements is not mandatory for Participants, although the Review recommended their inclusion in the Annual Reports. The Working Group on Review suggested that detailed information on infringements would be useful to the authorities of Participants both at home and abroad in efforts to identify the actors involved, the origin of the diamond shipments, and the routes taken as part of the overall effort to increase the efficacy of the Certification Scheme.⁹⁹

According to the Review, illegal diamond mining and trading has become a less viable option for rebel groups than in the past.¹⁰⁰ The Review Working Group recommended that high priority should be given to the nine points contained in the KP resolution on Côte d'Ivoire.¹⁰¹

The DRC, in its response to the Review Questionnaire, stated that it was 'totally satisfied' with the creation of the Certification Scheme and pointed to export statistics as one proof of the success of the Certification Scheme in combating the illicit production and trade in diamonds in countries previously affected by conflict diamonds.¹⁰² When the KP excluded the RoC from exporting legally to any major diamond-trading centre, exclusion appears to have contributed to a dramatic increase in legal exports from the DRC, since illegal routes were no longer available.¹⁰³

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ Third Year Review at 22; see Smillie 'Fire in the ice' (2002) at 10-1.

⁹⁹ Third Year Review at 23; see Smillie 'Killing Kimberley' (2006) at 9-11.

¹⁰⁰ Third Year Review; Olsson 'Diamonds are a rebel's best friend' (2006) at 1338-42 on rebels in Sierra Leone, the DRC and Angola 1333-49.

¹⁰¹ Third Year Review at 23; see Smillie 'Killing Kimberley' (2006) at 9-11.

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

In the case of Sierra Leone, the KP review visit found that the certification system had facilitated greater control over the diamond industry and reduced smuggling through the monitoring and control of diamond exports.¹⁰⁴ The review visit estimated that the official system captured up to 80 percent of production.¹⁰⁵

In Angola, the KP has also seen a dramatic increase in legal exports of diamonds.¹⁰⁶ In its response to the Review Questionnaire, Angola stated that it considered the Certification Scheme 'efficient'. Further, Angola stated that the end of local conflict and the implementation of the Certification Scheme have enabled it to significantly increase its control of its diamond production and trade, thereby increasing state fiscal revenue and discouraging the activities of rebel groups.¹⁰⁷

The Review suggested that the Certification Scheme should closely monitor the situation in the DRC, Sierra Leone, Angola and Liberia. A variety of natural resources, including diamonds, fuel conflicts.¹⁰⁸ While the Certification Scheme makes illicit rough diamonds less attractive as a means of financial support for rebel groups, it is not, of course, an absolute deterrent.¹⁰⁹ The DRC was encouraged, through the Chair, to invite a second KP review visit and the Expert Panels, which would allow the Certification Scheme to closely monitor the local situation.¹¹⁰

Although the conflict diamond trade was significantly reduced through the implementation of the Certification Scheme in Sierra Leone, Angola and the DRC, it must be borne in mind that the reports arise from the Certification Scheme itself. The Review was based on country reports and the Review visits undertaken by the KP. This may have tainted an objective

¹⁰⁴ Third Year Review at 23; see Smillie 'Killing Kimberley' (2006) at 9-10; see Shaw 'Regional dimensions of conflict' (2003) at 487-98 on 'external actors' including transnational mining corporations and their roles and at 492-3 on 'West Africa: blood diamonds and the Kimberley Process'.

¹⁰⁵ *Ibid*, According to Sierra Leone's official export statistics, the total value of exports increased from US\$26 million in 2001, to US\$155million in 2004, and US\$142 million in 2005.

¹⁰⁶ KP statistics show that the value of diamonds exported by Angola was US\$739 million in 2003, US\$773 million in 2004, rising to US\$1,089 million in 2005; see Third Year Review at 24; Smillie 'Killing Kimberley' (2006).

¹⁰⁷ Third Year Review at 24.

¹⁰⁸ United Nations Mission in the Democratic Republic of Congo (MONUC): Submission for the 2006 Review of the Certification Scheme (March 2006); and Global Witness: Submission for the 2006 Review of the KPCS (March 2006); see also UN Experts Meeting on 'Natural resources and conflict in Africa: Transforming a peace liability into a peace asset' 17-19 June Parts V and VI (2006).

¹⁰⁹ Third Year Review at 25.

¹¹⁰ *Ibid*.

assessment as other reports by civil society organisations and NGOs continually demonstrated that some of the factual assessments made by the KP were in fact contestable. After having briefly indicated past infringements of the Certification Scheme the KP's responses, it will be necessary for to consider the technical provisions of the Certification Scheme and difficulties arising there from.

5. Technical provisions and difficulties experienced

Having considered the contents of the Certification Scheme and its implementation and monitoring; and the Review process as well as the organisation of the Certification Scheme; and the infringements and responses to such infringements, it is now necessary to consider technical difficulties experienced by Certification Scheme in implementation and monitoring, as identified by the Review Panel.

Understanding problems with implementation as regards technical provisions will provide greater understanding of the Certification Scheme in implementation and monitoring. According to the findings of the Review Panel, the technical provisions are generally workable and effective in contributing to the aims of the Certification Scheme. This may be attributed to collaboration between the different stakeholders and consultations with other regulators during the negotiations that led to the Certification Scheme.¹¹¹ Nevertheless, and again in terms of the Review, it is evident from the responses to the Certification Scheme's Review Questionnaire that several technical provisions and operating procedures still pose problems and challenges to implementation.

In order to address implementation difficulties and to suggest improvements to existing working methods and administrative procedures, the Working Group of Diamond Experts (WGDE)¹¹² was created in 2003. The WGDE also provides diamond expert opinion and technical assistance to all participating countries and KP Working Groups in order to be able to fully implement the Certification Scheme or to improve the data collection and reporting capabilities of the importing or exporting national authorities.¹¹³

The establishment of a series of technical guidelines to address technical problems by the WGDE was well received by Participants. At first, the WGDE was concerned about instances in which the legitimate trade in rough diamonds was hindered. Subsequently, the attention

¹¹¹ Third Year Review at 26.

¹¹² The WGDE consists of representatives of Australia, Botswana, Canada, China, the European Community, India, Israel, the Russian Federation, South Africa and the World Diamond Council. It is chaired by the World Diamond Council and assisted by South Africa. The author has relied on the information provided in the Review document; this information is deemed confidential and is therefore not available to the public at large. Like the public, the author is prohibited from accessing this information. Only Participants are permitted access to this information.

¹¹³ Third Year Review at 26.

shifted to more complicated matters such, as Harmonized System (HS) classification difficulties and value discrepancies.¹¹⁴

Partial solutions were obtained by suggesting changes to the Explanatory Notes of the HS Classification. These changes were adopted by the World Customs Organization (WCO) HS Committee in May 2004.¹¹⁵ Some issues remain for the WGDE's attention. Classification difficulties between rough and polished diamonds are being investigated. An important part of the work of the WGDE has centred on the 'Harmonization of Valuation Methodologies'.¹¹⁶

The work on this topic is ongoing and will, ideally, result in a hierarchical order of valuation methods, the identification of what constitutes an 'unacceptable value discrepancy', and remedial procedures to be followed in case of such an occurrence. An issue that has remained in WGDE's agenda is the issue of samples and scientific shipments, for which no workable solutions have been proposed to date.

With regard to samples in particular, significant preparatory work has already taken place. One 'best practice' has been identified regarding the shipment of diamondiferous core and bulk samples to specialised laboratories.¹¹⁷ Still to be addressed is the current impossibility of sending extracted rough diamonds to countries from which they have been derived, but that are not yet Participants of the Certification Scheme.¹¹⁸ There is also the difficulty that scientific samples of rough diamonds cannot be exchanged with research institutes located in non-Participant countries.

The Moscow Plenary introduced the WGDE's role in engaging in a discussion with transnational companies such as banks, insurance and especially international courier companies, in order to investigate potential loopholes that may exist on this transnational level and consequently to suggest remedies.¹¹⁹

¹¹⁴ Third Year Review at 26.

¹¹⁵ Third Year Review at 27.

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ Third Year Review at 27.

a. Diversity in national laws and practice

Pursuant to its mandate, implementation of the Certification Scheme relies on national laws, procedures and personnel of Participants.¹²⁰ A consequence of this individualised approach is the absence of harmonisation in implementation, as Participants have interpreted the Certification Scheme's document in different ways. However, it is not certain that an international, harmonised approach would have yielded fewer discrepancies when translated into national law.

An example of this variance in national legislation is demonstrated by the translation of the minimum requirement that a valid and validated Certificate must accompany every rough diamond shipment. Some Participants have concluded that this requirement is met when the KP Certificate is packed inside the sealed tamper resistant container.¹²¹ Other Participants have concluded that no verification of the legitimacy of the shipment is possible while in transit, and consequently some attach the Certificate outside the container while others add it to the commercial documents accompanying the shipment.¹²²

Another consequence of differences under national legislation is that there may be a legislative gap between the moment when the rough diamond shipment leaves the exporting Participant and when it arrives at its destination, depending on the scope of jurisdiction under the two legislative systems concerned.¹²³

b. Definitions

The definitions listed in Section 1 of the Certification Scheme document sometimes conflict with definitions used by other authorities, notably customs.¹²⁴ This is particularly true of the terms *import*, *export*, *transit* and *country of origin*. In the judgment of the Chair of the

¹²⁰ UN GA Resolution UN Doc.A/RES/55/56 (2000).

¹²¹ Third Year Review at 28; Kaplan 'Carats and sticks' (2003) 559-581; see also Smillie 'Killing Kimberley' (2006) at 9-11.

¹²² *Ibid.*

¹²³ Third Year Review at 28.

¹²⁴ Third Year Review at 28.

WGDE, this conflict ‘may weaken the implementation of the Certification Scheme or even jeopardise the legitimate rough diamond trade’.¹²⁵

i. Transit

The Certification Scheme considers *transit* as the physical passing of a shipment of rough diamonds through the geographical territory of a Participant on its way from the exporter to an importer. The definition that most customs services apply is slightly different. When an importer refuses to accept a shipment *before* customs clearance, customs will simply return the shipment to the sender and will consider this a *transit* shipment.

However, when a shipment contains rough diamonds, this may be considered by some Participants to be problematic, as the returned shipment is not accompanied by a new KP Certificate.¹²⁶ Some Participants interpret *import* literally, as stated in Certification Scheme’s definitions, as the physical entry into the geographical territory of a Participant.¹²⁷ This interpretation requires that when the goods are returned, they should be covered as an *export* by a new Certificate, issued by the Participant that is returning the goods.¹²⁸

There has been little progress made in clarifying these definitions.¹²⁹

ii. Country of origin

The use of the term ‘country of origin’, but with a different meaning to the same term defined by WTO/WCO/Customs, has caused confusion.¹³⁰ To correct this problem, the WGDE issued Technical Guidelines 7, 12 and 15 to address different consequences of the issue. Technical Guideline 15 recommends that Certificates use ‘country of origin (mining)’.¹³¹

¹²⁵ *Ibid.*

¹²⁶ *Ibid*; see Smillie ‘Killing Kimberley’ (2006) at 9-10.

¹²⁷ Third Year Review at 28.

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

¹³⁰ Third Year Review at 28.

¹³¹ Third Year Review at 29; see Technical Guideline 12 has been issued to recommend filling the space after country of origin (mining) with asterisks when the country of mining of the diamonds is unknown, or when the diamonds are from different mining countries.

iii. Import/Export

There is no definition of ‘exporter’ or ‘importer’ in the Certification Scheme, but Technical Guideline 11 does state that the Exporter listed on the Certificate should have an address in the geographical territory of the Participant that issues the KP Certificate.¹³² Also, an address in the geographical territory of the importing Participant should be provided on the Certificate.¹³³

There is a risk of further confusion caused by missing definitions. Terms required on the Certificate are ‘*importer, exporter, number of parcels and deviations*’. The latter occurs when shipments of rough diamonds accompanied by a Certificate end up in a different Participant than the one mentioned as importer on the Certificate. None of these terms are defined in Section 1 of the Certification Scheme.¹³⁴

iv. Value

From the inception of the Certification Scheme, the issue of value disagreements has been, and continues to be, one of the most difficult problems on which the WGDE has had to advise.¹³⁵ It was repeatedly raised by Participants in responses to the Review Questionnaire, who pointed out that valuation methodologies have not been standardised.¹³⁶

Technical Guideline 6 states that ‘the value in US\$ on the Certificate remains a vital parameter for the successful implementation of the Certification Scheme and therefore reiterates that the mention of the value in US\$ on the Certificate is a minimum requirement of the Certification Scheme’.¹³⁷ Accordingly, the Review found that the WGDE was seized of the outstanding technical problem and decided to engage in discussions on ‘Harmonization of Methodologies’.

¹³² Third Year Review at 29.

¹³³ *Ibid.*

¹³⁴ In the case of the term ‘number of parcels,’ the issue was identified and addressed at the Gatineau Plenary (2004) where a ‘best practice’ was adopted.

¹³⁵ Third Year Review at 30; see Technical Guideline 12 has been issued to recommend filling the space after country of origin (mining) with asterisks when the country of mining of the diamonds is unknown, or when the diamonds are from different mining countries.

¹³⁶ *Ibid.*

¹³⁷ Third Year Review at 30; see Smillie ‘Killing Kimberley’ (2006).

v. Classification (Harmonized System codes)

The apparent lack of consistency within the Certification Scheme to classify rough diamonds using the Harmonized System (HS) codes has been problematic for some Participants.¹³⁸ This may be a consequence of the Certification Scheme being enacted through respective national legislations with the reliance on the KP authorities' interpretation of the HS System.¹³⁹ For almost all Participants, the agency responsible for commodity classification issues is Customs, which bases its classification on the HS System (WCO/WTO).¹⁴⁰

In cases where classification is at issue, any resulting action such as detaining shipments has implications for the relevant authorities and industry.¹⁴¹ In the judgment of the Chair of the WGDE, 'the value and classification disagreements have become increasingly problematic and are hampering trade'.¹⁴² Despite the issuance of Technical Guideline 5 and despite amending the explanatory notes of the HS Classification 7102 in May 2004, problems still remain. The WGDE is of the opinion that the way forward lies in collecting and making available a photographic library that documents and visualises the distinction between the different HS codes following the amended Explanatory Notes.¹⁴³

vi. The Kimberley Process Certificate

The Certification Scheme's document sets out the requirements for Certificates, which must conform to the minimum standards.¹⁴⁴ Technical Guidelines 4, 8 and 9 provide additional requirements and an Administrative Decision requires a maximum validity of 60 days. The Participation Committee is responsible for assessing the conformity of Certificates of applicants with these requirements.¹⁴⁵

¹³⁸ Third Year Review at 30.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

¹⁴² Third Year Review at 29; see Technical Guideline 12 has been issued to recommend filling the space after country of origin (mining) with asterisks when the country of mining of the diamonds is unknown, or when the diamonds are from different mining countries.

¹⁴³ *Ibid.*

¹⁴⁴ Section II, Annex I of the Certification Scheme.

¹⁴⁵ Third Year Review at 31.

There are many variations in type, style and duration of validity of Certificates, particularly in the area of security features. The Certificates of some Participants show minimal security features, whereas other Participants have invested in having a secure, tamper resistant document with sets of security features.¹⁴⁶ Variations have often led to confusion among authorities attempting to authenticate Certificates. They have also led to delays when additional information was sought, and in some cases have led to the seizure of shipments when Certificates differed from the specimens which were on file.¹⁴⁷

vii. Technical Guideline 10

Although it is not required, Participants are encouraged to break down shipments with more than one HS code by carat weight/US\$ value per HS code classification. Those with artisanal alluvial productions should be encouraged to list the quality characteristics of the rough diamonds in the shipment on the reverse of their Certificates, as it makes identification of the shipment more certain, and permits a more rigorous analysis of data.¹⁴⁸

viii. Errors in filing in KP Certificates

There are some recurrent errors in filling in Certificates. According to Technical Guideline 10, Participants should not impose undue burdens on other Participants, which can arise if Participants return shipments unnecessarily, raising the question of who should pay the resulting costs.¹⁴⁹ In terms of the Review, shipments should not be blocked because there is no advance notification (or other optional features on the KP Certificate are absent).¹⁵⁰ Only Certificates that do not comply with the Certification Scheme's requirements should be rejected.

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

¹⁴⁸ Third Year Review at 32. This procedure is recommended in Part B, Optional Certificate Elements in Annex I of the Certification Scheme.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*

ix. Mandatory import confirmation

According to the Review, import confirmation is mandatory. What is optional is the manner in which it is confirmed. Accordingly Annex I, paragraph B suggests that the Certificate might include a section that could be detached and returned to the exporter to confirm the import. The alternative or additional method is by e-mail.¹⁵¹

Reports from review visits make it clear that import confirmation is taking place more and more systematically.¹⁵² The information required on the import confirmation is the KP Certificate number; the name of the Participant confirming the import, and the date should be systematised.¹⁵³ Accordingly, it was recommended that the Working Group on Monitoring should monitor compliance with this requirement, and if noncompliance continues, the matter will be referred to the Participation Committee.¹⁵⁴

x. Who should confirm?

Most Participants delegate this responsibility to their KP Authority or sometimes customs. Review visits have discovered that detachable import confirmation parts of issued Certificates are returned sometimes bearing only the stamp and signature of private diamond companies.¹⁵⁵ According to the Review, confirmation notice requires an endorsement by an importing authority of a Participant to legalise or authenticate the confirmation.

xi. Advance notice of shipment

Annex II, Recommendation 21 of the Certification Scheme suggests that an advance notice of shipment be sent. For security reasons this notice should be encrypted, as outlined in Technical Guideline 10.¹⁵⁶ However, if import confirmation becomes a routine practice, as required, there is less reason for advance notification.¹⁵⁷ Another approach to mandatory

¹⁵¹ Third Year Review at 33.

¹⁵² Third Year Review at 33.

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*; see Smillie 'Killing Kimberley' (2006) at 9-10.

¹⁵⁶ Third Year Review at 33.

¹⁵⁷ *Ibid.*

confirmation of imports is to investigate the feasibility of having an interactive website or database into which all Participants would enter details of exports, and confirm details of imports.¹⁵⁸

xii. Distinction between rough diamonds and powder: Technical Guideline 13

No consensus could be reached (within the WGDE) in discriminating between ‘stones’ belonging to HS Classification Codes 7102.10-7102.21 or 7102.31, and ‘dust and powder of diamonds’ belonging to HS Classification Code 7105.10.¹⁵⁹ The WGDE adopted Technical Guideline 13 limiting the scope of the Certification Scheme to rough diamonds of a one millimetre circumference.¹⁶⁰

Unfortunately this ‘solution’ did not yield the results that were expected.¹⁶¹ The adoption of Technical Guideline 13 did not resolve the issue of distinguishing between rough diamonds and powder. There has been a repeated and widespread call for a consolidation of all technical guidelines and technical advice in one easily accessible place.¹⁶² The Review recommended that a consolidated technical guidance annex be created to form part of the Compilation of Kimberley Process Documents.¹⁶³

There remain, thus, significant difficulties with technical operations of the Certification Scheme’s provisions despite the investigations by the Working Groups and the passage of Technical Guidelines. They are highlighted in turn.

c. Diversity in national laws and practice

The Certification Scheme assumed at the outset that laws and practices will be uniform with respect to implementation. Still, there are difficulties because Participants differ in the national laws and practices through vagaries of interpretation. Moreover the Certification

¹⁵⁸ Third Year Review at 34; see Smillie ‘Killing Kimberley’ (2006) at 9-10.

¹⁵⁹ Third Year Review at 34.

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*; see also Goldman ‘Between a RoC and a hard place’ (2008-2009) at 362-3.

¹⁶³ Third Year Review at 35.

Scheme is not a legally binding instrument which is able to make particular demands upon Participants.

i. Definitions

Confusion around certain important definitions such as ‘transit,’ import,’ and ‘export’ hamper the operation of the Certification Scheme. This confusion is of concern to the operation of the Certification Scheme.

ii. Value attached to diamond parcels

Participants are not clear on the values to be attached to shipments of rough diamonds. Some make use of the US\$ system as set out by the Certification Scheme and others experience difficulties with the valuations. Thus the issue of values remains a problem for implementation.

iii. Classification

Despite the issuance of Technical Guideline 5, Participants continue to experience difficulties with classification of rough diamonds for shipment purposes. Thus, trade is hampered.

iv. The Certificate

Not all Participants comply with the issuance of a duly validated Certificate with minimum requirements as set out by the Certification Scheme’s document. Errors in filling out Certificates persist. The Certificate is the driving force of the Certification Scheme.

The Third Year Review found that instances of violation in the case of Côte d’ Ivoire. Partnership for Africa Canada and Global Witness have also found violations of mandatory information in Certificates in the cases of the DRC, Venezuela and Angola.¹⁶⁴

¹⁶⁴ Available on Partnership for Africa Canada website at www.pac.org. Last visited 01 September 2011.

v. Mandatory import confirmation

Mandatory import information is not always readily available or accurate. This, too, is a minimum requirement of the Certification Scheme's document with respect to issuance of Certificates. When information is not accurately presented, then the efficacy of the Certification Scheme is undermined.

vi. Distinction between rough diamonds and powder: Technical Guideline 13

Participants are encountering difficulties with distinguishing between rough diamonds and powder. Technical Guideline 13 assists very little in this regard for various reasons as not all the information is properly collated and distributed for usage by all Participants.

After having highlighted the technical difficulties experienced in implementation and monitoring of the Certification Scheme's contents, it is necessary to examine the operational issues as have been experienced by the Certification Scheme.

6. Operational issues

Understanding problems associated with implementation and monitoring of operational issues will highlight the strengths and weaknesses of the Certification Scheme in practice and thus enable the study to better appraise the Certification Scheme in its present form. Review visits have provided important information as to the efficacy of Participants' systems in place.

An assessment of internal controls has been a central concern of all review visits to date. Review visit reports highlight both that the kind of controls required vary greatly between Participants (for example between producers, traders and polishers), and that different mechanisms are being applied by different Participants.¹⁶⁵ Observations in review visit reports relate more generally to the implementation of other Certification Scheme requirements. The Review did not make this information available.

a. Lack of import procedures

Some diamond producing Participants with very limited imports of rough diamonds have been found not to have proper procedures in place for processing imports of rough diamonds.¹⁶⁶ The Review stated that it is essential that all Participants have both proper import and export procedures in place, regardless of the volume of imports and exports they deal with.¹⁶⁷

b. Illegal shipments

A small number of Participants, on identifying irregular or illegal shipments at import, systematically return these to the sender or country of origin, rather than seizing the diamonds.¹⁶⁸ According to the Review, Participants should ensure that it is a minimum

¹⁶⁵ Third Year Review at 35.

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*; see also Goldman 'Between a RoC and a hard place' (2008-2009) at 362-3; see also on the lack of efficacy of the Certification Scheme, see Fluet 'Conflict diamonds' (2004-2005) at 111-3.

¹⁶⁸ *Ibid.*; see Fishman 'Is diamond smuggling forever?' (2004-2005) at 217-42 on why the Certification Scheme is not effective.

requirement of the Certification Scheme to maintain dissuasive and proportional penalties for transgression.¹⁶⁹

c. Inadequate annual reporting on internal controls

Some Participants that have not yet received review visits fail to provide adequate information in their annual reports on the internal controls in place to prevent conflict diamonds from entering the pipeline. The WGM requested additional details in the process of its analysis of annual reports as they are another important tool to enable the KP to assess the adequacy of their internal controls.¹⁷⁰

d. Conflict diamond affected countries

In conflict diamond affected countries such as Sierra Leone, the DRC and Angola substantial challenges remain with regard to implementation of the Certification Scheme's minimum requirements, including organisation of diamond export certification, organisation of internal control systems, gathering of corresponding statistical data, as well as the traceability of rough diamond production from mine to export.¹⁷¹

Weak monitoring of border flows of rough diamonds remains a problem in terms of the Review. Capacity constraints on the part of customs and law enforcement, tax incentives for smuggling, and the physical length and porosity of borders remain substantial challenges for curbing smuggling.¹⁷²

¹⁶⁹ Section IV (d) of the Certification Scheme; see Malamut 'A band aid on a machete wound' (2005-2006) at 40-1 on the failings of the Certification Scheme 25-52.

¹⁷⁰ Third Year Review at 35; see on the lack of efficacy of the Certification Scheme, see Fluet 'Conflict diamonds' (2004-2005) at 111-3.

¹⁷¹ Partnership for Africa Canada and Global Witnesses *The key to Kimberley: Internal diamond controls-Seven case studies* (2004) wherein Ghana, Angola, the DRC, the EU (Belgium), UK, Canada and the US were used as case studies against the issue of 'internal controls' as contained in the Certification Scheme; see also with regard to the DRC see Samset 'Conflict of interest' (2002) at 465-70 and 476-7.

¹⁷² Third Year Review at 36; see Kaplan 'Carats and sticks' (2003) 560-5 on the pipeline of the diamond trade comprising of mostly miners, middlemen, rebel groups and foreign buyers; see also Wallis 'Data mining' (2005) 388-417 on monitoring, enforcement, redress and accountability issues.

e. Ease of operation of the Certification Scheme

Most Participants, according to the Review, responded that they consider the Certification Scheme to be simple and workable. Some Participants believe that difficulties do not lie in the complexity of the procedures but in the lack of capacity of governments, particularly at the provincial level, to implement them.¹⁷³ This is especially true when the remit of the government does not cover the entire country.¹⁷⁴ Participants note that some definitions of terms used in the KP differ from those used in other contexts, such as customs agreements.

f. Need for better communication

After investigation, it appears that many of the cases are caused by difficulties in communicating with the respondent's KP contact point.¹⁷⁵ This can occur where there are linguistic differences, where there is limited internet access, where an official moves on without notifying the KP of their successor, where government departments are reorganised, or for other day-to-day reasons.

The Review stated that it is essential to maintain an up-to-date register of KP focal contacts, as well as alternates which should continue to be available on the KP website and could also be circulated annually with the compilation of Kimberley Process documents. Participants should inform the KP Chair promptly of any change in contacts.¹⁷⁶

The Review identified problematic areas even though efforts have been made to address the problems. The following have been highlighted for discussion in the concluding chapter of this study.

¹⁷³ Third Year Review at 36.

¹⁷⁴ Response to KP Questionnaire from World Bank and DRC (MONUC). Not available for public access on the KP website.

¹⁷⁵ Third Year Review at 37.

¹⁷⁶ *Ibid.*

g. Lack of import procedures

There are no consistent procedures for import in accordance with the Certification Scheme. The Certification Scheme does not provide for import procedures. This is of concern for the implementation and the consequent monitoring of the Certification Scheme's workability.

i. Illegal shipments

Participants reported illegal shipments despite the operation of the Certification Scheme's contents within their respective jurisdictions. Trade is impeded in this manner.

ii. Inadequate annual reporting on internal controls

Some Participants were unable to report on internal controls as the KP had not yet undertaken review visits. The Working Group did not have sufficient capacity for review visits.

iii. Conflict diamond affected countries

Conflict diamond affected countries are unable to implement the Certification Scheme due to the absence of infrastructures. This is a basis of acute concern.

iv. Ease of operation of the Certification Scheme

Most Participants agreed that the Certification Scheme is simple and workable. Yet Participants continue to experience difficulties with implementing the Certification Scheme.

v. Need for better communication

All Participants agreed that there was a need for better communication between Participants on the one hand, and the between Participants and the KP on the other hand.

Having flagged the shortcomings in operational issues, it is necessary to examine the Peer Review Monitoring Mechanism of the Certification Scheme in implementation and monitoring, before a final discussion is undertaken in the concluding chapter.

7. The Peer Review Monitoring Mechanism (PRMM)

Understanding the PRMM in implementation and monitoring will bring to the fore the shortcomings and strengths of the KP. The workability of the Certification Scheme may be demonstrated with specific regard to implementation and monitoring in keeping with the objectives of the Certification Scheme. In terms of the Review, there is agreement among Participants and Observers that the PRMM has been a success, although civil society is concerned that it is not sufficiently penetrating, and that a timely follow-up is often lacking.¹⁷⁷

Between January 2004 and September 2006, review visits had been carried out to 32 Participants.¹⁷⁸ In addition, two non-Participants namely, Liberia and Lebanon prior to their joining the Certification Scheme, received special expert missions. Furthermore, two review missions had been carried out to the Central African Republic and to the Republic of Congo.¹⁷⁹ A further nine Participants¹⁸⁰ have invited review visits and one Participant, Guinea, has invited a follow-up review visit. Forty two out of 45 Participants (or 93 percent) have thus received or invited review visits, or review missions.¹⁸¹ One Participant has not been counted in this list, Côte d'Ivoire, which has been the subject of specific and ongoing monitoring measures since 2004.

The Chair of the WGM confirms that these Participants have been approached and are all considering inviting a review visit.¹⁸² All previously conflict diamond affected countries have received review visits, and almost all countries reporting diamond production or trade have had review visits according to the Review.¹⁸³

¹⁷⁷ Third Year Review at 37.

¹⁷⁸ United Arab Emirates; Israel; Botswana; Mauritius; Zimbabwe; South Africa; Lesotho; Canada; Democratic Republic of Congo; European Community; Switzerland; India; Sri Lanka; Sierra Leone; Guinea; Russian Federation; United States; Angola; Namibia; Ukraine; Belarus; Armenia; Ghana; Togo; People's Republic of China; Brazil; Guyana; Lebanon; Vietnam; Malaysia; Singapore; Tanzania.

¹⁷⁹ Third Year Review at 37.

¹⁸⁰ Norway; Japan; Romania; Australia; Republic of Korea; Thailand; Central African Republic; Bulgaria and Laos.

¹⁸¹ Third Year Review at 38.

¹⁸² *Ibid.*

¹⁸³ *Ibid.*

a. Expanding the mandate of the PRMM

According to the Review, it may be useful for the peer review system to examine patterns of rough diamond trade in or through Participants and non-Participants, where this has a direct bearing on the ability of Participants to implement the provisions of the Certification Scheme.¹⁸⁴ Thus, in terms of the Review, in specific circumstances, it may be useful to mandate review visits or, where applicants are concerned, in conjunction with the approval of the Participation Committee, ad hoc expert missions explicitly to integrate a regional dimension into review visit activities.¹⁸⁵

Effectiveness was demonstrated in two ways. Firstly, by considering whether the system had detected the main implementation problems as and where they arose. Secondly, by considering whether the PRMM contributed to bringing about tangible improvements with regard to problems identified.¹⁸⁶ Review visits were able to establish a complete overview of the practices of individual Participants.

Accordingly, the Review recommended that the report for each review visit will state that the team has reviewed internal controls for effective compliance with all Certification Scheme minimum standards, as set out in the Certification Scheme documents, recognising some procedures may be security sensitive.¹⁸⁷ Review teams should continue to identify Participant country needs for technical assistance and training in order to help Participants implement effective internal controls.¹⁸⁸

b. Compliance

The ADPR stipulates that review visits should carry out their work in an ‘analytical, expert and impartial manner’.¹⁸⁹ In order to further strengthen these safeguards, the criteria in the Administrative Decision on Peer Review should be expanded to include a provision that

¹⁸⁴ Third Year Review at 39.

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*

¹⁸⁷ Third Year Review at 40.

¹⁸⁸ *Ibid.*

¹⁸⁹ Third Year Review at 42.

experts are required to be impartial and highly professional and should further require members to disclose any potential conflict of interest.¹⁹⁰

c. Follow up to review visits

The ADPR contains limited provisions for follow up to a review visit's findings but makes provision for sending a follow up review visit where this is deemed 'necessary and appropriate'.¹⁹¹ The provisions of the ADPR are limited to address compliance.¹⁹² The WGM has therefore considered additional mechanisms for ensuring adequate follow-up.

The Review suggested that Participants identified by review teams as needing technical assistance or training should communicate their needs to international donors and the coordinator of technical assistance.¹⁹³ Donor countries were encouraged to provide technical assistance and training to meet the needs of Participants to implement effective internal controls, as identified by review teams.¹⁹⁴

The Review stated that the requirement to submit an annual report should be maintained, as should the requirement to provide feedback in the report on follow-up to review visits.¹⁹⁵ The recommendations listed above under 'Follow-up to review visits' should be integrated into the Administrative Decision on Peer Review according to the Review.

d. Transparency of review visits

Full reports of review visits are placed on the restricted 'Participants Only' section of the KP website, as set out in the ADPR. It may be useful, the Review recommended, to actively draw the attention of Participants and Observers to the reports of visits once they have been agreed upon.

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*

¹⁹² Third Year Review at 43.

¹⁹³ *Ibid.*

¹⁹⁴ Third Year Review at 44.

¹⁹⁵ *Ibid.*

This could be done by the Chair circulating a message to all Participants and Observers, informing them whenever a report has been completed, with a link to the full report on the website.¹⁹⁶ The Review recommended that the Chair circulates a message to all Participants and Observers informing them whenever a report has been completed, with a link to the full report on the website.¹⁹⁷

e. Access of review visit reports by parties outside the KP

Summaries of review visit reports are supposed to be publicly available and are supposed to be placed on the public section of the KP website. Consideration has been given to making the full reports public. Some Participants¹⁹⁸ believe the confidentiality of review visit reports has been crucial in ensuring full cooperation with review visit teams and transparency on the part of Participants under review.

Others¹⁹⁹ argue that review visit reports should be made publicly available, and that this would bolster the effectiveness of review visits and the overall credibility of the Certification Scheme. The Review stated that two possible steps would address some of the concerns about transparency while also taking into account that full publication might be detrimental to the willingness of Participants to share information.²⁰⁰

Firstly, detailed summaries of review visit reports, following a standard template developed by the Working Group on Monitoring, should be placed on the KP's public website. Secondly, review visit reports should be made available more consistently to other international organisations with an interest in diamond sector governance.²⁰¹

¹⁹⁶ Third Year Review at 45.

¹⁹⁷ *Ibid.*

¹⁹⁸ This information is not made available to the public. Rather, the information is kept confidential for use by Participants.

¹⁹⁹ This information is not made available to the public. Rather, the information is kept confidential for use by Participants.

²⁰⁰ Third Year Review at 45.

²⁰¹ *Ibid.*

f. The future of the APRMM

In addition to providing a comprehensive overview of the overall state of implementation of the Certification Scheme, the APRMM has enabled the KP to detect and address some major compliance issues; to work with Participants to remedy a range of practical implementation issues; and to highlight areas where capacity-building assistance is required.²⁰²

The Review recommended that the system of peer review and review visits, with its main components as established in 2003, should be maintained, recognising that the resource concerns of some Participants and Observers will need to be addressed.²⁰³ Relevant provisions in Section II of the Administrative Decision on Peer Review should be amended, specifying that in further review visits, attention should be focused on follow-up to issues identified in the first visit. In case of repeated review visits, the visits should be flexible and remain focused on substantial implementation issues.²⁰⁴ The recommendations listed in this assessment of the peer review monitoring system should be incorporated into a revised Administrative Decision on Peer Review.²⁰⁵

i. Expanding the mandate of the PRMM

Having discerned that the PRMM is successful, the Review found that experts should be appointed to undertake the Reviews. Not all Participants implemented the Certification Scheme's contents.²⁰⁶ To date, experts have not been permanently appointed, but only on an *ad hoc* basis. It is important for experts to undertake review missions consistently as Participants, at times, experience difficulties in implementing the contents of the Certification Scheme into practical measures.

²⁰² Third Year Review at 46; see on the lack of efficacy of the Certification Scheme, see Fluet 'Conflict diamonds' (2004-2005) at 111-3; see also Grant *et al* 'Global governance' (2004) at 375-85 on how actors stimulate concern about the externalities of foreign trade.

²⁰³ Third Year Review at 47.

²⁰⁴ Third Year Review at 46.

²⁰⁵ *Ibid.*

²⁰⁶ Like Zimbabwe.

ii. Compliance

Not all Participants were compliant with the contents of the Certification Scheme. There is a need to bolster capacity for implementation.

iii. Follow up to review visits

Follow up review visits were made to some Participants. In terms of the Review, the review visits were successful.

iv. Transparency of review visits

Review Reports are not made public. They are made available to other Participants in the restricted part of the KP's website. This cannot be commended as it severely compromises transparency and accountability.

v. Access of review visit reports by parties outside the KP

Only Participants may access the Review Reports. Parties outside the KP have no access to the Review Reports, which is problematic in light of accountability and transparency.

Having highlighted the strengths and weaknesses of the PRMM with respect to how the Certification Scheme is implemented and monitored, it will be necessary investigate the statistical issues of the Certification Scheme.

8. Statistical issues of the Certification Scheme

Having explained the workings of the PRMM, the chapter will proceed to discuss the statistical issues of the Certification Scheme.

Understanding the statistical issues of the Certification Scheme will allow the study to gain a better understanding of the Certification Scheme in terms of its workability from an empirical basis. Annex III of the Certification Scheme's document outlines the need for statistical information with the statement 'that reliable and comparable data on the production and the international trade in rough diamonds are an essential tool for the effective implementation of the Certification Scheme, and particularly for identifying any irregularities or anomalies which could indicate that conflict diamonds are entering the legitimate trade'.²⁰⁷ The complexity and difficulties involved in creating and managing a Certification Scheme's statistical database were enormous and underestimated at the outset.²⁰⁸

a. The WGS

The WGS offers Participants various options that may be used to submit their requisite statistical information, including online entry into the database into the KP's Rough Diamond Statistics website.²⁰⁹ Firstly, Participants can review and edit their reported data online. They can view the verified data submitted by all Participants. Processes are in place for providing assistance to Participants, and to address any concerns brought forward by Participants.²¹⁰

Secondly, multi-purpose tabulations of the statistical information gathered are regularly returned to Participants and are available on the KP Rough Diamond Statistics website.²¹¹ Tabulations, updated regularly, are also being provided annually to the Working Group on Monitoring to be integrated with each Participant's annual report. Thirdly, the website has matured into an effective tool in the collection and dissemination of statistics. Fourthly,

²⁰⁷ Third Year Review at 47.

²⁰⁸ *Ibid.*

²⁰⁹ Third Year Review at 48.

²¹⁰ *Ibid.*

²¹¹ *Ibid.*

statistical reviews and analyses are prepared by the WGS on an ongoing basis for all review visits.²¹²

Fifthly, the Working Group compiles an annual report to Plenary describing its progress and current issues.²¹³ As well, the WGS has brought forward a succession of administrative decisions, the latest as adopted by Plenary, recommending the use of trade statistics derived from the KP Certificates as the standard for submission of these data to the Certification Scheme. Sixthly, effective relations with the Certification Scheme's Chair, the Secretariat to the Chair, and other Working Groups and Committees have been established. Finally, to test the analysis methodology, a comprehensive analysis of the statistical data for 2004 was completed and an analysis of data for 2005 was underway.

b. Challenges

The WGS carried out one analysis of 2004 data on a pilot basis and, building on this, carried out a fuller analysis of 2005 data.²¹⁴ The inability of the WGS to complete a comprehensive analysis of the statistical database until recently in 2006 has been a cause for concern among Participants.²¹⁵ Participants believe that the statistical analysis should focus on situations where a clear risk of conflict diamonds exists and where there is a clear unwillingness or inability to comply with minimum standards, including referring the situation to the Participation Committee.²¹⁶

c. Country specific statistical analyses

The WGS prepares country specific, statistical analyses for review visits, which provide review teams with vital information before and during the visits.²¹⁷ Participants agree that these reports are a very useful tool for the purposes of the review visits. However, at times,

²¹² *Ibid.*

²¹³ Third Year Review at 49.

²¹⁴ Third Year Review at 49.

²¹⁵ Third Year Review at 50.

²¹⁶ *Ibid.*

²¹⁷ *Ibid.*; see also Petersmann E-U 'Human rights, constitutionalism and the World Trade Organization: Challenges for the World Trade Organisation and civil society' (2006) 19 *Leiden Journal of International Law* at 644-8.

the specific country analysis has been completed too late for useful discussion by the review team and Participant. It is important that the WGS be involved in preparing for review visits, particularly where statistical issues are known to exist and follow-up is required.

The timeliness of these reports depends, to some extent, on sufficient notice being provided of upcoming review visits. The Review recommended that the WGS continue to prepare Participant-specific analyses for review visits.²¹⁸ A number of WGS members are on the roster of experts for review visits and have participated in review visits, and not only when there are known statistical issues. Members of the WGS, according to the Review, should participate in review visits, particularly when there are known issues with the statistics of the Participant to be reviewed.²¹⁹

d. Timely submission of statistics

At times, Participants have failed to submit timely and complete data to the Certification Scheme, despite the system of notifications and reminders now in place. To address this issue, the WGS and the Participation Committee have established a documented process that clearly outlines the procedure and associated timelines used to remind Participants of their responsibility to submit statistical information.²²⁰ Participants recommended that the names of Participants who fail to meet Certification Scheme's requirements for submission of statistics over two consecutive reporting periods be posted on the public website.²²¹

e. Data quality and accuracy

The quality and accuracy of information provided by Participants on their data submitted and their use of trade data based on KP Certificates must constantly be monitored and, where necessary, questioned and verified.²²² In an effort to improve accuracy, within one week after the due date, the WGS publishes preliminary comprehensive tables for all Participants. The Review recommended that each table should be updated and posted on the website.

²¹⁸ *Ibid.*

²¹⁹ Third Year Review at 51.

²²⁰ Moscow Plenary at 51.

²²¹ The names of Participants in this instance are not made public.

²²² Third Year Review at 52.

f. Valuation parameter

The statistics on value of production, which are required by Technical Guideline 6, should continue to be reported.²²³ They provide an important indicator of the quality of the diamonds being traded, as well as transactional levels and of orders of magnitude of the sales of rough diamonds.

i. Technical assistance

The KP Rough Diamond Statistics website was developed to allow direct input of Certification Scheme statistics directly onto the website.²²⁴ The site also allows Participants to confirm the data submitted, to correct their data when warranted, to view verified data for all Participants, and to view statistical tabulations for all Participants from 2003 onward.²²⁵ Accordingly, it is now possible for all Participants to view and use Certification Scheme's statistics, both in raw and aggregated form.

ii. Transparency and publication

The Moscow Plenary in 2001 directed the WGS to study various options for the publication of statistics. Work is progressing on this issue and, building on discussions at the 2006 Intersessional is ongoing. Resolution of this issue will depend on balancing the need for transparency with the requirement to respect the commercially sensitive nature of certain data collected. Meanwhile, the WGS in its report recommends that, once steps necessary to protect commercially sensitive data are introduced, all data proven to be of a satisfactory quality be published.

iii. Website

It seems attractive to investigate the feasibility of developing an internet portal website database for the communication and interchange of transaction information and or KP Certificate information between Participants. However, at this point it appears impossible to

²²³ *Ibid.*

²²⁴ Third Year Review at 52.

²²⁵ *Ibid.*

deal satisfactorily with several major concerns, including: the current limited capability, technical infrastructure and capacity of some Participants; the requirement to have updated, compatible computer software and technical expertise to use and maintain such a website; the very sensitive issues of security for commercial data; and, the thorny question of financial and human resources to create, maintain and fund such a website.²²⁶ If such a website is created, the WGS would recommend that it not be placed under its aegis but be independently funded.²²⁷

iv. Resources

The financial and human resources required to run a Working Group of the importance of the WGS are considerable and have exceeded expectations. Some Participants argue that thought should be given to creating a permanent body or bodies outside of the Certification Scheme to manage functions such as the maintenance of the website and the analysis of statistics. The WGS should study and clarify the issue of maintenance of the KP Rough Diamond Statistics website.²²⁸

Strengths and mostly weaknesses, or concerns were revealed by the Third Year Review. Firstly, the WGS has made significant headway into the collection and submission of statistics. Secondly, Participants opine that the statistical analysis should focus on situations where there is a risk of conflict diamonds and where there is unwillingness or inability to comply with minimum standards, including referring the situation to the Participation Committee.

Thirdly, timely reports must be submitted by the WGS so as to enable complete and full contextual discussions. Fourthly, concern was expressed over the quality and accuracy of data collated. Fifthly, Participants were of the view that the data must be made available for verification purposes by themselves.

As previously stated, the issues highlighted throughout will be discussed in the concluding chapter of this study. Having highlighted how the Certification Scheme addresses statistical

²²⁶ Third Year Review at 53-4.

²²⁷ *Ibid.*

²²⁸ Third Year Review at 54.

issues with respect to implementation and monitoring, it will be necessary to examine the implementation and monitoring with respect to the internal controls of the Certification Scheme.

9. Internal controls

Having explained the conclusion of the Third Year Review, pertinent to the Certification Scheme, this chapter will proceed to discuss the internal controls of the Certification Scheme. Understanding the internal controls of the Certification Scheme will provide for a better understanding of the Certification Scheme and its practicability.

While the main Certification Scheme's document requires Participants to 'establish a system of internal controls designed to eliminate the presence of conflict diamonds from shipments of rough diamonds imported into and exported from its territory',²²⁹ and includes certain recommendations in its Annex II, there is little detail in the document on standards of effective internal controls. The Moscow Declaration of 2001 has made considerable progress on standard setting for alluvial and artisanal diamond producers. Internal controls have been improved.

There is consensus among Participants and observers that implementation on the ground is a major challenge for the Certification Scheme. The Review states that there is no doubt that internal controls are at the very heart of the Certification Scheme. Assessment of internal controls established by Participants, in line with the requirements of the Certification Scheme, has been a concern of all review visits carried out to date. This has been mainly attributable to the lack of financial resources and personnel to under such review visits.

The reports of these visits thus yield a significant amount of information regarding the effectiveness or lack of internal controls. The reasons for weak or non-existent controls include lack of capacity, technical shortcomings and poor governance. Some governments such as Zimbabwe and Venezuela lack the political will.²³⁰

Most borders of Participant countries are porous, and there is little regional cooperation to stop illicit, cross-border trading.²³¹ At the heart of the matter is how to develop appropriate, workable standards in greater detail than is currently found in the Certification Scheme document, and how best to ensure their effective implementation by Participants.

²²⁹ Third Year Review at 55.

²³⁰ *Ibid.*

²³¹ Third Year Review at 56.

In order to ensure the efficacy of the Certification Scheme and its long term sustainability, Participants should adopt an approach which is cohesive and indicative not only of an internal commitment with respect to national controls. They should in addition become robust by addressing concerns which arise from other Participant countries. If Participants were to become vocal and assist other Participant countries that ‘breach’ the Certification Scheme, it may strengthen internal controls and allow for room for improvement. Internal controls should be closely monitored through a possible peer review mechanism which would enable sanctions as well.

a. Artisanal and alluvial producers

Peer review visits have highlighted that the nature and extent of internal controls in artisanal and alluvial producing Participants remains a major challenge for the KP as a whole. Poor or badly enforced internal controls are most evident in countries where alluvial diamonds are produced by artisanal miners outside the formal sector.²³² Countries vulnerable to conflict diamonds in the first place are often the least able to adopt and enforce strong control measures.²³³

For Participants with artisanal-alluvial production, the report included recommendations on ensuring traceability of production from mine to export; regulating artisanal diamond mining and the trade in artisanal-alluvial diamonds; tackling illicit cross-border trade; and encouraging artisanal miners to move into the formal economy.²³⁴ In parallel with the Review of the Certification Scheme, an additional list of internal control standards for all Participants will be prepared complementary to the recommendations contained in Annex II to the basic Certification Scheme document.²³⁵

Implementation of the measures set out in it should be promoted as part of the peer review system. Review visits should be mandated in a revised Administrative Decision on Peer Review to assess specifically whether Participants have effective measures in place, on the

²³² Third Year Review at 56.

²³³ *Ibid*; many studies and reports of the KP Sub-Group on Artisanal-Alluvial Production have shown this to be the case; see also UN Experts Meeting on ‘Natural resources and conflict in Africa: Transforming a peace liability into a peace asset’ 17-19 June Part VI.

²³⁴ *Ibid*; see studies on Sierra Leone, the DRC and Angola in Smillie ‘Rich man, poor man’ (2004) at 5-8.

²³⁵ Smillie ‘Rich man, poor man’ (2004) at 5-6; the key recommendations from the Moscow Declaration were included.

basis of the measures set out in such an additional list of internal controls.²³⁶ Applicants for participation in the Certification Scheme should be invited to take into account, while designing their internal control measures, both the mandatory and the optional Certification Scheme requirements indicated in Annex II and in the additional list of internal controls.²³⁷

The reports of the Sub-Group on Alluvial Production and the Moscow Declaration on Alluvial Production have proved the Sub-Group's usefulness as a forum for the exchange of information and best practices among artisanal alluvial producers.²³⁸ It should be strongly encouraged to play an active role in promoting implementation of the recommendations of its report. Members of the Sub-Group on Alluvial Production should be strongly encouraged to play an active role in promoting and monitoring the implementation of the recommendations of the Declaration.²³⁹ A fully fledged Working Group on Artisanal and Alluvial Production should be established.

b. Industry self-regulation

In general Participants call for the peer monitoring system to incorporate as an integral part of its review an evaluation of how a Participant government is monitoring and verifying industry compliance.²⁴⁰ The Review reported that the EC has an extensive system of industry self-regulation in place, based on industry self-regulating bodies that have been recognised by the EC authorities.²⁴¹ The EC has sought to meet this objective through EC directives and resolutions.²⁴²

Participant governments retain responsibility for implementation of industry self-regulation within their territories. Participants are moving increasingly to ensure that industry self-regulation is implemented by government, where appropriate and consistent with national law.²⁴³

²³⁶ *Ibid.*

²³⁷ *Ibid.*

²³⁸ Third Year Review at 57.

²³⁹ *Ibid.*

²⁴⁰ Third Year Review at 58.

²⁴¹ Third Year Review at 58.

²⁴² Council Regulation 2368 of 2002.

²⁴³ Third Year Review at 59.

c. Controls on trading, cutting and polishing

When the Certification Scheme was initiated, the primary emphasis was on the international trade in conflict diamonds. The WGM should identify any loopholes in the implementation of the Certification Scheme in trading, cutting and polishing centres, and make recommendations to address them as needed, in accordance with its mandate.²⁴⁴

d. Standards and guidance for implementation of effective controls

In the original Certification Scheme document, Section IV Internal Controls, clause (f), Participants seeking guidance on additional internal controls are referred to Annex II of the same document, where ‘further options and recommendations for internal controls’ are elaborated.²⁴⁵ A number of Participants were of the opinion that the recommendations set out in Annex II, which were compiled in 2002, no longer reflect current best practices, as regards internal controls and could be added to.²⁴⁶

In terms of the Review, every effort should be made by the KP to ensure that such an additional list of internal control measures is progressively implemented by Participants. To this end, further review visits could be tasked specifically with assessing whether a given Participant is implementing key measures identified in the additional list of internal controls.²⁴⁷

Having discussed internal controls within the ambit of the Review, particular findings merit discussion. Although the work of the WG and the sub-WG are acknowledged by the Review, much work remains outstanding with respect to the internal controls contained in the Certification Scheme’s document. Firstly, it is debatable whether self-regulation may be undertaken in isolation. Participants need support and contact with other Participants.

Secondly, implementation and monitoring with respect to trading, cutting and polishing centres must be addressed for the purposes of beneficiation. Thirdly, concern over the

²⁴⁴ *Ibid.*

²⁴⁵ *Ibid.*

²⁴⁶ Third Year Review at 60.

²⁴⁷ Third Year Review at 60.

internal controls, as contained in the Certification Scheme document, must be addressed for as long as Participants lack confidence therein.

10. Conclusion

An investigation into the implementation and monitoring of the Certification Scheme highlights a number of strengths and weaknesses. For the purpose of this study seven problem areas can be identified:

1. Organisation and working of the Certification Scheme in implementation and monitoring;
2. Infringements of the Certification Scheme;
3. Technical issues;
4. Operational issues;
5. PRRM;
6. Statistical issues; and
7. Internal controls.

a. Organisation and working of the Certification Scheme in implementation and monitoring

Nine key problem areas can be identified with the organisation of the Certification Scheme with regard to implementation and monitoring.

There are various problems with the organisation of the Certification Scheme with regard to implementation and monitoring. The Working Group assumes a working knowledge of the Participants as regards the Certification Scheme. Under structures and operational methods, the following will be discussed as matters for implementation: national laws; the Chair of the Certification Scheme; the KP Working Groups; a global inclusive partnership; and Participation Committees; compliance issues and statistical non-compliance.

These are the factors which the Review took into account. The organisation of the Certification Scheme for implementation and monitoring presents ten key problems. First, the Review assumes that Participants have implemented the Certification Scheme into their respective jurisdictions. Second, Participant countries are expected to ensure that they adhere to the content of the Certification Scheme in their relations with other Participants.

Third, pertinent to the four Working Groups, not all Participants are aware of the activities of all the Working Groups.

Fourth, the Participation Committee is responsible for assessing whether or not a Participant is in compliance with the minimum standards of the Certification Scheme.

Fifth, compliance means that Participants adhere to the minimum standards of the Certification Scheme.

Sixth, the Participation Committee, in accordance with its Terms of Reference, must consider any relevant information submitted to it by the Working Group on Monitoring regarding compliance by a Participant.

Seventh, the issue of dispute resolution and compliance is dealt with by the Chair. This is problematic due to the rotation of the Chair and the lack of actual procedural provisions on dispute resolution.

Eighth, the role of observers comprises three aspects: the diamond industry is self regulation; the role of civil society and links with international organisations. All three aspects presented problems in the Review.

Finally, with respect to the impact of the Certification Scheme, curbing the production and trade in conflict diamonds, Côte d' Ivoire made very important submissions. Submissions reflected the lack of workability of the Certification Scheme which is another problematic.

b. Infringements of the Certification Scheme

Although the situations of conflict diamond trade have significantly been reduced through the implementation of the Certification Scheme in Sierra Leone, Angola and the DRC, it must be borne in mind that these reports arise from the Certification Scheme itself. The Review has been based on country reports and the Review visits of the KP. This may taint a proper scientific determination as other reports by civil society organisations for example, demonstrate contestable facts. Partnership Africa Canada undertook independent reviews in

2008, 2009 and 2010.²⁴⁸ These reviews were not measured against the independent Participant reviews which were undertaken by the Kimberley Process. Moreover, reviews undertaken by the Kimberley Process were made public only in summary form.²⁴⁹ Details of the infringements were not made public.

No infringements were made public by the Review.

c. Technical issues

There remain significant difficulties with technical operations of the Certification Scheme's provisions despite the investigations by the Working Groups and the passage of Technical Guidelines. They are highlighted in turn.

i. Diversity in national laws and practice

The Certification Scheme assumed at the outset that laws and practices will be uniform with respect to implementation. Still, there are difficulties because Participants differ in the national laws and practices through vagaries of interpretation. In this instance, the national systems of certain Participants did not enable proper implementation of the Certification Scheme. The case of Côte d' Ivoire is a prime example which demonstrates the lack of capabilities and technologies to implement the Certification Scheme.²⁵⁰ Côte d' Ivoire sought the assistance of the Kimberley Process with respect to capacity and also clarity on definitions and standards expected of the Certification Scheme.²⁵¹ Côte d' Ivoire's situation has not improved.

ii. Lack of clarity of technical issues

Confusion around certain important definitions such as 'transit', 'import', and 'export' persist. Issues around the value of shipments, classification of rough diamonds, the minimum

²⁴⁸ PAC Annual Reviews for 2008, 2009 and 2010 available on www.pacweb.org. Last visited 01 September 2011.

²⁴⁹ Available on www.kimberleyprocess.com. Last visited 01 September 2011.

²⁵⁰ Third Year Review at 80-120.

²⁵¹ *Ibid.*

requirements which must be included in the Certificate, mandatory import information also persist.

All the aforementioned hamper the efficacy of the Certification Scheme due to its lack of clarity. Despite the issuance of Technical Guidelines 5 and 13, Participants complain of lack of capability which arises, in the main, from a lack of clarity of understanding the contents of the Certification Scheme.

d. Operational issues

i. Lack of import procedures

There are no consistent procedures for import in accordance with the Certification Scheme, as the Certification Scheme does not provide for import procedures. This is of concern for implementation and the consequent monitoring of the Certification Scheme's workability.

ii. Illegal shipments

Participants reported illegal shipments despite the operation of the Certification Scheme's contents within their respective jurisdictions. Trade is impeded in this manner.

iii. Inadequate annual reporting on internal controls

Participants were unable to report on internal controls as the KP had not yet undertaken review visits. The Working Group did not have sufficient capacity for review visits.

iv. Conflict diamond affected countries

Conflict diamond affected countries are unable to implement the Certification Scheme due to the absence of infrastructures. This is a basis of acute concern.

v. Ease of operation of the Certification Scheme

Most Participants agreed that the Certification Scheme is simple and workable. Yet Participants continue to experience difficulties with implementing the Certification Scheme.

vi. Need for better communication

All Participants agreed that there was a need for better communication between Participants on the one hand, and the between Participants and the KP on the other hand.

e. PRRM

i. Expanding the mandate of the PRMM

Having determined that the PRMM is successful, the Review found that experts should be appointed to undertake the Reviews. Not all Participants implemented the Certification Scheme's contents. Reviews are funded, in the main, by civil society organisations Partnership Africa Canada, Global Witness, Amnesty International and Human Rights Watch.²⁵² They form the core of the team which undertakes review visits to Participant countries. Unfortunately, the details and specific contents of the review missions and or visits are not made available to the public.

ii. Compliance

According to the review missions, not all Participants were compliant with the contents of the Certification Scheme. The intrinsic content of the review missions are not made public. Most of the information gathered is held in confidence by the Kimberley Process. At best, it may be safe to speculate that there is a need to bolster capacity for implementation.

²⁵² As confirmed by the public statements made by PAC and other NGOs, confirmed by the Chairs of the Certification Scheme as contained in the Third Year Review and other country review missions.

iii. Follow-up to review visits

Follow up review visits were made to some Participants. In terms of the Review, the review visits were successful.

iv. Transparency of review visits

Review Reports are not made public. They are made available to other Participants in the restricted part of the KP's website. This may present some concerns as proper scrutiny is not possible. In the absence of transparency and accountability, the review missions, it is submitted will contribute little to improved implementation and compliance.

f. Statistical issues

Firstly, the WGS has made significant headway into the collection and submission of statistics. Secondly, Participants opine that the statistical analysis should focus on situations where there is considered a clear risk of conflict diamonds and where there is clear unwillingness or inability to comply with minimum standards, including referring the situation to the Participation Committee.

Third, timely reports must be submitted by the WGS so as to enable complete and full contextual discussions. Fourth, concern was expressed over the quality and accuracy of data collated.

Finally, Participants were of the view that the data must be made available for verification purposes by themselves.

g. Internal controls

Although the work of the WG and the sub-WG are acknowledged by the Review, much work remains outstanding with respect to the internal controls contained in the Certification Scheme's document. Firstly, it is doubtful that self-regulation may be undertaken in isolation. Participants need support and contact with other Participants.

Secondly, implementation and monitoring with respect to trading, cutting and polishing centres must be addressed for the purposes of beneficiation and otherwise. Thirdly, concern over the internal controls, as contained in the Certification Scheme document, should be addressed as Participants lack confidence therein.

In conclusion, various shortcomings arise from implementation and monitoring of the Certification Scheme. The problems highlighted may be categorised as both substantive and procedural. Some difficulties highlighted go to the heart of the efficacy of the Certification Scheme, such as the lack of clarity of definitions; internal controls and infringements of the Certification Scheme. Other difficulties in implementation and monitoring appear to be peripheral and more easily addressed, for example, the matter of the control and access to the KP websites. It is clear, however, that almost every facet of the Certification Scheme has encountered difficulties with implementation and monitoring.

This chapter discussed the context for Review of implementation and monitoring; the organisation of the Certification Scheme; the infringements and responses of the Certification Scheme; the technical difficulties experienced by the Certification Scheme; how the Certification Scheme deals with the PRMM; and the statistical issues of the Certification Scheme and the manner in which the implementation and monitoring has experienced internal controls.

The weaknesses and strengths in each of the above categories have been highlighted. An analysis of these weaknesses and strengths will be placed in the context of the strengths and weaknesses arising out of the provisions of the Certification Scheme, set out in chapter two and in the context of international law making addressed in chapter six of this study.

CHAPTER 5 : THE ROLE OF INTERNATIONAL ORGANISATIONS IN THE CERTIFICATION SCHEME

1. Introduction

This fifth chapter will focus on the role of international organisations in recognition of the Certification Scheme as an instrument of international law. The chapter will therefore proceed to discuss the different types of recognition accorded by different international organisations to the Certification Scheme. International organisations have influenced the Certification Scheme before its official inception. This chapter examines the impact of the UN SC, the UN GA and the WTO in its first part.

The second part of this chapter will examine two regional organisations, namely the EC and the AU. Notably, the EC's role will be studied with regard to the strides it has made in the combat against the illegal trade of rough diamonds. In other words, the recognition accorded to the Certification Scheme by the EC will be examined. Of note is the EC's promulgation of Council Regulation 2368 of 2002, which will be discussed.

An examination of the role of international organisations will show their importance to the success of the Certification Scheme in the international legal environment. Consequently, the important roles of these organisations will become clearer in relation to the formation of international instruments, which subsequently acquire legal force in practical application.

The UN GA Resolution established the initial mandate for the KP in December 2000.²⁵³ The Resolution called for several structural measures to regulate the trade of rough diamonds. It also explained the justification of the Certification Scheme, that is, to prevent the trade in conflict diamonds that leads to human rights crises. The Certification Scheme defines conflict

²⁵³ UN GA Resolution UN Doc A/RES/55/56 (2000) created the mandate for the Kimberley Process has been regularly renewed basis by the UN through the following UN GA Resolutions: UN Doc A/RES/56/263(2002), UN Doc A/RES/57/302(2003), UN Doc A/RES/58/290(2004), UN Doc A/RES/59/144(2004), and UN Doc A/RES/60/182(2005). The Certification Scheme has gained important recognition from the UN SC through Resolution 1459 UN Doc S/RES/1459(2003). More recently the role of the Certification Scheme has been acknowledged in UN SC Resolutions 1521(2003) and 1643(2005) respectively UN Doc S/RES/1521(2003) on Liberia and UN Doc S/RES/1643(2005) on Côte d'Ivoire.

diamonds as ‘rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments’.²⁵⁴

This is the most important shortcoming of the Certification Scheme. The Certification Scheme was drafted to address the issue of diamond pillaging rebel movements attempting to overthrow legitimate governments. It does not however, address the situation of governments producing blood diamonds under circumstances that constitute human rights abuses. This issue will be dealt with in chapter seven of this thesis.

Returning to the role of international organisations, the UN SC Resolutions combined with the series of UN GA Resolutions represent an important accomplishment because they reflect widespread and continued international support for the Certification Scheme by the UN. Resolutions, according to the Third Year Review, are discussed in chapter four. They also confer an important measure of legitimacy upon the Certification Scheme in their acknowledgement of the efforts of Participants and Observers.

The illicit production and trade of diamonds have fuelled conflicts in Sierra Leone, the DRC, Angola, and Liberia.²⁵⁵ What were once thought to be domestic conflicts, and thus out of the purview of international organisations in particular the UN and the AU, have now become internationalised conflicts.²⁵⁶

The internal conflicts in Sierra Leone, the DRC and Liberia appeared on international agendas because of the intensity of human rights violations observed. During the Millennium Session of the UNGA the agenda included ‘The role of diamonds in fuelling conflicts’. The General Assembly strived to maintain a balance between conflict diamonds that ‘were a crucial factor in promoting brutal wars in parts of Africa’ and legitimate diamonds that ‘contribute to the prosperity and development elsewhere on the continent’.²⁵⁷

²⁵⁴ Section I of the Certification Scheme.

²⁵⁵ Smillie, Gberie and Hazleton ‘At the heart of the matter’ (2000) at 5-6; see also on Liberia Smillie ‘Land grabbing’ (2007) at 8-10; with regard to the DRC see Samset ‘Conflict of interest’ (2002) at 465-70 and 476-77; see in general Onwuke RI Abegunrin L and Ghista DN *African development – The OAU/ECA Lagos Plan of Action and beyond* (1985) at 212-34.

²⁵⁶ See in general Mamdani (1996) at 45-102; Ndegwa ‘Citizenship and ethnicity’ (1997) at 101-49.

²⁵⁷ Section I of the Certification Scheme.

The UN recognised that international and regional organisations have a critical role to play in the trade of conflict diamonds.²⁵⁸ The Certification Scheme acknowledged the role of international and regional organisations in its Preamble.²⁵⁹ Therefore, it is important within the context of this study to examine the role of international and regional organisations as their actions are crucial to the illicit trade of conflict diamonds and the consequent human rights crises.

Since its inception, the Certification Scheme enjoyed the support of the UN, both the UNGA and the UNSC. Support has been evidenced in their Resolutions. Every year, the KP Chair is requested to report to the UNGA on its work. Each year since 2000, the UNGA has adopted a Resolution on the role of diamonds in fuelling conflict, demonstrating its support for the Certification Scheme by consensus.²⁶⁰ The UNSC also endorsed the Certification Scheme and has worked with the Certification Scheme, most recently in the cases of Liberian and Côte d'Ivoirian diamond trade.²⁶¹

²⁵⁸ Wellens K 'Fragmentation of international law and establishing an accountability regime for international organisations: The role of the judiciary in closing the gap' (2004) *Mich J of Int'l L* at 3-4; see also Article 56 of the UN Charter; see also Brownlie (1990) at 696-7; see Simma B, Mosler H, Randelzhofer A, Tomuschat C, Wolfum R, *The Charter of the United Nations - A commentary* (1994) at 400-40.

²⁵⁹ The Preamble to the Certification Scheme clearly recognises the role of international and regional organisations. Regional organisations consist of The Organization for American States, the European Union and the African Union. International organisations included the UN itself, the WTO, the World Bank, the World Diamond Council and many other organisations; see also Shaw 'Regional dimensions of conflict' (2003) at 491-4 and 487-98; see also Wallis 'Data mining' (2005) 388-94 on monitoring, enforcement, redress and accountability issues; see further UN Experts Meeting on 'Natural resources and conflict in Africa: Transforming a peace liability into a peace asset' 17-19 June Parts VIII and IX.

²⁶⁰ UN GA Resolution 55/56(2000) UN Doc A/RES/55/56 (2000) created the mandate for the Kimberley Process has been regularly renewed basis by the UN through the following UNGA Resolutions: UN Doc A/RES/56/263(2002), UN Doc A/RES/57/302(2003), UN Doc A/RES/58/290(2004), UN doc A/RES/59/144(2004), and UN Doc A/RES/60/182(2005). The Certification Scheme has gained important recognition from the UN SC through Resolution 1459(2003) UN Doc S/RES/1459(2003). More recently the role of the Certification Scheme has been acknowledged in UN SC Resolutions 1521 (2003) and 1643(2005) UN Doc S/RES/1521(2003) on Liberia and UN Doc S/RES/1643(2005) on Côte d'Ivoire.

²⁶¹ UN SC Resolution 1459(2003) UN Doc S/RES/1459 (2003).

2. The role of the UN SC and conflict diamonds (Resolutions): The Certification Scheme

In January 2003, the UN SC passed Resolution 1459 noting the linkage between the illicit trade of rough diamonds and the fuelling of armed conflicts in certain regions of the world, which were affecting international peace and security.²⁶² It also highlighted the importance of conflict prevention arising from the illicit trade of rough diamonds, which is the very purpose of the Certification Scheme.²⁶³

The Resolution made three points. Firstly, the UN SC expressed its ‘strong support’ for the Certification Scheme as well as the ongoing process to refine and implement the Certification Scheme as a valuable contribution against trafficking in conflict diamonds.²⁶⁴ Secondly, the UN SC welcomed the voluntary system of industry self-regulation, as described in the Interlaken Declaration.²⁶⁵ Finally, the Resolution stressed that the widest possible participation in the Certification Scheme is essential and urged all Member States of the UN to actively participate in the Certification Scheme.²⁶⁶

In the same year, on 15 December 2003, the UN SC passed another Resolution, which took note of the reports of the UN Panel of Experts on Liberia.²⁶⁷ The UN SC expressed concern at the findings of the Panel of Experts that the measures imposed by its 2001 Resolution, continued to be breached.²⁶⁸ The Security Council called upon all states in the region, particularly the National Transitional Government of Liberia, to work together to build regional peace, through the Economic Community of West African States (ECOWAS), the International Contact Group on Liberia, the Mano River Union and the Rabat Process.²⁶⁹

²⁶² UN Doc S/RES/1459(2003); Recalling all relevant resolutions of the Security Council to control the illicit trade in rough diamonds, including Un Doc S/RES/1173(1998), UN Doc S/1306(2000), UN Doc S/RES/1343(2001), UN Doc S/RES/1385 (2001), and UN Doc S/RES/1408(2002), Highlighting in particular Resolution 1295(2000) UN doc S/RES/1295(2000) which welcomed the proposal that led to the adoption of the Interlaken Declaration of 5 Nov. 2002 on the Kimberley Process Scheme for Rough Diamonds.

²⁶³ UN Doc S/RES/1459 (2003).

²⁶⁴ Adopted at the Interlaken Declaration 2002.

²⁶⁵ Of 2002; see also UN Experts Meeting on ‘Natural resources and conflict in Africa: Transforming a peace liability into a peace asset’ 17-19 June Parts VIII and IX.

²⁶⁶ Member States of the UN Charter.

²⁶⁷ UN Doc S/RES/1521 (2003); UN Doc S/RES//779(2003) and UN Doc S/RES/937(2003) and UN Doc S/RES/937(2003) submitted pursuant to Resolution 1478(2003) UN Doc S/RES/1478 (2003).

²⁶⁸ UN Doc S/RES/1343 (2001).

²⁶⁹ UN Doc S/RES/1521 (2003); see also Gberie ‘West Africa’ (2003).

Furthermore, the Resolution identified the linkage between the illegal exploitation of natural resources such as diamonds and the illicit trade of resources. The Resolution also recognised the proliferation and trafficking of illegal arms as a major source of fuelling and exacerbating conflicts in West Africa, particularly in Liberia. Conflicts continued to pose a threat to international peace and security in West Africa, in particular to the peace process in Liberia.²⁷⁰

Acting under Chapter VII of the UN Charter, the Security Council imposed an arms trade embargo against Liberia.²⁷¹ The Resolution made two ‘demands’.²⁷² Firstly, the Resolution demanded that all States in West Africa take action to prevent armed individuals and groups from using their territory to prepare and commit attacks on neighbouring countries. Secondly, the Resolution demanded that countries refrain from any action that might contribute to further destabilisation of the situation in the sub region.

In addition, the Resolution decided that all States shall take the necessary measures to prevent the direct or indirect import of all rough diamonds from Liberia, whether or not such diamonds originated in Liberia.²⁷³ The Resolution also called upon the National Transitional Government of Liberia to urgently establish an effective Certificate of Origin regime, for trade of Liberian rough diamonds. This, the Resolution stated should be transparent and internationally verifiable with a view to joining the Kimberley Process.²⁷⁴

A year later, the UN SC passed another Resolution, which noted the reports of the UN Panel of Experts on Liberia.²⁷⁵ Again, the Security Council recognised the linkage between the illegal exploitation of diamonds and the illicit trade in diamonds, and the proliferation and trafficking of arms as one of the sources of fuelling and exacerbating conflicts in West

²⁷⁰ Under Chapter VII of the UN Charter; see also Gberie *supra*.

²⁷¹ Part 2(a)-(g) of Resolution 1521 UN Doc S/RES/1521 (2003). Recalling its UN SC Resolutions UN Doc S/RES/1343(2001), UN Doc S/RES/1408(2002), UN Doc S/RES/1478(2003), UN Doc S/RES/1497(2003) and UN Doc S/RES/1509(2003); see also Grant *et al* ‘Global Governance’ (2004) at 375-85.

²⁷² Part 3 of UN SC Resolution 1521(2003) UN Doc S/RES/1521(2003).

²⁷³ Part 6 of UN SC Resolution 1521(2003) *supra*.

²⁷⁴ Part 7 of UN SC Resolution 1521 *supra*.

²⁷⁵ UN Doc S/RES/752(2004) and UN Doc S/RES/995(2004) submitted pursuant to UN Doc S/RES/1549(2004)

Africa, particularly in Liberia.²⁷⁶ The measures imposed under the Resolution were designed to prevent illegal exploitation from fuelling a resurgence of the conflict in Liberia.²⁷⁷

The Security Council stated that the situation in Liberia continued to constitute a threat to international peace and security in the region. Acting under Chapter VII of the UN Charter, the Security Council renewed the previous Resolution 1521 of 2003 for a further six months.²⁷⁸ The Security Council also decided to re-establish the Panel of Experts.²⁷⁹

Another year passed when the state of Côte d'Ivoire appeared on the Security Council's agenda. In December 2005, the Security Council passed a Resolution expressing its concern at the persistence of the crisis in Côte d'Ivoire and of obstacles to the peace and national reconciliation process by all parties.²⁸⁰ It reiterated its firm condemnation of all violations of human rights and international humanitarian law, including the use of child soldiers, in Côte d'Ivoire.

The Security Council noted the final communiqué of the KP Plenary Meeting held in Moscow in November 2005. Furthermore, it noted the Resolution adopted by the Certification Scheme's Participants at that meeting 'setting out concrete measures to prevent the introduction of diamonds from Côte d'Ivoire into the legitimate diamond trade, and recognising the linkage between the illegal exploitation of diamonds, illicit trade in diamonds, and the proliferation and trafficking of arms and the recruitment and use of mercenaries as one of the sources of fuelling and exacerbating conflicts in West Africa'.²⁸¹

The Security Council noted the report of the UN Panel of Experts on Côte d'Ivoire²⁸² and determined that the situation in Côte d'Ivoire continued to pose a threat to international peace and security in the region. Acting under Chapter VII of the Charter of the UN, the Security Council renewed the provisions of Resolution 1572 until December 2006.²⁸³

²⁷⁶ UN Doc S/RES/1579(2004).

²⁷⁷ UN Doc S/RES/1521(2003).

²⁷⁸ Part 1 of UN SC Resolution 1521(2003) UN Doc S/RES/1521(2003).

²⁷⁹ Part 8 of UN SC Resolution 1521 *supra*.

²⁸⁰ UN Doc S/RES/1643 (2005).

²⁸¹ *Ibid.*

²⁸² UN Doc S/RES/699(2005).

²⁸³ Paras 1-12 of UN SC Resolution 1572(2004) UN Doc S/RES/1572 (2004) until 15 December 2006. Part 1 of UN SC Resolution 1643(2005) UN Doc S/RES/1643 (2005).

Further, the Security Council decided that all states were obliged to take necessary measures to prevent the import of all rough diamonds from Côte d'Ivoire.²⁸⁴ The Resolution noted pleasure at the agreement by Participants to the Certification Scheme. The Resolution also called upon the states in the region, which were not Participants in the Certification Scheme, to intensify their efforts to join the same in order to increase the effectiveness of monitoring the import of diamonds from Côte d'Ivoire.²⁸⁵

As the Resolution referred to above shows that, many strides have been made by the UN SC to support the objectives of the Certification Scheme. The UN SC has also enjoyed the support of Participants in its Resolutions. Indeed, the UN SC has been vociferous in making the role of the illicit trade of conflict diamonds an international agenda item. Through its Resolutions, the UN SC has made known its concern for the illicit trade in rough diamonds. At the outset in 2003, the UN SC made itself clear on the pursuance of an international certification scheme for the trade in rough diamonds, which lead to human rights abuses and sustain conflicts.

The UN SC has through its Resolutions demonstrated support for the elimination of the illegal trade of rough diamonds, which cause human rights violations. Because Resolutions of the UN SC are legally binding, the UN SC has significant power in making particular determinations, toward the maintenance of international peace and security.

The right to veto of the permanent members of the Security Council is embodied in Article 27 of the UN Charter.²⁸⁶ Chapter V of the UN Charter provides for the vital role of the Security

²⁸⁴ Part 6 of UN SC Resolution 1643(2005) UN Doc S/RES/1643 (2005).

²⁸⁵ *Ibid.*

²⁸⁶ Article 27 of the UN Charter reads as follows:

‘Each member of the Security Council shall have one vote. Decisions of the Security Council on the procedural matters shall be made by an affirmative vote of seven (nine) members. Decisions of the Security Council on all other matters shall be made by an affirmative vote of seven (nine) members including the *concurring votes* of the *permanent members*, provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, *a party to a dispute shall abstain from voting*’(added emphasis)

This must be done with due regard being specially paid, in the first instance to the *contribution* (added emphasis) of Members of the UN to the maintenance of international peace and security and to the other purposes of the UN; and also to equitable geographical distribution. See further Article 23(1) of the UN Charter.

Council in the UN system. Resolutions passed by the UN SC are legally binding. Since 1998, the UN has engaged in Resolutions regarding the illicit trade in conflict diamonds.²⁸⁷

Subject to proportionality and the requisite consensus of the veto members, the UN SC may impose sanctions to enforce its resolutions that deal with the maintenance and international peace and security.²⁸⁸ Sanctions have their basis in international law.²⁸⁹ Sanctions are intended to persuade heads of state to amend their military, economic, or human rights policies, to end wars, civil conflicts or other crises that threaten international peace and security.²⁹⁰

Sanctions are a significant means to deter actions, which threaten international peace and security.²⁹¹

Contained within the power of the UN SC, is the ability to call upon Member States of the UN to support Resolutions. Also, the UN SC has the power to enforce Resolutions. Consequently the UN SC Resolutions on the illegal trade of rough diamonds have an internationally legally binding effect on Member States and organisations.

Having discussed the role of the UN SC, this chapter will examine the Resolutions of the UN GA.

²⁸⁷ *Ibid*; see also UN GA Resolution 55/56(2000) UN Doc A/RES/55/56 (2000) created the mandate for the Kimberley Process has been regularly renewed basis by the UN through the following UNGA Resolutions: UN Doc A/RES/56/263(2002), UN Doc A/RES/57/302(2003), UN Doc A/RES/58/290(2004), UN doc A/RES/59/144(2004), and UN Doc A/RES/60/182(2005). The Certification Scheme has gained important recognition from the UN SC through Resolution 1459(2003) UN Doc S/RES/1459(2003). More recently the role of the Certification Scheme has been acknowledged in UN SC Resolutions 1521 (2003) and 1643(2005) UN Doc S/RES/1521(2003) on Liberia and UN Doc S/RES/1643(2005) on Côte d'Ivoire.

²⁸⁸ Brownlie (1990) at 100-3.

²⁸⁹ Brownlie *supra* at 98-105.

²⁹⁰ Brownlie *supra* at 98.

²⁹¹ Brownlie *supra* at 97.

3. The role of the UN GA on conflict diamonds: The Certification Scheme

Having reviewed the Resolutions of the UN SC, the chapter will proceed to examine the role of the UN General Assembly (UN GA) in the illegal trade of rough diamonds, which culminated in the formation of the Certification Scheme.

In terms of the UN Charter, the function of the UN GA is confined to making recommendations.²⁹² Issues appearing on the UN GA agenda may secure the attention of the UN SC upon referral by the UN GA.²⁹³

Brownlie discusses law making by organisations. In particular, he opines that resolutions of the UN GA may be termed ‘prescriptive resolutions’.²⁹⁴ He acknowledges that resolutions in themselves are not legally binding. Yet they may ‘prescribe principles of international law and be, or purport to be, merely declaratory’. When UNGA Resolutions emanate from or have a direct bearing upon a subject within the UN Charter, they may be regarded as an ‘authoritative interpretation of the Charter’.²⁹⁵

New issues have a greater possibility of success when UNGA Resolutions may be relied upon as a source of international law. Resolutions of the UN GA in such instances provide ‘a means of corraling and defining the quickly growing practice of States, while remaining hortatory in form’.²⁹⁶ Generally, these issues have been of considerable importance.

It is important to examine the role of the UN GA in the Certification Scheme so that the study may be able to assess the future role of the UN GA, to be followed by an examination of the role the WTO to the Certification Scheme.

²⁹² Articles 10-18 of the UN Charter.

²⁹³ Brownlie (1990) at 14; see also UN Experts Meeting on ‘Natural resources and conflict in Africa: Transforming a peace liability into a peace asset’ 17-19 June Part VIII.

²⁹⁴ Brownlie *supra* at 699.

²⁹⁵ *Ibid.* Here Brownlie gives the examples of Universal Declaration of Human Rights and the Declaration on the Granting of Independence to Colonial Countries and Peoples contained in Resolutions of the UN GA.

²⁹⁶ Brownlie (1990) at 14; see also UN Experts Meeting on ‘Natural resources and conflict in Africa: Transforming a peace liability into a peace asset’ 17-19 June Part VIII.

a. UN GA Resolution 55/56

General Assembly Resolution 55/56 in 2000 expressed concern over ‘the problem of conflict diamonds fuelling conflicts in a number of countries and the devastating impact of these conflicts on peace, safety and security for people in affected countries’.²⁹⁷ The Resolution also recognised that the legitimate trade in diamonds makes a critical contribution to economic development in many countries worldwide.

Further, the Resolution stated that conflict diamonds are of serious international concern. The UN GA recommended that measures to address the problem should involve all concerned parties, including producing, processing, exporting and importing countries, as well as the diamond industry. The Resolution also emphasised that measures should be effective and pragmatic, consistent with international law and should not hinder the development of the diamond industry.²⁹⁸

The UN GA supported an initiative to launch an inclusive consultation process of governments, industry and civil society. Consultation found fruition in the Kimberley Process,²⁹⁹ expressing appreciation to African countries for their initiatives.³⁰⁰ The General Assembly called upon all states to implement Security Council measures targeting the link between the trade in conflict diamonds and the supply to rebel movements of weapons, fuel or other prohibited material.³⁰¹

The Resolution urged all states to support efforts of the diamond producing, processing, exporting and importing countries and the diamond industry, to find ways to break the link between conflict diamonds and armed conflict. The Resolution also encouraged improved international cooperation on law enforcement.³⁰² In expressing the need to consider devising

²⁹⁷ UN GA Resolution 55/56(2000) UN Doc A/RES/55/56 (2000).

²⁹⁸ Recalling all the relevant Resolutions of the Security Council, including its Resolutions UN Doc S/RES/1173 (1998), UN Doc S/RES/1295(2000), UN Doc S/RES/1306 (2000) and UN Doc S/RES/1304 (2000).

²⁹⁹ The ministerial statement was issued at the conclusion of the meeting on diamonds held in Pretoria on 21 September 2000. At KP website http://www.kimberleyprocess.com/background/index_en.html. Last visited 08 July 2011.

³⁰⁰ UN GA Resolution 55/56(2000) Annex UN doc A/RES/55/628 Annex; The communique was issued by the London Intergovernmental Meeting on Conflict Diamonds, held on 25 and 26 October 2000.

³⁰¹ Part 1 of UN GA Resolution 55/56(2000) UN Doc A/RES/55/56.

³⁰² Part 2 of UN GA Resolution 55/56(2000) *supra*.

measures to address the problem of conflict diamonds, the Resolution stated that the following elements should be included:³⁰³

- (a) The creation and implementation of a simple and workable international Certification Scheme for rough diamonds;
- (b) basing the scheme primarily on national Certification Schemes;
- (c) the need for national practices to meet internationally agreed minimum standards;
- (d) the aim of securing the widest possible participation;
- (e) the need for diamond processing, exporting and importing States to act in concert;
- (f) the need for appropriate arrangements to help to ensure compliance, acting with respect for the sovereignty of States; and
- (g) the need for transparency.

These elements became the backbone of the Certification Scheme as it is in existence.

b. UN GA Resolution 56/263

In 2002, the UN GA adopted another Resolution. Whilst reiterating and commending the work of the Kimberley Process, the Resolution encouraged the resolution of outstanding measures to be taken to implement the international Certification Scheme for rough diamonds consistent with international law governing international trade.³⁰⁴ Also the UN GA encouraged finalisation and implementation of the international Certification Scheme, recognising the urgency of the situation from a humanitarian and security standpoint.³⁰⁵

Further, it drew attention to essential tools for the successful implementation of the proposed international Certification Scheme, for the collation and dissemination of relevant statistical data on the production of and international trade in rough diamonds.³⁰⁶

³⁰³ Part 3 of UN GA Resolution 55/56(2000) *supra*.

³⁰⁴ Part 5 of Resolution UN GA Resolution 55/56(2000) UN Doc A/RES/56/263(2000); These statements were reiterated in the General Assembly Resolutions UN Doc A/RES/58/290 (2004) and UN doc A/RES/58/L.59 (2004)

³⁰⁵ Part 6 of UN GA Resolution 56/263(2004) UN Doc A/RES/56/263(2004).

³⁰⁶ Part 7 of UN GA Resolution 56/263(2004) *supra*.

c. UN GA Resolution 57/302

UNGA Resolution 57/302 restated the role of diamonds in fuelling conflict, and the need to break the link between the illicit transaction of rough diamonds and armed conflict, as a much needed contribution to the prevention and settlement of conflicts. In addition to reiterating the contents of the preceding Resolution, this Resolution also recognised the following: the impact of conflicts fuelled by the trade in conflict diamonds on the peace; safety and security of people in affected countries; and the systematic and gross human rights violations, which were perpetrated in such conflicts.³⁰⁷

Therefore, urgent action to curb the trade in conflict diamonds was considered imperative. The introduction of the Certification Scheme should, according to the Resolution, substantially reduce the opportunity for conflict diamonds to play a role in fuelling armed conflict. The Certification Scheme should also help to protect legitimate trade and ensure the effective implementation of the relevant resolutions on trade in conflict diamonds. Voluntary self-regulation initiatives for the diamond industry announced by the World Diamond Council were acknowledged in that a system of such voluntary self-regulation will contribute, as described in the Interlaken Declaration.³⁰⁸

Resolutions of the UN GA are of a recommendation making nature. Unlike the Resolutions of the UN SC, they are not legally binding. However, the strength of the UN GA Resolutions rests in their ability to gather mobility for action toward the agenda of the UN SC. Once the attention of the UN SC is gained, UN GA Resolutions may be turned into action by the UN SC. In this manner, the significance of the UN GA is improved. The efficacy of the UN GA is further bolstered through its wide Member State representation.

Resolution 55/56 is synonymous with the Certification Scheme. The Resolution set down the fundamental elements of the Certification Scheme. These elements formed the basic structure of the Certification Scheme. The Resolution was strong on the points of the need for the

³⁰⁷ UN GA Resolution 57/302 UN Doc A/RES/57/302(2004).

³⁰⁸ UN GA Resolution 57/489(2002) UN Doc A/57/489, Annex 2 (2002) on the Kimberley Process Scheme for Rough Diamonds. The General Assembly in UN GA Resolution 59/144(2005) UN Doc A/59/144(2005) restated its commitment to the Kimberley Process and the work of the diamond industry most especially the World Diamond Council. In another Resolution UN Doc A/RES/60/182(2006); UN Doc A/RES/61/28(2007); UN Doc A/RES/62/L.16(2007) and UN GA Resolution A/RES/63/L.52 (as orally amended) of 5 December 2008, the General Assembly noted with satisfaction the progress of the Kimberley Process.

compilation and dissemination of statistics relating to blood diamonds to all Member States. At the time, the opinion that prevailed in the UN GA was that the introduction of an international certification scheme would substantially reduce the illegal trade in rough and conflict diamonds.

The Resolution also recognised the role of international organisations, recognised the human rights violations and conflicts generated by the illicit trade in rough and conflict diamonds, the impact of trade on regional stability and the maintenance of peace and security. All these factors were a sum total of the pertinent aspects for international concern arising from the illegal trade in rough and conflict diamonds.

Having examined the UN SC and the UN GA Resolutions, the role of the WTO in the Certification Scheme can be considered.

4. The World Trade Organisation (WTO)

The contribution of the WTO in the setting up and implementation of the Certification Scheme is evidenced by a WTO policy document.³⁰⁹ The document is indicative of the WTO's recognition of the Certification Scheme in the diamond trade.

The WTO is an organisation focused on liberalising trade. It is a forum for governments to negotiate trade agreements.³¹⁰ It is a place for them to settle trade disputes. It operates a system, which has created rules for trade.³¹¹ Lowering trade barriers is one of the most obvious means of encouraging trade.

Where countries have encountered trade barriers and wished them lowered, WTO negotiations have helped to liberalise trade.³¹² However, the WTO is not only about liberalising trade. In some circumstances, its rules support maintaining trade barriers.³¹³ At the heart of the WTO are its agreements, negotiated and signed by the majority of the world's trading nations. These documents provide the legal framework for international commerce. Diamond trade has also been regulated within the policies of the WTO.

The system's overriding purpose is to help trade flow as freely as possible because this is important for economic development and economic wellbeing.³¹⁴ It also means ensuring that individuals, companies and governments know what the global trade rules are; which affords transparency.³¹⁵

³⁰⁹ Waiver granted; see General Council, Decision of 15 Dec 2006, *Kimberley Process Certification Scheme for Rough Diamonds*, WTO Doc WTJL/676 (19 Dec 2006).

³¹⁰ Stephan PB 'The new international law: Legitimacy, accountability, authority and freedom in the new global order' (1999) *U Col L Rev* at 1555 for a critique on the WTO; see also Goldsmith E and Mander J *The case against the global economy and a for a turn towards localization* (2001) at 323-9.

³¹¹ Price 'Conflict diamonds' (2003) at 12.

³¹² Atik J 'Democratizing the WTO' (2001) *Geo Wash Int L Rev* at 451; see also Zagel GM 'WTO and human rights: Examining linkages and suggesting convergences' (2005) *2/2 International Development Law Organisation Voices of development jurists paper series* at 30-5; see also Martin FF, Schnably SJ, Wislon RJ, Simon JS and Tushnet MV *International human rights and humanitarian law: Treaties, cases and analysis* (2006) at 203.

³¹³ Atik *supra* at 468-71.

³¹⁴ Price *supra* at 22-49.

³¹⁵ Sapra S 'The WTO's system of trade governance: The stale NGO debate and the appropriate role for non state actors' (2009) *11 Oregon Rev Int'l L* at 71; see in general: Williams A 'The post colony as trope: Searching for a lost continent in a borderless world' (2000) *31/2 Research in African Literature* at 56-9; see also Cochrane WW and Bell CS *The economics of consumption* (1956) at 87-93; see also Burk M *Consumption economics: A multidisciplinary approach* (1968) at 78-97; see also Hoekman BM and Olarreaga M € *Global*

In recent years, this danger of flouting rules has become increasingly evident with the emergence of the WTO's totalising economic agenda.³¹⁶ Most rough diamonds are mined in Africa. The components for an international Certification Scheme for rough diamonds are contained in the Certification Scheme's document.

a. The Kimberley Process: WTO Conformity³¹⁷

The key provision with regard to the question of WTO conformity is contained in Section III.³¹⁸

Each Participant should: ...

- (c) ensure that no shipment of rough diamonds is *imported* from or *exported* to a non-Participant; ...' (emphasis added).

The Section requires Participants to the Certification Scheme to prohibit trade in rough diamonds with trade partners that are not participating to the Certification Scheme. One justification for the trade restriction is to attain broad participation in the Certification Scheme and to prevent non Participants from mixing conflict free diamonds with conflict diamonds.³¹⁹

Since the Certification Scheme encourages Participants to adopt trade measures at a national level, if necessary, the question of WTO conformity will arise at the level of national

trade and poor nations: The poverty impacts and policy implications of liberalization (2007) at 93-107; see also Gwartney JD and Wagner RE *Public choice and constitutional economics* (1988) at 56-98; see Robinson NA *Strategies toward sustainable development: Implementing Agenda 21* (2004) at 123-89.

³¹⁶ Tandon Y 'Globalization and Africa's options (Part Two)' (1999) 1 *Journal of Development Economics for Southern Africa* at 109-35; see also Atik J 'Repenser NAFTA chapter 11: A catalogue of legitimacy critiques' (2003) *Asper Bus Int'l and Trade L Rev* at 215.

³¹⁷ From the Workshop on WTO Conformity, 15-17 February 2002 Chairman's Non-Paper.

³¹⁸ Undertakings in respect of the international trade in rough diamonds; see UN GA A/RES/55/56 (2000) on the role of the trade in conflict diamonds in fuelling armed conflict called on the international community 'to give urgent and careful consideration to devising effective and pragmatic measures to address the problem of conflict diamonds' which would include 'the creation and implementation of a simple and workable international Scheme for rough diamonds.'

³¹⁹ Pauwelyn J 'WTO compassion or superiority complex?: What to make of the WTO waiver for "conflict diamonds"' (2003) *Mich Jrnl of Int'l L* at 1117 for a discussion on the purpose for which the waiver was granted; see also Woody 'Diamonds' (2006-2007) 335-56 wherein she analyses the events predicating the KP and examines the validity of the KP in relation to international trade obligations. The article argues that despite the WTO waiver, the KP is a violation of international trade law. Consequently, the waiver was granted on a moral basis, that is, the use of morality in international trade law.

implementation.³²⁰ In this context, the WTO considered measures to implement the Certification Scheme as well as to enforce it through trade restrictions such as an import or export ban.

The Certification Scheme developed in the Kimberley Process is enshrined in a political document providing guidance to Participants on how to implement the Certification Scheme at national level.³²¹ As a political document, the Certification Scheme contains no legally binding obligations. Therefore, according to the WTO, the Certification Scheme does not constitute a trade measure in WTO terms and will not be under scrutiny of the WTO.³²²

Any national legislation of WTO members, relevant to the WTO Agreements, is subject to the WTO dispute settlement procedure.³²³ Therefore, national laws or regulations amended or enacted to implement and enforce the Certification Scheme may be subject to legal review by the WTO dispute settlement institutions.³²⁴ Thus, national laws or regulations have to be drafted in conformity with relevant WTO obligations.

b. Rules of treaty interpretation

The WTO's Policy Paper refers to rules of treaty interpretation in examining national implementation of the Certification Scheme.³²⁵ Article 3.2 of the WTO Dispute Settlement Understanding directs members to clarify WTO provisions 'in accordance with customary rules of interpretation of public international law'.³²⁶ It is generally recognised that the fundamental rules set out in Articles 31 and 32 of the Vienna Convention have attained the

³²⁰ Article 3.2 of the WTO Dispute Settlement Understanding; see also Petersmann 'Human rights' (2006) at 644-8.

³²¹ Section III-VI of the Certification Scheme; see also Sapra 'The WTO's system' (2009) at 85-95.

³²² Hernandez-Lopez E 'Recent trends and perspectives for non state actor participation in the WTO disputes' (2001) 35/3 *Journal of World Trade* at 474-8.

³²³ Hernandez-Lopez *supra* at 478-81.

³²⁴ By analogy and application of the same principles applicable to Dispute Settlement; see also report by International Council on Human Rights Policy 'Beyond voluntarism' (2002) at 110-15; see further Price 'Conflict diamonds' (2003) at 12; see also in general Jellum LD and Hricik DC *Modern statutory interpretation: problems, theories and lawyering strategies* (2006) at 55-109; see also Zagel 'WTO and human rights' (2005) at 30-5.

³²⁵ Chairpersons Non-Paper (2002) at 21.

³²⁶ Guzman AT 'Global governance and the WTO' (2002) *UC Berk Pub Law and Legal Theory Research Paper Series* Research Paper No 89 at 28-34; see also Price 'Conflict diamonds' (2003) at 12.

status of customary international law.³²⁷ According to Article 31, the, ‘text, context and object and purpose of the treaty form the foundation for interpretation of same’.

In addition, any subsequent agreement between the parties and subsequent practice in the application of the treaty shall be taken into account; thereby giving effect to the notion of abrogation.³²⁸ According to Article 32 (Supplementary means of interpretation) recourse may also be made to the ‘preparatory work and the circumstances of its conclusion’. In the *Shrimp/Turtle case*,³²⁹ the Appellate Body also relied on international conventions³³⁰ and political declarations, outside of the WTO context, to interpret provisions of Article XX.2.

c. Articles I, XI and XIII GATT 94

The most significant obligations in GATT 1994 affected by an import and export ban on rough diamonds are the ‘most favoured nation treatment’ obligation of Article I; the ban on prohibitions and quantitative restrictions of Article XI; and the obligation of non-discrimination in the administration of quantitative restrictions of Article XIII.³³¹ Article XIII: 1 establishes the more specific obligation of non-discrimination with regard to the application of prohibitions and quantitative restrictions. It is, therefore, according to the WTO considered to be the *lex specialis* taking priority of Article I in a particular case.³³²

Under the WTO agreements, countries cannot normally discriminate between their trading partners. To grant a state a special favour (such as a lower customs duty rate for one of their products) and this must be reciprocated for all other WTO members, is one such example.

This principle is known as most-favoured-nation treatment. It is so important that it is the first article of the General Agreement on Tariffs and Trade (GATT), which governs trade in goods. MFN is also a priority in the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), although in

³²⁷ Article 38(1) of the ICJ; see also the *Corfu Channel* case.

³²⁸ Article 31 of the VC.

³²⁹ WTO case Nos 58 (and 61) 6 November (1998).

³³⁰ UN Convention on the Law of the Sea.

³³¹ Applicable to the grant of waiver; see further Schram ‘The legal aspects’ (2007) at 22 and 28.

³³² Woody ‘Diamonds’ (2006-2007) at 347-9 on WTO ‘challenges’ and 349-55 on ‘morality’ grounds of waiver grant 335-56.

each agreement the principle is handled slightly differently. Together, those three agreements cover all three main areas of trade handled by the WTO. Some exceptions are allowed.

Article XI: 1 applies to exports as well as imports underpinning the basic GATT philosophy in respect of trade restrictions. As a matter of principle, such restrictions have to be in the form of ‘duties, taxes or other charges’. Article XI bans other forms of import and export restraints, mentioning in particular prohibitions and quantitative restrictions.³³³

An import and export ban on rough diamonds with regard to WTO members not participating in the Certification Scheme could, therefore, constitute a trade restriction prohibited by this provision. There are a number of specific exceptions listed in Article XI. According to the WTO, a closer examination of the wording and intention demonstrates that they have no application in the trade of rough diamonds.

d. Article XXI GATT 94: Security exceptions

The World Trade Organization (WTO) deals with the rules of trade between nations at the international level. There are a number of ways of looking at the WTO in that it is an organization for liberalizing trade. It is also a forum for governments to negotiate trade agreements and a place for them to settle trade disputes. It operates a system of trade rules. Essentially, the WTO is a place where member governments attempt to resolve disputes.

The WTO was born out of negotiations, and everything the WTO does is the result of negotiations. The bulk of the WTO’s current work comes from the 1986-94 negotiations called the Uruguay Round and earlier negotiations under the General Agreement on Tariffs and Trade (GATT). The WTO is currently the host to new negotiations, under the ‘Doha Development Agenda’ launched in 2001.

At its heart are the WTO agreements, negotiated and signed by most of the world’s trading nations. These documents provide the legal ground-rules for international commerce. They are essentially contracts, binding governments to keep their trade policies within agreed limits. Although negotiated and signed by governments, the goal is to help producers of

³³³ Lindsay P ‘The ambiguity of GATT Article XXI: Subtle success or rampant failure’ (2003) 52 *Duke LJ* at 1280-1.

goods and services, exporters, and importers conduct their business, while allowing governments to meet social and environmental objectives.

The system's overriding purpose is to help trade flow as freely as possible because this is important for economic development and well-being. That partly means removing obstacles. It also means ensuring that individuals, companies and governments know what the trade rules are around the world, and giving them the confidence that there will be no sudden changes of policy. In other words, the rules have to be "transparent" and predictable.

This is a third important side to the WTO's work. Trade relations often involve conflicting interests. Agreements, including those painstakingly negotiated in the WTO system, often need interpreting. The most harmonious way to settle these differences is through some neutral procedure based on an agreed legal foundation. That is the purpose behind the dispute settlement process written into the WTO agreements.

Articles XX and XXI provide as follows:

‘Article XX

General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health;
- (c) relating to the importations or exportations of gold or silver;
- (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;
- (e) relating to the products of prison labour;

- (f) imposed for the protection of national treasures of artistic, historic or archaeological value;
- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
- (h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;*
- (i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; *Provided* that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination;
- (j) essential to the acquisition or distribution of products in general or local short supply; *Provided* that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The CONTRACTING PARTIES shall review the need for this subparagraph not later than 30 June 1960.

Article XXI

Security Exceptions

Nothing in this Agreement shall be construed

- (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
- (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
 - (i) relating to fissionable materials or the materials from which they are derived;
 - (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
 - (iii) taken in time of war or other emergency in international relations; or
- (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.'

The wording of Article XXI, the so called security exception, is broader than Article XX. In contrast to Article XX, there is no introductory clause limiting the scope of these exceptions. Article XXI is considered to be among the most sensitive of GATT and broad enough to be subject to abuse. It is held that, in some cases, it could be difficult to draw a clear line between national security and political purposes.³³⁴

In the case of a trade ban on rough diamonds, considerations can be limited to Paragraphs (b) and (c) of Article XXI. These provisions apply to imports as well as exports since the term 'action' includes all kinds of trade measures. Article XXI (b) contains a general exception for certain measures taken by a member 'which it considers necessary for the protection of its essential security interests'.

The language bestows the right of determining the necessity for the protection of security interests to individual governments. However, it is limited to 'essential security interests'.³³⁵ Therefore, trade measures may not be used for political purposes that have a tangential relationship to national security. The applicability of this provision could be the subject of differing interpretations.

Thus far, this exception has rarely been invoked and governments have shown restraint in using it.³³⁶ The provision is limited to three specific situations. In the context of a trade ban on rough diamonds, a closer examination must be had to Paragraphs (ii) and (iii).³³⁷ Paragraph (ii) covers any action relating to the traffic of goods carried on 'directly or indirectly for supplying a military establishment'.³³⁸

Thus, all goods, which could contribute to war, may potentially fall within the exception of Article XXI (b). Accordingly, if the WTO is of the view that rebel movements use conflict diamonds to finance their military activities, then the wording of this paragraph may be considered applicable to the Certification Scheme.³³⁹

³³⁴ Lindsay 'The ambiguity of GATT Article XXI' (2003) at 1280-1.

³³⁵ Chairman's Non-Paper (2002) at 3-4.

³³⁶ Kelly CR 'Power, linkage and accommodation: The WTO as an international actor and its influence on other international actors and regimes' (2006) 26/1 *Berkeley J Int'l L* at 1-3 and 108; Chairman's Non-Paper (2002) at 4.

³³⁷ Chairman's Non-Paper (2002) at 3-5.

³³⁸ Chairman's Non Paper (2002) at 4; see Kelly 'Power, linkage and accommodation' (2006) at 103-8.

³³⁹ Pauwelyn 'WTO compassion' (2003) at 1117; Chairman's Non Paper (2002) at 4; see also Price 'Conflict diamonds' (2003) at 11 providing insight into the tactics of the RUF and other rebel groups in Sierra Leone, and

Paragraph (iii) covers action ‘taken in time of war or other emergency in international relations’. Therefore, the main question is whether the problem of conflict diamonds could be considered in an emergency situation in international relations. If the answer is in the affirmative, then the WTO may conclude that this paragraph is applicable to the Certification Scheme.

The exception in Article XXI(c) covers actions in pursuance of the obligations ‘under the UN Charter for the maintenance of international peace and security’.³⁴⁰ The necessity for taking action is, therefore, based on a multilateral decision and not on a decision of an individual government as in Article XXI (b).³⁴¹

With regard to the wording of this provision, it is not clear whether it applies only to UN SC actions or also other measures such as recommendations of the UN GA. Imposition of economic and military sanctions according to Chapter VII of the UN Charter is within the competence of the Security Council.³⁴²

However, the General Assembly can make recommendations on ‘the general principles of co-operation in the maintenance of international peace and security’.³⁴³ Therefore, the key issue is whether only UN SC actions or recommendations of the UN GA can lead to obligations within the meaning of Article XXI(c).

Participant Countries threatened by an insurgency, which is funded by the sale of diamonds outside the auspices of the Certification Scheme, may choose to rely on the invocation of Article XXI. Ultimately, the WTO will casuistically assess the applicability of Article XXI.

stating that the group would ‘hold mines ransom in exchange for a more democratic system, while killing and mutilating the local villagers’.

³⁴⁰ Chapter VII of the UN Charter read in conjunction with Article 2(7) of the UN Charter; see also Genugten VW ‘Linking the power of economics to the realisation of human rights: The WTO as a special case’ (2006) *Human rights and development: Law policy and governance* at 205-7; see also Schefer N ‘Chilling the protection of human rights’ (2007) *NCCR Trade Working Paper*.

³⁴¹ Zagel ‘WTO and human rights’ (2005) at 30-5; by virtue of the possible application of Chapter VII in order to take measures to maintain peace and security.

³⁴² Articles 41-55 of the UN Charter.

³⁴³ Article 11 of the UN Charter.

e. Article XX GATT 94: General exceptions

The question whether Article XX applies to a trade ban on conflict diamonds is of subsidiary importance, to be reverted to in a situation where the applicability of Article XXI is denied.³⁴⁴ Firstly, the security exceptions of Article XXI are more specific and fit better the objectives of possible restrictions on the trade with conflict diamonds.³⁴⁵ Article XX applies to imports as well as to exports since the term ‘measures’ includes all kinds of trade measures.³⁴⁶

Secondly, the scope of Article XX is limited by the introductory clause, which prohibits; amongst others, any ‘disguised restriction on international trade’.³⁴⁷ Thirdly, and according to numerous precedents, the Appellate Body noted that Article XX permits only a limited and conditional exception to the GATT obligations, which must be interpreted narrowly.³⁴⁸

Upon examining the specific situations listed in Article XX it seems that, in particular, paragraphs (a), (b), and (d) might cover the case of a trade ban on rough diamonds. In accordance with the approach of WTO Panels, it must first be examined whether a measure falls within the scope of one of these paragraphs.³⁴⁹

f. Article VIII GATT 94 and Agreement on import licensing procedures

According to Article VIII.1(c) GATT, the formalities and documentation requirements for imports and exports should be kept to a minimum in order to facilitate trade. However, it is recognised that members may, for various reasons, require importers or exporters to obtain licenses.

The Certification Scheme requires Participants to obtain Certificates. This implies obtaining licenses to trade in rough diamonds. Licensing systems may be applied, for example, to administer quantitative restrictions or to implement the Certification Scheme. Nothing in the

³⁴⁴ Chairman’s Non-Paper at 6 (2002).

³⁴⁵ Zagel ‘WTO and human rights’ (2005) at 1; see also Pauwelyn ‘WTO compassion’ (2003) at 1117.

³⁴⁶ Chairman’s Non-Paper *supra* at 6-7.

³⁴⁷ *Ibid*

³⁴⁸ Zagel *supra* at 22; see also Kelly ‘Power, linkage and accommodation’ (2006) at 1-3.

³⁴⁹ Zagel ‘WTO and human rights’ (2005) at 2; see Chairman’s Non Paper (2002) at 7; see also Price ‘Conflict diamonds’ (2003) at 12.

Certification Scheme requires the adoption of measures *prima facie* inconsistent with Article VIII GATT 1994 or the Agreement on Import Licensing Procedures.

The Agreement on Import Licensing Procedures lays down rules for adopting and implementing national procedures for issuing import licenses. It divides licensing systems into two categories, namely automatic and non-automatic, and sets down general rules applicable to both systems as well as specific rules for each system.

The rules require national licensing authorities to ensure, for example, that licensing procedures:

- a. are implemented in a transparent and predictable manner (Preamble);
- b. are neutral in application and administered in a fair and equitable manner (Art 1.3);
- c. are not more burdensome than absolutely necessary to administer the measure (Art 3.2); and
- d. protect importers and foreign suppliers from unnecessary delays (e.g. time limits in Art 2.2(a) (iii) and Art 3.5(f))

The Agreement also obliges members to notify the WTO when they introduce new licensing procedures, or change existing procedures, and contains a list of elements that should be included in the notification.³⁵⁰ Finally, the Agreement states that with regard to security exceptions, the provisions of Article XXI GATT apply.³⁵¹

Conditions of the Certification Scheme are not inconsistent, *prima facie* with the requirements of Article VIII (1) (c). It must, however, be borne in mind that should Participants embark upon implementing legislation broadening the ambit of the Certification Scheme, caution will be exercised in light of their WTO membership.

³⁵⁰ Article 5 of the Agreement.

³⁵¹ Article 1.10 of the Agreement; see Lindsay 'The ambiguity of GATT Article XXI' (2003) at 1280-1.

g. Request for a waiver under Article IX of the WTO Agreement

According to Article IX of the WTO Agreement, in exceptional circumstances WTO members may decide to waive an obligation imposed on a Member by the WTO Agreements, if certain requirements are fulfilled.³⁵² In the context of the Certification Scheme, a waiver could be sought for trade measures that are inconsistent with WTO obligations.

A waiver may be sought following a determination that the measures would not be justified by the general exceptions. However, a waiver could also be seen as an instrument to provide legal certainty by ensuring the WTO compatibility of trade measures from their inception.³⁵³

The request for a waiver is without prejudice to the question of WTO conformity. For example, in the 1990 Panel Report on the *United States – Restrictions on the Importation of Sugar 26*, the Panel concluded that a waiver does not alter the legal nature of a measure. The Panel stated that a party having obtained a waiver for a particular measure is not barred from arguing in a dispute settlement procedure that the measure would be consistent with the GATT even in the absence of the waiver.³⁵⁴

In case a waiver is requested, a few practical questions will have to be taken into account. Firstly, a request can be made by each Participant or collectively.³⁵⁵ However, it must be noted that the Certification Scheme, as such, does not constitute a trade measure in WTO terms. Only concrete trade measures adopted at national level to implement the Certification Scheme could be subject to a waiver.³⁵⁶

Secondly, a waiver can be requested at various stages of the implementation of the Certification Scheme. A waiver may be requested before the entry into force of trade measures. Alternatively, a waiver may be requested during the first step of a dispute

³⁵² The decision must in general be taken by three fourths of the members (IX:3); the decision granting a waiver shall state the exceptional circumstances justifying the decision and the date on which the waiver will terminate (IX:4); and any waiver granted for a period of more than one year shall be reviewed annually until the waiver terminates (IX:4). In addition, the Understanding in Respect of Waivers of Obligations under the GATT 1994 states that a request for a waiver shall describe: the measures which a Member proposes to take; the specific policy objectives which the Member seeks to pursue; and the reasons which prevent the Member from achieving its policy objectives by measures consistent with the GATT 1994; see Pauwelyn 'WTO' (2003) at 1117.

³⁵³ Price 'Conflict diamonds' (2003) at 12; see also see Pauwelyn *supra* at 1118-9.

³⁵⁴ Petersmann 'Human rights' (2006) at 634.

³⁵⁵ Pauwelyn 'WTO compassion' (2003) at 1182-1189; see also Petersmann *id* 644-648.

³⁵⁶ Pauwelyn *supra* at 1183-1187.

settlement procedure; or as a last resort, in case a trade measure has been found to be a violation of WTO rules and disciplines.³⁵⁷ Election of one of these options is within the discretion of Participants.

h. The General Council: Request for waiver in the Certification Scheme

The General Council of the WTO conducted the function of the Ministerial Conference pursuant to paragraph 2 of Article IV of the Marrakesh Agreement Establishing the WTO (the WTO Agreement).³⁵⁸ A request was made by Member States to the WTO in 2002 and again in 2006 for the extension on the waiver for the trade in rough diamonds.³⁵⁹

The General Council referred to its previous decision, which granted Members a waiver from obligations.³⁶⁰ It took note of the request of the Members listed in the Annex for an extension of the Existing Waiver with respect to their domestic measures to regulate the international trade in rough diamonds consistent with the Certification Scheme.³⁶¹

The General Council made clear that its decision³⁶² did not prejudice the consistency of domestic measures taken consistent with the Certification Scheme with provisions of the WTO Agreement, including any relevant WTO exceptions, and that the Existing Waiver was to expire. Thus, the Council granted and extended the Waiver for reasons of legal certainty.

The waiver was granted in recognition that ‘the trade in conflict diamonds remains a matter of serious international concern and has been directly linked to the fuelling of armed conflict,

³⁵⁷ Pauwelyn *supra* at 1189-1193; see also Petersmann *supra* at 644-649.

³⁵⁸ Having regard to paragraphs 1, 3 and 4 of Article IX of the WTO Agreement, the Guiding Principles to be followed in considering applications for waivers adopted on 1 November 1956 (BISD 5S/25), and the Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994 (the ‘Understanding’). It noted the UN SC Resolution UN Doc S/RES/1459 (2003) supporting the Certification Scheme.

³⁵⁹ See Chairman’s Non Paper; see also WT/L/676 waiver extension granted on the recognising the ‘extraordinary humanitarian nature of this issue and the devastating impact of conflicts fuelled by the trade in conflict diamonds on the peace, safety and security of people in affected countries and the systematic and gross human rights violations that have been perpetrated in such conflicts...’; see also Zagal ‘WTO and human rights’ (2005) at 30-5.

³⁶⁰ Under paragraph 1 of Article I, 1 of Article XI, and 1 of Article XIII of the GATT 1994 for the period 1 January 2003 until 31 December 2006 (the ‘Existing Waiver’).

³⁶¹ Australia, Botswana, Brazil, Canada, Croatia, India, Israel, Japan, Korea, Mauritius, Mexico, Norway, Philippines, Sierra Leone, Chinese Taipei, Thailand, United Arab Emirates, United States and Venezuela.

³⁶² Adopted in accordance with the Decision-Making Procedures under Articles IX and XII of the WTO Agreement agreed by the General Council in Nov 1995 (WT/L/93) WT/L/518.

the activities of rebel movements aimed at undermining or overthrowing legitimate governments, and the illicit traffic in, and proliferation of, armaments, especially small arms and light weapons'.³⁶³

Further it recognised the 'extraordinary humanitarian nature of this issue and the devastating impact of conflicts fuelled by the trade in conflict diamonds on the peace, safety and security of people in affected countries and the systematic and gross human rights violations that have been perpetrated in such conflicts'.³⁶⁴ Members gave the assurance for implementing the Certification Scheme through national legislation.

If the Certification Scheme is to create a certain sense of efficacy, the role of the WTO must be seriously considered. Member States must ensure that implementation of the Certification Scheme's contents at national level is in conformity with the WTO principles.³⁶⁵ Of importance also is that trade import and export rules as well as procedures must be revised, so that legitimate trade of diamonds legally mined takes place within an economic context compliant with peace and security which arises from the protection of human rights.

Much debate ensued amongst Participants before the adoption of the Interlaken Declaration.³⁶⁶ Two main concerns gave rise to the debate. Firstly, Participants were concerned about whether the Certification Scheme might be regarded as restricting trade under the regulations of the trade agreements administered by the World Trade Organization. Secondly, Participants expressed concern around GATT.

During the negotiations of the Certification Scheme, it was considered necessary to create a special working group on WTO compliance issues.³⁶⁷ In paragraph 3 of the Interlaken Declaration, the Participants declare, 'We will ensure that the measures taken to implement

³⁶³ Zagel *supra* at 30-5.

³⁶⁴ Guzman 'Global governance' (2002) a 75-9 on state 'sovereignty'; see also Harris D *Cases and materials on international law* (2004) at 109-20.

³⁶⁵ Pauwelyn 'WTO compassion' (2003) at 1182-7; see also Petersmann 'Human rights' (2006) at 644-8; see further Zagel 'WTO and human rights' (2005) at 30-5.

³⁶⁶ With the 'Interlaken Declaration' the Participants announced their agreement on the Certification Scheme done on Nov 5 2002 at Interlaken, Switzerland; see Schram 'The legal aspects' (2007) at 18 and 30.

³⁶⁷ *Kimberley Process Meeting, Ottawa Final Communiqué*, 18 to 20 March 2002 available on www.kimberleyprocess.com; last visited 01 September 2011.

the Kimberley Process Certification Scheme for rough diamonds will be consistent with international trade rules'.³⁶⁸

Consequently, the request for a waiver seemed a fitting gesture to the fulfillment of the Interlaken promise.³⁶⁹ Although it is highly unlikely that the exceptions of GATT articles XX and XXI would not be applicable to the case of a multilateral certification system, set out to resolve transboundary disputes, some WTO Members nevertheless wanted to have absolute certainty on WTO compliance once the Certification Scheme was in place.³⁷⁰

The extra assurance was ultimately reached through the waiver.³⁷¹ The waiver nonetheless leaves open the possibility for a WTO Member to bring before the WTO General Council potential future concerns related to 'any benefit accruing...under the GATT 1994' that is 'impaired unduly', as well as concerns regarding a Member's potential claim that the Certification Scheme measures are being 'applied inconsistently'.³⁷²

Certainly the WTO has deemed appropriate their role in the implementation of the Certification Scheme at a national level. This means that the WTO involvement and compliance for WTO Member States is inevitable. Diamond trading has naturally elevated the world economy. This, then must be subject to regulation in order to afford a fair measure of control. As such, the WTO has made its position clear. The role of international organisations, as has been evidenced by the WTO policy document, is crucial to the operation and future sustainability for an international certification scheme for the trade of rough diamonds.

The inclusion of the Certification Scheme on the agenda of the WTO evidences the importance of the Certification Scheme and the work undertaken to date which demanded the attention of the WTO. This impact of the policy document demonstrates the importance of the Certification Scheme. Examination of the role of the WTO in the operation of the Certification Scheme concludes the first part of this chapter.

³⁶⁸ Interlaken Declaration.

³⁶⁹ Pauwelyn *supra* at 1220.

³⁷⁰ Schram *supra* at 31.

³⁷¹ *Ibid.*

³⁷² *Ibid.*

This chapter will proceed to its second part to discuss the role of regional organisations, namely the AU and the EC, in the Certification Scheme.

5. The role of regional organisations in the maintenance of international peace and security

Having provided an introduction to the importance of international organisations to the Certification Scheme and specifically; the roles of the UN SC and the UN GA and the WTO, this chapter will proceed to explore the role of regional organisations.

It is anticipated that this will reveal the importance of regional organisations for the long term sustainability and optimal efficacy of an international certification scheme within which diamond trading may ensue. The AU and the EC will be examined. To date the EC has ‘implemented’ the Certification Scheme into its region. To this end, it may be stated that the EC gave full recognition to the Certification Scheme as if it were a legally binding treaty.

According to the UN Charter, Member States may form regional alliances to maintain peace and security provided these activities are consistent with the Purposes and Principles of the UN.³⁷³ The Charter gives full recognition to regional organisations insofar as arrangements are made for the maintenance of peace and security whilst the general principle of subordination of regional arrangements and agencies to the Purposes and Principles of the Charter is asserted.³⁷⁴ Maintenance of international peace and security is contingent on regional and domestic peace and security.³⁷⁵

a. The African Union (AU) and the African region

The Constitutive Act of the African Union established the African Union.³⁷⁶ There are a number of mechanisms that address peace and security in Africa.³⁷⁷ One of the objectives of

³⁷³ Wallace R *International law* (1997) at 134-139; see also Wallace R *International law* (1997) at 230-234; see also the Preamble to the Certification Scheme notes: ‘Noting the negative impact of such conflicts on regional stability and the obligations placed upon states by the United Nations Charter regarding the maintenance of international peace and security...’ see also Shaw ‘Regional dimensions of conflict’ (2003) at 487-498; at 489 on ‘external actors’ including transnational mining corporations and their roles and at 492-3 on ‘West Africa: blood diamonds and the Kimberley Process’.

³⁷⁴ Goodrich LM and Hambro E *Charter of the United Nations* (1949) at 459-474; see also Chapter VIII of the UN Charter.

³⁷⁵ The Preamble to the Certification Scheme recognises: ‘Further recognising the devastating impact of conflicts fuelled by the trade in conflict diamonds on the peace, safety and security of people in affected countries and the systematic and gross human rights violations that have been perpetrated in such conflicts ...’

³⁷⁶ Article 2 of the Constitutive Act of the African Union 2000/2001.

the AU is to promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments.³⁷⁸

One of the most important mechanisms of the AU is the creation of the Peace and Security Council (PSC).³⁷⁹ The primary objective of the PSC is the promotion of peace, security and stability in Africa.³⁸⁰

The PSC is supported by five main organs: the AU Commission; the Continental Early Warning System, the Peace Fund, the Panel of the Wise and the African Standby Force which includes the Military Staff Committee.³⁸¹

The Protocol Relating to the Establishment of Peace and Security Council came into force in December 2003. The coming into force of the Protocol paved the way for the selection of members in March 2004. The Protocol was launched in May 2004. The PSC comprises fifteen Member States.³⁸² Ten of the fifteen Member States serve a two year term while five members serve a three year term.³⁸³

Unlike the UN SC, the AU's PSC does not have permanent member States. Nor does any member enjoy the right to veto. Decision making of the PSC is through consensus. In the absence of attaining consensus, a vote of a simple majority will inform the decision. The PSC

³⁷⁷ AU Peace and Security Structures; African Peer Review Mechanism; Economic, Social and Cultural Council (ECOSOCC) Statutes of ECOSOCC (2004); Pan African Parliament (PAP) (2001/2003) Africa's regional organisations: Arab Maghreb Union (AMU) 1989; Common Market for Eastern and Southern Africa (COMESA) 1993/1994; East African Community (EAC) 1999/2000; Economic Community of Central African States (ECCAS) 1983; Intergovernmental Authority on Development (IGAD) 1996; Southern African Development Community (SADC) 1992/1993.

³⁷⁸ Article 3(h) of the Constitutive Act of the AU; see also Fowler (1994) at 133-134 and 159-163; see also Hanski R and Suski M *An introduction to the international protection of human rights* (1999) in general.

³⁷⁹ Constitutive Act of the African Union 2000/2001.

³⁸⁰ Article 3(f) of the Constitutive Act of the AU; see generally Cilliers J and Sturman K 'Challenges facing the AU's Peace and Security Council' (2004) 13/1 *African Security Review*.

³⁸¹ Article 2 of the Protocol Relating to the Establishment of the Peace and Security Council.

³⁸² Southern Africa: Republic of Zimbabwe (3 years); East Africa: Republic of Kenya (3 years); Central Africa: Republic of Equatorial Guinea (3 years); West Africa: Federal Republic of Nigeria; North Africa: Libya (3 years) Southern Africa: Republic of Namibia; Southern Africa: Republic of South Africa; East Africa: Republic of Djibouti; East Africa: Republic of Rwanda; Central Africa: Republic of Burundi; Central Africa: Republic of Chad; West Africa: Republic of Benin; West Africa: Republic of Cote d'Ivoire; West Africa: Republic of Mali; North Africa: Republic of Mauritania. June (2006).

³⁸³ Southern Africa: Republic of Namibia; Southern Africa: Republic of South Africa; East Africa: Republic of Djibouti; East Africa: Republic of Rwanda; Central Africa: Republic of Burundi; Central Africa: Republic of Chad; West Africa: Republic of Benin; West Africa: Republic of Cote d'Ivoire; West Africa: Republic of Mali; North Africa: Republic of Mauritania

may convene at three different levels, namely Heads of States level, the Ministerial level and or the Permanent Representatives level.

Regional organisations on the African continent, such as SADC, have not been seized with the issue of conflict diamonds. As such, the matter of the Certification Scheme has not received attention from African regional organisations.

It is submitted that regional bodies should incorporate the initiatives such as the international certification scheme for trading in rough diamonds onto its agenda.³⁸⁴ To date other regional organisations such as the European Community have issued directives for the inclusion of the Certification Scheme's content into policies and legislation so as to ensure that the mandate of the Certification Scheme is met. This aspect will be discussed below.

In contrast, the AU has not issued directives or policies with respect to the implementation of the Certification Scheme. Thus, the sound of a singular voice with regards to the trade of conflict diamonds has not resonated in the African region. Certain African countries have incorporated the contents of the Certification Scheme into their domestic legal systems. The limited incorporation of the Certification Scheme may only be had as an indirect application under the rubric of human rights violations through the possible invocation of international legal principles.

b. The European Union (EU)

The EU is the regional organisation for the European states. It currently comprises 27 States.³⁸⁵ For most international trade matters, including the matter of trading of rough diamonds, the EC is considered as one entity without internal state borders. The EC operates as a single market and customs and economic union. All trade of commodities must in the first instance comply with the regulations set down by the European Council.³⁸⁶

³⁸⁴ Shaw 'Regional dimensions of conflict' (2003) at 487-98; see also UN Experts Meeting on 'Natural resources and conflict in Africa: Transforming a peace liability into a peace asset' 17-19 June Part VIII.

³⁸⁵ Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, The Netherlands and the United Kingdom.

³⁸⁶ Guidelines on Trading with the EC: A practical guide on Kimberley Participants and companies involved in trade in rough diamonds with Europe' (2008) at 2.

A singular set of EU rules govern the trade of rough diamonds for all 27 Member States at the external borders of a single economic market.³⁸⁷ The EU is a single Participant to the Certification Scheme. The EC formulated and passed a Council Regulation implementing the Certification Scheme for the international trade in rough diamonds.³⁸⁸

In article 288 of the Treaty on the Functioning of the European Union provides that in order for the EU to exercise competencies, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.³⁸⁹ Furthermore it states that a regulation shall have general application and shall be binding in its entirety and directly applicable in all Member States.³⁹⁰

The European Council can delegate legislative authority to the Commission and, depending on the area and the appropriate legislative procedure, both institutions can make laws.³⁹¹ The legal effect of regulations is that they are in some sense equivalent to ‘Acts of Parliament’, in that what they say is law and does not need to be mediated into national law by means of implementing measures.³⁹²

Thus, when a regulation comes into force, it overrides all national laws pertinent to the subject matter and subsequent legislation must be consistent with the regulation issued. Whilst Member States are prohibited from making irrelevant the direct effect of regulations, it is common practice to pass legislation dealing with consequential matters arising from the coming into force of a regulation.³⁹³

³⁸⁷ Guidelines on Trading with the EC: A practical guide on Kimberley Participants and companies involved in trade in rough diamonds with Europe’ (2008) at 2; see also Joerges C ‘The law in the process of constitutionalising Europe’ (2002) *EUI Working Paper Law* No 2002/4 at 11-25.

³⁸⁸ EC No 2368/2002; see Article 133 of the Treaty establishing the European Community.

³⁸⁹ Treaty on the Functioning of the European Union C 83/2010; see also Joerges C ‘The law in the process of constitutionalising Europe’ (2002) *EUI Working Paper Law* No 2002/4 at 11-25.

³⁹⁰ Article 288 of the Treaty on the Functioning of the European Union C 83/2010.

³⁹¹ *Ibid.*

³⁹² Article 288 of the Treaty on the Functioning of the European Union C 83/2010.

³⁹³ Article 290 of the Treaty on the Functioning of the European Union *supra*

Regulation 2368 of 2002 created a Community system of certification and import and export controls for rough diamonds for the purposes of implementing the Certification Scheme.³⁹⁴ Thus, all EU Member States must conform to the uniform set of rules set by the EC Council Regulation in order to engage the trade of rough diamonds.³⁹⁵

Rules were formulated in response to the Certification Scheme in order to recognise, ‘... the sanctions adopted by the United Nations Security Council against rebel movements in Sierra Leone and Angola against the Liberian government, prohibiting under certain conditions imports of rough diamonds from Liberia, Angola and Sierra Leone have not been able to stop the flow of conflict diamonds into the legitimate trade or to bring conflicts to a halt’.³⁹⁶

In June 2001, the Goteborg European Council (GEC) endorsed a programme for the prevention of violent conflicts. The programme provided that Member States and the Commission will deal with the illicit trade in high value commodities, including ways of breaking the link between rough diamonds and violent conflicts and supporting the Kimberley Process.³⁹⁷

The EU found that regulations dealing with the import of rough diamonds into the Union from Sierra Leone, which prohibited trade under certain conditions, were insufficient.³⁹⁸ Recognising the need to complement the then existing measures with effective controls over the international trade of rough diamonds which were financing the wars in diamond producing African countries and the undermining of legitimate governments, the EU sought to formulate a system for the certification of rough diamonds.³⁹⁹

Effective control of the rough diamond trade, the EU envisaged, will help maintain international peace and security; and will protect the revenue from the export of rough diamonds.⁴⁰⁰ The Regulation in very large part emulates the contents of the Certification

³⁹⁴ Article 1 of the EC Regulation 2368/2002.

³⁹⁵ Guidelines on Trading with the EC: A practical guide on Kimberley Participants and companies involved in trade in rough diamonds with Europe’ at 9 (2008).

³⁹⁶ Preamble to the Council Regulation EC No 2368/2002 OJ L 47 L358/28; see also Joerges ‘The law in the process of constitutionalising Europe’(2002) at 11-25 .

³⁹⁷ EC No 2368/2002.

³⁹⁸ Council Regulation EC No 303/2002 OJ L 47, 19.2.2002 at 8.

³⁹⁹ *Ibid.*

⁴⁰⁰ *Ibid.*

Scheme. Thus, these provisions will not be duplicated in this chapter save the contents, which differ from the contents of the Certification Scheme. The contents of the Certification Scheme document have been discussed in chapter two of this study.

The EU distinguishes between a ‘regulation’ and a ‘directive’. The principle of ‘indirect effect’ of European Community Law was brought out in the hallmark of the *Ratti* case in the European Court of Justice.⁴⁰¹ The principle compels national courts to interpret ‘so far as possible’ national legislation in accordance with the aims of a directive. In the EU, a ‘directive’ is a legislative order that requires implementation in every Member State by the national government.⁴⁰²

Whilst the Member State has the freedom to draft individual implementing legislation, the law must comply with the objective of the original directives. Therefore, implementation of a directive may assume different forms in different member states. In contrast, a ‘regulation,’ is a single law for all Members States of the EU. It is directly applicable in Member States; meaning a regulation does not require implementing legislation. Measures necessary for the implementation of the Regulation need not be adopted by Member States in accordance with procedures laid down by Council Decision.⁴⁰³ However, in order to give effect to the regulation, mechanisms must be instituted so that the meaning of the regulation is not watered down.

The Regulation states that its provisions should not be applicable to rough diamonds transiting the Community in the course of export to another Participant.⁴⁰⁴ Implied in this provision is that the EC has complied with import regulations and that all Member States will serve as a transit country.

Chapter II deals with the import regime, which governs the EC. Chapter III of the EC Regulation deals with the export regime, which governs the EC Member States. Chapter IV deals with industry self regulation. Chapter VII addresses transit of rough diamonds. Chapter VI deals with general provisions.

⁴⁰¹ *Pubblico Ministero v Ratti* (1979) ECR 1629 (C-148/78).

⁴⁰² See article 288 of the Treaty on the Functioning of the European Union C 83/2010.

⁴⁰³ Preamble to the Council Regulation EC No 2368/2002 OJ L 184, 17.7.1999 at 23 (20); see also Council Decision 1999/468/EC of 28 June 1999.

⁴⁰⁴ *Ibid* Preamble to the EC Regulation (18).

c. Chapter II of the Council Regulation No 2368/2002: Import of rough diamonds into the EU

Chapter II of the Council Regulation deals with the import of rough diamonds into the EC. In order to facilitate uniform application of the EC customs and tariffs legislation by the customs services of each Member state, the EC created the Integrated Tariff of the Community (TARIC, Tarif Integre de la Communaute) and a Combined Nomenclature (CN) in 1987.⁴⁰⁵

TARIC is an electronic system that indicates all customs duties or commercial policy measures applicable to any given product.⁴⁰⁶ The use of TARIC is obligatory in customs declarations in trade with third world countries.⁴⁰⁷ In importing rough diamonds, importers or economic operators may freely opt for a point of entry at an external border of the EC.

If rough diamonds are registered at any EU customs authority for import into the Community, TARIC automatically flags the existence of a trade restriction by means of an electronic warning system. The warning system refers to Council Regulation, which specifies the applicable rules for the import of rough diamonds into the EC in keeping with the Certification Scheme.⁴⁰⁸

Every import of rough diamond shipments must be verified by a Community Authority.⁴⁰⁹ A Community authority is a competent authority designated by a Member State and agreed by the Commission to fulfil certain tasks in connection with the implementation of the Certification Scheme.⁴¹⁰ Specifically, the task of the Community Authority is verification of incoming shipments for conformity with the Certification Scheme's rules and issuance of Kimberley Process Certificates for export shipments.⁴¹¹

⁴⁰⁵ Guidelines on Trading with the EC: A practical guide on Kimberley Participants and companies involved in trade in rough diamonds with Europe' (2008) at 2.

⁴⁰⁶ Guidelines on Trading with the EC: A practical guide on Kimberley Participants and companies involved in trade in rough diamonds with Europe' *supra* at 2-3.

⁴⁰⁷ *Ibid.*

⁴⁰⁸ Council Regulation EC No 2368/2002 at Chapter II.

⁴⁰⁹ *Ibid.*

⁴¹⁰ *Ibid.*

⁴¹¹ Guidelines on Trading with the EC (2008).

Import of rough diamonds into the Community shall be prohibited unless three conditions have been fulfilled. Firstly, pursuant to article 3(a) of the Regulation and Section II of the Certification Scheme, the rough diamond shipment must be accompanied by a certificate validated by the competent authority of a Participant.⁴¹² Secondly, the rough diamond shipment must be contained in tamper resistant containers, and the seals applied at export by the Participant must not be broken.⁴¹³ Thirdly, the Certificate must identify clearly the consignment to which it refers.⁴¹⁴

If there is a Community authority⁴¹⁵ in either the Member State where the rough diamonds are intended for import or the Member State for which the rough diamonds are destined, then the containers and certificates should be submitted for verification. Submission to either the Member State or importing destination Member State should be undertaken at the earliest opportunity.⁴¹⁶

The procedure to be followed if there is no Community authority in either the Member State where the rough diamonds are intended for import or the destined Member State, allows the importer to elect which Community authority submission of the shipment certificate will be made to, for verification purposes.⁴¹⁷

The customs authorities at the point of entry into the Community territory will register the shipment of rough diamonds for the external transit procedure. The procedure allows for the movement of goods from one point to another within the customs territory of the Community, without being subject to import duties.⁴¹⁸

Registration for this procedure allows for the transfer of rough diamonds to a Community authority for verification. Community authorities verify if the contents of a container matches the particulars on the corresponding certificates. After verification by a Community authority, the goods are submitted to the relevant national customs authorities for regular customs

⁴¹² Council Regulation EC No 2368/2002 at Chapter II Article 3(a).

⁴¹³ Council Regulation 2368 *supra* Article 3(b).

⁴¹⁴ Council Regulation 2368 *supra* Article 3(c).

⁴¹⁵ There are currently Community authorities in Antwerp (Belgium), London (United Kingdom), Idar-Oberstein (Germany), Prague (Czech Republic), Bucharest (Romania) and Sofia (Bulgaria).

⁴¹⁶ Council Regulation EC No 2368/2002 at Chapter II Article 4(1).

⁴¹⁷ Council Regulation 2368/2002 Article 4(2).

⁴¹⁸ Council Regulation (EEC) No 2913/92 of 12 October 1992.

procedures.⁴¹⁹ Therefore, it is important that importers and exporters alike familiarise themselves with the Community authority, which they wish to utilise in the first instance.

d. Chapter III of the Council Regulation No 2368/2002: Export of rough diamonds from the EC/ EU

In order to obtain a Community certificate for exporting rough diamonds outside of the EC, the exporter must submit an export declaration and or an invoice to a Community authority.⁴²⁰ The exporter must provide conclusive documentary evidence that the rough diamonds to be exported were legally imported into the Community.⁴²¹ This may include the provision of invoices from the original import certificates and any others flowing from the same transaction.

In terms of Article 13 of the Council Regulation, the Community authority may accept as conclusive, evidence of lawful import into the Community a signed declaration by the exporter to that effect.⁴²² Such a declaration shall contain at least the information to be given in an invoice under Article 17. The invoice requirements are that each sale of rough diamonds is accompanied by an invoice containing: the said signed guarantee unequivocally identifying the seller and the buyer and their registered offices; containing the VAT identification number of the seller, where applicable; the quantity of weight and qualification of the goods sold; the value of the transaction and the date of delivery.⁴²³

Before issuing a Community Certificate, the Community authority may decide to physically inspect the contents of the consignment in order to verify that the conditions laid down in the Regulation have indeed been met.⁴²⁴ Within the validity period of the Certificate, Participants are able to elect when and where customs formalities and the actual export from the

⁴¹⁹ Article 4(3) of the EC Regulation EC No 2368/2002.

⁴²⁰ Council Regulation 2368 *supra* Article 12.

⁴²¹ Council Regulation 2368 *ibid* Articles 3 and 12.

⁴²² Council Regulation EC No 2368/2002 at Chapter II Article 10.

⁴²³ *Ibid*

⁴²⁴ Council Regulation EC No 2368/2002 at Chapter II Article 13.

Community are to take place.⁴²⁵ Verification of the actual export of the shipment is undertaken by control of import receipts from the receiving Participant.⁴²⁶

Community authorities in Prague, London and Idar-Oberstein systematically send advance notices of shipments by email containing information on the carat weight, value, country of origin or provenance, exporter, importer and the serial number of the Certificate to the importing authorities of participants.⁴²⁷ All details of rough diamonds shipments are recorded on a computerised database and reported to the Commission as the KP authority on a monthly basis.⁴²⁸

In the instance of resolutions of discrepancies with respect to import confirmation, Technical Guideline 14 states that exporting participants are requested to exchange with importing participants on a bilateral basis quarterly lists of Certificate numbers accompanying rough diamond shipments.⁴²⁹ Importing participants are requested to verify and flag any missing numbers and other discrepancies to the exporting participant and the Chair.⁴³⁰

Article 14 makes provision for procedures to be adopted in instances of irregular shipments.⁴³¹ Pursuant to Article 14 of the Regulation, a Community authority may detain a shipment if the provisions of Articles 11, 12 and 13 have not been fulfilled.⁴³² A shipment can therefore not be released or sent back to the country of provenance unless all Regulation conditions are met.

If a Community authority finds that failure to fulfil the requisite conditions of Articles 11, 12 and 13, is not made knowingly or intentionally or is the result of an action by another authority in exercising its proper duties, the Community authority may release the shipment and proceed with the issuance of a valid Certificate.⁴³³ The issuance of a Certificate will be

⁴²⁵ Article 13 of the EC Regulation EC No 2368/2002.

⁴²⁶ *Ibid.*

⁴²⁷ Council Regulation EC No 2368/2002 at Chapter II Article 10.

⁴²⁸ Council Regulation EC No 2368/2002 at Chapter II Article 15.

⁴²⁹ Technical guideline 14 of October 2004.

⁴³⁰ *Ibid.*

⁴³¹ Article 14(1) of the EC Regulation EC No 2368/2002 *supra* at Chapter IV.

⁴³² *Ibid.*

⁴³³ Council Regulation EC No 2368/2002 at Chapter II Article 14.

made available after the exporter has undertaken the necessary remedial measures in that the exporter ensures that the provisions of Articles 11, 12 and 13 have been met.

The EU explicitly endorses the principle of industry self-regulation as laid down in Section IV of the Certification Scheme document in its legislation implementing the Certification Scheme in the Community. Chapter IV ('Industry Self-Regulation') of Council Regulation sets out requirements for the establishment of a system of warranties and industry self-regulation by organisations representing traders in rough diamonds should be guided and provides for a 'fast track' procedure for organisations applying a system of warranties and industry self-regulation.⁴³⁴

It is important to clarify that the EC does not understand by the term 'industry self-regulation' the delegation of governmental responsibilities to industry bodies.⁴³⁵ Rather it means the granting of a privilege ('fast track' issuance of the Certificate) to companies subject to considerable responsibilities, as members of industry bodies.⁴³⁶

In order to be listed in Annex V of Council Regulation (EC) No 2368/2002n, an organisation representing traders in rough diamonds has to provide conclusive evidence to the Commission that it has adopted rules and regulations obliging the organisation and its members to respect specific principles and procedures set out in Article 17 of the Regulation.

In particular, the rules and regulations of such organisations must oblige members: to sell only diamonds purchased from legitimate sources in compliance with the Certification Scheme; to guarantee that, on the basis of their personal knowledge and/or written warranties provided by the suppliers of rough diamonds, the rough diamonds sold are not conflict diamonds; not to buy rough diamonds from suspect or unknown sources of supply and/or rough diamonds originating in non-participants in the Certification Scheme; not to knowingly buy, sell or assist others in buying or selling conflict diamonds; and to create and maintain for at least three years records of invoices received from suppliers and issued to customers, and

⁴³⁴ Council Regulation EC No 2368/2002 at Chapter IV.

⁴³⁵ *Ibid.*

⁴³⁶ Council Regulation EC No 2368/2002 at Chapter IV.

instruct an independent auditor to certify that these records have been created and maintained accurately.

The rules and regulations adopted by the organisation must foresee disciplinary measures, in particular the obligation for the organisation to expel any member found, after a due process inquiry by the organisation itself, to have seriously violated the principles laid down in Article 17 of the Regulation.

Community Authorities communicate relevant developments and information on the Kimberley Process to the Bourses, *inter alia*:

- Updates to Participants list;
- New EC Regulations;
- New technical guidelines, best practices, administrative decisions;
- Chair's notices; and
- Practical guidelines for import and export procedures.

In turn, Bourses should pass on this information to their members. In accordance with Article 13 of Council Regulation, Members of a listed organisation can obtain a Community certificate on the basis of a signed declaration by that Member that the rough diamonds to be exported were lawfully imported.⁴³⁷

In accordance with Article 17(5) of the Council Regulation, the Community authorities in Antwerp and London provide the European Commission with annual reports on their assessment of the functioning of the system of warranties and industry self-regulation on an annual basis.⁴³⁸ In a small number of cases, members of bourses have failed to submit the

⁴³⁷ By its Regulations No 762/2003 of 30 April 2003 and No 1214/2003 of 7 July 2003, the Commission granted listing in Annex V to: Antwerpsche Diamantkring CV, Beurs voor Diamanthatel CV, Diamantclub van Antwerpen CV, Vrije Diamanthatel NV (all based in Antwerp) and, the London Diamond Bourse and Club upon their application and following verification that each of the bourses has adopted rules and regulations, in particular a binding Code of Conduct, that ensure compliance by the bourses and their members with the requirements laid down in the Regulation. On 7 September 2004, the Belgian Minister of Economy and the Presidents of the four Antwerp Bourses signed a Protocol on the modalities for the implementation of the provisions on industry self-regulation in Belgium. The Protocol provides a framework for the Belgian Community Authority with regard to the monitoring of the functioning and implementation of Article 17.

⁴³⁸ Article 17(5) of EC Council Regulation EC No 2368/2002.

required attestations by independent auditors and have been subjected to disciplinary hearings.⁴³⁹

The Community Authorities have carried out, or intend to carry out, random spot-checks of company audits.⁴⁴⁰ This involves: examining the invoices of the companies, and checking for the presence of the warranty on the invoices; checking the presence of Kimberley Process certificates in respect of imports and exports of rough diamonds; checking data on the annual stock declarations against information on the Certification Scheme's database held by the Community Authority.⁴⁴¹

The examination of the role played by regional organisations shows that only the EU is contributing actively toward ensuring that the Certification Scheme is given effect to at the regional and sub-regional levels, that is, at Member States levels within the region. To this end, a regional organisation such as the African Union has a much more limited scope of intervention, in particular due to lack of harmonisation of national laws on the African continent. This problem might be overcome in the instance of a legally binding mechanism. What would be required is a set of rules that could apply independently of the political will and capacity at the national levels, so as to ensure that an international certification scheme for rough or conflict diamond trading could be enforced in Africa as effectively as in Europe.

In the global diamond mining production arena African states dominate.⁴⁴² European and American states are the largest importers of rough diamonds out of African countries, where producers domiciled or funded in Europe and in the US dominate the mining sectors.⁴⁴³ It would only make sense that the largest importers of rough diamonds and the largest producers would find equally effective mechanisms in place both for the import as well as for the export of rough diamonds, if the Certification Scheme is to truly succeed in Africa.

⁴³⁹ *Ibid.*

⁴⁴⁰ Council Regulation EC No 2368/2002 at Chapter IV.

⁴⁴¹ *Ibid.*

⁴⁴² www.kimberleyprocess.com on Sources. Last visited 01 September 2011.

⁴⁴³ *Ibid.*

6. Conclusion

Having shown the relevance of the work of international organisations to the Certification Scheme, the study will provide a preliminary conclusion in this chapter.

a. The UN SC

The Security Council has the power to make decisions, which are binding upon Member States. The UN is vested with the authority to create international law and ensure compliance, contrary to any public private or industry based association, such as the World Diamond Council.

The UN SC has been vociferous in making the risks attached to the illicit trade of conflict diamonds an international agenda item. Through its Resolutions, the UNSC has acted out of its concern for the illicit trade in rough diamonds.

b. The UN GA

Resolution 55/56 of the UN GA is synonymous with the Certification Scheme. The Resolution set down the fundamental elements of the Certification Scheme. These elements formed the basic structure of the Certification Scheme.⁴⁴⁴ The Resolutions were strong on the points of statistical compilation and their dissemination to all Member States. The UN GA was of the opinion that the introduction of an international certification scheme, in particular the KPCS, would substantially reduce the illegal trade in rough and conflict diamonds.

c. The WTO and then regional organisations

The policy document shows the critical view the WTO accords the Certification Scheme. The WTO has demonstrated its commitment to the Certification Scheme. Rough diamond trading is no longer an issue of domestic concern. Rather, it is an issue of international concern. The WTO testifies to this concern by means of its policy. The most important consequence expressed by the WTO is that trade and import and export rules as well as their procedures

⁴⁴⁴ Brownlie (1990) at 14; see judgment in the case of *Nicaragua v United States* (Merits) ICJ Reports (1986) paras 98-104 and 187-195 at 7-8.

can and must be revised so that the legitimate trade of diamonds legally mined is safeguarded and takes place within an economic context compliant with peace and security imperatives, arising from the protection of human rights.⁴⁴⁵

d. The AU

Regrettably, the AU to date has not been able to specifically address the illegal trade of rough diamonds. In part, alternative arguments might be developed from an extrapolating interpretation of the peace and security mechanisms. The AU should incorporate the initiatives and contents of the Certification Scheme for trading in rough diamonds onto their agendas for regional and domestic application.

e. The EU

Unlike the AU, the EU has lent significant support to the Certification Scheme. In a most comprehensive way, the EU has emulated the contents of the Certification Scheme with innovation.⁴⁴⁶ The EC has passed Regulation 2368 having the force of law.

⁴⁴⁵ Zagel 'WTO and human rights' (2005) at 30-35.

⁴⁴⁶ On competitive market theory, see Perry A 'Multinational enterprises, international economic organisations and convergences of legal systems: Non state actors and international law' in Mattei U *Comparative law and economics* (2000) vol 2 at 23-39; see also Joerges 'The law in the process'(2002) at 11-25.

7. Summary

International organisations are essential for the implementation of the Certification Scheme, which they influence in various ways. Most importantly, they provide the impetus for inclusion into national schemes of implementation. However, the question of compliance and mechanisms continues.

Implementation and compliance are essential for the workability and the long term sustainability of the Certification Scheme in view of the initially envisaged objectives: of curbing or eliminating entirely the illegal trade of rough diamonds which leads to severe human rights crises.

The next chapter will address international law making and non-law making instruments with the intention of answering the question of this study: namely to identify and evaluate the legal nature of the Certification Scheme. In other words: through the infinite varieties of theories presented in international law, which most aptly characterises the Certification Scheme?

PART II

CHAPTER 6 : THE CERTIFICATION SCHEME AS A MANIFESTATION OF SOFT LAW (EVOLUTION AND CHARACTERISATION OF THE CERTIFICATION SCHEME)

1. Introduction

At the time of adoption, the Certification Scheme was accepted as a voluntary mechanism which was intended to curb the illicit trade of conflict diamonds that lead to human rights abuses. It remains a voluntary instrument in international law.

Thus the purpose of this chapter is to determine the framework of the Certification Scheme and to examine the principles of public international law that may characterise the Certification Scheme.

a. Sources of international law

Traditionally the sources of international law have been divided into two categories, namely binding and non-binding sources.⁴⁴⁷ International law becomes binding upon states due to the fact that states become party to legally binding instruments in the first instance through acceptance and ratification.⁴⁴⁸ This is explicit. In the second instance international law may become binding implicitly.⁴⁴⁹

An implicit acceptance of international legal norms may occur as a result of recognition by a number of states of rules that can claim legal force.⁴⁵⁰ This means that particular principles of international law can be considered legally binding upon all states.⁴⁵¹

⁴⁴⁷ Vijoen F *International human rights law in Africa* (2007) at 19.

⁴⁴⁸ Brownlie (1990) at 607-608.

⁴⁴⁹ Boyle AE 'Some Reflections on the relationship of treaties and soft law' (1999) *Int'l and Comp LQ* at 901-913.

⁴⁵⁰ Brownlie *supra* at 512-515.

⁴⁵¹ Brownlie *supra* at 4, 19 and 512-515.

Explicit legally binding instruments are usually clear. States consent to be bound by virtue of their expression to carry out certain legal duties arising from an international agreement or treaty.⁴⁵² Non-legally binding instruments may give rise to binding obligations because the contents of such agreements become in whole or part, with the passage of time or with sufficient pace recognised by states. Non-legally binding instruments may assume the form of declarations, recommendations by the UNGA, covenants and conventions.⁴⁵³ The body of non-legally binding instruments is what has come to be termed ‘soft law’.⁴⁵⁴

i. Background to the sources of international law

Sources of international law have long been recorded. It may be stated that the first source of international law was the practice by states of a particular type or kind of conduct.⁴⁵⁵ With the passage of time, post-World War I, the Statute of the International Court of Justice which is the primary dispute resolution body for the United Nations Charter came into being with the formation of the predecessor to the United Nations, namely the League of Nations.⁴⁵⁶

ii. Article 38 of the Statute of the International Court of Justice

Article 38(1) of the International Court of Justice Statute provides as follows:

‘Article 38

1 The Court, whose function is to decide in accordance with international law such disputes as are admitted to it, shall apply:

- a) International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b) International custom, as evidence of a general practice accepted as law;
- c) The general principles of law recognized by civilized nations;

Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.⁴⁵⁷

2 This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.’

⁴⁵² Brownlie at 608; see also Thurer ‘Norms in the twilight’ (2011) at paras 1-2.

⁴⁵³ For example the UDHR, the ICCPR and the ICESCR.

⁴⁵⁴ Viljoen (2007) at 28-30.

⁴⁵⁵ Brownlie *supra* at 608.

⁴⁵⁶ Brownlie *supra* at 569-572.

⁴⁵⁷ Article 59 as referred to in Article 38 provides that the ‘decision of the Court has no binding force except between parties and in respect of that particular case.’

Article 38 does not present a hierarchy of sources of international law. It makes reference to a combination of informal and formal sources of law such as treaties and opinions respectively. Strictly speaking, the provisions of Article 38(1) are only legally binding on the International Court of Justice. In practice, many courts and tribunals throughout the world apply the provisions of Article 38(1) when determining a matter concerning the sources of international law.

iii. International treaties

Treaties are international instruments which determine legal relations between parties.⁴⁵⁸ The International Law Commission defines a ‘treaty’ as:

‘any international agreement in written form, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation (treaty, convention, protocol, covenant, charter, statute, act, declaration, concordat, exchange of notes, agreed minute, memorandum of agreement, *modus Vivendi* or any other appellation), concluded between two or more States or other subjects of international law and governed by international law.’⁴⁵⁹

The Vienna Convention on the Law of Treaties⁴⁶⁰ defines a treaty as ‘an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation’.⁴⁶¹ A treaty need not be reduced to writing.⁴⁶² At first glance it would appear that the Vienna Convention confines treaty making to state parties.⁴⁶³

However, on closer examination of Article 3, the Vienna Convention provides that the fact that the Convention is limited shall not affect the legal force of agreements between states and other subjects of international law, or between such other subjects of international law or between such other subjects.⁴⁶⁴ This means entities which exist in the public international legal domain, apart from states, are recognised by the Vienna Convention.

⁴⁵⁸ Aust *A Modern treaty law and practice* (2000) at 76-106.

⁴⁵⁹ International Law Commission *ILC Yearbook* (1962) at 161.

⁴⁶⁰ Vienna Convention on the Law of Treaties (1980) hereafter referred to as the ‘VC’.

⁴⁶¹ Article 2(1)(a) of the VC.

⁴⁶² Article 3 of the VC.

⁴⁶³ Article 2(1)(a) of the VC; see also Viljoen (2007) at 614.

⁴⁶⁴ Brownlie (1990) at 605; see also Thurer ‘Norms in the twilight’ (2011) at para 6.

Parties to treaties may be states and international organisations.⁴⁶⁵ Two types of treaties exist in public international law, namely bilateral and multilateral treaties.⁴⁶⁶ Bilateral treaties are entered into by two parties in the international arena whilst multilateral treaties are entered into by more than two parties. An example of the former is an extradition agreement.⁴⁶⁷ An example of the latter would be the United Nations Charter.⁴⁶⁸ Multilateral treaties create legal obligations between all the parties as all parties to the treaty have rights and duties *vis-a-vis* one another.

b. International law governing treaties

International legal principles govern treaties and their subsequent operation. Legal obligations arise from treaties insofar as they are regarded as a source of international law.⁴⁶⁹ Parties to the treaties must fulfil treaty obligations as demanded by the most fundamental principles of law and international law of *pacta sunt servanda*. International law makes provision for parties to treaties; the formation of treaties; the interpretation of treaties and amendment of treaties.

i. Parties to treaties

State and international organisations are subjects of public international law. They enjoy international legal personality. States are the primary subjects of public international law.⁴⁷⁰ According to the 1933 Montevideo Convention, an entity qualifies as a State when it has the elements of a territory; a population; a government in control over such territory and population and independence or sovereignty.⁴⁷¹

An international organisation is an organisation made up of states or other international organisations which derives its powers from a founding document drawn up by the (state or

⁴⁶⁵ Brownlie *supra* at 605; at 63, see the concept of ‘legal personality’ such as the example of the Holy See, the United Nations and other international entities such as ‘insurgents;’ Viljoen *id* at 615-617.

⁴⁶⁶ Viljoen *supra* at 13-14.

⁴⁶⁷ Viljoen *supra* at 30.

⁴⁶⁸ *Ibid.*

⁴⁶⁹ Holmes ‘The Kimberley Process’ (2006-2007) at 230-232.

⁴⁷⁰ Brownlie (1990) at 87-106.

⁴⁷¹ Article 1 of the Montevideo Convention 1933.

international organisations) parties.⁴⁷² Like states, international organisations are subjects of public international law. Public international law developed to regulate relationships between states, rather than individuals. The capacity of an international organisation to make treaties depends on the constitution of the organisation concerned.⁴⁷³

International legal personality includes the ability to act independently on the international plane; to acquire rights and duties; to conclude agreements; and to enforce rights and agreements in international tribunals against other public international legal subjects.⁴⁷⁴ States and international organisations remain the principal subjects of public international law.⁴⁷⁵

Generally treaties are regarded as a source of international law.⁴⁷⁶ Recognition is given to the different types of treaties in existence in public international legal arena. Some treaties are merely declaratory of existing legal rules as opposed to those which are legally binding in that they are law making treaties.⁴⁷⁷

Where a large majority of states accept a rule created by treaties, then that new rule may become part of the general international law. Here, it is opined that it is the custom which the treaty embodies which creates the law rather than the treaty itself.

A prime example is the case of the French nuclear testing in the Pacific Basin from 1966 to 1972. Australia and New Zealand applied to the International Court of Justice for an injunction pursuant to the Limited Test Ban Treaty of 1963. The injunction was intended to prevent France from further testing until such time as the Court determined on the issue of legality under the Limited Test Ban Treaty.⁴⁷⁸

⁴⁷² Articles 2 and 4 of the UN Charter.

⁴⁷³ Brownlie *supra* at 605.

⁴⁷⁴ Brownlie *supra* at 92-106.

⁴⁷⁵ States and international organisations are subjects of international law; see also the Vienna Law of Conventions and the Montevideo Convention. Recent decades have brought human rights treaties such as the ICCPR and the ICESCR; see also Harland C 'The status of the International Covenant on Civil and Political Rights (ICCPR) in the domestic law of state parties: An initial global survey through UN Human Rights Committee documents' (2000) 22/1 *Hum Rts Q* 187-260.

⁴⁷⁶ Harland 'The status of the ICCPR' (2002) at 615, 621-622.

⁴⁷⁷ Brownlie (1990) at 604 .

⁴⁷⁸ Nuclear Tests (*Australia v France*) (1974) ICJ at 253; Nuclear Test Case (*New Zealand v France*) (1974) ICJ at 457.

France was not a signatory to the treaty, nor had France accepted the treaty. The Court granted the applicants interim relief which France did not heed. France continued testing. Six months later the Court examined the case on its merits. The Court avoided the substantive issues which involved making a determination on the legality of nuclear tests. Instead, the Court relied on official statements by France that it did not intend to conduct further tests.

States which do not ratify or acquiesce to treaties are strictly speaking not bound by the provisions of the treaty in question.⁴⁷⁹ Nevertheless, a state may become bound from the time at which it accepted the rules contained in the treaty. The legally binding nature of treaty provisions or the contents of international instruments may be determined upon attainment of the status of international customary law.⁴⁸⁰

This aspect of law making and non-law making treaties is crucial to the formation of international customary law.⁴⁸¹ Whether or not treaty rules are rules of international law or confined to parties which agreed to the rules, is in the main dependent upon whether the rules have the potential to bind non-parties to the treaty.⁴⁸²

According to Brierly, ‘consent cannot of itself create an obligation; it can only do so within a system of law which declares that consent duly given, as in a treaty or in a contract, shall be binding on the party consenting’.⁴⁸³ Brierly’s opinion begs the question: if consent alone is insufficient, then what indeed gives treaties in international law its legally binding force?

One response lies in the notion of *pacta sunt servanda*.⁴⁸⁴ This term means that a contract entered into between parties is binding upon the parties. If a party to the contract breaches a term of the contract, then the aggrieved party may bring a legal action against the offending party on the basis of law. Law making treaties concluded between states are intended to create legally binding obligations. Treaties are a specialised type of contract. Unlike ordinary contracts, which ensue between one or more parties involving natural persons, treaties are

⁴⁷⁹ Brownlie *supra* at 622-625; see also Viljoen (2007) at 22.

⁴⁸⁰ Brownlie *supra* at 623; see also Viljoen *supra* at 26-28.

⁴⁸¹ Viljoen (2007) at 26.

⁴⁸² Viljoen *supra* at 26-27.

⁴⁸³ Brierly *JL Law of nations* (1938) at 43.

⁴⁸⁴ See generally Lach M ‘Pacta sunt servanda’ (1984) 7 *Public International Law* at 364-371.

contracts concluded at the highest levels possible; namely between juristic personalities in the form of States and international organisations.⁴⁸⁵

Be that as it may, the same contractual principles applicable in the ordinary law of contract may be applicable to the law of treaties.⁴⁸⁶ In the instance of a breach by any contractant, that party may be held liable on the basis of a breach in international law. Treaties are usually binding upon state parties that agree to be bound by the contents of the treaty.⁴⁸⁷ With the passage of time, law making treaties may become legally binding⁴⁸⁸ upon non-state parties to the treaty.⁴⁸⁹ The liability of non-state parties is attributed to the provisions of the treaty becoming widely applicable as a source of law.

It is the creation of new legally binding norms which are problematic.⁴⁹⁰ When new norms are created within the parameters of law, then there is no problem. However, when new norms come about as a result of conduct which does not rise to the level of international customary law, then problems arise in its application. One must either accept that new legal norms are created through treaties in the first instance. Or, in the second instance, one may accept that new legal norms are created through the acceptance of same by non-parties to the treaty in question. The latter appears to be simpler and more easily accepted in international law in order for a treaty's rules to become legally binding on non-parties.

As has been explained, the ability to bind the newly created legal rules or norms arise from wide acceptance by state parties. This is attributed to the fact that States have the ability to enter into legally binding treaties.

It may be then said that law making treaties create legally binding obligations by virtue of the inherent ability of states to bind themselves to obligations. However, the issue of states that are not party to the treaty may still be bound by the provisions of the treaty remains

⁴⁸⁵ Brownlie (1990) at 622.

⁴⁸⁶ Trite common law rules appreciated in the maxim *pacta sunt servanda*; Brownlie *supra* at 77-78, 608 and 616; see also Wallis 'Data mining' (2005) 388-417 on monitoring, enforcement, redress and accountability.

⁴⁸⁷ Brownlie *supra* at 624.

⁴⁸⁸ Thurer 'Norms in the twilight' (2011) at para 6.

⁴⁸⁹ Brownlie (1990) at 604-5; see also ICHRP 'Beyond voluntarism' (2002) at 7-18 on the importance and relevance of international law; at 7 on the need for legal obligations; at 11 on the case for international rules; see also in general Fitzmaurice M and O Elias *Contemporary issues in the law of treaties* (2005) at 156-175.

⁴⁹⁰ See in general Milanovic M 'Norm conflict in international law: Whither human rights?' (2009) 22 *Leiden Journal of International Law* at 1-79.

outstanding. Often this is due to the international community's need for change, coupled with other impacting factors such as economics, international pressure and political will.⁴⁹¹

These conditions in the international community provide a potent impetus for new norm creation. In this manner, new legal rules are created and accepted by the international community which seemingly appears to be read into, as a source of international law.

ii. International customary law

Unlike national legal systems supported by a framework of a constitution which enables functioning within a prescribed manner establishing legitimacy, international law is deprived of any such framework.⁴⁹² For its legitimacy, international law relies upon a 'general recognition among States of a certain practice as obligatory'.⁴⁹³ States create laws for themselves.

Article 38(1) refers to international custom, as evidence of a general practice accepted as law.⁴⁹⁴ This part refers to custom with its two components of *usus* and *opinio iuris*. These are the two elements which must be satisfied for international customary legal principles to become recognised. This is encapsulated in the second subsection. In the instance of a majority of states accepting the legally binding rules created by the treaty either by the process of ratification or acquiescence, the new legal rule may potentially become part of the generally accepted rules of international law.

Thus, the newly accepted rule of international law may be relied upon for future legal determinations in the international legal domain. A legal rule may become part of the international body of law even if a few states agree with the rule and practice it.⁴⁹⁵

⁴⁹¹ Thurer at paras 2-4.

⁴⁹² Arajavi N 'From state centricism to where? The formation of international (customary) law and non state actors' on state practice and *opinio iuris* (2010) at 3-14.

⁴⁹³ Brierly (1938) at 61.

⁴⁹⁴ Article 38(1)(b) of the Statute of the ICJ.

⁴⁹⁵ Brownlie (1990) at 7; see also *UK v Albania* (1949) ICJ 4 Report (*Corfu Channel* case). For an interesting read, see Wright Q 'The Corfu Channel Case' (1949) 43/3 *The American Journal of International Law* at 491-4.

When legally binding treaties become part of the body of customary law through acquiescence or ratification, such treaty law will become legally binding on all states.⁴⁹⁶ This is due to the fact that the new legal rules created by a particular treaty will have obtained international recognition generally.

The test as to whether treaty rules are rules of international law or legal rules that bind the parties to the treaty, is determined mainly by whether the new legal rule binds all other parties, apart from those parties to the legally binding treaty.⁴⁹⁷ Two instances present themselves: *opinio iuris* and *usus* in the broader ambit of custom.⁴⁹⁸

In evaluating whether or not a rule has been created by practice, the International Court of Justice has sought evidence of a general practice. 'General practice' requires a distinction between those states which acquiesce to a particular practice and those states or parties which are silent.⁴⁹⁹ With regard to the duration of time within which a general practice must have been in existence, no particular duration is required provided that the repetition and the generality of the practice can be proven.⁵⁰⁰

In the establishment of custom, overt acts of positive assertion count for more than abstract claims.⁵⁰¹ 'State practice' is deemed to be in place when states manifest their intentions to accept a particular code of conduct such as a declaration, or joint actions by states, documents submitted or statements made, or resolutions of the UN organs or treaties.⁵⁰² Non-governmental organisations and other non-state actors may also establish state practice in the same manner as states do. That is to say that non state actors or non-governmental

⁴⁹⁶ *UK v Albania* (1949) ICJ 4 Report (Corfu Channel case).

⁴⁹⁷ *North Sea Continental Shelf Cases* ICJ Reports (1969) wherein the ICJ held that the Article 6 of the Continental Shelf Convention was not declaratory as it was not binding on West Germany as West Germany did not ratify the Convention at p251.

⁴⁹⁸ Brownlie (1990) at 8; see also Holmes 'The Kimberley Process' (2006-2007) at 228-229 on evidence on international 'evidence for international customary law.'

⁴⁹⁹ See *Anglo-Norwegian Fisheries* (1951) ICJ Reports 116. In this case Britain challenged the Norwegian territorial waters limit. The ICJ found in favour of Norway on the basis of the geographical outline and economic dependence on fishing. The Court went further to discuss the issue of the length of time which transpired during which Britain failed to contest the matter. The Court was of the opinion that where vital interests which could not have failed to have to come to the attention of the affected state were indeed affected, then abstention from counteraction could safely be regarded as acquiescence.

⁵⁰⁰ Brownlie *supra* at 6; see also Holmes 'The Kimberley Process' (2006-2007) at 228-229 on evidence on international 'evidence for international customary law'.

⁵⁰¹ *Anglo-Norwegian Fisheries* (1951) Principles of public international law' (1990) ICJ Reports 116 at 197.

⁵⁰² Treves *Customary international law* (2011) at para 43-52.

organisations manifest their intention to be bound by particular rules of conduct which may become accepted as ‘state practice’.

iii. General principles of law

Article 38(1)(c) of the Statute of the International Court of Justice refers to the ‘general principles of law recognised by civilised nations’. Most authorities agree that treaty law and custom are sources of international law. However, there is no agreement on the content of Article 38(1)(c).

When examining Article 38(1)(c) it is important to distinguish between general principles of law and general principles of international law. The former makes reference to domestic law as is applicable within states. The latter makes reference to those principles which have for so long and so generally been accepted that they can no longer be directly attributed to any particular system of law but are instead peculiar to the needs of international law.⁵⁰³

The phrase ‘General principles of law recognized by civilized nations’ does not make reference to a comparative study of domestic legal systems in an attempt to ascertain commonly established features. The International Court of Justice relies upon a coincidence of opinion from its judges who have in any case been elected as representatives ‘of the main forms of civilization and the principal legal systems of the world’.⁵⁰⁴

iv. Judicial decisions and text writings

Article 38(1)(d) provides that another source of law are general principles of law recognised by civilised nations.⁵⁰⁵ Finally Article 38(1) provides for judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.⁵⁰⁶

⁵⁰³ Thurer ‘Norms in the twilight’ (2011) at para 11.

⁵⁰⁴ Article 9 of the Statute of the ICJ; example of *pacta sunt servanda* in the law of contracts.

⁵⁰⁵ Article 38(1)(c) of the Statute of the ICJ.

⁵⁰⁶ Article 38(1)(d) of the Statute of the ICJ.

Judicial decisions are not confined to the jurisprudence of the International Court of Justice. Rather judicial decisions are inclusive of decisions of other international tribunals, national courts and tribunals in general. According to Brownlie, several judgments and advisory opinions have had a decisive influence on international law, still he advocates more caution in handling decisions.⁵⁰⁷

The importance of judicial decisions, *prima facie*, lies in their value as a means of indicating the successful recognition and application of rules of law. The substantive value of the decisions rests more upon the authority of the Court and the reasoning applied than on their actual binding forces. Although Article 59 provides that the Court has no binding force except between the parties and in respect of that particular case, the rule of precedent is firmly adhered to in matters of procedure.⁵⁰⁸

Article 38(1)(d) also refers to the ‘teachings of the most highly qualified publicists of the various nations’. As a ‘source’ the writings of publicists only constitute evidence of the law although some writers and organisations of substantial repute do have a shaping influence.

⁵⁰⁷ Brownlie (1990) at 21.

⁵⁰⁸ Article 59 of the Statute of the ICJ.

2. UN Resolutions- a possible new source of international law?

a. Introduction

The UN is the primary international body whose foremost objective is to maintain international peace and security.⁵⁰⁹ The background to the creation of the UN is provided in the Preamble to the UN Charter.

Article 1 of the UN Charter lists the objectives and principles of the UN. Article 1 provides, inter alia, as follows:

‘... To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace ... in conformity with the principles of justice and international law ...’

International peace and security has many components to its maintenance and long term sustainability. According to Article I the UN must undertake measures in order to meet its intended objectives.

b. ‘effective and collective measures for the prevention and removal of threats to peace’

Conflicts within states arise from various sources.⁵¹⁰ Conflicts that are fought within the borders of a single sovereign state are characterised as being within the domestic jurisdiction of the state concerned.⁵¹¹ Thus the state itself must attempt resolution of conflicts. Competence for conflict resolution arises from the ‘sovereignty of state’ doctrine.⁵¹² The doctrine hinders UN involvement under the Charter.⁵¹³ The singular qualification to intervention by the UN is permissible if the UN SC deems a threat to international peace and security.⁵¹⁴

⁵⁰⁹ Principles and Purposes of the UN Charter in terms of Article 1.

⁵¹⁰ Clapham A ‘Human rights obligations of non state actors in conflict situations’ (2006) 98/863 *International Review of the Red Cross* at 495-508 on rebel groups, unrecognised insurgent groups, armed opposition groups or parties to an internal conflict.

⁵¹¹ Article 2(7) of the UN Charter.

⁵¹² *Ibid*; see also Brownlie (1990) at 78-79.

⁵¹³ Article 2(7) of the UN Charter.

⁵¹⁴ Articles 39-54 of the UN Charter.

A threat may exist within the state or have the potential for cross-border conflict. Cross-border conflict or interstate conflict is already deemed to be a conflict of an international nature;⁵¹⁵ or it may have the potential of becoming a conflict of an international nature thereby necessitating UN involvement under Article 1 of the Charter. In this manner, the UN is authorised to embark upon action pursuant to its objectives.⁵¹⁶

Diamond trading has contributed significantly to intra-state and interstate conflicts in Sierra Leone; Angola, the DRC and Liberia.⁵¹⁷ The international community responded approximately 20 years after the conflicts commenced.⁵¹⁸ In fulfilling its duty to maintain international peace and security through collective means, the UN SC passed Resolutions to address the conflicts. Human rights abuses in Sierra Leone and Liberia gave way to humanitarian crises. The UN stepped in as the custodian of human rights.⁵¹⁹ The UNSC and UNGA Resolutions sought to address the prevailing situations through security and trade embargos, which had minimal effect.⁵²⁰

The principles of justice and international law are crucial when embarking on initiatives to bring about peace and security.⁵²¹ The Security Council is at the heart of the UN in maintaining peace and security.⁵²² Security Council intervention is meant to be in conformity with the principles of justice and international law.⁵²³ The Security Council is held to act in good faith in an attempt to curb any conflict from spilling across borders.

⁵¹⁵ Geneva Conventions on the Laws of War; see also Article 1 of the UN Charter.

⁵¹⁶ Articles 1 and 39-54 of the UN Charter.

⁵¹⁷ With regard to the DRC see Samset 'Conflict of interest' (2002) at 465-470, 476-7 and 463-480; on Liberia see in general Smillie 'Land grabbing' (2007) at 2-9; on Sierra Leone see Gberie 'War and peace in Sierra Leone' (2002) at 2-8; see also Smillie, Gberie and Hazleton 'At the heart of the matter' (2000) at 8-11.

⁵¹⁸ Wars in the Great Lakes Region and West Africa have persisted over two decades; on Guinea see Gberie 'Destabilising Guinea' (2001) at 8-9; see also UN Experts Meeting on 'Natural resources and conflict in Africa: Transforming a peace liability into a peace asset' 17-19 June Part IV.

⁵¹⁹ Wallis 'Data mining' (2005) in general on monitoring, enforcement, redress and accountability issues; see also Hazleton R 'Diamonds are forever or for good: The economic impact of diamonds on Southern Africa' (2003) *Partnership Africa Canada: The diamonds human security project* Occasional Paper No 3 at 4-8.

⁵²⁰ Wars still persisted; diamonds were traded illegally on the market; see Africa Research Bulletin 'Commodities' 17640 Nov-Dec (2007) for Sierra Leone, Angola and the DRC on diamonds and their rate of production; see Shaw 'Regional dimensions' (2003) at 489 on 'external actors' including transnational mining corporations and their roles and at 492-493.

⁵²¹ Chapter VII of the UN Charter.

⁵²² Articles 39-55 of the UN Charter.

⁵²³ Articles 1 and 41-42 of the UN Charter.

The fear underlying conflict spillage is regional instability and conflict, which can engage other states on a global level.⁵²⁴ The ineffectiveness of the security and trade embargoes on the DRC and Liberia caused the UN SC to address the matter in a number of Resolutions as has been discussed in chapter four of this study. An important Resolution culminated in respect of Sierra Leone, with the formation of the Special Court for Sierra Leone which was established to address atrocities committed during the period of conflict.⁵²⁵

Illicit diamond production and trade have factually given rise to human rights abuse, predominantly in Africa.⁵²⁶ The human rights situation has remarkably improved in Sierra Leone.⁵²⁷ However it persists in other African countries where diamond production and trade do not meet the requirements of the legal diamond trade.⁵²⁸ In so doing, systemic abuses are sustained. In accordance with the principles of justice, the UN SC and the UN GA passed several Resolutions in an attempt to address the problem of conflict diamonds which result in human rights abuses.

The initial mandate for the KP was established by UN GA Resolution in December 2000.⁵²⁹ The Resolution called for several structural measures to regulate the trade of rough diamonds. It also spelt out the justification of the Certification Scheme, that is, to prevent the trade in

⁵²⁴ Shaw *supra* at 489.

⁵²⁵ UN Doc S/RES/1315 (2000); see also Article 1 of the Statute.

⁵²⁶ Africa Research Bulletin 'Commodities' 17640 Nov-Dec (2007) for Sierra Leone, Angola and the DRC on diamonds and their rate of production; see also Olsson 'Diamonds are a rebel's best friend' (2006) at 1338-1342 on rebels in Sierra Leone, the DRC and Angola 1333-1349; see UN Experts Meeting on 'Natural resources and conflict in Africa: Transforming a peace liability into a peace asset' 17-19 June Part V; see also Goldman 'Between a RoC and a hard place' (2008-2009) at 362-363; see Askin 'The quest for post conflict gender justice' (2003) 509-515 on sex based crimes in Sierra Leone; see also Shaik-Peremanov 'RUF case' (2009) at 176-178; see also Hirsch (2001) at 156-178.

⁵²⁷ Bosl A and Diescho J *Human rights in Africa: Legal perspectives in their protection and promotion* (2009) at 112-116.

⁵²⁸ See Fluet 'Conflict diamonds' (2004-2005) at 111-113; see also Goldman 'Between a RoC and a hard place' (2008-2009) at 362-363; see also ICHRP 'Beyond voluntarism' (2002) at 15 on strengths of the human rights framework; at 18 on legal framework that brings advantages for companies; at 21-41 on international human rights law and examples; at 31 on child labour ; at 32 on slavery, forced and bonded labour; at 45-53 on duties of states and indirect obligations; at 46-50 on the duty to protect – obligations on states to regulate private actors pursuant to provisions in human rights treaties; at 51 on when is a state responsible for abuses by private actors; at 55-77 direct obligations, that is, duties on companies; on international law is not only for states; at 58 on applying international standards directly to companies and the Universal Declaration of Human Rights; at 62 'elementary considerations of humanity' and international criminal law.

⁵²⁹ UN GA Resolution UN Doc A/RES/55/56 (2000) created the mandate for the Kimberley Process has been regularly renewed basis by the UN through the following UN GA Resolutions: UN Doc A/RES/56/263(2002), UN Doc A/RES/57/302(2003), UN Doc A/RES/58/290(2004), UN Doc A/RES/59/144(2004), and UN Doc A/RES/60/182(2005). The Certification Scheme has gained important recognition from the UN SC through UN Doc S/RES/1459(2003). More recently the role of the Certification Scheme has been acknowledged in UN SC Resolutions UN Doc S/RES/1521(2003) on Liberia and UN Doc S/RES/1643(2005) on Côte d'Ivoire.

conflict diamonds that leads to human rights crises. The Certification Scheme defines conflict diamonds as ‘rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments’.⁵³⁰

UN SC Resolutions combined with the series of UN GA Resolutions represent an important accomplishment because they reflect widespread and continued international support for the Certification Scheme by the UN.⁵³¹ Resolutions, according to the Review also confer an important measure of legitimacy upon the Certification Scheme in their acknowledgement of the efforts of Participants and Observers.⁵³²

The illicit production and trade of diamonds, in particular in Sierra Leone, the DRC, Angola and Liberia, have significantly fuelled conflicts in Africa.⁵³³ Domestic conflicts, once thought to be out of the purview of international organisations and regional organisations, such as the UN and AU, have become internationalised.⁵³⁴

Conflicts in these countries appeared on international agendas. During the Millennium Session of the UN GA the agenda included ‘The role of diamonds in fuelling conflicts’. The UN GA strove to maintain a balance between conflict diamonds that ‘were a crucial factor in promoting brutal wars in parts of Africa’ and legitimate diamonds that ‘contribute to the prosperity and development elsewhere on the continent’.⁵³⁵

The UN recognised that international and regional organisations have a critical role to play in trade of conflict diamonds.⁵³⁶ The Certification Scheme acknowledged the role of international and regional organisations.⁵³⁷ It is important therefore, within the context of this

⁵³⁰ Section I of the Certification Scheme.

⁵³¹ Thurer ‘Norms in the twilight’(2011) at paras 11-14.

⁵³² Thurer *supra* at para 11.

⁵³³ Smillie, Gberie and Hazleton ‘At the heart of the matter’ (2000) at 4-8; see also on Liberia, Smillie ‘Land grabbing’ (2007) at 6-9 with regard to the DRC see Samset ‘Conflict of interest’ (2002) at 465-470, 476-477 and 463-480; see in general Onwuke RI, Abegunrin L and Ghista DN *African development – The OAU/ECA Lagos Plan of Action and beyond* (1985) at 145-160.

⁵³⁴ Mamdani (1996) at 167-199; see also Ndegwa ‘Citizenship and Ethnicity’ (1997) at 145-189.

⁵³⁵ Section I of the Certification Scheme.

⁵³⁶ Wellens ‘Fragmentation of international law’ (2004) at 3-4; see also Article 56 of the UN Charter; see also Brownlie (1990) at 696-697; see Simma *et al* (1994) at 605-650.

⁵³⁷ The Preamble to the Certification Scheme clearly recognises the role of international and regional organisations. Regional organisations consist of The Organisation for American States, the European Union and the African Union. International organisations included the UN itself, the WTO, the World Bank, the World

study, to examine the role of international and regional organisations. The actions of these organisations are crucial to the illicit trade of conflict diamonds and the consequent human rights crises that have their basis in international law.

Since its inception, the Certification Scheme has enjoyed the support of the UN, both the UN GA and the UN SC. Support has been evidenced in their Resolutions. Every year, the KP Chair is requested to report to the UN GA on its work. Each year since 2000, the UN GA has adopted a Resolution on the role of diamonds in fuelling conflict, demonstrating its support for the Certification Scheme by consensus.⁵³⁸ The UN SC also endorsed the Certification Scheme and has worked with the Certification Scheme, most recently in the cases of Liberian and Côte d' Ivoirian diamond trade.⁵³⁹

c. Resolutions of the UN GA

The General Assembly consists of all the member States of the United Nations. Pursuant to the United Nations Charter, the UN GA is authorised to discuss any question of matters except as provided in Article 12, to make recommendations on any such questions or matters. Resolutions of the UN GA are not legally binding on member states.⁵⁴⁰

According to Brownlie when resolutions concern general norms of international law, 'then acceptance by a majority vote constitutes evidence of the opinions of governments in the widest forum for the expression of such opinions'.⁵⁴¹ Resolutions of this kind when couched as general principles provide a basis for the progressive development of the law and the speedy consolidation of customary rules, Brownlie further opines.

Diamond Council and many other organisations; see also Shaw 'Regional dimensions (2003) at 491-494 and 487-498; see also Wallis 'Data mining' (2005) at 56; see further UN Experts Meeting on 'Natural resources and conflict in Africa: Transforming a peace liability into a peace asset' 17-19 June Parts VIII and IX.

⁵³⁸ UN GA Resolutions: UN Doc A/RES/55/56 (2000) created the mandate for the Kimberley Process has been regularly renewed basis by the UN through the following UN GA Resolutions: UN Doc A/RES/56/263(2002), UN Doc A/RES/57/302(2003), UN Doc A/RES/58/290(2004), UN Doc A/RES/59/144(2004), and UN Doc A/RES/60/182(2005). The Certification Scheme has gained important recognition from the UN SC through Resolution 1459(2003) UN Doc S/RES/1459(2003). More recently the role of the Certification Scheme has been acknowledged in UN SC Resolutions: UN Doc S/RES/1521(2003) on Liberia and UN Doc S/RES/1643(2005) on Côte d'Ivoire.

⁵³⁹ UN SC Resolution UN Doc S/RES/1459 (2003).

⁵⁴⁰ Brownlie (1990) at 696; also see Thurer 'Norms in the twilight'(2011) at paras 11-15.

⁵⁴¹Thurer supra at para 14; see also judgment in the case of *Nicaragua v United States* (Merits) ICJ Reports (1986) 98-10 4 paras 187-195 and pp 107-108, paras 203-205.

In some instances a resolution may have direct legal effect as an authoritative interpretation and application of the principles of the UN Charter.⁵⁴² Ultimately, every UN GA resolution must be individually assessed with regard to the context within which it came into being with especial reference to other evidence of the opinions of States on the specific matter.

d. Resolutions of the UN SC

The UN SC comprises representatives of fifteen member States of the United Nations. There are five permanent members and ten elected member States. Pursuant to Article 24(1) of the United Nations Charter, the UN SC holds the primary responsibility for the maintenance of international peace and security. Therefore members of the United Nations have agreed to ‘accept and carry out the decisions of the Security Council in accordance with the present Charter’.⁵⁴³

The UN SC is empowered to adopt legally binding resolutions on matters relating to international peace and security.⁵⁴⁴ The UN SC also has the power to make recommendations. In order to determine whether a particular resolution of the UN SC is intended as a recommendation or a legally binding resolution, it is necessary to have recourse to the relevant provisions of the UN Charter.⁵⁴⁵ UN SC resolutions made pursuant to Chapter VI of the Charter are generally accepted as not being legally binding.⁵⁴⁶

Resolutions pursuant to Article 39 of the UN Charter, the UN SC have the competence to pass legally binding actions. Article 39 provides that ‘the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security’.

⁵⁴² Brownlie (1990) at 15 wherein he cites the example of the Declaration on the Elimination of All Forms of Racial Discrimination adopted 20 Nov 1963 and the Declaration on Principles of International Law Concerning Friendly Relations adopted without vote on 24 Oct 1970; see also Thurer wherein he cites the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights which arose from the Universal Declaration of Human Rights as an example of soft law.

⁵⁴³ Article 25 of the UN Charter.

⁵⁴⁴ Chapter VII of the UN Charter.

⁵⁴⁵ *Ibid.*

⁵⁴⁶ *Ibid.*

Articles 41 and 42 of the Charter enable the UN to embark upon enforcement action against an offending state. Action may include ‘complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations’.⁵⁴⁷ The UN may also embark upon ‘such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security’.⁵⁴⁸ Both enforcement measures have been embarked upon by the UN SC.

e. Conclusion

It has been shown that Article 38 of the Statute of the International Court of Justice is the accepted definition of the recognised sources of international law. However, the use of recommendations and declarations for example, demonstrates that it could not have been the intention of the drafters of Article 38 to limit the development of the sources of international law. It is submitted that albeit the fact that Article 38 is accepted as the foundational provision for sources of law, it is acknowledged that it is not an exhaustive list.

International bodies such as the UN SC and the UN GA have also contributed to the body of international law through their respective roles.⁵⁴⁹ Whilst they may not have direct law making powers, resolutions of the UN GA and the UN SC play an important role in the continuous development of the body of international law.⁵⁵⁰ Whether resolutions of the UN GA and the UN SC may be regarded as a source of law, still remains debatable.

In appraising the Certification Scheme in legal terms, it is essential to identify the source of the Certification Scheme’s legal effect. Through identification of sources of norms of international law it becomes possible to make a determination of the legal impact of the Certification Scheme. Therefore it is pertinent that the myriad of factors which point in this direction are examined. These factors include the subject matter of the Certification Scheme, the contents, the circumstances of its adoption, the intention of the drafters, the process of adoption, implementation of the Certification, the role and practice of Participants, and the conduct of Participants.

⁵⁴⁷ Article 41 of the UN Charter.

⁵⁴⁸ Article 42 of the UN Charter.

⁵⁴⁹ Thurer ‘Norms in the twilight’ (2011) at para 11.

⁵⁵⁰ Thurer *supra* at paras 11-5.

3. What type of international agreement?

The question of whether the Certification Scheme may be classified as a Memorandum of Understanding in international law is an important one. This is because the Certification Scheme is a voluntary instrument without a legally binding force. However, States have incorporated its requirements, so-called, into domestic legislation.

A Memorandum of Understanding (MoU) has a less formal character. MoUs usually set out working arrangements within the framework of an international agreement. Schram argues that there are different opinions on the requirements for constituting a legally binding treaty or a non-legally binding MoU.⁵⁵¹ According to Schram, multilateral MoUs are mostly qualified as being ‘soft law’⁵⁵² and, because a MoU is generally not regarded as legally binding, the question arises as to what kind of rights and obligations are generated for the signatories.

Schram opines that it remains unclear as to what extent the lapse of time, the intention of the parties to be legally bound, the principle of good faith,⁵⁵³ and the doctrine of estoppel, constitute a legally binding treaty or can grant legal effects to what are purportedly non-legally binding agreements.⁵⁵⁴ Generally, the intention of the parties to be legally bound is viewed as being conclusive.

Despite Brierly’s philosophical contestation of the element of the legal fiction pertinent to the lack of a mental aspect attributable to a state, the facts which have appeared in the EU most especially on a factually practical level have more than counterbalanced this. Any agreement which is concluded with a meeting of the ‘minds,’ or, otherwise stated, are *ad idem*, acting without reservation, is by definition a legally binding agreement.

Participants embarked upon the formation of the Certification Scheme intending to be bound by the contents. Empirically this may be demonstrated by the ‘duties’ accorded to Participants, the ‘duties’ of importers, the ‘duties’ of exporters and various other

⁵⁵¹ Schram ‘The legal aspects’ (2007) at 7; see also Thurer ‘Norms in the twilight’ (2011) at para 3.

⁵⁵² VC Article 44.

⁵⁵³ VC Article 31(1).

⁵⁵⁴ Klabbers J ‘The concept of treaty in international law’ (1996) 22 *Kluwer law international* at 111-112.

manifestations reflecting the intention to be bound.⁵⁵⁵ Having pointed to these crucial elements, the Certification Scheme does not reflect the makings of a MoU.

Other commentators⁵⁵⁶ argue that a politically or morally binding agreement cannot exist unless it is expressly legally binding, regardless of the parties' intention. Political agreements rely upon the good faith of Parties.⁵⁵⁷ Further the general principle of 'consent to be bound' is a crucial element of international law.⁵⁵⁸ This means that if there usually are no legal consequences following the failure to implement a MoU, it does not mean that the matter is not lawful, or that a State is free, politically or morally, to disregard it.⁵⁵⁹

Participants to the Certification Scheme have never formally stated their 'consent to be bound',⁵⁶⁰ which normally implies that an agreement is not legally binding in the conventional sense. It is most likely that the parties had not intended to create a scheme containing rules and obligations of too rigid a nature. In all likelihood, it is for that reason they opted for the more flexible 'political agreement'.⁵⁶¹

Certainly, these options allowed for political swiftness, which is sometimes necessary as setting up an international agreement between many countries and international organisations. The Certification Scheme was probably seen as a 'dynamic effort and a framework for the future that seeks to reconcile competing priorities, rather than assessing it against a set of accountability measures' according to Schram.⁵⁶²

However, the Certification Scheme that includes parties that are neither states nor international organisations, is not a treaty. Logically, some feared that without a legally binding treaty, complete with a monitoring and enforcement mechanism, 'the KPCS would be no more binding than a nod and a handshake'.⁵⁶³ It is therefore surprising that this political

⁵⁵⁵ See Schram 'The legal aspects' (2007) at 7-9.

⁵⁵⁷ Thurer 'Norms in the twilight' (2011) at para 3.

⁵⁵⁸ *Ibid.*

⁵⁵⁹ Aust (2000) at 49.

⁵⁶⁰ See Art 11 of the VC; see also Klabbers 'Treaty in international law (1996) at 241.

⁵⁶¹ Baxter R 'International law in "Her Infinite Variety"' (1980) 29 *ICLQ* at 561.

⁵⁶² Schram at 11.

⁵⁶³ Price 'The Kimberley Process' (2003) at 66; see also Thurer 'Norms in the twilight' (2011) at paras 1-4.

agreement has nonetheless attained a certain force of law, with countries abiding by it and changing their behaviour to avoid violating its commands.⁵⁶⁴

Even if a commitment is not legally binding, it may still have the force of ‘political commitment’.⁵⁶⁵ Governments may develop expectations of political commitments, invoke them in public debate to marshal support, and even impose sanctions for their violations. However, the distinction between political and legally binding commitments may become blurred in particular cases.⁵⁶⁶ Non-legal commitments are generally viewed as politically or morally binding instruments which are intended to be carried out in good faith. Good faith, according to Carter and Trimble, is an accepted general principle in international law.⁵⁶⁷

Good faith does not draw distinction within the legal and political paradigms.⁵⁶⁸ Essentially, in the legal sense the notion of ‘good faith’ does not differ from one situation to another. Thus, particular parties to a non-legally binding instrument may rely upon other parties to meet their obligations. The focal difficulty with reliance upon good faith arises when the ‘other party’ does not ‘perform’ under the so called ‘obligations’. Other parties to the instrument may not label the lack of action on the former as being ‘illegal’. However, the former state or party may rely upon the approval or consensus reached by all other states or parties to the instrument. Thus, compliance may be demanded in this instance. Non-binding undertakings are able to attract a possible ‘beach’ when relying upon ‘good faith’.

Inasmuch as ‘good faith’ is evident from States incorporating the contents of the Certification Scheme into domestic legislation, the Certification Scheme may not be classified as an MoU.

⁵⁶⁴ Schram ‘The legal aspects’ (2007) at 9.

⁵⁶⁵ Carter BE and Trimble TR *International law* (1999) at 120; see also Thurer *supra* para 4.

⁵⁶⁶ David C and Chiles E ‘The United States and the issue of the binding or voluntary nature of International Codes of Conduct regarding restrictive business practices’ (1978) 77 *Am J Int L* at 250-6

⁵⁶⁷ Carter and Trimble *supra* at 34.

⁵⁶⁸ Dupuy P-M ‘Soft law and the international law of the environment’ (1990-1991) 12 *Mich J Int’l L* at 434; see also Schram *ibid* at 8-15.

4. Exploring ‘Soft law’

a. Introduction

Having established that the Certification Scheme may not be classified as a MoU, its characterisation in international law remains an open question. Thus, it may be prudent to examine the possibility of the Certification Scheme falling into the ambit of a ‘soft law’ instrument.

Law is a system of rules created with the objective to bind and determine the conduct of legal subjects, where possible under the threat of enforcement.⁵⁶⁹ Often rules created are enforceable by institutions.

Difficult instances arise when parties in the international legal arena agree to rules of conduct without wishing to be strictly bound.⁵⁷⁰ Voluntary mechanisms such as declarations may acquire the force of law over time. Less conventional means of establishing norms may arise through the voluntary conduct of States and organisations within the international arena.⁵⁷¹ States and organisations may elect to modify their behaviour outside of treaties and custom.⁵⁷²

The interdependence of states and organisations evidences the need for adaptation of existing norms. The adapted norms require a constant renegotiation that usually takes place within various organs of international law. The renegotiation arises from a steady evolution of the conduct by actors within the international community. Hence, a new normative phenomenon is created. This new normative phenomenon may be termed as ‘soft law’.

⁵⁶⁹ *The Legal Encyclopaedia* at 80.0

⁵⁷⁰ D’Amato DA *International soft law, hard law and coherence* at 8-14.

⁵⁷¹ See Thurer (2011) *supra* at 14.

⁵⁷² See Dupuy ‘Soft law’ (1990-1991) at 421-2 provision of reasons for the ‘sociological phenomenon’ of creating soft law, namely the structural nature of soft law, the diversification of the components of the world community, most importantly the rapid evolution of the world economy and increasing state interdependence combined with the development of new fields of activity created by the unceasing progress of science and technology; see also Abbott KW and Snidal D ‘Hard and soft law in international governance’ (2000) 54/3 *Legalization and World Politics* at 423; see also Hollis DB ‘Why state consent still matters – Non state actors, treaties and the changing sources of international law’ (2005) *Berkeley Journal of Int’l L* at 1 on state consent.

Certain provisions of treaties are hortatory. They call for co-operation by states to achieve certain purposes. As Judge Dillard wrote in his separate opinion in the *Appeal Relating to the Jurisdiction of the ICA O Council (India v Pakistan)*:

‘... (M)ultilateral treaties establishing functioning institutions frequently contain articles that represent ideals and aspirations which, being hortatory, are not considered to be legally binding except by those who seek to apply them to the other fellow.’⁵⁷³

Baxter states further that the intent is to avoid clashes of interests between State parties and or international organisations. These may not be ‘treaties’ in the technical sense, but they do form part of the agreed machinery by which governments avoid or soften clashes of interest.⁵⁷⁴

In view of the controversy surrounding ‘soft law,’ as new legal rules established by states and organisations, it is important to understand the nature of ‘soft law’. The phenomenon of ‘soft law’ has been the subject of much discussion. Here, an analysis of a representative selection of literature on ‘soft law’ will be discussed. The aim is to understand the nature and function of ‘soft law’ with a view to understand the legal nature of the Certification Scheme.

i. Thurer’s features of ‘soft law’

According to Thurer, it is not easy to define soft law in a precise sense. It does not represent a legal concept with a clearly determinable scope and content.⁵⁷⁵ He states that ‘to put it abstractly, soft law as a phenomenon in international relations covers all those social rules generated by States or other subjects of international law which are not legally binding but which are nevertheless of special legal relevance’.⁵⁷⁶

He identifies four aspects which are seemingly intrinsic to the current scope of soft law. Firstly, he states that soft law generally expresses common expectations concerning the conduct of international relations, as is often shaped, or arises within, the framework of

⁵⁷³ ICJ Reports (1972) at 46 and at 107, n 1. Discussed in Baxter ‘In her infinite variety’ (1980) at 553-554.

⁵⁷⁴ Baxter *supra* at 556; see also Thurer *supra* (2011) at paras 4-9.

⁵⁷⁵ Thurer *supra* (2011) at paras 8-9.

⁵⁷⁶ Thurer *supra* at para 8.

international organisations.⁵⁷⁷ The second aspect that Thurer identifies is that soft law is created by subjects of international law.⁵⁷⁸ This, he states is in contrast to commercial customs and rules such as codes of conduct set up by private organisations or companies.

In the third instance, Thurer observes the aspect that soft law rules have not or have not in entirety passed through all the stages of the procedures prescribed for international law making.⁵⁷⁹ They do not stem from a formal source of law. Therefore they lack a legally binding force. Fourthly, Thurer states that soft law, despite the legally ‘noncommittal quality,’ it is characterised by a certain proximity to the law with a capacity to produce certain legal effects.⁵⁸⁰

ii. Dupuy

Dupuy identifies ‘soft law’ as a tool which ‘developing states’ utilise to recreate international law.⁵⁸¹ He describes the traditional view of custom as ‘the multiplication of facts that leads to a growth in juridical consciousness in an existential process in which existence precedes essence, termed after the fact as law.’⁵⁸² He explains that ‘the anonymity resulting from the passage of time masks three customs disguised as rules of general interest’.⁵⁸³

He goes on further to discuss counter custom by stating that ‘... classical custom grows from tacit agreement, revisionist custom develops from the common will of the States involved which adopt a unilateral approach in attempting to place the inchoate custom in opposition to the rest of the international community’.⁵⁸⁴ The voluntary element prevails over the historical factor.⁵⁸⁵ According to Dupuy then, it may occur that law precedes fact.

⁵⁷⁷ Thurer *supra* at para 9.

⁵⁷⁸ *Ibid.*

⁵⁷⁹ *Ibid.*

⁵⁸⁰ *Ibid.*

⁵⁸¹ Dupuy RJ ‘Declaratory law and programmatic law’ in Akkerman R, Van Krieken P and Pannenburg C (eds) *Declarations on principles: A quest for universal peace* (1977) at 248.

⁵⁸² Dupuy *supra* at 252.

⁵⁸³ Dupuy *supra* at 249.

⁵⁸⁴ *Ibid.*

⁵⁸⁵ Dupuy *id* at 250.

According to Dupuy, the process by which customary law is challenged is carried out in a particular manner. In the instance of the UN GA, the first step is to create a declaration which is introduced to the international community by the UN system in an attempt to gain recognition. In this manner, some of the norms contained in the UN GA resolutions are relied upon. Such a declaration has two functions. First, it can complete the development of an undeveloped custom. Second, the declaration may provide the ‘psychological pivot’ in justifying later practice which conforms to the ‘declaration’ itself.⁵⁸⁶

For Dupuy the ‘declaration’ is not entirely without legal effect. Once the so called ‘counter custom’ has been established and accepted by a certain number of states, the ‘counter custom’ may be used against other States in that the latter may be bound by what the former has created. The fact that a minority number of states disagree or decide not to be the part of the process of the ‘counter custom’ becomes irrelevant, as the views of the minority are not taken cognisance of.⁵⁸⁷ This is so because a resolution is passed through consensus. In this way, ‘counter custom’ becomes custom accepted by the international community, according to Dupuy.

In the other situation, a ‘declaration’ or parts thereof may not yet have attained the recognition of the representative or so called States that matter in the international community. The ‘declaration’ of the parts thereof thus remains in a state of transition. This, Dupuy states is a matter of programmatic and not declaratory law.⁵⁸⁸ At this point Dupuy makes use of the notion of ‘soft law’ which he regards as the ‘transitional stage of development of norms where their content is vague and their scope imprecise’.⁵⁸⁹

Dupuy states that the role of programmatic or ‘soft law’ is to create awareness.⁵⁹⁰ In attributing the creation of ‘soft law’ to Third World countries, he states that ‘when passed by the Third World countries, they are advanced in opposition to the principle of positive law which they contradict...the new or future norms are submitted as legitimate on the basis of

⁵⁸⁶ Dupuy *supra* at 251.

⁵⁸⁷ See also Hollis ‘Why state consent still matters’ (2005) at 1 on state consent.

⁵⁸⁸ Dupuy *supra* at 252.

⁵⁸⁹ *Ibid.*

⁵⁹⁰ Dupuy ‘Declaratory law’ (1977) at 254.

democratic and egalitarian imperatives which nobody would dream of contesting as the General Assembly or UNCTAD'.⁵⁹¹

For a 'declaration' to pass from programmatic to customary law, three elements need to be satisfied, according to Dupuy. Firstly, the conditions governing the vote which adopted the text in question; secondly, the precision in detail and drafting and thirdly, the effective application of the contents of the declaration.⁵⁹² Dupuy stresses that none of the three elements aforementioned are of importance. For example, a resolution that does not secure the support of many of the important states may still have the effect of changing and acceptance of new values and norms. In the same vein, resolutions that are clear on objectives and principles also create the way for more concrete rules to be adopted between states on the international plane.

Resolutions may already have the effect of the force of law where states have relied upon them to justify actions at the national level. In this way, states may justify actions when they have 'acted in conformity' with the contents of a resolution.⁵⁹³ Here the third element, that is, the element of effective application of the contents of the 'declaration' does not lose value in the case of a lack of sanctions from other states or the international community or even within the domestic jurisdiction of the applying state itself. Dupuy further states that the fact that the state has elected to make the contents of the declaration or the resolution part of its domestic system strengthens its arguments against opposing states in the creation of new custom or norms.

Ultimately, for Dupuy 'soft law' is an instrument of 'revolutionary custom' justified by the unfortunate situations experienced by Third World countries arising from the era of colonisation.⁵⁹⁴

⁵⁹¹ *Ibid*; see also Thurer 'Norms in the twilight' (2011) at para 13.

⁵⁹² Dupuy *supra* at 254-256.

⁵⁹³ Dupuy *supra* at 255; see also Thurer *supra* at paras 11-15.

⁵⁹⁴ Dupuy *supra* at 250.

iii. Schreuer

According to Schreuer, formulating recommendations of general standards of international conduct is a common feature of modern international organisations.⁵⁹⁵ International organisations such as the UN, within the UN GA meetings agree upon sets of general principles which are either declaratory or recommendation making in nature which ultimately set the tone for conduct in international business relations.

Recommendations do not have the same force and effect as treaties have, most especially law making treaties which create immediately binding legal obligations. Consequently, treaty implementation supports the view that treaties – both law making and non-law making treaties-have a significant influence in international decision making processes.⁵⁹⁶ In other words, the role of treaty practice and implementation impacts on the conduct of international organisations and parties.

International relations have transformed significantly with respect to the new norm creation in that declarations, recommendations and memoranda of understandings have played a significant role in international relations. That is to say, these so called programmatic norm creation have steadily gained momentum for future usage. Thus, Schreuer advances the argument that attempts to insinuate the ‘soft law’ aspects of the body of international law within the parameters of the traditional sources of international law have in the main been unsuccessful.

The changing face of international relations as was previously governed through the traditional sources have in recent decades opened its doors to new norm creation as Schreuer argues.⁵⁹⁷ Schreuer also recognises that the ‘new realities of organised international cooperation and communication’ would be ignored if the traditional sources of international law were strictly examined.

⁵⁹⁵ Schreuer CH ‘Recommendations and the traditional sources of international law’ *G Yrbk of Int’l L* (1977) at 103.

⁵⁹⁶ Schreuer *supra* at 105; see also Thurer *supra* (2011) at paras 11-5.

⁵⁹⁷ Schreuer *supra* at 106-11.

Schreuer goes on to argue that all the legitimate factors which affect authority of a specific decision must be appropriately examined in order to avoid a strict construction of traditional sources of international law.⁵⁹⁸ It should also be recognised that this approach takes cognisance of the values based theory of interpretation which demands a recourse to the circumstances within which an event occurs as opposed to a strict and literal adherence to the letter of the law.

Consequently examination may be had of the subject matter of the recommendation; the degree and quality of consensus underlying it; the actual language of the text and attendant statements; the will of a significant minority; citation of later resolutions, the institution of follow up procedures to encourage implementation; the moral authority of the adopting organ, and most importantly the actual conduct of the recommendation's addressees.⁵⁹⁹ Schreuer, therefore, adopts a more liberal and holistic approach to 'possible occurrences' of 'soft law' or 'instances of transition'. Of use to the 'soft law' paradigm is the inclusive aspect of Schreuer's approach in that he insists upon taking into account all the relevant factors that would lead to a classification of the possible occurrence.

With regard to the legal consequences of the recommendations of international organs, Schreuer states that by virtue of their non-legally binding nature, recommendations do not require absolute conformity with the letter of its construction. This means that there is sufficient room for manoeuvring within the spirit, object and purport of the recommendations.⁶⁰⁰ In other words, instances of deviation from the recommendation must not be so significant so as to render the recommendation meaningless. Instead, the practical application of the recommendation should be accompanied by the notion of good faith.

After all, a recommendation is not based on the strict legal obligations. Rather the implementation of recommendations is based on moral or political or other commitments. The obligation of good faith requires a Member States to refrain from acts calculated to frustrate the objects of the programmatic instrument.⁶⁰¹

⁵⁹⁸ *Ibid* at 113.

⁵⁹⁹ Schreuer *supra* at 116-7.

⁶⁰⁰ Devenish GE *Interpretation of statutes* (1992) at chapters 3-5.

⁶⁰¹ Brownlie (1990) *supra* at 606 when he discusses treaties; see also Thurer (2011) *supra* at para 7; see further Carter and Trimble (1999) at 120; see also D'Amato 'International soft law' at 8-14.

Good faith does not draw distinction within the legal and political paradigms. Essentially in the legal sense the notion of ‘good faith’ does not differ from one situation to another.⁶⁰² Thus, particular parties to a non-legally binding instrument may rely upon other parties to meet their obligations.

The focal difficulty with reliance upon good faith arises when the ‘other party’ does not ‘perform’ under the so called ‘obligations’. Other parties to the instrument may not label the lack of action on the former as being ‘illegal’. However, the former State or party may rely upon the approval or consensus reached by all other States or parties to the instrument. Thus compliance may be demanded in this instance. Non-binding undertakings would therefore be in a position to rely upon ‘good faith’.

For Schreuer, there is at minimal a duty on the part of international organisations to consider recommendations in good faith. Caution must be exercised when approaching the notion of good faith as it implies a legal concept has come into existence. This, in turn, implies that non-legal instruments may be granted a legal status.⁶⁰³

Within the international community, law making is not confined to a central constitutional authority. Instead law making and its development is a task assumed by Member States and international organisations. As aforementioned, Schreuer states that recommendations do not carry the force of law. Inasmuch as this may be true within the realms of traditional sources of law, it does not detract from the ability of recommendations to dictate conformity of state behaviour in practice and provide and an expectation to the recommendation. Therefore, irrespective of the legal force of recommendations, they set down the rules for conduct by Member States and international organisations.⁶⁰⁴

⁶⁰² Thurer *supra* at paras 6-7; see also Carter and Trimble *supra* at 120.

⁶⁰³ Baxter *supra* at 549.

⁶⁰⁴ Shreuer *supra* at 115.

iv. Bothe

In order for society to function with reasonable harmony, legal rules predict behaviour, which makes it easier for society to function.⁶⁰⁵ Rules vary from society to society depending on their individual needs and contexts.⁶⁰⁶ When known and made available, rules create an environment for predictable behaviour. In this manner, rules organise society into conduct which is acceptable.

Bothe states that it is with respect to the precise nature of specifically various rules that the controversy arises.⁶⁰⁷ Legal obligations arising from a normal contractual relationship are predictable because the parties to the contract are aware and agree to the terms of the contract. The terms of the contract are the so called legal norms which arise from the contract.

Within the international arena, different methods of formulating expectations exist. Some international agreements provide for consent and thus the legal norms are the terms of the agreement. In the case where agreements have no basis in consent to be bound as a matter of law, Bothe regards this use of non-legal or policy considerations as a legitimate technique to regulate state behaviour.⁶⁰⁸

Bothe points out that then when states comply with a non-legal obligation; he rejects reliance upon the principle of 'good faith'. He argues that in such an instance it is a legal concept which must be confined to legal obligations.⁶⁰⁹ Therefore he accepts that reliance upon concepts of authority and promise are valid sources of an obligation which are outside the scope of law.⁶¹⁰

For Bothe, the distinction between hard law and 'soft law' is dependent upon the will and desire of states. With respect to hard law, the matter is not difficult as state behaviour is

⁶⁰⁵ Bothe M 'Legal and non legal norms – A meaningful distinction in international relations?' (1980) 65 *Neth Yrbk of Int'l L* at 65, 95.

⁶⁰⁶ Bothe *supra* at 65-66.

⁶⁰⁷ Bothe *supra* at 67-70.

⁶⁰⁸ Bothe *supra* at 70.

⁶⁰⁹ Bothe *supra* at 95.

⁶¹⁰ *Ibid.*

regulated through consensus to be bound. With respect to soft law, the intention of the state parties will dictate compliance or non-compliance with norms which have been created. In this way, state parties seem to regulate their own behaviour.

v. Weil

Inasmuch as ‘soft law’ may be used a positive mechanism in developing the body of legal norms, Weil disagrees. Weil cautions against the formation of new legal norms in the absence of consensus by state parties to be bound. He does so citing the dangers associated with the misconstruction of legal norms in the absence of consensus.

Weil states that public international law ‘is the aggregate of the legal norms governing international relations’.⁶¹¹ Public international law serves two purposes. Its first purpose is to facilitate the peaceful orderly co-existence of states.⁶¹² The second purpose of public international law is to provide for the common interests of states.⁶¹³

Furthermore, he states that the aggregate of legal norms dictate what its subjects must do. These norms, he terms ‘prescriptive norms’. The aggregate of legal norms also dictate what its subjects must not do and may not do. These norms are known as prohibitive and permissive norms, respectively. Together, all three types of norms constitute the source of legal rights and obligations.

According to Weil, the quality of international legal norms becomes compromised through the degraded quality of the constituent elements. Poor quality legal norms will not be able to fulfil the two purposes of public international law. Weil is of the opinion that ‘soft law’ is inherently weak due to its ‘lack of rigour’ in making the distinction between that which is norm creating and that which does not create norms. In light of the aforementioned, the threshold for what is norm creating and what is non-norm creating is unclear. For Weil, this is precisely what fails in making the cross or the transition from non-legal to legal norms.⁶¹⁴

⁶¹¹ Weil P ‘Towards relative normativity in international law’ (1983) 77 *Am Jrnal of Intl L* at 413.

⁶¹² Weil *supra* at 418-419.

⁶¹³ *Ibid.*

⁶¹⁴ *Id* at 415.

Thus Weil has two primary concerns. Firstly, he is concerned about the lack of clarity as to the normative force of international actions. The lack of clarity impedes the dual function of public international law. His second concern is that the slippery slope argument which when elucidated undercuts the traditional notion that states make law.⁶¹⁵

Resolutions of UN GA are considered by Weil as a stage in the development of the body of soft law. However he rejects the idea that they are a source of new legal norms. He states that to accept UN GA resolutions as a source of new legal norms is to undermine ‘the specific nature of the legal phenomenon’.⁶¹⁶

Although ‘soft law’ is considered by some to acquire the status of *jus cogens*, Weil rejects this idea too.⁶¹⁷ He does so on the grounds that some states or a few States will create legally binding rules for all states.⁶¹⁸ Thus, states that object to the formation of new legal norms, will nonetheless be bound by them. Further, he states that the creation of new binding legal norms flies in the face of the sovereignty of states doctrine.⁶¹⁹

vi. Boyle

Boyle observes that the subtlety of the processes by which contemporary international law can be created is no longer adequately captured by reference to the orthodox categories of custom and treaty.⁶²⁰ He supports his observation by stating that ‘the role of soft law as an element in international law-making is now widely appreciated, and its influence throughout international law is evident’.⁶²¹ Within that law-making course of action, the relationships between treaty and custom or between ‘soft law’ and custom become well understood.

⁶¹⁵Weil *supra* at 433.

⁶¹⁶Weil *supra* at 417.

⁶¹⁷Weil *supra* at 433-41.

⁶¹⁸*Ibid.*

⁶¹⁹*Ibid.*

⁶²⁰Boyle ‘Some reflections’ (1999) at 901; see also Thurer (2011) *supra* at para 4.

⁶²¹*Ibid.*

For Boyle, 'soft law' has a wide range of possible meanings,⁶²² but three are of direct relevance for him, namely: 'soft law' is not binding; 'soft law' consists of norms and principles and not rules; and finally the notion that 'soft law' is non-binding law.⁶²³

With regards to the notion that 'soft law is not binding,' Boyle means that when used in this sense 'soft law' can be contrasted with hard law, which is binding. Treaties are by definition always hard law because they are always binding. In this category of 'soft law' the legal form is decisive he states.⁶²⁴ If the form is that of a treaty it cannot be soft law. If the form is that of a non-binding agreement, such as the Helsinki Accords for example,⁶²⁵ it will not be a treaty for precisely that reason and the result is a 'soft' agreement.

The question whether an agreement is a binding treaty is not necessarily easy to answer, as Boyle observed in the *Qatar-Bahrain Maritime Delimitation Case*.⁶²⁶ Moreover, he opines that an agreement involving states may be binding even if it is not a treaty. Thus the distinction between hard and soft agreements is not synonymous with the distinction between treaties and non-treaties.⁶²⁷ When 'soft law' begins to interact with binding treaties its non-binding character may be lost or altered.⁶²⁸

The second notion, according to Boyle regards 'soft law' as consisting of general norms or principles, not rules. An alternative view of soft law, Boyle explains, 'focuses on the contrast between "rules", involving clear and reasonably specific commitments which are in this sense hard law, and "norms" or "principles", which, being more open textured or general in the content and wording can thus be seen as soft'.⁶²⁹

⁶²² See generally Baxter 'In her infinite variety' (1980) at 549; Chinkin CM 'The challenge of soft law: development and change in international law' (1989) *ICLQ* at 850; Dupuy 'Soft law' (1991) at 420; Sztucki J 'Reflections on international soft law' (1992) *de Leg* at 365; Elias and Lim 'General principles of law, soft law and the identification of international law' (1997) 28 *Neths Ybk IL* at 3.

⁶²³ Boyle *supra* at 901.

⁶²⁴ *Id* at 901.

⁶²⁵ See Schachter O 'The twilight existence of non-binding international agreements' (1997) 71 *Am Jrnal Int'l L* at 296.

⁶²⁶ (1994) ICJ Rep 112.

⁶²⁷ Bothe 'Legal and non legal norms' (1980) at 67-70.

⁶²⁸ Boyle (1999) *supra* at 901.

⁶²⁹ Boyle *supra* at 902.

From this perspective treaties may be either hard or soft, or both. Consequently, for Boyle, it is the contents of treaties that are decisive in determining whether they are hard or soft.⁶³⁰ The enquiry as to whether something is reduced to treaty form or not is irrelevant.

The third notion is that of ‘soft law as non-binding law’.⁶³¹ Reliance on soft law, as part of the law-making process, takes a number of different forms including declarations of inter-governmental conferences, such as the Rio Declaration on Environment and Development.⁶³² The legal effect of different ‘soft law’ instruments is not necessarily the same. Rather, it is distinguishing features of ‘soft law’ instruments which are important.

For example, ‘soft law’ agreements are carefully negotiated and often carefully drafted statements. These are its two distinguishing features.⁶³³ In some cases, these distinguishing features are intended to have some normative significance despite their non-binding, non-treaty form.⁶³⁴ At minimal, there is an ‘element of good faith commitment, and in many cases, a desire to influence State practice and an element of lawmaking intention and progressive development’.⁶³⁵ In this respect, Boyle states they may be both an alternative to and a part of the process of multilateral treaty making, in particular law-making treaties.⁶³⁶

He cites four main reasons why ‘soft law’ instruments may represent an attractive alternative to law making by treaty. Firstly, it may be easier to reach agreement when the form is non-binding.⁶³⁷ Boyle explains that the use of ‘soft law’ instruments enables States to agree to more detailed and precise provisions because their legal commitment and the consequences of any non-compliance are more limited.⁶³⁸

Secondly, he states that it may be easier for some States to adhere to non-binding instruments. In so doing states can avoid the domestic treaty ratification process and escape

⁶³⁰ *Ibid.*

⁶³¹ *Ibid.*

⁶³² *Ibid.*

⁶³³ *Ibid.*

⁶³⁴ *Ibid.*

⁶³⁵ Boyle *supra* at 901.

⁶³⁶ *Ibid.*

⁶³⁷ Boyle *supra* at 903.

⁶³⁸ *Ibid.*

democratic accountability for the domestic treaty ratification process.⁶³⁹ States may also escape democratic accountability for the policy to which they have agreed.

Boyle's third reason is that 'soft law' instruments will normally be easier to amend or replace than treaties, particularly when all that is required is the adoption of a new resolution by an international institution.⁶⁴⁰ Finally, 'soft law' instruments may provide immediate evidence of international support and consensus than a treaty whose impact is heavily qualified by reservations and the need to wait for ratification and entry into force.⁶⁴¹

The argument for using a treaty rather than a 'soft law' instrument is stronger in the case of new law-making, such as the renegotiation of the law of the sea or the elaboration of human rights law. Although in several cases institutions with wide powers were also being simultaneously established and a treaty was thus desirable in any event.

According to Boyle, for the creation of new law, non-binding instruments may still be useful if they can help generate widespread and consistent State practice and/or provide evidence of *opinio juris* in support of a customary rule.⁶⁴² Here he relies upon the examples⁶⁴³ of UN General Assembly resolutions and inter-governmental declarations having this effect in the *Nicaragua Case*,⁶⁴⁴ the *Nuclear Weapons Advisory Opinion*,⁶⁴⁵ and the *Gabcikovo-Nagymaros Dam Case*.⁶⁴⁶

This suggests that the non-binding form of an instrument is of relatively limited relevance in the context of customary international law-making.⁶⁴⁷ Treaties do not generate or codify customary law because of their binding form but because they either influence state practice and provide evidence of *opinion juris* for new or emerging rules, or because they are good

⁶³⁹ Boyle *supra* at 902.

⁶⁴⁰ *Ibid.*

⁶⁴¹ *Ibid.*

⁶⁴² Boyle *supra* at 903.

⁶⁴³ Boyle *supra* at 904.

⁶⁴⁴ (1986) ICJ Rep 14.

⁶⁴⁵ (1996) ICJ Rep 241.

⁶⁴⁶ (1997) LCJ Rep 7.

⁶⁴⁷ Boyle *id* at 904.

evidence of what the existing law is.⁶⁴⁸ In many cases this is no different from the potential effect of non-binding ‘soft law’ instruments.

Treaties and ‘soft law’ instruments may be utilised as vehicles for focusing consensus on rules and principles, and for mobilising a consistent, general response on the part of states.⁶⁴⁹ Depending upon what is involved, treaties may be more effective than ‘soft law’ instruments for this purpose. Thus treaties indicate a stronger commitment to the principles in question and to that extent carry greater weight than a ‘soft law’ instrument, but the assumption that they are necessarily more authoritative is misplaced, according to Boyle.⁶⁵⁰ It may occur that a treaty will not achieve the same level of participation and acceptance for a significant period whereas a ‘soft law’ agreement may secure acceptance with relatively more ease.

According to Boyle, other ‘soft law’ instruments are used as mechanisms for authoritative interpretation or amplification of the terms of a treaty as part of a multilateral treaty making process.⁶⁵¹ He relies upon the occasional role of General Assembly resolutions in regard to articles of the UN Charter, such as those dealing with decolonisation, or the use of force.⁶⁵² Of importance, he states that the same task is performed more frequently by resolutions, recommendations and decisions of other international organisations, and by the conferences of parties to treaties.⁶⁵³

Boyle opines ‘... another important related role for ‘soft law’ instruments is to provide the detailed rules and technical standards required for implementation of some treaties.⁶⁵⁴ Environmental “soft law” is quite often important for this reason, setting standards of best practice or due diligence to be achieved by the parties in implementing their obligations.⁶⁵⁵ These “ecostandards” are essential in giving hard content to the overly general and open-textured terms of framework environmental treaties.’⁶⁵⁶

⁶⁴⁸ *Ibid.*

⁶⁴⁹ *Ibid.*

⁶⁵⁰ *Ibid.*

⁶⁵¹ *Ibid.*

⁶⁵² Boyle *supra* at 905.

⁶⁵³ *Ibid.*

⁶⁵⁴ *Ibid.*

⁶⁵⁵ *Ibid.*

⁶⁵⁶ *Ibid.*

The advantages of regulating environmental risks in this manner are that the detailed rules can easily be changed or strengthened as scientific understanding develops, or as political priorities change.⁶⁵⁷ Such standards may be adopted in binding form, using easily amended annexes to provide flexibility, depending on the needs of the parties.

Boyle agrees with the point made many years ago by the late Judge Baxter that some treaties are soft in the sense that they impose no real obligations on the parties.⁶⁵⁸ Though formally binding, the vagueness, indeterminacy, or generality of their provisions may deprive them of the character of ‘hard law’ in any meaningful sense. According to Boyle, this remains true.⁶⁵⁹ He uses the example of the Framework Convention on Climate Change to demonstrate the point. Adopted at the Rio Conference in 1992, this treaty does impose some commitments on the parties, but its core articles, dealing with policies and measures to tackle greenhouse gas emissions, are so cautiously and obscurely worded and so weak that it is uncertain whether any real obligations are created.⁶⁶⁰

Such treaty provisions are almost impossible to breach and in that narrow sense, Boyle advances that Baxter is justified in terming them ‘soft law’.⁶⁶¹ ‘Soft’ undertakings which are very weak represent more of a political compromise than a legal one. They are not normative and cannot be described as creating ‘rules’. This point was recognised by the International Court in the *North Sea Continental Shelf* Case wherein it stated that one of the conditions to be met before a treaty could be regarded as law-making is that it should be drafted in a manner which may be ‘potentially normative’ in character.⁶⁶²

More significantly, a treaty may be potentially normative, but still ‘soft’ in character, because it articulates ‘principles’ rather than ‘rules’.⁶⁶³ Such a treaty may lay down parameters which influence a court’s decisions,⁶⁶⁴ or the manner in which an international institution exercises

⁶⁵⁷ *Ibid.*

⁶⁵⁸ Boyle *supra* at 949.

⁶⁵⁹ Boyle *supra* at 907.

⁶⁶⁰ *Ibid.*

⁶⁶¹ *Ibid.*

⁶⁶² (1969) ICJ Rep 3; also Boyle *supra* at 907.

⁶⁶³ Dworkin R *Law’s empire* (1986), this argument is developed by Sands in Lang W (ed) *Sustainable development and international law* (1995); also Boyle *supra* at 902.

⁶⁶⁴ See for example, the International Court’s reliance on the principle of sustainable development in the *Gabcikovo-Nagymaros case*, on which see Lowe AV in Boyle and Freestone (eds) *International law and*

its discretionary powers.⁶⁶⁵ Treaties of this nature may lack the legal muster attached to hard law of a ‘rule’ or an ‘obligation’, but they are certainly not legally irrelevant. As such they constitute a very important form of law.

Hard law and ‘soft law’ have ‘enforcement mechanisms’. Hard enforcement has many remedies arising from legal obligations. Boyle opines that the contrasting model of ‘soft enforcement’, or ‘dispute avoidance’, is one in which problems are referred to non-binding conciliation before an independent third party, or to some form of non-compliance procedure involving other parties to the treaty.⁶⁶⁶

In both situations there is an attempt to find an agreed solution, rather than to engage in adversarial litigation, or claims for reparation.⁶⁶⁷ Soft enforcement characteristically evades issues of responsibility for breach, and relies on a combination of inducements, or the possibility of termination or suspension of treaty rights to secure compliance.⁶⁶⁸

For Boyle an example of a soft enforcement is best exemplified by the non-compliance procedure adopted by parties to the 1987 Montreal Protocol to the Ozone Convention.⁶⁶⁹ The procedure, adopted in 1990 and revised in 1992, may be invoked by any party to the Protocol, or by the Protocol Secretariat, or by the party itself, wherever there are thought to be problems regarding compliance.⁶⁷⁰

The matter is then referred for investigation to an Implementation Committee consisting of 10 parties elected on the basis of equitable geographical representation. The main task of the Implementation Committee is to consider the submissions, information and observations made to it with a view to securing an amicable solution of the matter on the basis of respect

sustainable development (1999) ch 2, and Boyle EA ‘Gabcikovo-Nagymaros case: New wine in old bottles’ (1997) 8 *Yearbook of International Environmental Law* at 13.

⁶⁶⁵ (1996) ICJ Rep 241.

⁶⁶⁶ Boyle *supra* at 907-908; see also see also Hollis ‘Why state consent still matters’ (2005) at 1 on state consent..

⁶⁶⁷ Boyle *supra* at 909.

⁶⁶⁸ *Ibid.*

⁶⁶⁹ Boyle *supra* at 910 Article 8, and Annex IV, as adopted at Copenhagen in 1992. The process is described in UNEP, Report of the Implementation Committee for the Montreal Protocol, 20th Meeting, UNEP/OzL.Pro/Imp/Com/20/4, paras.24-33, and Yoshida O ‘Soft enforcement of treaties: The Montreal Non-Compliance Procedure and the functions of the Internal International Institutions (1999) 10 *Colorado JIELP* at 95.

⁶⁷⁰ Boyle *supra* at 905.

for the provisions of the Protocol.⁶⁷¹ The Implementation Committee can seek whatever information it needs through the Secretariat.

For this purpose it may also visit the territory of the party under investigation if invited to do so. A report is then made to the full Meeting of the Parties, which decides what steps to call for in order to bring about full compliance.⁶⁷² Steps may include the provision of appropriate financial, technical, or training assistance in order to help the party to comply. If these measures are insufficient, cautions may be issued, or, as a last resort, rights and privileges under the treaty can be suspended in accordance with the law of treaties.⁶⁷³ The non-compliance procedure has been invoked on several occasions by parties to the Montreal Protocol.

The effect has been to secure compliance, albeit at the cost of some delay in implementation.⁶⁷⁴ Boyle argues that this new process represents a further move away from formal, binding, third party dispute settlement in favour of procedures that facilitate compliance but cannot compel it.⁶⁷⁵ Like the Montreal Protocol procedure it tries to resolve problems, differences, or disputes, through political rather than judicial processes, relying on negotiation and persuasion, rather than formal findings of breach of treaty or responsibility.⁶⁷⁶

‘Soft enforcement’ of this type is not confined to environmental agreements. According to some, it has been criticised for undermining the binding character of the treaties concerned and setting them apart from ‘normal’ treaties.

It creates another category of ‘soft’ treaty.⁶⁷⁷ Why do states employ these techniques of soft enforcement for certain treaties? Boyle advances several reasons. Firstly, he states that like non-binding instruments, it facilitates agreement on rules or commitments which are hard in

⁶⁷¹ Boyle *supra*. For another example, see the 1950 European Convention on Human Rights, Article 28 provided that the Commission on Human Rights ‘shall place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention.’

⁶⁷² Boyle *supra* at 910.

⁶⁷³ *Ibid.*

⁶⁷⁴ Boyle *supra* at 911.

⁶⁷⁵ *Ibid.*

⁶⁷⁶ *Ibid.*

⁶⁷⁷ Boyle *supra* at 912.

content.⁶⁷⁸ These rules or commitments do have the binding force of a treaty, with all that implies in terms of a sense of obligation. Yet the consequences of non-compliance are not as severe or potentially troublesome as they would be if there was compulsory binding adjudication in every case of dispute or alleged non-compliance.⁶⁷⁹

This may be important where compliance may not be equally easy for all states, or where the capacities of states differ. It allows some leeway for parties in difficulty, while the emphasis on co-operation is consistent with broader notions of solidarity which underlie many modern environmental agreements.

Secondly, soft enforcement is more suited to a regulatory approach that emphasises prevention of problems rather than reparation after the event.⁶⁸⁰ Boyle's third reason is that non-compliance affects all parties to the treaty equally. There is considerable merit in designing a process for securing compliance, which is multilateral in character and which allows all parties, as well as NGOs, to participate, and which ensures that all interests are adequately represented.⁶⁸¹

Boyle goes further to say that although it is possible to accommodate a multiplicity of parties and NGOs in judicial proceedings, it is not easy to do so, and an adversarial procedure is not well suited to the resolution of the kind of non-compliance problems likely to arise under global environmental treaties.⁶⁸² Finally he states that soft enforcement typically facilitates more readily than judicial processes the necessary input of scientific and technical expertise required to deal with issues of compliance under agreements of a particular kind.⁶⁸³

b. Conclusion

Soft law is evidently a multifaceted notion, whose relationship to treaties is both subtle and diverse. Soft law agreements present alternatives to treaties in certain circumstances. In other

⁶⁷⁸ *Ibid.*

⁶⁷⁹ *Ibid.*

⁶⁸⁰ Boyle *supra* at 912.

⁶⁸¹ *Ibid.*

⁶⁸² *Ibid.*

⁶⁸³ *Ibid.*

instances, 'soft law' agreements complement treaties.⁶⁸⁴ They also provide different ways of understanding the legal effect of different kinds of treaties.

Even Weil admits that whether a rule is hard or soft does not affect its normative character. A rule of treaty or customary law may be vague or soft but it does not cease to be a legal norm.⁶⁸⁵

According to Boyle, those who continue to maintain that 'soft law' is simply not law are grossly incorrect due to the rate of 'compliance' and 'adherence' to 'soft law' agreements. As Baxter wrote, those who see a treaty as having greater legal effect than 'soft law' have perhaps not examined the 'infinite variety' of treaties.

Soft law in its various forms is certainly subject to abuse. The same abuse is true for most legal forms. Boyle surmises that 'soft law' has generally been more useful to the process of international law-making than it has been objectionable. Succinctly he writes, 'it is simply another tool in the professional lawyer's armoury'.⁶⁸⁶

⁶⁸⁴ D'Amato 'International soft law, hard law and coherence' at 8-14.

⁶⁸⁵ Weil *supra* at 414.

⁶⁸⁶ Boyle *supra* at 913.

5. Conclusion: Soft law as law

Soft law encompasses a variety of instruments under the level of compelling treaty law, the exact scope and nature of which can only be determined on a casuistic basis. Soft law is communicated in the form of an ideology, an ideal, or a set of rules or procedures. The principal function of 'soft law' is to facilitate concrete state action in response to declarations, declarations of policy, intent or common principles without incurring legal obligations.⁶⁸⁷ These instruments rely on the willingness of parties to implement them for their effect.

Non-legally binding instruments, within the realm of soft law, have shown states entering into legal obligations within accepted parameters. The Certification Scheme is a voluntary non-legally binding international instrument, which has been accepted by many states. Therefore, the Certification Scheme may be viewed as one such agreement.

A study of existing international law demonstrates the existence of normative phenomena which states conform to. The normative phenomena are new and dynamic. Therefore they are not capable of being categorised according to the traditional sources of law per se, namely that of treaties or custom. All the same, the normative phenomena cannot easily be ruled out of the realm of law. Their legal effect is diffused, yet in particularly limited instances it is clear.

As Baxter points out when he states that the totality of these 'arrangements,' these undertakings, constitute another form of 'soft law,' complied with in fact but not under the coercion of the principle of *pacta sunt servanda* or any other rules of customary international law.⁶⁸⁸

States demonstrate their volition to become part of the international community through their behaviour. In some cases, States modify their behaviour to suit their particular contexts, such as modifying relevant existing legislation within their domestic contexts to reflect the views of the international community. In other instances, states become part of the international community through subscription to new normative behaviour. The conduct in both cases is

⁶⁸⁷ Baxter (1980) *supra* at 550 notes his use of the term 'international agreements' *vis-a-vis* the traditional definition provided for in the VC; see also Hollis 'Why state consent still matters' (2005) on state consent.

⁶⁸⁸ Baxter *supra* at 556; see also Thurer *supra* at para 21.

undertaken outside the parameters of treaty law or international customary law. It is in this specialty of conduct that the normative phenomenon of ‘soft law’ occurs.

Regardless of the legal force of ‘soft law’, states may agree to abide by the new normative phenomena and as a result of such practices eventually feel compelled to continue to abide. Therefore, it is hardly surprising to note that the conduct of states adheres to resolutions of the UN GA or the codes of MNCs for example. Resolutions of the UN GA, codes of conduct of MNCs, codes of good practice and such have a common feature. These instruments possess the ability to articulate objectives and principles that state conduct manifests. In this manner, states are able to better formulate or concretise new rules of behaviour (new norms) which agreeable states subsequently adopt.

New norms do not easily become established norms. Whilst some argue that new norms arise from the consent of state parties, others argue the holistic, contextual impact of new norms must be carefully examined in order to determine their effect. States are not grappling with law itself in the ‘soft law’ domain. Instead, States are confronted with non-legally binding norms. Non-legally binding norms may or may not culminate in fulfilment of expectations of and by state parties. Fulfilment of expectations is largely dependent on the prevailing political and social contexts.

States make law for themselves which regulates their conduct in different circumstances. In the same manner, States make ‘soft law’ for themselves. As its name implies, ‘soft law’ is ‘law’ insofar as it constitutes an agreement between the parties in the first instance. In the second instance, it is ‘soft’ insofar as an integral part of that agreement is that the state parties agree not to be bound by legal obligations, and to retain a comfortable margin of flexibility.

Parties can be said to be bound by the basic principle of contracts. According to Schachter, the fact that an agreement is non-legally binding does not imply that the agreement is not binding.⁶⁸⁹ Rather, it means that the agreement is binding insofar as states consider themselves to be bound without any recourse for breach because there can be no breach. As a further inducement to comply with a voluntary instrument, acts which are performed pursuant

⁶⁸⁹ Schachter *supra* at 300.

to the agreement are valid and cannot, according to the principles of contract law, be rescinded.

Adherence to the principle of good faith may also encourage compliance with soft law. However, good faith alone cannot provide a binding force. More likely, the binding force may arise from non-legal relations such as the authority of states, mutual benefit and good international relations. Compliance by state parties to 'soft law' instruments may rise to the level of international customary law thereby creating new norms.

However, the evolution of 'soft law' into international customary law through compliance by MNCs is not possible owing to their lack of full legal personality. Thus, a more detailed examination of the Certification Scheme as implemented by member states themselves will permit a determination of the type of authority vested in the Certification Scheme. This will also allow a determination on the classification of the Certification Scheme.

Having examined the Certification Scheme in detail in chapter three; and the Third Year Review with respect to implementation and monitoring in chapter four; and the role of international and regional organisations in this chapter, it is appropriate to address two of the central concerns of this study, namely implementation and monitoring. Thus, the next chapter deals with the highlights of the shortcomings and failings of the Certification Scheme.

CHAPTER 7 : SHORTCOMINGS AND FAILINGS OF THE CERTIFICATION SCHEME

1. Introduction

Difficulties with the Certification Scheme's contents; and its implementation and monitoring have been highlighted in chapters three and four of the study. Problems identified in chapter three arose from the Certificate which must accompany rough diamond shipments, with regard to the undertakings by Participants, co-operation and transparency and administrative matters to the Certification Scheme. At this point it is necessary to discuss some of the major difficulties of the Certification Scheme's contents.

The Certification Scheme was formed in an effort to address two major objectives: the curbing or elimination of the illegal trade of rough diamonds, which provoke human rights crises. The Certification Scheme operates on the basic premise that a KP Certificate must accompany each shipment of rough diamonds from the point of origin to the point of destination. The Certification Scheme presently comprises 75 Participants. The Certification Scheme is a voluntary mechanism.

Participants to the Certification Scheme may only engage in the legal trade of rough diamonds with other Participants who have also met the 'minimum requirements of the Scheme'.⁶⁹⁰ International shipments of rough diamonds must also be accompanied by a KP Certificate guaranteeing that they are conflict-free.⁶⁹¹ The KP Certificate is the driving mechanism of the Certification Scheme. However, the Certification Scheme per se does not have the force of law. There is no central body which controls the workings of the Certification Scheme. Working groups and committees are the hub of the Scheme.⁶⁹²

For ease of reference, the composition of the Certification Scheme document is repeated. The Certification Scheme document comprises a Preamble and six sections with three annexes, which form part of the sections. Section I of the Certification Scheme provides for definitions. Section II of the Scheme deals with the actual 'Kimberley process Certificate'. A

⁶⁹⁰ Section II Annex I of the Certification Scheme.

⁶⁹¹ Section II of the Certification Scheme.

⁶⁹² Section VI of the Certification Scheme.

‘Kimberley Process Certificate’ must accompany each shipment⁶⁹³ of export of rough diamonds.

The problems with the Certification Scheme have therefore been divided into two categories ‘capacity’ and ‘accountability’. These categories have been identified to draw together the problems with the Certification Scheme in a thematic manner. The categories of ‘capacity’ and ‘accountability’ allow for the problems with the Certification Scheme to be correlated with the advantages offered by an international instrument which has or acquires the force of law.

The categories of capacity and accountability are by no means definitive or all encompassing. There is also a degree of overlap and fluidity between the concepts. However, the categories have been used in this study for the purposes of conceptual analysis and are sufficient for this purpose.

It may be stated that problems with the Certification Scheme discussed under capacity are problems, which broadly speaking can to a lesser or greater degree be remedied by formulating an international instrument having the force of law. Such an instrument is able to afford measures couched in legally binding obligations between parties.

The problems identified in the formation, implementation and monitoring of the Certification Scheme may be classified into two groups, namely that of capacity and accountability. Accountability arises due to a lack of mechanisms, which may ensure compliance with the contents of the Certification Scheme. In this manner, accountability may be seen to comprise two forms, namely legal and moral accountability. Here, the focus is upon legal accountability.

a. Section II: The KP Certificate⁶⁹⁴

The KP Certificate must meet the 14 minimum requirements as discussed in chapter three of the study. The Certificate is the driving force of the Certification Scheme.

⁶⁹³ The Certification Scheme defines a ‘shipment’ as one or more parcels that are physically imported or exported.

⁶⁹⁴ A ‘Kimberley Process Certificate’ means ‘a forgery resistant document with a particular format which identifies a shipment of rough diamonds as being in compliance with the requirements of the Scheme.’ Section 1.

Problem

According to the Review, not all Participants comply with the issuance of a duly validated KP Certificate with minimum requirements as set out by the Certification Scheme's document. Errors in filling out KP Certificates persist.

A KP Certificate must accompany every shipment of rough diamonds from one Participant to another.⁶⁹⁵ Each shipment must have a specifically numbered and government validated KP Certificate that promises the shipment does not contain conflict diamonds.⁶⁹⁶

Since the issuance of KP Certificates is at the heart of legitimising the trade in rough and or conflict diamonds, the KP Certificate must be complied with by all exporting and importing Participants. In order to ensure compliance with the fourteen minimum requirements of the KP Certificate, the Certification Scheme demands that governments must have in place measures and the necessary infrastructure, which will enable the issuance of the KP compliant Certificate. This particular 'requirement' of the Certification Scheme assumes that all Participants shall have the necessary infrastructure to ensure the issuance of KP Certificates.

The capacities of differing state Participants who are the primary exporters of diamonds is not taken into account. Each participating government to the Certification Scheme ideally must have the ability to ensure that all fourteen minimum requirements are met. Each Participant should ensure that a KP Certificate accompanies every shipment of rough diamonds in keeping with the minimum standards⁶⁹⁷ and minimum requirements⁶⁹⁸ of the Certification Scheme. Drafting and issuing of KP Certificates have complexities in most of the 14 minimum requirements. The issue of fraud is also a central concern for the Certification Scheme.⁶⁹⁹

⁶⁹⁵ Section II(a) of the Certification Scheme.

⁶⁹⁶ Section IV of the Certification Scheme.

⁶⁹⁷ In accordance with Section IV; see also Section 1(a) of the Certification Scheme.

⁶⁹⁸ As set out in Annex I of the Certification Scheme; see also Section II(b) and Section IV of the Certification Scheme.

⁶⁹⁹ Correspondence issued by the KP Chair from Namibia on the 'Public general warning: the risk of fraudulent KP Certificates. Available at www.kimberelyprocess.com/documents Last visited 08 July 2011.

Mandatory import information is not always readily available or accurate.⁷⁰⁰ This, too, is a minimum requirement of the Certification Scheme's document with respect to issuance of KP Certificates. When information is not accurately presented, then the efficacy of the Certification Scheme is undermined. The efficacy of the Certification Scheme is also undermined when Participants do not adhere to the contents of the Certification Scheme.⁷⁰¹

Problem: Minimum requirement 1 (KP Certificate)

Each KP Certificate should bear the title 'Kimberley Process Certificate' and the following statement: 'The rough diamonds in this shipment have been handled in accordance with the provisions of the Kimberley Process Certification Scheme for rough diamonds'.

The requirement for Certificates to accompany each shipment as such does not guarantee that shipments not accompanied by a KP Certificate will no longer occur. The issue of rebel movements controlling and mining rough diamonds is addressed by the Certification Scheme. However, the issue of governments causing human rights abuses through mining and production of rough diamonds is not addressed. Indeed, this is of serious concern. As such, it is addressed in the next chapter of this thesis.

KP Certificates must accompany every shipment of rough diamonds. It is difficult to ensure that each and every shipment of diamonds is accompanied by a KP Certificate due to the nature of the commodity. Smuggling and criminal activities associated with diamond import and exports have been reported by credible sources. Zimbabwean diamonds having their origin in Angola have made their way to South Africa for export purposes. Diamonds are portable. Consequently they are easily transferred from one party to another. This is a significant shortcoming of the Certification Scheme.

However the Certification Scheme and De Beers maintain that 99.8 percent of diamonds are conflict-free.⁷⁰² This averment does not take cognisance of diamonds which do not reach the mainstream market. In other words, diamonds entering the markets through informal trade mechanisms and will not be captured by data bases.⁷⁰³

⁷⁰⁰ Third Year Review in general.

⁷⁰¹ PAC Zimbabwe (2010) at 15-24; see also 'Zimbabwe, Diamonds' (2008) PAC and Global Witness at 10-24.

⁷⁰² PAC Zimbabwe (2010) at 10-24; see also 'Zimbabwe, Diamonds' (2008) PAC and Global Witness at 15-24.

⁷⁰³ 'Zimbabwe, Diamonds' (2008) PAC and Global Witness at 4.

All products mined will not necessarily follow the correct channels of entering the market. Simultaneously, it is conceded that diamonds may nonetheless slip the long arm of controlling law. But this amount will be almost negligible in comparison to that which ordinarily would have been lost to the informal trade sector. South African dealers reported large volumes of smuggling during 2006 and 2007, and Zimbabwe's Central Bank Governor, Gideon Gono has said many times that huge volumes of government revenue are being lost to diamond smugglers.⁷⁰⁴

According to the PAC and Global Witness, in 2008, if there has been smuggling to neighbouring countries, it is not clearly evident in the statistics they submit to the Kimberley Process.⁷⁰⁵ Further, it was stated that at first glance, a tenfold spike in Tanzanian exports in 2006 looked suspicious, but it could not be explained by increased production in Zimbabwe.⁷⁰⁶ According to the PAC and Global Witness, the Marange rush in Zimbabwe began in mid 2006, and the Tanzanian spike was spread evenly across all four quarters of the year. Tanzanian exports dropped significantly in 2007 and during 2008 were back to 2005 levels.⁷⁰⁷ There was little record of KP certificates. Simultaneously, Canada was commended for its system of KP certificates.⁷⁰⁸

Thus Participants should have in place mechanisms which the Certification Scheme at large provides, in terms of all the requirements in general. The statement implies that an exporting Participant State has the necessary infrastructural capacities such as implementation of the Certification Scheme's document into national legislation.⁷⁰⁹

Problem Minimum requirement 5 (KP Certificate)

The Certificate is to be 'tamper and forgery resistant.'

The Certification Scheme does not provide guidelines as to how the KP Certificate is supposed to be 'tamper and forgery resistant'. Participants must address this matter in their respective capacities. Different standards within Participant countries may result in a wide

⁷⁰⁴ *Ibid.*

⁷⁰⁵ 'Zimbabwe Diamonds' *supra* at 4-6.

⁷⁰⁶ *Ibid.*

⁷⁰⁷ 'Zimbabwe Diamonds' *supra* at 4-7.

⁷⁰⁸ PAC 'Seven case studies' (2004) at 16.

⁷⁰⁹ PAC 'Implementing the KP' (2005) at 3.

range of different implementation standards. This also undermines the efficacy of the Working Groups to the Kimberley Process. Many Participants lack the capacity to undertake such assurances.⁷¹⁰

The Certification Scheme does not adequately address this problem. An international law instrument may be able to address this problem; as it may be able to establish a permanent secretariat and office headquarters which will issue certificates that are tamper and forgery resistant. In this manner, capacity may be fostered and accountability may be established.

Changing technologies may in all likelihood intercept an original Kimberly Process Certificate. However, this constraint will be under control if the secretariat was a permanent body established pursuant to a law making treaty. Furthermore, a permanent secretariat will be in favourable position for the issuance of dates of entry and expiry of certificates.

The possibility of strengthening the existing roaming secretariat is not viable as this would require funding which must come from the Participant country holding the seat of the Chair. In the alternative, a trust fund may be established which would make it possible for the collection and utilisation of funds for the Participant country holding the seat of the Chair.

Problem

*Recommendations for rough diamond buyers, sellers and exporters to be legally obliged to maintain records of their daily business for a period of five years.*⁷¹¹

The Recommendations made by the Certification Scheme present concerns to buyers and sellers for obtaining licenses. Nor are all buyers and sellers willing to comply with legal requirements. Small scale buyers enter and exit the diamond industry at a fast pace. Thus, these Recommendations appear to be intended for large scale buyers and sellers. These Recommendations may very well escape the hands of small scale buyers and sellers.

Daily records should include buying, selling or exporting records listing names of buyers or selling clients, their license number and the amount and value of diamonds sold, exported or

⁷¹⁰ PAC 'Zimbabwe, Diamonds' (2008) at 3-10.

⁷¹¹ Recommendation 15 Annex II of the Certification Scheme.

purchased.⁷¹² Daily records must be stored on a computer data base.⁷¹³ Once more the problem with regard to technological capacities presents itself. The PAC and Global Witness in 2002 commended the US government for its implementation of technological systems in place which comply with the Certification Scheme.⁷¹⁴

There are major problems in getting Participants to submit required statistics on time according to the PAC.⁷¹⁵ A significant number of Participants are consistently late in reporting data and are therefore in non-compliance with the statistical reporting requirements. In 2005, Tanzania did not submit any statistical data. Ten other countries: Bulgaria, Central African Republic, China, Guinea, Ghana, Guyana, Laos, Lesotho, Malaysia and Venezuela had outstanding, limited or incomplete data.⁷¹⁶ There were no consequences for Participants that are non-compliant with statistical submissions even though this meant that they failed to meet the minimum requirements of the Kimberley Process.⁷¹⁷

Problem

Intrinsic to the export process is the duty of the exporter. The Scheme recommends that the relevant Exporting Authority should convey a meticulous electronic message, which must be recorded on a computer database,⁷¹⁸ to the intended Importing Authority.⁷¹⁹ Thus, the electronic message should contain information on the carat weight, value, country of origin or provenance, importer and the serial number of the Certificate.⁷²⁰

Cognisance must be had to the technological gap as previously stated in this chapter. Also, the clarity of questions which the Exporting Authority must pose to the exporter is uncertain. Thus the workability of these Recommendations is debatable. Again, not all Participants possess the necessary technological infrastructure to ensure that they meet the impositions of this Recommendation.⁷²¹

⁷¹² *Ibid.*

⁷¹³ Recommendation 16 Annex II of the Certification Scheme.

⁷¹⁴ PAC 'Seven case studies' (2004) at 17-19.

⁷¹⁵ PAC 'Implementing the KP' (2005) at 3.

⁷¹⁶ *Ibid.*

⁷¹⁷ *Ibid.*

⁷¹⁸ Recommendation 20 Annex II of the Certification Scheme.

⁷¹⁹ Recommendation 19 Annex II of the Certification Scheme.

⁷²⁰ *Ibid.*

⁷²¹ PAC 'Seven case studies' (2004) at 17-19.

b. Section VI: Administrative matters to the Certification Scheme

Problem

The administrative matters of the Scheme show where the Scheme is actually ‘housed’ like most international instruments. The instrument of the Scheme though is not located in any specific place. Instead it is ‘hosted’ by different state Participants each year.

Section VI addresses administrative matters within the purview of the Certification Scheme. The section deals with meetings, administrative support, participation, Participant measures, compliance and dispute prevention, modifications and review mechanisms. Essentially housekeeping matters are given due attention in Section VI.

At best, these rules of procedure should be pre-emptive in response to the prevailing conditions of application of the Scheme. There is no single head office for the Certification Scheme and its management. The matter of a ‘roaming’ Secretariat is once more problematic.⁷²²

The presence of a permanent head office with occupancy for the Chair, irrespective of the country may be achieved through an instrument which has the force of law. Such an instrument will thus alleviate the concerns regarding capacity with especial regard to dissemination of information and communication.⁷²³ The PAC Global Witness Coalition suggested that an evaluation exercise be undertaken.⁷²⁴

c. Synopsis of problems relating to ‘capacity’

The investigation into the problems with the Certification Scheme indicates that there is a lack of capacity with regards to the Certification Scheme brought about by the absence of a central office and the non-legal nature of the Certification Scheme. The implementation of a legal instrument could alleviate these problems as a legal instrument is able to alleviate and in some instances resolve the capacity issue which the study has identified.

⁷²² PAC Annual Review (2009) at 1-2.

⁷²³ PAC ‘Implementing KP’ (2005) at 6-7.

⁷²⁴ *Ibid.*

d. Accountability

Accountability in this context refers to the ability of Participants or parties to the Certification Scheme to meet obligations as contained in the Certification Scheme document. Thus, a Participant must be held to account for a failure to comply with an obligation or a violation of an obligation. In this instance, a legal instrument is best suited to ameliorate difficulties encountered by the present Certification Scheme.⁷²⁵

i. Section I: Definitions

Problem

According to the Review, there is confusion around certain important definitions.

Certainly unclear definitions can seriously impede the operation of the Certification Scheme. Definitional uncertainty is of concern to the operation and long term sustainability of the Scheme. The Review found that Participants experienced problems with the terms ‘value’ and ‘classification’.

a. Value

Participants are not clear as to the values which must be attached to shipments of rough diamonds. Some make use of the US dollar system as set out by the Certification Scheme and others experience difficulties with the valuations of rough diamond shipments. Thus the issues of values remain a problem for implementation.

Unfortunately, and as this information is held by the WGDE and not made available for public inspection, the actual details and seriousness of this problem remain cloudy.

⁷²⁵ Curtin D and Nollkaemper A ‘Conceptualizing accountability in international and European law’ (2006) 36 *Neth Ybk IL* at 9-14.

b. Classification

Despite the issuance of Technical Guideline 5, Participants continue to experience difficulties with classification of rough diamonds for shipment purposes. Thus, trade is hampered.

Problems exist with some definitions such as ‘Participants’ and ‘rough diamonds’. Problems also exist with respect to the Importing and Exporting Authorities. Unfortunately, this information is held by the WGDE. It is not made available for public inspection.

c. Participant

‘Participant,’ in terms of the Certification Scheme means a regional economic integration organisation or a State for which the Certification Scheme is effective.⁷²⁶

According to the Certification Scheme, ‘regional economic integration organisation’ means an organisation comprised of sovereign States that have transferred competence to that organisation in respect of matters governed by the Certification Scheme.⁷²⁷ The EU, as an entity which has been granted competence for matters governed by the Scheme is considered to fall within the ambit of this definition.

Consequently the EU passed its Council Regulation for the implementation of the Certification Scheme. The Council made allowance for individual states party to the EU to formulate country specific legislation in keeping with the overall thrust of the implementation of the Certification Scheme. Each State retained a small measure of discretion to formulate its legislation, also known as margin of appreciation.

d. Distinction between rough diamonds and powder

Technical Guideline 13 addresses the distinction between rough diamonds and powder. Technical Guidelines are only made available to Participants on a confidential basis. They are not made available to the public, thus frustrating transparency. Participants also encounter

⁷²⁶ Section I of the Certification Scheme.

⁷²⁷ *Ibid.*

difficulties due to a lack of information. It has been averred that although Technical Guideline 13 addresses this issue, it is not sufficiently clear for Participants.

Participants are encountering difficulties with distinguishing between rough diamonds and powder. Technical Guideline 13 assists very little in this regard for various reasons as not all the information is properly collated and distributed for usage by all Participants. Unfortunately, this information is held by the WGDE. It is not made available for public inspection.

Definitions by their nature are defined by the context within which they are utilised. Therefore neither a scheme nor legal instrument will resolve this problem in its entirety. However, it must be noted that a legal instrument will allow for renewed consultations with the diamond industry, Participants and other important stakeholders have a greater vested interest in according legal authority to future definitions. This process could be especially facilitated under the auspices of the UN.

ii. KP: Problem Minimum requirement 2

*Country of origin for shipment of parcels of unmixed (ie from the same origin).*⁷²⁸

The Certification Scheme defines ‘country of origin’ as ‘the country where a shipment of rough diamonds has been mined or extracted’.⁷²⁹ Pursuant to the Certification Scheme ‘parcel means one or more diamonds that are packed together and that are not individualised’.⁷³⁰ It is difficult to ensure that parcels remain unmixed due to human error. Here too, the scheme mechanism does not provide an adequate answer.

Whereas a legal instrument may be of a legally binding nature it would result in uniformly acceptable standards, taking into account the country specific situations. In particular, the situations prevailing in major diamond exporting nations such as Sierra Leone will play a major role in the determination of norms and standards. Legal instruments, as have been

⁷²⁸ The Certification Scheme defines ‘Country of origin’ means the country where a shipment of rough diamonds has been mined or extracted

⁷²⁹ Section I of the Certification Scheme.

⁷³⁰ *Ibid.*

outlined above also provide for amendments, especially when the concept of ‘progression’ is borne in mind.

iii. KP: Problem Minimum requirement 9

The Certificate is to contain the ‘identification of exporter and importer’.

Problems arise when the details of the exporter must be noted on the KP Certificate. Identification of the exporting and importing states are comparatively easy. However, the precise details of acquisition of the diamonds to the exporting authority of a state are somewhat difficult to ascertain. The Review noted the presence of artisanal and other clandestine diamond dealers.⁷³¹

The Review also noted a lack of import procedures for rough diamond shipments. There are no consistent procedures for import in accordance with the Certification Scheme, as the latter does not provide for import procedures. This is of concern for the implementation and the consequent monitoring of the Certification Scheme’s workability. Participants reported illegal shipments despite the operation of the Certification Scheme’s contents within their respective jurisdictions. Legitimate trade is impeded in this manner.

Problem

All international rough diamond⁷³² shipments⁷³³ must be traded in tamper-proof boxes and accompanied by a forgery-proof Certificate which states that the rough diamonds are conflict free.

⁷³¹ PAC Annual Review (2009) at 3-4.

⁷³² A ‘diamond’ is defined as ‘a natural mineral consisting essentially of pure crystallized carbon in the isometric system, with a hardness on the Mohs (scratch) scale of 10, a specific gravity of approximately 3.52 and a refractive index of 2.42.’ Section I of the Scheme. A diamond is accorded the minimal criteria necessary for trade. The Scheme defines ‘rough diamonds’ to mean ‘diamonds that are unworked or simply sawn, cleaved or bruted and fall under the Relevant Harmonised Commodity Description and Coding System 7102.10, 7102.21 and 7102.31.’ Rough diamonds are diamonds which have been mined with a specific value. Section I of the Certification Scheme.

⁷³³ The term ‘shipment’ means ‘one or more parcels that are physically imported or exported.’ Section 1 of the Certification Scheme.

Tamper-proof boxes must necessarily be of such a quality that they are rendered incapable of manipulation by otherwise unscrupulous parties. The nature and measure of a tamper proof box is not defined by the Scheme. The design and construction of such boxes appears to rest within the discretion of the Participants.

iv. Section III: Undertakings in respect of the international trade in rough diamonds

This Section deals with undertakings of transit Participants. In other words, the undertakings of Participants through whose territory a shipment of rough diamonds pass en route to the final importing Participant.

Problem

*The importing Participant requires that the original Certificate be readily accessible for a period of no less than three years.*⁷³⁴

Thus the country of import should have in place mechanisms to ensure storage and verification facilities for a period of three years. This may be problematic as not all Participants will be in a position to put into place storage and verification facilities. Monetary implications present difficulties yet again, as not all Participants are in a financially amicable position to install storage and verification facilities. The monetary implications become important in making the argument for a treaty making mechanism *vis-a-vis* the present Certification Scheme. In the instance of a treaty making mechanism, there will be no real monetary obstacles as the parties to the treaty mechanism would undertake particular legal obligations. In contrast, the Participants to the Certification Scheme may be financially unable to install such storage and verification facilities.

Storage and verification facilities imply that the country of import puts these mechanisms into place prior to becoming a Participant to the Certification Scheme. It may be that the drafters of the Certification Scheme had two possible intentions with this particular aspect.

⁷³⁴ Section III (b) of the Certification Scheme. The Certification Scheme defines ‘import’ to mean the physical entering/bringing into any part of the geographical territory of a Participant. The Scheme defines an ‘importing authority’ as the authority(ies) or body(ies) designated by a Participant into whose territory a shipment of rough diamonds is imported to conduct all import formalities and particularly the verification of accompanying Kimberley Process Certificates. Section 1 of the Certification Scheme.

Firstly, the drafters intended that rough diamonds could be traced. Secondly, the drafters intended that the relationship between exporters and importers may be secured.

Further the importing Participant should ensure that no shipment of rough diamonds is imported from or exported to a non-Participant.⁷³⁵ Section III of the Certification Scheme demands that the trade of rough diamonds be confined to Participants of the Certification Scheme. Participants may only trade rough diamonds with each other.

All parties and states who have not signed the Certification Scheme are prohibited from trading with Participants to the Certification Scheme. To date there are 75 Participants to the Certification Scheme, which includes the 49 Member States of the EU.

v. Trading Participants

The Certification Scheme may encounter problems with regard to trading partners as there are between 192 to 196 States in the world today.⁷³⁶ Presently 192 States have signed the UN Charter.⁷³⁷ With the number of States becoming party to treaties with regard to international trade, it is most appropriate to have a treaty mechanism in place. A legal instrument will be able to successfully invoke the provisions of international trade law.

To date, there are 75 Participants to the Certification Scheme as aforementioned. The number of Participants demonstrates the lack of universal acceptance of the Certification Scheme; and consequently its long term sustainability and workability in the diamond industry. At the same time, it must be borne in mind that the Participants to the Certification Scheme are predominantly the diamond trading and production partners in the world.

⁷³⁵ Section III(c) of the Certification Scheme.

⁷³⁶ www.un.org

⁷³⁷ *Ibid.*

vi. Section III

Problem

'Each Participant should when embarking on trading rough diamonds on the international level, recognise that Participants through whose territory shipments pass through are not required to meet the requirement of producing a duly validated Certificate'.⁷³⁸

According to the Certification Scheme, 'transit' means the physical passage across the territory of a Participant or a non-Participant, with or without transshipment, warehousing or change in mode of transport, when such passage is only a portion of a complete journey beginning and terminating beyond the frontier of the Participant or non-Participant across whose territory a shipment passes'.⁷³⁹

There is very little difficulty foreseen when the shipment passes through the territory of a Participant to the Certification Scheme. However, concern arises when the shipment and KP Certificate pass through the territory of a non-Participant to the Certification Scheme. This definition presents difficulties.

When unpacked, the difficulties may be seen. Firstly, a shipment destined for international trade may pass through the country of a non-Participant state or region. Secondly, the Certification Scheme's definition allows for the shipment to be warehoused or change the mode of transport from air to water. Thirdly, the passage of the shipment may be on the territory of a non-Participant through any part of its journey en route its final destination.

Whether the shipment is safe and remains intact together with the KP Certificate arises from the goodwill or comity of the non-Participant. Further, the transit non-Participant state is not required to comply with the minimum requirements for the issuance of the duly validated KP Certificate or with the Certification Scheme itself.⁷⁴⁰

⁷³⁸ The Certification Scheme defines 'transit' as the physical passage across the territory of a Participant or a non-Participant, with or without transshipment, warehousing or change in mode of transport, when such passage is only a portion of a complete journey beginning and terminating beyond the frontier of the Participant or non-Participant across whose territory a shipment passes.

⁷³⁹ Section I of the Certification Scheme.

⁷⁴⁰ Section II(a) provides as follows: 'a Kimberley Process Certificate (hereafter referred to as the Certificate) accompanies each shipment of rough diamonds on export;' and Section II (b) provides as follows: 'its processes

According to the Certification Scheme, the last two of requirements of a ‘duly validated Certificate and the number of parcels, carat weight, Certificate number and details of importer and exporter’⁷⁴¹ are waived, provided that the import and export authorities of the Participant through whose territory a shipment passes, ensures that the shipment leaves its territory in an identical state as it entered its territory.⁷⁴²

This means that the shipment must not be opened or tampered with.⁷⁴³ This too, is problematic as the importing and exporting authorities may not be in a position to evade interception. Issues of bribery and corruption are inadequately addressed in light of the history of the trade of rough diamonds. The non-Participant country may have or make their own customs regulations which may not be consonant with the contents of the Certification Scheme. For example, customs rules and regulations may be made with regard to ‘tamper-resistant’ containers utilised for the shipment of diamonds.

As have been noted above, difficulties exist with regard to the definition of ‘transit’ and the transit of shipments of rough diamonds through territories of non-Participants to the Certification Scheme in particular. Difficulties encountered with securing the identity and contents of a diamond parcel intended for shipment and receipt by an importer will be in significant part be addressed by a legal instrument. A legal instrument will create mutually legally binding obligations for all signatories.

vii. Section IV: Internal controls

Problem

*Pursuant to Section IV, Participants should undertake to establish particular internal control systems for the export of rough diamonds. 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’.*⁷⁴⁴

for issuing Certificates meet the minimum standards of the Kimberley Process as set out in Section IV ...’ respectively.

⁷⁴¹ Section III(a) and (b) of the Certification Scheme.

⁷⁴² Section III(d) of the Certification Scheme.

⁷⁴³ *Ibid.*

⁷⁴⁴ Section IV (a) of the Certification Scheme.

Table 2 • Top Diamond Producing Countries in 2008
(by volume)

| Country | Carats | World Total % |
|--------------------|-------------|---------------|
| Russian Federation | 36,925,150 | 22.7% |
| DR Congo | 33,401,927 | 20.5% |
| Botswana | 32,276,000 | 19.8% |
| Australia | 14,932,137 | 9.2% |
| Canada | 14,802,699 | 9.1% |
| Other | 30,569,803 | 18.7% |
| Totals | 162,907,716 | 100% |

Source: Kimberley Process Statistical Data Base.

Table 3 • Top Diamond Producing Countries in 2008
(by value)

| Country | Value US\$ | World Total % |
|--------------|----------------|---------------|
| Botswana | 3,273,001,000 | 25.7% |
| Russia | 2,508,957,130 | 19.7% |
| Canada | 2,254,710,603 | 17.7% |
| South Africa | 1,236,240,109 | 9.7% |
| Angola | 1,209,789,970 | 9.5% |
| Other | 2,249,579,996 | 17.7% |
| Totals | 12,732,278,808 | 100% |

Source: Kimberley Process Statistical Data Base.

Figure 12: Top diamond producing countries in 2008.

A few components must be in place to establish a ‘body’ of a ‘system of internal controls’. Intrinsic to the system of internal controls is that each Participant should designate an ‘Importing and an Exporting Authority’.⁷⁴⁵ In furtherance of establishing a body of internal systems of control, Participants should ensure that rough diamonds are imported and exported in tamper resistant containers.⁷⁴⁶ Each Participant should 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.⁷⁴⁷

⁷⁴⁵ Section IV(b) of the Certification Scheme.

⁷⁴⁶ Section IV(c) of the Certification Scheme.

⁷⁴⁷ Section IV(d) of the Certification Scheme.

Firstly, the Review assumes that Participants have implemented the Certification Scheme's contents into their respective jurisdictions. Secondly, Participant countries are expected to ensure that they adhere to the content of the Certification Scheme in their relations with other Participants. Thirdly, non-state Participants must ensure that the content of the Certification Scheme are included in their regulations and policies. With regards to the Chair, the Certification Scheme assumes that the Chair undertakes to fulfil all the duties imposed by the Kimberley Process.

Fourthly, the Review stated that the Participation Committee is responsible for assessing whether or not a Participant is in compliance with the minimum standards of the Certification Scheme. As such, it is the body that decides who can join the Certification Scheme, and who should be expelled for non-compliance. Its Terms of Reference detail its importance to the Certification Scheme. They were revised at the Gataineau Plenary of 2004, and again at the Moscow Plenary of 2005.

The Certification Scheme assumes that laws and practices will be uniform with respect to implementation. In reality, Participants differ in the national laws and practices through vagaries of interpretation.⁷⁴⁸ As the Certification Scheme is a voluntary instrument which is not able to make particular demands upon Participants, little redress can be expected in respect of unequal application and implementation standards.⁷⁴⁹

The Certification Scheme itself is not a legally binding contract. As such, it is incapable of providing for any means of enforcement. A breach of the requirements will not result in sanctions. The Certification Scheme does not possess any legally sanctionable clauses. Thus, Participants are not held to account for breaches of the contents of the Certification Scheme.

Although the work of the WG and the sub-WG are acknowledged by the Review, much work remains outstanding with respect to the internal controls contained in the Certification Scheme's document. Firstly, it is debatable whether self-regulation may be undertaken in isolation of other impacting factors. Participants need support and contact with other Participants.⁷⁵⁰

⁷⁴⁸ PAC 'Implementing the KP' (2005) at 4-6.

⁷⁴⁹ Guyana has become a destination of choice for diamond smugglers. See PAC Annual Review (2009) at 23.

⁷⁵⁰ PAC Annual Review (2009) at 9 on the DRC; at 8 on Angola.

Secondly, implementation and monitoring with respect to trading, cutting and polishing centres must be addressed for the purposes of beneficiation and otherwise. Thirdly, concern over the internal controls, as contained in the Scheme document, should be addressed as Participants lack confidence therein. Belgium, Angola, Guyana and the Côte d' Ivoire expressed concern over the lack of internal controls.⁷⁵¹

The lack of uniformity and implementation of internal controls is best addressed in a legally binding instrument. Legal instruments provide for the incorporation of its provisions into domestic legislation. Further, provision is also made for the progressive implementation of treaty provisions within particular time frames. In this manner, legal instruments remove the elements of uncertainty and lack of uniformity of practice.⁷⁵²

Table 1 • 2008 Diamond Exports
(countries covered in this report)

| Country | Volume (carats) | Value (US\$) | US\$/ct |
|------------------------------|-----------------|--------------|---------|
| Democratic Republic of Congo | 21,284,136 | 551,879,602 | 25.93 |
| Angola | 7,389,133 | 995,408,419 | 134.71 |
| Guinea | 3,097,360 | 66,705,270 | 21.54 |
| Lebanon | 2,456,651 | 48,475,333 | 19.73 |
| Ghana | 629,043 | 19,959,304 | 31.73 |
| Sierra Leone | 371,260 | 98,772,170 | 266.05 |
| Zimbabwe | 327,833 | 26,693,385 | 81.42 |
| Guyana | 193,026 | 31,190,622 | 161.59 |
| Liberia | 46,888 | 9,871,033 | 210.52 |
| Republic of Congo | 36,737 | 1,019,705 | 27.76 |
| Côte d'Ivoire | 0 | 0 | 0 |
| Venezuela | 0 | 0 | 0 |

Source: Kimberley Process Statistical Data Base.
Note: Côte d'Ivoire remained under a UN diamond export embargo during 2008. Venezuela reported that no diamonds had been exported during the year.

Figure 13: Diamond exports 2008

⁷⁵¹ See Third Year Review; see also PAC 'Seven case studies' (2004) at 6-14.

⁷⁵² PAC *supra* recommends Tri-lateral agreements be entered into at 24.

viii. Section V

Problem

Each Participant should collect and maintain relevant official production, import and export data, and collate and exchange such data in accordance with the provisions of Section V.⁷⁵³

Table 4 • Top Diamond Importing Countries in 2008 (by value)

| Country | Value US\$ | World Total % |
|----------------------|----------------|---------------|
| European Community | 14,507,530,886 | 37.5% |
| India | 9,591,555,855 | 24.8% |
| Israel | 5,357,613,277 | 13.9% |
| PR China | 2,331,180,223 | 6.0% |
| United Arab Emirates | 2,155,662,557 | 5.6% |
| Switzerland | 1,560,438,270 | 4.0% |
| Other | 3,171,797,424 | 8.2% |
| Totals | 38,675,778,492 | 100% |

Source: Kimberley Process Statistical Data Base.
Note: Imports appear to exceed global production figures by a significant factor because rough diamonds imported to the EC, for example, are re-exported to other countries. There is, therefore, considerable double counting. These figures are mainly indicative of the level of commercial interest a country has in rough diamonds.

Figure 14: Top diamond importing countries 2008

Data collection entails the presence of technological facilities and information storage facilities for data collection and record keeping purposes. This may also prove problematic as not all Participants are technologically efficient.

⁷⁵³ Section IV (e) of the Certification Scheme.

Participants, when establishing a system of internal controls, take into account, where appropriate, the further options and recommendations for internal controls as elaborated in Annex II.⁷⁵⁴

Pertinent to the four Working Groups, not all Participants are aware of the activities of all working Groups. The four main KP WGs are: Working Group on Statistics, Working Group of Diamond Experts, Working Group on Monitoring, and the Participation Committee. In terms of the Review, it can be difficult for those who are not Working Group members to be aware of all the activities of the Working Groups.

Some Participants have failed to timeously submit data to the WG which hampers their work. Some members of the various Working Groups have noted that time-zone differences have made some teleconferences difficult to plan and execute.

These further problems which the Certification Scheme encounters undermine its efficacy. The issues of enactment and amendment of laws to enforce the Certification Scheme's contents and the issue of data collection relate to legally binding obligations and lack of capacity. A scheme mechanism is unable to oblige members or participants to abide by its contents. This inability arises from the non-legal nature of the instrument of a scheme. In order to demand compliance a legally binding mechanism or instrument must be sought.

ix. Recommendations

*In total twenty six recommendations are made to Participants. They are general recommendations; recommendations for control over diamond mines; recommendations for Participants with small-scale diamond mining; recommendations for rough diamond buyers, sellers and exporters; recommendations for export processes; recommendations for import processes and recommendations on shipments to and from free trade zones.*⁷⁵⁵

⁷⁵⁴ Section IV(f) of the Certification Scheme.

⁷⁵⁵ The Certification Scheme defines as 'free trade zone' as a part of the territory of a Participant where any goods introduced are generally regarded, insofar as import duties and taxes are concerned, as being outside the customs territory. Section I of the Certification Scheme.

The recommendations given in the Certification Scheme are sound in principle. Attention should now be given to the application of these recommendations by Participants. This may give rise to different avenues which must be sought to assist especially developing countries to overcome the real challenges they face in the day to day implementation of the Certification Scheme.⁷⁵⁶

Participants may elect to follow through with recommendations. Recommendations relate to the transmission of electronic messages, sharing information to identify areas of rebel diamond mining activities.⁷⁵⁷

Problems

- a. *Contravention arising from conviction of legal persons should be disclosed by Participants.⁷⁵⁸ Disclosure should be made to all other Participants through the Chair.⁷⁵⁹*
- b. *Participants to ensure that all cash purchases of rough diamonds follow the trajectory of a legally acceptable purchase and sale transaction.⁷⁶⁰*

The transaction should include all the factors necessary for the conclusion of a legally valid sale, including, but not limited to routing through official banking channels.⁷⁶¹ All of the facets to the transaction should be supported by verifiable documentation.⁷⁶²

Indeed these Recommendations are commendable. However, their application in practical terms may become problematic. For example, the collection and storage of data pertaining to transactions is onerous on countries afflicted by poverty and lack of access to modern communications and data processing technology. Infrastructural constraints, lack of finances and other factors should have been considered.⁷⁶³ This may be remedied in a treaty-making mechanism that would provide for a permanent secretariat and centrally available funding.

⁷⁵⁶ PAC 'Seven case studies' (2004) at 8-12.

⁷⁵⁷ General Recommendation 5 Annex II of the Certification Scheme.

⁷⁵⁸ General Recommendation 6 of the Certification Scheme.

⁷⁵⁹ *Ibid.*

⁷⁶⁰ General Recommendation 7 of the Certification Scheme.

⁷⁶¹ General Recommendation 7 of the Certification Scheme.

⁷⁶² *Ibid.*

⁷⁶³ Third Year Review at 22-25.

Problem

Recommendations for Control over Diamond Mines

The Certification Scheme also provides for 'Recommendations for the Control over Diamond Mines' which is an aspect pivotal to tracing the course of a rough diamond.

In so doing, the Certification Scheme encourages Participants to ensure that all diamond mines within their control are licensed.⁷⁶⁴ Permission for diamond mining will thus depend on the license status of a given mine. If a diamond mine is not licensed, then it will be prohibited from mining diamonds.⁷⁶⁵

'Security standards' was another issue which concerned the Certification Scheme drafters.⁷⁶⁶ Provision is made for prospecting and mining companies to maintain effective security standards, but these standards are not actually defined and stipulated. Effective security standards are aimed at ensuring that conflict diamonds do enter the legitimate diamond production sphere.⁷⁶⁷

Control over diamond mines is intricate and demanding. Unless the Certification Scheme is able to provide assistance to diamond producing countries, these Recommendations will in all likelihood remain problematic to implement.

Problem

*Provision is made in the Kimberley Process for 'Participants with small scale diamond mining' within their territories.*⁷⁶⁸

Artisanal and informal diamond miners⁷⁶⁹ should hold licenses prior to embarking on mining initiatives.⁷⁷⁰ Only those artisanal and informal diamond miners who are license bearers will be permitted to engage in diamond mining.⁷⁷¹ Therefore artisanal and informal diamond miners who do not possess licenses will be prohibited from mining. At minimum the

⁷⁶⁴ General Recommendation 9 Annex II of the Certification Scheme.

⁷⁶⁵ *Ibid.*

⁷⁶⁶ *Ibid.*

⁷⁶⁷ *Ibid.*

⁷⁶⁸ Recommendations 11 and 12 Annex I.I of the Certification Scheme.

⁷⁶⁹ The Certification Scheme does not define 'artisanal miners'.

⁷⁷⁰ Recommendation 11 Annex II of the Certification Scheme.

⁷⁷¹ *Ibid.*

licensing records should contain the name, address, nationality and or residence status and the area of authorised for diamond mining purposes.⁷⁷²

Indeed, the role of the artisanal or informal diamond miner is important to the diamond industry; most especially in curbing the illegal international trade in rough diamonds. However, especially the poorer diamond producing countries experience grave administrative shortcomings generally and do not the level of administrative capacity and territorial reach to be actually able to locating and identify and administer artisanal miners.⁷⁷³ In instances where they are located, a lack of trust will prevent co-operation.

x. Section V

Problem

Participants should co-operate with each other to ensure that shipments of rough diamonds are conflict-free. The Scheme attempts to create co-operation between the Participants anticipating transparency.

The hope is that effective checks and balances would result in the desired level of accountability.⁷⁷⁴ In so doing they must necessarily ‘comply’ with the contents of the Certification Scheme. Participants should share with each other, through the Chair of the Kimberley Process, particular information.⁷⁷⁵

Of particular importance is the fact that the Certification Scheme makes provision for the reporting of other Participants whose domestic legislation is not in keeping with the ‘provisions’ of the Certification Scheme. The fact that the information pertaining to laws, regulations and procedures should be provided in English is detrimental to non-English Participants who are burdened with the cost and difficulties of translation. The Chair Participant should facilitate co-operation and sharing of information amongst Participants.

⁷⁷² The Certification Scheme Recommendation 12; see PAC Annual Review (2009) on Angolan artisanal miners and their Code at 4.

⁷⁷³ Smillie ‘Loupe holes’ (2008) at 6.

⁷⁷⁴ PAC ‘Implementing the KP’ (2005) at 4-8.

⁷⁷⁵ Section V (a) of the Certification Scheme.

xi. Annex III: Statistical data

Problem

Participants should compile and make available to all other Participants statistical data in line with particular principles.⁷⁷⁶ Annex III deals with the matters of statistics and commercially sensitive information.

Reliable and comparable data on the production and the international trade in rough diamonds are an essential tool for the effective implementation of any mechanism. Nevertheless, nearly half of the 30 million carats of diamonds exported from the Congo in 2008 remained untraceable.⁷⁷⁷

In particular the data is necessary for identifying any irregularities or anomalies which may indicate that conflict diamonds are entering the legitimate trade market.⁷⁷⁸ Participants should inform any other Participant through the Chair if it considers that the laws, regulations, rules, procedures or practices of an exporting Participants do not ensure the compliance with the Certification Scheme with regard to the rough diamonds intended for export.⁷⁷⁹

Strengths and mostly weaknesses, or concerns were revealed by the Review. Clearly, the WGS has made significant headway into the collection and submission of statistics. However, Participants opine that the statistical analysis should focus on situations where there is considered a clear risk of conflict diamonds and where there is clear unwillingness or inability to comply with minimum standards, including referring the situation to the Participation Committee.⁷⁸⁰

Timely reports must be submitted by the WGS to enable complete and full contextual discussions. Concern was expressed over the quality and accuracy of data collated. Participants were of the view that the data must be made available for verification purposes by themselves.

⁷⁷⁶ Section V (b) of the Certification Scheme.

⁷⁷⁷ PAC Annual Review (2009) at 11.

⁷⁷⁸ The Certification Scheme Annex III.

⁷⁷⁹ Section V (e) of the Certification Scheme.

⁷⁸⁰ As noted above, countries delay in submitting statistical data or submit incomplete data. See PAC 'Implementing the KP' (2005) at 3-4.

The Certification Scheme assumes that all Participants have in place structures and personnel with specialised expertise and knowledge. It is doubtful that this is the case with most of the diamond producing Participants.⁷⁸¹ A treaty instrument could address this issue specifically and ensure the effective and proper collation of statistical data from a permanent secretariat, which could then adequately disseminate the statistical data to all signatories.

Problem

*Any applicant wishing to participate in the Certification Scheme should signify its interest by notifying the Chair through diplomatic channels.*⁷⁸²

The Participation Committee, in accordance with its Terms of Reference, must consider any relevant information submitted to it by the Working Group on Monitoring regarding compliance by a Participant. It then determines whether, in its view, the Participant in question remains able and willing to meet the minimum requirements of the Certification Scheme.⁷⁸³

The only requirement for participating in the Certification Scheme is that interested parties should notify the Chair through diplomatic channels. In the event of a legally binding treaty instrument signatures would be a formal process requiring ratification and thus incorporation into the domestic legal systems. In the alternative, it may be expedient for the Certification Scheme to adopt some substantive admission criteria.

xii. Section VI: Review mechanism

Problem

*Participants intended that the Scheme should be subject to periodic review, to allow Participants to conduct a thorough analysis of all elements contained in the scheme.*⁷⁸⁴

⁷⁸¹ PAC Annual Review (2009) on the DRC at 10-11.

⁷⁸² Section VI(9) of the Certification Scheme.

⁷⁸³ The Certification Scheme's minimum standards are defined in Sections II, III, IV, and V, and Annexes I, II, and III.

⁷⁸⁴ The Certification Scheme Section VI(20).

The Third Year Review was carried out in 2006. Since then, no reviews have been undertaken by the Kimberley Process. The Certification Scheme was not discussed in its entirety in accordance with the intention of the Participants. The Review was undertaken pursuant to a questionnaire formulated by the KP WG and handed to Participants. Indeed, a Review based on responses to a questionnaire is of concern. Regarding the impact of the Scheme, curbing the production and trade in conflict diamonds, Côte d'Ivoire made very important submissions.

Submissions reflected the lack of workability of the Certification Scheme. Participants were unable to report on internal controls as the KP had not yet undertaken review visits. The Working Group did not have sufficient capacity for review visits.

The KP Review WG decided that the Peer Review Monitoring Mechanism should be appointed to undertake the Reviews. The PRMM operates under the rubric of the KP. The PRMM comprises a group of experts, including the role of observers. The role of observers comprises three aspects: the diamond industry self regulation; civil society and links with international organisations. All three aspects presented problems in the Review.

Not all Participants were compliant with the contents of the Certification Scheme.⁷⁸⁵ There is a need to bolster capacity for implementation. Follow up review visits were made to some Participants. In terms of the Review, the review visits were successful. Review Reports are not made public. They are made available to other Participants in the restricted part of the KP's website. This presents some concerns. Only Participants may access the Review Reports. Parties outside the KP have no access to the Review Reports, which is problematic in light of accountability and transparency.

The Certification Scheme was established at the Ministerial Meeting on the KPCS for Rough Diamonds in Interlaken on 5 November 2002.⁷⁸⁶ Since then a review was commissioned annually. Reviews are of crucial importance as they are indicators of the efficacy of the Certification Scheme's contents and the Participants commitments.

⁷⁸⁵ The DRC and Venezuela, for example, as explained in the PAC Annual Review (2009) at 10-15.

⁷⁸⁶ Section VI (21) of the Certification Scheme.

A scheme or any mechanism of such importance should not only rely upon a self-review. Self-reviews may taint the true state of affairs. It is important that impartial outside organisations, NGOs and other States can participate in the process of reviews. Again, a legal treaty instrument could ensure more uniform and effective standards of accountability and transparency.

xiii. Synopsis of problems relating to ‘accountability’

For accountability to be attained, a legal instrument in its formation is best suited in order to demonstrate positive results.

With respect to the problem of definitions, a legal instrument will allow for open discussions and renewed consultations with the diamond industry, Participants and other important stakeholders. This process is especially possible through the auspices of the UN.

Mixed parcels: whereas a legal instrument may be of a legally binding nature it would result in uniformly acceptable standards, taking into account the country specific situations. In particular, the situations prevailing in major diamond exporting nations such as Sierra Leone will play a major role in the determination of norms and standards. Diamond exports dropped significantly from \$141 million USD in 2007 to \$99 million USD in 2008. PAC Annual Review states that the main reason for the decrease in exports is stringent trade control measures.⁷⁸⁷ However, diamonds left the country through other means; they reached Antwerp through Dubai and Israel.⁷⁸⁸

⁷⁸⁷ PAC Annual Review (2009) at 14-15.

⁷⁸⁸ PAC *id* at 16.

Table 7 • Sierra Leone Diamond Exports 2003-2008

| Year | Exports (carats) | Exports (US\$) | Average Per Carat (US\$/carat) |
|-------------|-------------------------|-----------------------|---------------------------------------|
| 2003 | 506,674 | 75,926,192 | 149.88 |
| 2004 | 691,756 | 126,652,633 | 183.09 |
| 2005 | 668,635 | 141,833,581 | 212.12 |
| 2006 | 603,566 | 125,304,842 | 207.61 |
| 2007 | 603,623 | 141,565,685 | 234.53 |
| 2008 | 371,260 | 98,772,170 | 266.05 |

Source: Kimberley Process

Figure 15: Sierra Leone diamond exports for 2003-2008.

The table shows the steady increase in the rough diamond export from 2003-2007 from Sierra Leone. In 2008 the volume of rough diamonds exported decreased. This is attributed to the cessation of conflict and the establishment of accountability through the Special Court for Sierra Leone.

A legal instrument would be better suited for the running of satellite offices in diamond producing member states, in order to provide uniform training and capacity building for exports of rough diamonds. In turn, this would provide empowerment and human resource development opportunities, with minimal supervision. Ideally, such empowerment could create a platform for long term sustainability and efficacy. In this manner, the issues of KP Certificates and language could also be addressed more effectively.

To become party to the Certification Scheme: the Scheme requires parties for participating in the Certification Scheme to notify the Chair through diplomatic channels. Such requirement is usually reserved for legally binding and policy agreements. The Certification Scheme, in making such a requirement is akin to a legally binding mechanism, as opposed to a voluntary measure. However, the requirement effectively bars NGOs and non-state actors from becoming participants, which a treaty instrument could permit, with due regard to best international practices.

xiv. Concluding remarks on difficulties with the Certification Scheme: Problem identification and analysis

Both capacity and accountability may be significantly improved through the formation of a legal instrument. Firstly, a legal instrument creates certainty. This means that all parties as well as industry parties and even the artisanal miners can be made aware of their obligations. Secondly, legal instruments can make binding provisions for the progressive realisation of their provisions.

In this manner, parties to the instrument would be given better opportunities at acquiring and implementing best practices.⁷⁸⁹ Through this learning process, parties to the instruments could more rapidly improve their standing in the international community.

e. Infringements of the Scheme

The effectiveness of the Certification Scheme may also be measured in terms of the number of reported cases of Certification Scheme infringement or violation in relation to how many of these cases are pursued through the judicial channels of respective Participants. This provides evidence that the Certification Scheme is being enforced in Participant countries.

With respect to the KP Review Questionnaires, nearly half of all Participants reported that they have not had any cases of infringement.⁷⁹⁰ Among the Participants that did report instances of infringement on their questionnaires, the number of cases ranged most commonly from one to five. For example, since the implementation of national legislation in January 2003, Canada recorded five cases of infringement, resulting in convictions and forfeitures.⁷⁹¹ All five cases were investigated in accordance with Canada's legislative and judicial provisions.

⁷⁸⁹ Milanovic 'Norm conflict' (2009) at 307.

⁷⁹⁰ China, India, Israel, Japan, the Russian Federation, and the United States did not report cases of infringement on their KP Review Questionnaires, despite having mentioned such cases in their 2003 and/or 2004 Annual Reports. For example, US authorities seized four rough diamond shipments in 2004. Brazil and Venezuela did not submit a response to the KP Review Questionnaires. This is according to the Third Year Review at 23.

⁷⁹¹ Third Year Review at 23.

According to the Review, only three Participants reported more than five cases of infringement on their questionnaires: Australia recorded eight, Sierra Leone recorded 16, and the EC recorded 26.⁷⁹² In each country, the cases were investigated in conjunction with customs officials and in accordance with national legislative provisions and judicial means. For example, the Australian Customs Service has seized a total of 339.264 carats of rough diamonds.⁷⁹³ Sierra Leone has seized a total of 340.5 carats worth approximately US\$19,029.⁷⁹⁴ The EC has seized more than 12,000 carats worth approximately US\$1.5 million.⁷⁹⁵

The response of the Participants to instances of infringement varied from case to case. The vast majority of cases led to the seizure of the parcel or shipment of rough diamonds in question.⁷⁹⁶ According to the Review, some parcels of rough diamonds were returned to the exporting country while others were forwarded to the intended recipient pending receipt of proper documentation.⁷⁹⁷ Several cases led to the imposition of fines and the commencement of criminal proceedings following a police investigation and other judicial instruments.

The Review made the following recommendations:⁷⁹⁸

- As part of their Annual Reports, Participants should be required to provide more detailed information on cases of infringement, which they are able to share within the provisions of their national legislation.
- Where possible, they should include the number of seizures of rough diamond shipments along with details on the weight, value, exporter, importer, and country of origin of the parcel, as well as other details concerning the prosecution and outcome of each case.
- Participants should be encouraged to share this information with one another on an *ad hoc* basis.

⁷⁹² Third Year Review at 23-24.

⁷⁹³ Two of the seized shipments did not have a declared value; thus, a precise total value cannot be computed.

⁷⁹⁴ Third Year Review at 24.

⁷⁹⁵ In the European Union, EC authorities have pursued additional cases (even when diamond shipments were not seized) based on suspect documentation on re-exports from the EU.

⁷⁹⁶ This information is made available to Participants. The information is not made public.

⁷⁹⁷ This information is made available to Participants. The information is not made public.

⁷⁹⁸ This information is made available to Participants. The information is not made public.

Although the situations of conflict diamond trade have significantly been reduced through the implementation of the Certification Scheme in Sierra Leone, Angola and the DRC, it must be borne in mind that these reports arise from the Certification Scheme itself. The Review has been based on country reports and the Review visits of the KP. This may taint a proper scientific determination as other reports by civil society organisations for example, demonstrate contestable facts.

Legal instruments provide for a range of mechanisms of accountability due to their legally binding nature. As such, legal instruments are a sufficient and a powerful means of achieving objectives generally pursued in the international environment. The salient mechanisms of accountability pertinent to the study are legal accountability; lobbying; sanctions; capacity and technology; peer review, reporting and ostracism; the role of international and civil society organisations.

The issues analysed in this study presents concerns as to the long term sustainability and efficacy of the Certification Scheme. It must be borne in mind that at the time the Certification Scheme was formulated, it was undertaken with full recognition that it was appropriate to counter the illegal trade of rough diamonds. However, ten years on, it appears prudent and appropriate to consider the efficacy and long term sustainability of the Certification Scheme.

2. Legal nature of the Scheme with respect to compliance and implementation of the Scheme

Participants to the Certification Scheme are expected to fulfil particular ‘requirements’ pursuant to the Certification Scheme in order for it to have application within their respective jurisdictions.⁷⁹⁹ Furthermore, Participants are also expected to undertake several other measures aimed toward the workability of the Certification Scheme.

The Certification Scheme is a voluntary mechanism with no force of law. However the contents of the Certification Scheme in some salient instances, as will be mentioned below, are couched in legal terms. This would create implied legal obligations despite the Certification Scheme not having the status of a legal document such as a treaty. In many instances, the Certification Scheme appears to aspire to features of a treaty mechanism. In the main, it may be stated that the Certification Scheme has a quasi legal basis in law.⁸⁰⁰ It is a voluntary, self-regulatory initiative whose provisions may be complied with by States and the diamond sector.

The Certification Scheme operates on the basic premise that each shipment of rough diamonds must be accompanied by a KP Certificate from the point of origin to the point of destination.

The Certification Scheme nevertheless remains a voluntary mechanism. In public international law, parties to a mechanism may only be bound by the provisions of the said mechanism if they agree to be bound. Moreover parties to mechanisms may be bound when the mechanism is of a law-making nature. A treaty is an agreement between parties which is recognised in public international law.

Parties may be States or international organisations. They enter into treaties for their mutual benefit; however, in certain instances parties may enter into treaties for the benefit of persons within their jurisdiction.

⁷⁹⁹ Sections II-VII of the Certification Scheme.

⁸⁰⁰ Brownlie (1990) at 605.

3. Outcomes from the 2010 Seminar held on Implementation and Enforcement

Recognising the importance of strengthening efforts to address diamond smuggling, the KP Chair for 2010 (Boaz Hirsch) identified enforcement as a key priority for the Chairmanship of Israel.⁸⁰¹ To support the Chair's efforts to make progress on the issue of diamond smuggling, in particular, efforts to keep Ivorian diamonds from entering the black market, the United States funded national dialogues on diamond smuggling in four countries, namely, Guinea, Côte d'Ivoire, Sierra Leone and Liberia. Technical assistance of Partnership Africa Canada was secured.⁸⁰²

The purpose of the workshops, which were convened by civil society organisations in each country, was to create a space for multi stakeholder dialogue on diamond smuggling and the Kimberley Process. A broad and diverse range of organisations, including mine ministries, civil society, artisanal miners, union members, diamond dealers, customs and police, attended the workshops. Following the workshops, national profiles on diamond smuggling were created for each country and presented at the first KPCS Enforcement Seminar, held in Tel Aviv at the June 2010 KPCS Intercessional.

Immediately following the Kimberley Process Intercessional in June 2010, a daylong seminar was held with representatives of governments, civil society, and the diamond industry to explore the complex issues surrounding fraud and diamond smuggling.⁸⁰³ Co-sponsored by the Governments of Canada and the United States, with the financial support of many organisations, the Enforcement Seminar brought together a group of actors, particularly customs and police officials.

The Enforcement Seminar created an opportunity for officials to interact with government, industry and civil society in order to exchange information and perspectives on ways to strengthen the principles and practices of Certification Scheme's enforcement measures.

⁸⁰¹ 'Diamonds without borders: An assessment of the challenges implementing and enforcing of the Kimberley Process Certification Scheme' Report submitted to the KPCS Plenary by PAC, the governments of Canada and the US 1-4 November 2010 Jerusalem at 3. Available electronically at www.kimberleyprocess.com. Last visited 01 September 2011.

⁸⁰² *Ibid.*

⁸⁰³ West African countries, in particular Sierra Leone, Ghana, Liberia and Côte d'Ivoire.

Two sessions were held. The first session consisted of two sets of panel presentations followed by breakout meetings and then a plenary summary. Specialists from the diamond industry and customs organisations provided in depth reviews of the nature of diamond smuggling and other associated illicit activities. Workshop participants appreciated the recounting of the then current diamond smuggling situation and the complexities involved in combating fraudulent trading practices. Civil society groups and multilateral organisations also provided unique and complementary perspectives on diamond smuggling.

The second session consisted of presentations and small group discussions focused on the Certification Scheme's enforcement issues in West Africa. This session built upon the extensive preparatory efforts of national delegations from West Africa and some participants sponsored by the Canadian and US governments.

a. Multilateral:⁸⁰⁴ way forward and outcomes (first session)

i. Inter-agency co-operation

Inter-regional diamond smuggling requires region-wide responses, especially among enforcement agencies. Whatever institutional form it might take, stakeholders agreed on the importance of having some type of high level forum that could bring together officials from key enforcement agencies in both exporting and importing countries to develop effective approaches to combat fraud, smuggling and other illegal activities around diamonds.⁸⁰⁵

⁸⁰⁴ http://www.kimberleyprocess.com/documents/kp_enforcement_en.html. 'Diamonds without borders: An assessment of the challenges on implementing and enforcing the KPCS' Seminar held by PAC and the governments of Canada and the USA in Jerusalem November 1-4 2010. Reported to the Plenary of the Certification Scheme. Last visited 08 July 2011.

⁸⁰⁵ 'Diamonds without borders: An assessment of the challenges implementing and enforcing of the Kimberley Process Certification Scheme' Report submitted to the KPCS Plenary by PAC, the governments of Canada and the US 1-4 November 2010 Jerusalem at 15. Available electronically at www.kimberleyprocess.com. Last visited 01 September 2011.

ii. Working Group on enforcement

Given the centrality of this issue to the work of the Certification Scheme, many stakeholders suggested that the KP either set up a Working Group on Enforcement or ensure that enforcement issues were more regularly discussed in existing working groups.⁸⁰⁶

iii. Work Plan on enforcement

Once partners have found a mechanism to come together for cooperation and information sharing, the Certification Scheme should coordinate implementation of a comprehensive work plan on enforcement encompassing solutions at the local, national, regional and international levels.⁸⁰⁷

iv. Information sharing and trust building

One of the first items on an Enforcement Work Plan would be creating mechanisms for enforcement agencies to share information and build trust, both within occupational groups such as police officials from different countries; and across occupations such as bringing customs officials and police together.⁸⁰⁸ Existing multilateral institutions should create spaces/networks/institutions to enhance information sharing.

v. Trust fund on enforcement

Several stakeholders noted that although the Certification Scheme has extremely high expectations of the types of enforcement actions that African countries should undertake to prevent diamonds from being smuggled; resources to finance enforcement activities remain scarce.⁸⁰⁹

⁸⁰⁶ *Ibid.*

⁸⁰⁷ *Ibid.*

⁸⁰⁸ 'Diamonds without borders: An assessment of the challenges implementing and enforcing of the Kimberley Process Certification Scheme' Report submitted to the KPCS Plenary by PAC, the governments of Canada and the US 1-4 November 2010 Jerusalem at 16. Available electronically at www.kimberleyprocess.com. Last visited 01 September 2011.

⁸⁰⁹ 'Diamonds without borders: An assessment of the challenges implementing and enforcing of the Kimberley Process Certification Scheme' Report submitted to the KPCS Plenary by PAC, the governments of Canada and

b. Regional focus: way forward and outcomes

Stakeholders highlighted the importance of focusing limited resources in the initial stages of developing Certification Scheme enforcement initiatives. A focus on Côte d'Ivoire was suggested.

c. National: way forward

While multilateral cooperation is essential for dealing with smuggling, a number of national level actions were highlighted as well. Three types of solutions were put forward:

i. Development solutions

This should encompass ideas on how to prevent smuggling from occurring by dealing with issues of fairness and security from the perspective of artisanal miners. Central to the discussions on development solutions were strong recommendations for governments to examine closely the prices artisanal miners receive when they participate in the formal market, and to develop and promote community reinvestment initiatives to highlight the social value of participating in the formal system.⁸¹⁰

ii. Governance solutions

Governance solutions were also put forward for national governments to improve the oversight and accountability systems in the diamond supply chain, that make it more difficult for individuals to smuggle without being caught.⁸¹¹ A recurring theme was for government officials to take a more systemic approach to monitoring the diamond supply chain by introducing more random audits and 'spot checks' into the oversight systems, set up at the national level.⁸¹² Stakeholders also highlighted the importance of collecting meaningful

the US 1-4 November 2010 Jerusalem at 16. Available electronically at www.kimberleyprocess.com. Last visited 01 September 2011.

⁸¹⁰ 'Diamonds without borders: An assessment of the challenges implementing and enforcing of the Kimberley Process Certification Scheme' Report submitted to the KPCS Plenary by PAC, the governments of Canada and the US 1-4 November 2010 Jerusalem at 11-12. Available electronically at www.kimberleyprocess.com. Last visited 01 September 2011.

⁸¹¹ *Ibid.*

⁸¹² *Ibid.*

production data, and continuing to hold multi-stakeholder dialogues on Certification Scheme issues.⁸¹³

iii. Enforcement solutions

Enforcement solutions focussed on improving the effectiveness of institutions designed to intercept diamond smugglers and bring them to justice.⁸¹⁴ Numerous stakeholders emphasised the importance of improving collaboration between enforcement agencies at the national and regional levels, and providing education, training and logistical support for enforcement officials.⁸¹⁵ An innovative proposal to involve community members in monitoring porous borders emerged from the Liberian workshop, as a means to compensate for limited state resources to monitor remote border areas.

The Certification Scheme has made significant progress in understanding the issue of enforcement, and building up its capacity to address challenges at the multilateral level. Initial steps that have been taken include a promising new partnership with the World Customs Organisation, which was proposed at the 2010 KPCS Intercessional in Tel Aviv.⁸¹⁶

Going forward, the KP has an opportunity to build on the momentum created by the Chair to institutionalise efforts to improve enforcement cooperation at the international and regional levels. Priority actions for the KP could include the following:⁸¹⁷

- 1 Set up a KPCS Working Group on Enforcement to steward the development and implementation of a KPCS Work Plan on enforcement.
- 2 Support initiatives that lead to increased interagency cooperation, information sharing and trust building (the WCO, Interpol, the IMF Anti Money Laundering Initiative)
- 3 Facilitate the funding of enforcement related cooperation and activity.

⁸¹³ *Ibid.*

⁸¹⁴ *Ibid.*

⁸¹⁵ *Ibid.*

⁸¹⁶ ‘Diamonds without borders: An assessment of the challenges implementing and enforcing of the Kimberley Process Certification Scheme’ Report submitted to the KPCS Plenary by PAC, the governments of Canada and the US 1-4 November 2010 Jerusalem at 22. Available electronically at www.kimberleyprocess.com. Last visited 01 September 2011.

⁸¹⁷ *Ibid.*

Certification Scheme participants could: ⁸¹⁸

- 1 Closely examine the prices artisanal miners receive, and explore ways to ensure they receive fair prices.
- 2 Reinvest a portion of diamond related revenues back into mining communities and report on the impacts of these investments.
- 3 Approach the design and implementation of internal controls from a systemic risk management perspective by conducting more random audits and spot checks.
- 4 Explore models for collecting meaningful production data.
- 5 Improve logistical supports for enforcement agencies.
- 6 Involve communities in community based monitoring of diamond producing areas.
- 7 Continue to involve diverse stakeholders in the design and implementation of the Certification Scheme related policies and programs.

It is important to recognise that the KP Intersessional affirmed the concerns on the shortcomings and failings of the Certification Scheme. Having done so, the KP organs and Participants must endeavour to realise the suggestions in order for the Certification Scheme to have a significant impact on important matters, especially smuggling which is still ensuing. Further reports by NGO PAC have also demonstrated that Zimbabwean diamonds from the Marange region are being smuggled into South Africa. It was further reported that Angolan diamonds reach South Africa through Zimbabwe.

Inasmuch as the issue of smuggling has been significantly addressed, the concerns surrounding the implementation and monitoring of the Certification Scheme must still be addressed. Enforcement of the Certification Scheme is mostly dependent on the will of Participants. In the absence of sufficient good will and motivation of Participants, the Certification Scheme must still seek a more viable means for enforcement to ensure implementation and accountability.

⁸¹⁸ *Ibid.*

4. Concluding remarks

While the Certification Scheme is uniquely qualified to serve in Africa in certain areas, it lacks the capacity to address the full range of development challenges on its own. This is evidenced by the outcomes and evidences of the Enforcement Seminar of 2010. Partnerships based on comparative advantage and pooling of resources were recognised as being critical to maximising impact on African development. The Certification Scheme must progressively strengthen its partnership agenda with a wide spectrum of constituencies both regionally and internationally.

In order to devise sustainable strategies to address challenges experienced on Certification Scheme's agenda, it is imperative that symptoms be classified and their causes be understood.⁸¹⁹ This is the first step to successful or sustainable prevention and or alleviation of threats to peace and security.⁸²⁰

Another concern is the increasing technological gap between Africa and other developing regions in the world. This is not only in terms of the acquisition of technology but also in terms of the manner of internalising, adapting, optimising and actually operating it. The crucial question is not that of transfer of technology. Rather the crucial need is to reverse the historical dependency relationship with the developed countries for certain types of technologies that are generally inappropriate for African capacities and needs.⁸²¹

Another factor that affects the effectiveness of the Certification Scheme is the implementation by Participants both in the areas of international and internal control. It is evident that developing countries particularly those in Africa face unique challenges in, for example, effectively implementing the recommendations for Control over Diamond Mines or recommendations for the import or Export Processes.

⁸¹⁹ Wolfowitz P 'Africa-A continent of hope' 7 June 2005, <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,print:Y~isCURLY:Y~content.htm>. Last visited 08 July 2011.

⁸²⁰ 'Proceedings of the Conference on African conflicts: their management, resolution and reconstruction and post-conflict resolution' held at the United Nations Economic Commission for Africa 13-15 December 2000.

⁸²¹ Thisen 'Briefing on the socio-economic activities on the United Nations Economic Commission for Africa (UNECA): A historical background' (1992) these three elements have been adapted from paper presented by Cogen M 'The impact of international humanitarian law on current security policy trends' (2001) *Bruges Colloquium* at 15-25; also published in *Crimes of war: Terrorism and the laws of war: September 11 and its aftermath*.

Issues such as the lack of technology infrastructure, resources and monitoring through to effective border controls offer challenges to Participant countries especially those in the developing world. The recommendations given in the Certification Scheme are sound in principle, however attention should now be given to the application of these recommendations by participants and ways must be sought to assist especially developing countries to overcome the real challenges they face in the day to day implementation of the Certification Scheme.

In spite of its acclaimed successes to date, the Certification Scheme has serious flaws. Many flaws have been highlighted in chapters three and four of the study. In the main, technological gaps between Participants predominantly on the African and South American continents hinder the Certification Scheme's stringent recommendations.

Recommendations do not carry the force of law. Yet at certain points the Certification Scheme invokes principles of international trade law in the trade of rough diamonds. Still, such references and stipulations do not attend to the deficits of accountability. Accountability is crucial to the tenets of the Certification Scheme. Without accountability, the Certification Scheme becomes a white elephant with a few willing Participants.

One of the major quandaries of the Certification Scheme is the lack of enforcement. The voluntary nature of the Certification Scheme does not permit the uniform adoption processes to actually eradicate conflict diamonds from the legal diamond market.

These problems, it is submitted, relate mostly to the nature of the Certification Scheme. If the nature was legally defined, then the identified problems would have to be addressed by consensus. A document that would legally bind Participants to the Scheme would inevitably make accommodation for accountability, thus giving effect to the original purport or intention of the Certification Scheme.

For this to occur, cognisance must be taken of the fact that not all matters are resolved through the formation and implementation of a legal instrument. The EC passed Council Regulation 2368 implementing the Certification Scheme. EC Council Regulation 2368 codified the contents of the Certification Scheme into statutory law.

In the main, the Certification Scheme appears to work well for those Participants whose interests and capabilities are well aligned with other objectives.

The next chapter addresses the particular issues that arise from the application of Certification Scheme in the Zimbabwean context.

CHAPTER 8 : THE CERTIFICATION SCHEME: ITS APPLICABILITY IN ZIMBABWE

1. Introduction

This chapter is relevant to the second objective of the Certification Scheme, namely to eliminate or curb the flow of illegal conflict diamond trading, which results in human rights abuses and crises.

Having made the assessment on the legal characterisation of the Certification Scheme, the case of Zimbabwe's Marange diamond mines will now be examined, as a particularly important test case of the effectiveness of the Certification Scheme in an actual situation of systematic human rights abuses. Thus a brief situational analysis of the Marange mine region will be explored first.

Human rights abuses and conflicts were the primary impetus for the setting up of the Kimberley Process International Certification Scheme for the trade of rough diamonds.⁸²² Resolutions, as discussed in chapter four of the study, of the UN GA and the UN SC evidenced the international concern over the illegal trade of rough diamonds as it fuelled conflicts.⁸²³ Thus, regulation of the trade of rough diamonds and the curbing of conflict diamonds entering the international trade of diamonds was sought.

Within international law, a state party to a human rights instrument is accountable to three different categories of legal entities. First, a state party is accountable to its citizens, and second to Member States. Third, a state party is accountable to the UN, in particular to the

⁸²² United Nations General Assembly Resolutions. UN Doc A/RES 55/56(2000); UN Doc A/RES/1306(2000); UN Doc A/Res/56/263(2002); UN Doc A/57/489(2002); UN Doc A/Res/57/302(2003); UN Doc A/RES/56/263(2004); UN Doc A/58/290(2004); UN Doc A/RES/58/L.59 (2004); UN Doc A/59/144(2004); UN Doc A/60/182(2005); UN Doc A/RES/61/28(2007) and UN Doc A/62/L.16(2007). United Nations Security Council Resolutions. UN Doc S/RES/864 (1993); UN Doc S/RES/995 (1994); UN Doc S/RES/1127(1997); UN Doc S/RES/1171(1988); UN Doc S/RES/1173 (1998); UN Doc S/RES/1176(1998); UN Doc S/RES/1237(1999); UN Doc S/RES/1270(1999); UN Doc S/RES/125(2000); UN Doc S/RES/203(2000); UN Doc S/RES/1132 (2000); UN Doc S/RES/1195(2000); UN Doc S/RES/1289(2000); UN Doc S/RES/1295(2000); UN Doc S/RES/1299(2000); UN Doc S/RES/1304 (2000); UN Doc S/RES/1306 (2000); UN Doc S/RES/1315 (2000); UN Doc S/RES/1336(2000); UN Doc S/RES/1343(2001); UN Doc S/RES/1385 (2001); UN Doc S/RES/1408(2002); UN Doc S/RES/779(2003); UN Doc S/RES/937(2003); UN Doc S/1459(2003); UN Doc S/1521(2003); UN Doc S/RES/1478 (2003); UN Doc S/RES/1497(2003); UN Doc S/RES/1509(2003); UN Doc S/RES/1521(2003); UN Doc S/RES/752(2004); UN Doc S/RES/995(2004); UN Doc S/RES/1522(2004); UN Doc S/RES/1533(2004); UN Doc S/RES/1549(2004); UN Doc S/RES/1555(2004); UN Doc S/RES/1565(2004); UN Doc S/RES/1572 (2004); UN Doc S/RES/1579(2004); UN Doc S/RES/1643 (2005); UN Doc S/RES/1645(2005); UN Doc S/RES/699(2005) and UN Doc S/RES/1643(2005).

⁸²³ *Ibid.*

bodies created by its human rights treaty mechanisms.⁸²⁴ Thus the relationship between a state party and its citizens in international human rights law is crucial as the state is the primary role player.

⁸²⁴ Namely the bodies established by the UN Human Rights Committee emanating from the ICCPR and the UN ESCR Committee arising from the ICESCR; see also 'Beyond voluntarism' (2002) at 7-15.

2. Human rights situation in Marange

a. Move for suspension of Zimbabwe from the Certification Scheme

In their investigation in 2010, Human Rights Watch researchers were able to interview 23 people directly linked to the Marange diamond fields and to confirm the following abuses, which put Zimbabwe in violation of the minimum standards required for membership in the Kimberley Process:⁸²⁵

- The Zimbabwean army uses syndicates of local miners to extract diamonds, often using forced labour, including children.
- On September 17, a soldier shot and killed a 19 year old member of one syndicate. The soldier stated, in the presence of witnesses, that he had shot the man for hiding a raw diamond instead of handing it over to the soldier.
- Local miners provided information that soldiers have begun to recruit people from outside Marange to join army-run diamond mining syndicates.
- Smuggling of Marange diamonds has intensified. Scores of buyers and middlemen openly trade in Marange diamonds in the small Mozambique town of Vila de Manica, 20 miles from Mutare.⁸²⁶

This following table demonstrates the events in the Marange (Zimbabwe) diamond fields despite Zimbabwe being a Participant in the Certification Scheme.

⁸²⁵ <http://www.hrw.org/news/2009/10/29/india-suspend-zimbabwe-diamond-trade-0>; see also <http://www.hrw.org/news/2010/06/02/zimbabwe-end-persecution-activist-group>; <http://www.hrw.org/news/2010/06/20/kimberley-process-halt-zimbabwe-diamond-trade>. Last visited 30 September 2011; see further Mobbs P 'The mineral industry of Zimbabwe' (2004) *Commodity Review* at 42.1-4.

⁸²⁶ <http://www.hrw.org/news/2009/10/29/kimberley-process-suspend-zimbabwe>. Last visited 30 September 2011.

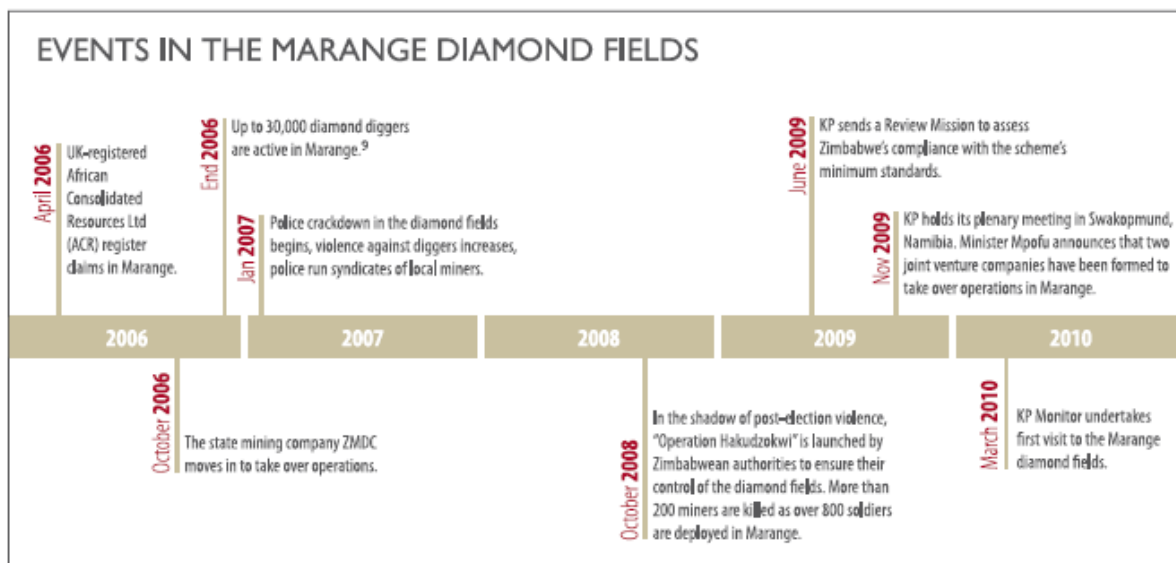


Figure 16: PAC Occasional Paper 2010 available at www.pacweb.org/zimbabwe

The ownership of the Marange diamond fields is in dispute. The mines minister, the police commissioner, and the government owned company, ZMDC, have all failed to comply with a High Court order issued by Judge Charles Hungwe on September 28 2010, to restore prospecting and diamond mining rights in the diamond fields to the previous owner, ACR.⁸²⁷

The judge also directed ZMDC to cease prospecting and diamond mining activities in the area as the Court stated that the mining area belongs to ACR, a private company. Although the High Court ordered the police to cease interfering with ACR's prospecting and mining activities, both the police and the army continue to bar it from access to the diamond fields. Zimbabwe's minister of mines has appealed the High Court Order, and ZMDC continues to carry out prospecting and mining operations at Marange.⁸²⁸

On October 6 2010, to comply with a demand by Kimberley Process members, President Mugabe announced that the government had selected two new private sector investors to take over mining in Marange.⁸²⁹ However, the process of selection has been shrouded in secrecy

⁸²⁷ *Ibid.*

⁸²⁸ HRW Report available at <http://www.hrw.org/news/2011/03/29/universal-periodic-review-zimbabwe>. Last visited 30 September 2011

⁸²⁹ *Ibid.*

and the investors' identities remain unknown.⁸³⁰ The Kimberley Process's Certification Scheme's rules require Participants to ensure that all diamond mines are licensed and that only licensed mines extract diamonds.⁸³¹

In its June 26 report, Human Rights Watch documented how Zimbabwe's army, under the control of Zimbabwe's dominant political party, ZANU-PF, had committed horrific abuses against miners and local residents, including killings, beatings, and torture.⁸³² The report also revealed the army's policy of rotating military units into the diamond fields for roughly two-month periods.⁸³³ This policy was designed to maintain the loyalty of senior military and other officials to ZANU-PF by giving them illicit access to Zimbabwe's mineral wealth at a time of national economic and political crisis.⁸³⁴ Human Rights Watch found new evidence of rotation of army units into Marange.⁸³⁵ At the beginning of October, the Harare based special mechanised brigade was deployed, replacing the Kwekwe based fifth brigade.⁸³⁶

The Kimberley Process sent a review mission to Marange in late June 2010 to assess Zimbabwe's compliance with the organisation's standards, which require diamonds to be lawfully mined, documented, and exported by Participant countries.⁸³⁷ On July 4, local and international media reported that the review mission found Zimbabwe to be in violation of these standards.⁸³⁸ The media reports said that the review mission urged the government to take corrective action by July 20 or face suspension.⁸³⁹ The KP did not suspend Zimbabwe from the Certification Scheme. The consensus based mechanism within the KP structures on decision making, hence a decision on suspending a Participant means that only one Participant may dissent which will render a decision to suspend inoperable.

The government of Zimbabwe ignored calls by the review mission to remove military units from Marange, to end human rights violations and smuggling, and hold accountable those

⁸³⁰ *Ibid.*

⁸³¹ *Ibid.*

⁸³² *Ibid.*

⁸³³ *Ibid.*

⁸³⁴ *Ibid.*

⁸³⁵ *Ibid.*

⁸³⁶ *Ibid.*

⁸³⁷ *Ibid.*

⁸³⁸ HRW Report available at <http://www.hrw.org/news/2011/03/29/universal-periodic-review-zimbabwe>. Last visited 30 September 2011.

⁸³⁹ HRW Report available at <http://www.hrw.org/news/2011/03/29/universal-periodic-review-zimbabwe>. Last visited 30 September 2011.

responsible for abuses.⁸⁴⁰ In this context, Human Rights Watch again called on the Kimberley Process to set up a local monitoring mechanism comprising independent local civil society organisations and Marange community leaders, who could freely monitor and verify the Zimbabwe government's compliance with the Kimberley Process review mission's recommendations.⁸⁴¹

b. Key Kimberley Process Members

The final decision on a possible suspension of Zimbabwe rests with Participants to the Certification Scheme, who work on the basis of consensus. When consensus is impossible to reach, the Chair is mandated to carry out consultations. To reach consensus, it is essential for the following key countries to support fully the suspension of Zimbabwe:

i. Namibia

As previous Chair of the Kimberley Process, Namibia presided over all plenary proceedings and, in the event that consensus cannot be reached, may be mandated to assist in conducting consultations on the way forward. Namibia is also a major regional diamond producer, and its ruling party, SWAPO, has long had close links with Zimbabwe's ZANU-PF.⁸⁴²

ii. India

Some of the world's largest rough diamond cutting and polishing centres are found in India. India chairs the Kimberley committee on participation, which is responsible for making recommendations regarding Zimbabwe's future participation. Human Rights Watch investigations found that raw Marange diamonds are being channelled to India for polishing.⁸⁴³ This raises the risk that Marange diamonds could taint the reputation of India's domestic industry if no action is taken.⁸⁴⁴

⁸⁴⁰ Ploch L 'Zimbabwe: The power sharing agreement and implications for US Policy' (May 2009) *Congressional Research Service* at 15.

⁸⁴¹ See Parlevliet M 'Rethinking conflict transformation from a human rights perspective' (2010) 9 *Berghof Conflict Research Dialogue* at 14-15.

⁸⁴² <http://www.hrw.org/news/2010/10/29/kimberley-process-demand-end-abuses-diamond-trade>. Last visited 30 September 2011.

⁸⁴³ <http://www.hrw.org/news/2010/10/29/kimberley-process-demand-end-abuses-diamond-trade>. Last visited 30 September 2011.

⁸⁴⁴ *Ibid.*

iii. South Africa

Human Rights Watch investigations found that South Africa is one of the main destinations of Marange diamonds, and that they are also smuggled there via Mozambique.⁸⁴⁵ Along with the region's other main diamond producers, Botswana and Namibia, South Africa will find its market reputation undermined if it blocks Kimberley Process action on Zimbabwe and permits the continued entry of Marange diamonds.⁸⁴⁶

iv. Belgium

Home to a huge diamond sorting and polishing industry, Belgium is another notable destination for raw Marange diamonds.⁸⁴⁷ Belgium's position within the organisation is likely to have great influence on the rest of the European Union.⁸⁴⁸ Its reputation could suffer if it continues to handle tainted Zimbabwe stones.

v. Israel

As the 2010 Chair of the Kimberley Process, Israel encountered scrutiny for its position on Zimbabwe's suspension at the meeting.⁸⁴⁹

Human Rights Watch learned that the Kimberley Process team sent in to review conditions in the fields in August 2010 was routinely obstructed by government officials from conducting its activities and was unable to gather crucial information about conditions in the majority of diamond fields.⁸⁵⁰

⁸⁴⁵ *Ibid.*

⁸⁴⁶ *Ibid.*

⁸⁴⁷ *Ibid.*

⁸⁴⁸ *Ibid.*

⁸⁴⁹ <http://www.hrw.org/news/2010/10/29/kimberley-process-demand-end-abuses-diamond-trade>. Last visited 30 September 2011.

⁸⁵⁰ *Ibid.*

3. Human rights violations in Marange diamond fields

According to Human Rights Watch Reports, corruption is rife, and smuggling of diamonds by soldiers in the fields is prolific.⁸⁵¹ The diamond revenues continue to benefit a few senior people in the government and their associates, rather than the people of Zimbabwe.⁸⁵² Soldiers continue to perpetrate abuses in Marange, including forced labour, beatings, and harassment, which Zimbabwe's government has failed to investigate or prosecute.⁸⁵³

State security agents have harassed local civil society organisations that were attempting to document smuggling and abuses in the fields. In June 2006, police arrested Farai Maguwu, the head of the Centre for Research and Development, after he provided sensitive information on the activities of soldiers in the fields to Abbey Chikane, a monitor appointed by the Certification Scheme.⁸⁵⁴ Police also beat, arrested, and detained members of Maguwu's family. Maguwu was charged with 'communicating and publishing falsehoods against the State with the intention to cause prejudice to the security or economic interests of the country' under section 31 of the Criminal Law (Codification and Reform) Act.⁸⁵⁵

a. Principal buyers and smuggling routes

Human Rights Watch was not able to fully pursue the global chain of purchase of diamonds from Marange, but Human Rights Watch's research suggests that the majority of Marange diamonds have been smuggled out of the country via Mozambique, South Africa, and Harare international airport, and then shipped to Lebanon, the United Arab Emirates, India, Pakistan, and Europe, among other destinations.⁸⁵⁶

⁸⁵¹ <http://www.hrw.org/news/2009/06/26/zimbabwe-end-repression-marange-diamond-fields>. Last visited 01 September 2011.

⁸⁵² *Ibid.*

⁸⁵³ <http://www.hrw.org/news/2011/08/30/zimbabwe-rampant-abuses-marange-diamond-fields>. Last visited 30 September 2011.

⁸⁵⁴ *Ibid.*

⁸⁵⁵ <http://www.hrw.org/news/2011/08/30/zimbabwe-rampant-abuses-marange-diamond-fields>; see also Peerenboom R 'Human rights and the rule of law: What's the relationship?' Research Paper No 05-31. Electronic copy available at <http://ssrn.com/abstract=816024>. Last visited 30 September 2011.

⁸⁵⁶ <http://www.hrw.org/news/2011/08/30/zimbabwe-rampant-abuses-marange-diamond-fields>. Last visited 30 September 2011; see also Sauders R 'Crisis, capital, compromise: Mining and empowerment in Zimbabwe' (2008) 12/1 *African Sociological Review* at 74-80.

A significant number of homes in the district have been rented to foreign nationals with connections to diamond mining.⁸⁵⁷ As early as September 2006, Zimbabwe authorities acknowledged that the smuggling of Marange diamonds had become a serious problem.⁸⁵⁸ Soon after, the Ministry of Mines directed the MMCZ to ‘mop up all diamonds in Marange and reduce the quantity of diamonds that were illegally leaving the country’.⁸⁵⁹ From October 2006, the MMCZ moved into Marange and began trying to purchase diamonds from illegal, unlicensed local miners.⁸⁶⁰

MMCZ officials added to the number of middlemen operating.⁸⁶¹ They paid out token cash sums as incentives to get miners to hand in stones that they had extracted and to stop them from trading with foreigners or smuggling the gems.⁸⁶² The MMCZ offered prices that were far below market value and much lower than those offered by foreign smugglers, so their interventions failed to halt smuggling and illicit trading.⁸⁶³

b. Specific human rights abuses, corruption, and extortion by the police (November 2006 to October 2008)

On November 21, 2006, five months after the discovery of diamonds in Marange, the government launched a nationwide police operation code-named Chikorokoza Chapera (End to Illegal Panning), which was aimed at stopping illegal mining across Zimbabwe.⁸⁶⁴ During the operation, police deployed approximately 600 police officers, arrested about 22,500 illegal miners,⁸⁶⁵ and seized rough diamonds and minerals with an estimated value of US\$7 million.⁸⁶⁶

⁸⁵⁷ *Ibid.*

⁸⁵⁸ *Ibid.*

⁸⁵⁹ *Ibid.*

⁸⁶⁰ *Ibid.*

⁸⁶¹ <http://www.hrw.org/news/2011/08/30/zimbabwe-rampant-abuses-marange-diamond-fields>. Last visited 30 September 2011.

⁸⁶² <http://www.hrw.org/news/2011/08/30/zimbabwe-rampant-abuses-marange-diamond-fields>. Last visited 30 September 2011.

⁸⁶³ *Ibid.*

⁸⁶⁴ See Peerenboom ‘Human rights’ Last visited 30 September 2011; see further Sauters ‘Crisis’ (2008) at 74-80.

⁸⁶⁵ Of this figure, approximately 9000 persons were arrested in the Marange region.

⁸⁶⁶ See <http://www.hrw.org/news/2009/12/17/letter-select-major-diamond-retailers>; see also <http://www.hrw.org/news/2009/12/23/stop-zims-abusive-diamond-trade>; see <http://www.hrw.org/news/2009/06/22/kimberley-process-and-zim-last-chance-saloon>. Last visited 01 September 2011 <http://www.hrw.org/news/2010/01/28/how->

In June 2009, Human Rights Watch published a report documenting horrific human rights abuses in the Marange diamond fields by the Zimbabwean military, including forced labour, child labour, the killing of more than 200 people, beatings, smuggling, and corruption.⁸⁶⁷

israel-can-help-stop-flow-zimbabwe-s-blood-diamonds; see further <http://www.hrw.org/news/2010/02/04/blood-diamond>; see <http://www.hrw.org/news/2010/03/18/zimbabwe-en-finir-avec-les-diamants-du-sang-0>; <http://www.hrw.org/news/2010/05/21/exposing-blood-diamond-trade>. Last visited 30 September 2011; see further Sauders 'Crisis' (2008) at 74-80.

⁸⁶⁷ See <http://www.hrw.org/news/2009/12/17/letter-select-major-diamond-retailers>; see also <http://www.hrw.org/news/2009/12/23/stop-zims-abusive-diamond-trade>; see <http://www.hrw.org/news/2009/06/22/kimberley-process-and-zim-last-chance-saloon>. Last visited 01 September 2011 <http://www.hrw.org/news/2010/01/28/how-israel-can-help-stop-flow-zimbabwe-s-blood-diamonds>; see further <http://www.hrw.org/news/2010/02/04/blood-diamond>; see <http://www.hrw.org/news/2010/03/18/zimbabwe-en-finir-avec-les-diamants-du-sang-0>; <http://www.hrw.org/news/2010/05/21/exposing-blood-diamond-trade>. Last visited 30 September 2011; see further Sauders *supra*.

4. Role of the Reserve Bank of Zimbabwe

Human Rights Watch research suggests that the RBZ, which had no legal status to buy diamonds until the end of January 2009, has been a major buyer of illegal diamonds from Marange since as early as 2006.⁸⁶⁸ In so doing, it violated the Precious Stones Trade Act by buying diamonds from unlicensed miners and other illegal sources.⁸⁶⁹ Buying diamonds from illegal and undocumented sources also violates Certification Scheme requirements, which stipulate that Participants must record all sources of diamonds and export them with necessary documentation indicating their origin.⁸⁷⁰

Several middlemen told Human Rights Watch that they had been RBZ agents in Marange since October 2006 and that they were given money to buy diamonds from bank officials.⁸⁷¹ Local miners told Human Rights Watch that the RBZ and foreign buyers offered market prices for the diamonds purchased.⁸⁷² A credible local organisation based in Mutare that carried out research in Marange has also named the RBZ as one of the main buyers of the area's diamonds.⁸⁷³

In its Preamble, the Certification Scheme provides for the curbing of human rights abuses resulting from the illicit trade of rough diamonds. The State of Zimbabwe, as has been explained above has a duty to respect and ensure human rights. In so doing, the human rights abuses in the Marange region must be curbed. It should not be acceptable for a Participant to the Certification Scheme to embark upon rough diamond mining and production whilst perpetrating human rights abuses.

⁸⁶⁸ See Makochekanwa A 'Chiadzwa diamonds: Zimbabwe's potential economic recovery option' (2009) at 10 available at http://mpira.ub.uni-muenchen.de/22488/1/Chiadzwa_Diamond_Zims_recovery_option.pdf; see also Rudolf G *Governance without government* (2010) in general.

⁸⁶⁹ <http://www.hrw.org/news/2011/08/30/zimbabwe-rampant-abuses-marange-diamond-fields>. Last visited 30 September 2011.

⁸⁷⁰ *Ibid.*

⁸⁷¹ *Ibid.*

⁸⁷² <http://www.hrw.org/news/2009/12/17/letter-select-major-diamond-retailers>; see also <http://www.hrw.org/news/2009/12/23/stop-zims-abusive-diamond-trade>; see <http://www.hrw.org/news/2010/01/28/how-israel-can-help-stop-flow-zimbabwe-s-blood-diamonds>; see further <http://www.hrw.org/news/2010/02/04/blood-diamond>; see <http://www.hrw.org/news/2010/03/18/zimbabwe-en-finir-avec-les-diamants-du-sang-0>; <http://www.hrw.org/news/2010/05/21/exposing-blood-diamond-trade>. Last visited 30 September 2011.

⁸⁷³ *Ibid.*

At the Final Communique held in the DRC on 3 November 2011, the Plenary endorsed the KP Chair's proposal for a decision on Marange (Zimbabwe). The Communique commended the DRC, as KP Chair, the EU and Zimbabwe for their relentless efforts at promoting an agreement that allows for trade of compliant Marange diamonds under the KPCS and maintains the KP integrity and credibility.⁸⁷⁴ The Plenary called on Zimbabwe and the WGM to jointly implement the decision with a view to bringing Zimbabwe's Certification Scheme's implementation in the Marange mining area into full compliance with minimum requirements.⁸⁷⁵

The KP decided upon an enhanced vigilance approach as aforementioned. No reports were made of KP Certificates issued from Zimbabwe, yet it has been reported that the rough diamond export continues to increase from the Marange region. The Plenary also called upon representatives of the KP civil society coalition, namely Partnership Africa Canada and Global Witness to engage actively in the implementation of the decision. There was no moratorium placed on the trade of rough diamonds from the Marange region. Therefore, rough diamond trading in the Marange region continues.

⁸⁷⁴ Final Communique of the Kimberley Process Plenary Meeting 3 November 2011 Kinshasa Democratic Republic of the Congo at p 4 para 19. Available on www.kimberlyprocess.com document 1218_Plenary_Final_Communique_eg[1].pdf

⁸⁷⁵ *Ibid.*

5. Legal standards applicable to Zimbabwe's diamond industry

Apart from the UN GA Resolutions, especially Resolution 55/56 (2000),⁸⁷⁶ international human rights instruments such as the ICCPR and the ICESCR, Zimbabwe ratified the African Charter on Human and Peoples' Rights in 1986,⁸⁷⁷ which, among its many provisions, requires states to protect the right to life⁸⁷⁸ and property.⁸⁷⁹

Article 5 of the African Charter on Human and Peoples' Rights states:

'Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.'⁸⁸⁰

Zimbabwe ratified the UN International Covenant on Economic, Social and Cultural Rights (ICESCR). The ICESCR states that state parties to it accept the right of everyone to an adequate standard of living for himself and his family, including the continuous improvement of living conditions and prohibition of forced eviction.⁸⁸¹ In 1998, Zimbabwe ratified the International Labour Organisation Convention, prohibiting forced or compulsory labour. Furthermore in 2000, Zimbabwe ratified the ILO's Worst Forms of Child Labour Convention.⁸⁸²

⁸⁷⁶ UN GA Resolution 55/56(2000) UN Doc. A/RES/55/56(2000).

⁸⁷⁷ African [Banjul] Charter on Human and Peoples' Rights adopted June 27, 1981, OAU Doc CAB/LEG/67/3 rev 5 21 ILM 58 (1982), entered into force October 21, 1986, ratified by Zimbabwe in 1986, art 5.

⁸⁷⁸ Article 4 of the African Charter.

⁸⁷⁹ Article 14 of the African Charter.

⁸⁸⁰ See the African [Banjul] Charter on Human and Peoples' Rights Article 5, see also International Covenant on Economic, Social and Cultural Rights (ICESCR).

⁸⁸¹ Article 11 of the ICESCR.

⁸⁸² ILO Convention No 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Worst Forms of Child Labour Convention), adopted June 17, 1999; and ILO Convention No 29 concerning Forced or Compulsory Labour, adopted June 28, 1930.

6. The Certification Scheme and its role in Marange

The Certification Scheme obliges Participants to exercise effective internal control over their diamond industry to prevent trade in conflict diamonds in the global market. Each Participant is required to ensure that all rough diamonds that it exports from its domestic industry are accompanied by a valid, forgery resistant Kimberley Process certificate attesting to their origin. The Certification Scheme has an investigative arm, the Working Group on Monitoring, which monitors compliance with Certification Scheme requirements in all Participant countries.

The Certification Scheme has, to date, taken a number of steps to address the Marange diamonds issue. In June 2007 a Certification Scheme review team led by the Russian Federation visited Zimbabwe and came up with recommendations to strengthen Zimbabwe's certification system.⁸⁸³ In 2008 the Certification Scheme plenary meeting noted with great concern 'the continuing challenges faced by Zimbabwe in meeting its obligations and recommended further monitoring of developments and concerted actions in that respect'.⁸⁸⁴

In the same month, a delegation, led by the then Kimberley Process Chairperson Esau Bernhard of Namibia, visited Zimbabwe and expressed concern to the government of Zimbabwe about reports of smuggling and abuses in Marange.⁸⁸⁵ He urged Zimbabwean authorities to 'put an end to the violence in Marange and bring the area under control'.⁸⁸⁶ A review mission also ensued in June 2009 which evaluated, among other things, the situation in the Marange diamond fields.⁸⁸⁷

The Chairperson publicly questioned, following the March 2009 visit, whether suspending Zimbabwe from the Certification Scheme would bring the smuggling of Marange diamonds to a halt or end illegal activities in the district.⁸⁸⁸ He said that suspending Zimbabwe 'will

⁸⁸³ Esau, Kimberley Process Chairperson 'Statement on the situation in the Marange diamond fields, Zimbabwe' March 26, 2009. Available at <http://www.kimberleyprocess.com> last visited 01 September 2011.

⁸⁸⁴ *Ibid.*

⁸⁸⁵ Esau, Kimberley Process Chairperson 'Statement on the situation in the Marange diamond fields, Zimbabwe' March 26, 2009. Available at <http://www.kimberleyprocess.com> last visited 01 September 2011.

⁸⁸⁶ *Ibid.*

⁸⁸⁷ *Ibid.*

⁸⁸⁸ *Ibid.*

only help exacerbate the problems in Zimbabwe’ without stopping Marange diamonds from penetrating the legitimate trade.⁸⁸⁹

The KP expressed concern at the illicit trade of diamonds from the Marange area in Zimbabwe and decided to step up international efforts to prevent the illicit trafficking of those diamonds, notably by calling on KP Participants to take appropriate ‘enhanced vigilance measures’ as per KP Chair notice of 10 February 2009. Pursuant to the KP Chair notice of 06/05/2010, the KP decided to upgrade the vigilance measures. This guidance aims at assisting KP Participants to implement the ‘enhanced vigilance measures’ and handle suspicious shipments from the Marange area.⁸⁹⁰

- ‘Participants should make use of the *footprint* on Marange diamonds and, when confronted with a suspicious Marange shipment, Participants should take the following *precautionary measures*:
 - Provisionally detain the shipment;
 - Exercise due diligence, i.e. request the necessary information in view of an examination to determine, where possible, the origin of the goods;
- Participants confronted with a suspicious shipment should ensure transparency and duly inform the KP Chair and the WGM and issue a *suspicious shipment report* for their consideration, subject to national applicable provisions. The suspicious shipment report should contain information pertaining to the determination of the origin of the goods, without prejudice to the confidentiality of commercial information. Where necessary, the WGM will ensure coordination with other KP working bodies such as WGS or WGDE;
- Upon receipt of such a report, the WGM will consider making a recommendation to the KP Chair to place the suspicious shipment *report on the Participants section of KP website*. Participants are encouraged to keep their own records of suspicious shipments;

⁸⁸⁹ *Ibid.*

⁸⁹⁰ KP Chair’s Notice of 6 May 2010 on ‘Vigilance against the laundering of illicit shipments’ ‘Trade of Marange diamonds in compliance with KPCS requirements’ available at www.kimberleyprocess.com at 1077_KP_Chair’s_Notice_-_Trade_of_Marange_Diamonds_en[1].pdf at p 1. Last visited 30 September 2011.

- When a Participant is confronted with a suspicious shipment requires assistance of technical nature for the examination of suspicious shipment and/or evaluation of the origin of the goods, the Participant may present a request to the KP Chair or the TA coordination mechanism for specific technical assistance in the matter'.⁸⁹¹

Considering that the appropriate use of KP certificates is crucial for the credibility of the KP, Participants were also encouraged to exercise caution as regards possible fraudulent KP Certificates.⁸⁹²

For ease of reference, the Certification Scheme defines 'conflict diamonds' as meaning rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments, as described in relevant United Nations Security Council (UNSC) resolutions insofar as they remain in effect, or in other similar UNSC resolutions which may be adopted in the future, and as understood and recognised in United Nations General Assembly (UNGA) Resolution 55/56, or in other similar UNGA resolutions which may be adopted in future.⁸⁹³

In July 2009, a Kimberley Process investigative mission again found serious human rights abuses and rampant smuggling at the Marange diamond fields.⁸⁹⁴ Despite these findings, Participants to the Certification Scheme decided not to suspend Zimbabwe from participation, nor to ban the export of its diamonds.⁸⁹⁵ The reason advanced was that the mandate of the Certification Scheme only addresses 'conflict diamonds,' if those mined by rebel groups, but not by abusive governments.⁸⁹⁶ In this case, the abuses at Marange were committed by Zimbabwe's police and army, rather than rebel groups.

⁸⁹¹ KP Chair's Notice of 6 May 2010 on 'Vigilance against the laundering of illicit shipments' 'Trade of Marange diamonds in compliance with KPCS requirements' available at www.kimberleyprocess.com at 1077_KP_Chair's_Notice_-_Trade_of_Marange_Diamonds_en[1].pdf at p 3. Last visited 30 September 2011.

⁸⁹² *Ibid.*

⁸⁹³ Section I of the Certification Scheme.

⁸⁹⁴ Global Witness and PAC 'Conflict diamonds scheme must suspend Zimbabwe' (2008) available at http://www.globalwitness.org/media_library_detail.php/695/en/conflict_diamond_scheme_must_suspend_zimbabwe Last visited 01 September 2011.

⁸⁹⁵ KP Chair's Notice of 6 May 2010 on 'Vigilance against the laundering of illicit shipments' 'Trade of Marange diamonds in compliance with KPCS requirements' available at www.kimberleyprocess.com at 1077_KP_Chair's_Notice_-_Trade_of_Marange_Diamonds_en[1].pdf at p3. Last visited 11 November 2011.

⁸⁹⁶ *Ibid.*

These abuses are as serious as those that the Kimberley Process was designed to address. Reliance on a technicality provides no comfort for the victims of the abuses. Instead of ignoring human rights abuses, Certification Scheme Participants, as well as retailers, should expand the definition of ‘conflict diamonds’ to include the Marange diamonds.

Zimbabwe is a Participant in the Certification Scheme, which was established in 2003 to combat the trade in conflict diamonds. The Certification Scheme defines conflict diamonds as rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments.⁸⁹⁷ In the strictest sense, due to the absence of armed conflict and the involvement of a rebel army or movement in Zimbabwe, the Marange diamonds would not fall within Certification Scheme’s definition of conflict diamonds.

However, such serious human rights abuses by security forces connected with diamond mining justify a more expansive interpretation of the Certification Scheme’s mandate to include human rights issues. To formalise this extension of its mandate, the Certification Scheme’s rules should be amended to assert that human rights are a key concern for the Certification Scheme. The preamble of the Certification Scheme’s core document recognises ‘the devastating impact of conflicts fuelled by the trade in conflict diamonds on the peace, safety and security of people in affected countries and the systematic and gross human rights violations that have been perpetrated in such conflicts’.

The Certification Scheme’s core document can be modified by consensus of the Participants following a proposal by any participant. Civil society organisations participating in the Certification Scheme have already initiated a dialogue among participants with respect to conflict diamonds, calling on the Certification Scheme to ensure its minimum standards are consistent with international human rights law.

The Certification Scheme ultimately delineated the scope of the diamond problem it was to address by regulating ‘rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments. ...’⁸⁹⁸ This founding document’s preamble reflects a similarly narrow interpretation in ‘[r]ecognizing that the trade in conflict diamonds is a matter of serious international concern, which can directly be linked to the

⁸⁹⁷ Section I of the Certification Scheme.

⁸⁹⁸ Certification Scheme at Section 1.

fuelling of armed conflict, the activities of rebel movements aimed at undermining or overthrowing legitimate governments, and the illicit traffic in, and proliferation of, armaments. ...⁸⁹⁹

Yet the Certification Scheme left the larger illicit diamond trade as well as Zimbabwe's use of diamonds to increase and consolidate control and the diamond industry's role in other human rights abuses unmentioned and unregulated.⁹⁰⁰ According to Wexler, the newly emerged Certification Scheme that regulates the diamond trade reflects a very state-centred definition of the problem to be addressed.⁹⁰¹

The Kimberley Process embodies this interest in its unwillingness to distinguish between rebels and freedom fighters. Wexler further states that the Kimberley Process simply presumes preventing or ending conflict is a sufficient end in itself.⁹⁰² This Certification Scheme attempts to cut off rebel access to illegal diamond mining, but does nothing to regulate what undemocratic or repressive governments do with such resources.⁹⁰³ In so doing, it reinforces the state's primacy and emphasises the legitimacy of the existing political order.⁹⁰⁴

Such an approach is unsurprisingly consistent with much of existing international law.⁹⁰⁵ For instance, the Kimberley Process's failure to acknowledge the potential legitimacy of non-state struggles accords well with much of international humanitarian law which usually only applies to state actors engaged in armed conflict. Even Common Article 3 of the Geneva Convention and Protocol II to the Geneva Convention, which include some limited protections for non-state actors engaged in internal armed conflicts, leave purely internal disputes to be regulated domestically.⁹⁰⁶

⁸⁹⁹ *Ibid.*

⁹⁰⁰ For a criticism of this exclusion, see Gooch 'Conflict diamonds' (2008) at 189.

⁹⁰¹ Wexler L 'Regulating resource curses: Institutional design and evolution of the blood diamond regime' (2009) at 12.

⁹⁰² *Ibid.*

⁹⁰³ *Ibid.*

⁹⁰⁴ Wexler *supra* at 6-10.

⁹⁰⁵ *Ibid.*

⁹⁰⁶ *Ibid.*

Wexler argues that rebel forces seeking diamond mining are not freedom fighters seeking national liberation, nor do they seem committed to improving the state's human rights practices, and moreover, these groups clearly engaged in rampant and systemic human rights abuses themselves.⁹⁰⁷ Rather, this-sub section means to convey the insight that the Kimberley Process's initial focus on rebel groups reflects a common, statist strategy that might compromise larger human rights goals.⁹⁰⁸ The initial scope of the Kimberley Process along with the Certification Scheme as a whole shows non-state actor abuses while ignoring state and corporate abuses.⁹⁰⁹ It suggests that the international community acts to deny resources to rebel groups regardless of the nature of the underlying conflict.

As the nature of conflicts, repression and human rights abuses changed over the past decade, with the virtually total disappearance of post-independence rebel groups in Africa, the Certification Scheme risks becoming irrelevant and ineffective if it adheres to a narrow interpretation of its original core mandate and limits its human rights focus to human rights abuses committed by non-state actors. It can thus be submitted that the Zimbabwean case highlights a further serious shortcoming of the Certification Scheme which makes the need to revisit its mandate and nature compelling.

The Certification Scheme or an international treaty instrument that may replace it must expand its objectives to specifically cover broader human rights concerns and unambiguously include them as part of the Certification Scheme. Diamonds originating from situations like Marange, where serious human rights abuses have taken place, should be shunned in the same manner as traditional 'conflict diamonds' acquired by rebel groups. The term itself should be amended to reflect a broader array of abuses connected to mining.

⁹⁰⁷ Wexler *supra* at 13; see also 'Beyond voluntarism'(2002) at 7-14.

⁹⁰⁸ Wexler *supra* at 13.

⁹⁰⁹ Passas & Jones (2007) at 6.

CHAPTER 9: SUMMARY AND CONCLUSION

1. Introduction

Like many extractive industries, the diamond trade has proven a highly lucrative business. Each year the diamond industry produces over US \$62 billion in diamond revenue.⁹¹⁰ Also like many other extractive industries, the majority of diamonds are produced in African countries. In total, approximately 65 percent of world diamond production occurs on the African continent, amounting to roughly US \$8.4 billion. This comprises about one fifth of total diamond revenues.⁹¹¹ Top producing African countries today include Botswana (26 percent), South Africa (11.8 percent), Angola (8.1 percent), and the Democratic Republic of Congo (8.0 percent).⁹¹²

However, these countries' markets and others, notably Sierra Leone, Liberia and more recently, Zimbabwe, have experienced considerable challenges in recent times. That is, throughout the 1990s diamonds fuelled instability in African countries already rife with political unrest, corruption and violence. This was the case in Sierra Leone, where diamonds were a viable source of funding for many rebel groups willing to exploit human rights in order to seize the established government.

By the end of the 1990s, and after an eleven year civil war, 50000 people were killed across Sierra Leone and hundreds of thousands were displaced.⁹¹³ The Revolutionary United Front (RUF) earned roughly US \$400 million in conflict diamond revenues in the course of one decade, which were used to systematically exploit citizens for arms, labour and other abusive means.⁹¹⁴

UNITA gained power as a Cold War proxy militia for the United States, earning an estimated US \$3-4 million from the trade in illegal diamonds in 1999 alone. Sierra Leone and Angola experienced damaging returns from its diamond market. Over the course of the 1990s, and

⁹¹⁰ www.diamondfacts.org, 'Diamond Facts'. Last visited 30 September 2011.

⁹¹¹ www.diamondfacts.org, 'Diamond Facts'. Last visited 30 September 2011.

⁹¹² www.economist.com, 2007. Last visited 30 September 2011.

⁹¹³ www.un.org, 'Conflict Diamonds: Sanctions and War'. Last visited 30 September 2011.

⁹¹⁴ www.ec.europa.eu, 'Blood Diamonds: the international response'. Last visited 30 September 2011.

into the 2000s, approximately 3.7 million people were killed and another 6.5 million people were displaced across Africa as a result of conflicts fuelled by diamond profits.⁹¹⁵

Angola was in fact the first African country to attract the attention of the UN SC, as it launched an investigation in 1999 into the activities of UNITA leader Jonas Savimbi, finding that he and his supporters were able to leverage illicit diamond profits for munitions purposes and war operations.⁹¹⁶ Such activities had been carried out despite continued UN arms and financial sanctions and in April 2000 the UN SC adopted Resolution 1295, establishing a “Monitoring Mechanism” to collect additional information and investigate any relevant leads regarding sanctions violations, with a view to enhancing the implementation of the measures imposed on UNITA’.⁹¹⁷

Today, the Certification Scheme is comprised of 75 Member States who account for approximately 99.8 percent of rough diamond production.⁹¹⁸ The aim of this chapter is to examine the legal characterisation, implementation, monitoring and evolution of the Certification Scheme.

Blood diamonds gave rise to humanitarian crises of untold proportions such as those typified in Sierra Leone, the DRC, Angola and Liberia. The Certification Scheme is the most significant attempt to comprehensively address the issue of conflict diamonds. The international community has long sought an international certification scheme for the legitimate trade of rough diamonds. The Certification Scheme signified the international community’s commitment to attain a mechanism which would ensure the legitimate trade of rough diamonds; arising from conflict production regions which ultimately resulted in human rights abuses and humanitarian crises.

state parties evidenced commitment by embarking upon sanctions against diamond producing nations alleged to have traded in conflict rough diamonds. Furthermore, the UN GA in its hallmark Resolution 55/56 (2000) provided the impetus to the international community of

⁹¹⁵ www.amnesty.org, ‘Blood diamonds are still a reality’. Last visited 30 September 2011.

⁹¹⁶ www.un.org. Last visited 30 September 2011.

⁹¹⁷ *Ibid.*

⁹¹⁸ www.kimberleyprocess.org. Last visited 30 September 2011.

nations, international organisations and NGOs which was required to respond to the illegal trade of rough diamonds.

The Certification Scheme was adopted at a meeting between governments, NGOs and diamond industry representatives in May 2000 in Kimberley, South Africa. That was the beginning of a three year long negotiating process that led to the establishment of the Certification Scheme. The Certification Scheme came into operation in January 2003.

The meetings which culminated in the finalisation of the Kimberley Process did not undergo a formal or diplomatic process. Treaty documents were neither signed nor ratified.⁹¹⁹ Participants to the Kimberley Process were state parties, NGOs and representatives of the diamond industry. Apart from State parties, the latter two are entities without legislative authority.

All countries with a vested interest in the international trade of rough diamonds participated in the Kimberley Process. Subsequently countries became Participants to the Certification Scheme which arose from the Kimberley Process.

⁹¹⁹ Feldman 'Conflict diamonds' (2003) at 836 and 870.

2. Implementation and monitoring

Out of the fourteen countries that are part of the Southern Africa Development Community (SADC), eight are diamond producers: Angola, Botswana, DRC, Lesotho, Namibia, Tanzania, South Africa, and Zimbabwe. One member, Mauritius, is an important diamond cutting centre. Botswana is the world largest producer of rough diamonds by value.

Since its inception the Certification Scheme has not undergone any changes. However the effect of the Certification Scheme was fundamentally altered with added impetus when Participants began implementing the provisions of the Certification Scheme.

Lack of mechanisms of accountability within the Certification Scheme, in the main, cause the Certification Scheme to lose credibility. Mechanisms are necessary for enforceability of the Certification Scheme. In recognition of the development of many State Participants, particularly the EU, it may be surmised that consensus for sustaining an economic goal was at the forefront of implementation which manifested in the subsequent Council Regulation of 2002.⁹²⁰

Limitation: Certification Scheme's implementation

The Certification Scheme is a voluntary mechanism, which can only be effective with the support and determination of the implementing country. An effective implementation of the Certification Scheme is possible in countries where the Participant concerned has minimum capacity to enforce regulation and where the political will exists.

It is important to note that the capacity of the Participant State is not determined by peace and democracy alone. The implementation of the Certification Scheme requires commitment from governments. The political will to enforce the law must be present in order for a government to devote sufficient energy and resources to the initiative.

In Southern Africa, it is in countries that have each of these characteristics in which the Certification Scheme has been effective. These countries include Botswana, Namibia and South Africa. In these countries systems of resource management, including the management

⁹²⁰ EC Council Regulation 2386 (2002).

of diamonds, are well structured and controlled. Governments in these countries can monitor both imports and exports of rough diamonds effectively and with the same efficiency and rigour as their European counterparts. The Certification Scheme's contents are progressively realised; thus making implementation in countries that uphold the rule of law and ensure good governance possible. Equally, the Certification Scheme is much easier to implement in countries where the objectives are in line with those of the country's leaders.

However, it has been far more difficult to implement the Certification Scheme in an undemocratic environment where the Participant is itself involved in accumulation of diamond resources. Again, DRC and Angola stand as stark examples of environments in which corruption and the absence of the rule of law have raised questions about the veracity of the claims that the Certification Scheme has been implemented in a credible manner. In both countries there are serious challenges.

The government of the DRC is known for not being in control of its entire territory.⁹²¹ Indeed, the Participant state is so weak that it is not even in a position to monitor the mining contracts that it has signed with companies.⁹²² The state has no capacity to monitor the extraction of diamonds.⁹²³ So weak are the systems that on a daily basis, flights land in remote parts of the DRC without government knowledge.⁹²⁴ Most importantly, the state is so weak that it cannot produce reliable statistics on which to base an accurate conclusion about the state of the diamonds trade.⁹²⁵

In Angola, another phenomenon exists. There we find a strong state that is in control of its resources.⁹²⁶ The Angolan government can monitor its diamond trade if it wants to, yet has chosen to abdicate that responsibility because powerful networks of political figures control the diamond industry. The illicit diamond trade continues in Angola despite the fact the war

⁹²¹ <http://www.nationsencyclopedia.com/Africa/Congo-Democratic-Republic-of-the-DROC-HISTORY.html>. Last visited 30 November 2011.

⁹²² Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms Of Wealth of the Democratic Republic of the Congo <http://www.un.org/news/dh/latest/drcongo.htm>. Last visited 30 November 2011.

⁹²³ *Ibid.*

⁹²⁴ *Ibid.*

⁹²⁵ *Ibid.*

⁹²⁶ Kamemba C *Kimberley Process Certification Scheme: Compliance and limitations in Southern Africa* (May 2008) available at <http://www.sarwatch.org/sarwadoocs/KimberlyFA.pdf>. Last visited 30 November 2011.

has ended and in spite of the presence of the Certification Scheme.⁹²⁷ It is difficult to find statistics on diamonds in Angola. This does not mean there is no legal diamond trade in Angola. Instead, the lack of statistics reflects the fact that the figures are likely to be so distorted that the government is not prepared to publish production and revenue figures.⁹²⁸ As a result of this, it is not clear how much revenue government receives from legal diamond sales.

Limitation: Certification Scheme's mandate

The Certification Scheme's objective of ending the illicit diamond trade and reducing violent conflict only deals with the symptom, which is conflict. It does not deal with the cause. The cause of the illicit trade is bad governance in the management of diamond revenues. Conflict is simply an all-too-familiar consequence of poor management of resources and their revenues.

Just as conflicts will not be solved by limiting the illegal trade of diamonds, the illicit diamond trade will not disappear because wars have ended. Both conflict and the illicit diamond trade will be solved when countries like the DRC and Angola are able to put in place accountable and transparent resource management systems. Perhaps this is where the Certification Scheme's biggest weaknesses lies. One cannot rely on externally driven mechanisms to deal with a problem which is mainly caused by internal structural weaknesses.

The recent case of Zimbabwe shows that when state structures are weak or have collapsed people fill in the gap. This sometimes includes moving into the extraction of resources that governments can no longer protect and control. Until recently Zimbabwe had an efficient and effective resource management system, but as the political crisis has unfolded across the country, this system has collapsed.⁹²⁹ The formal diamond trade is being replaced by an informal diamond trade. Despite the state's efforts to curb the informal diamond trade, it is continuing and in fact becoming increasingly sophisticated.⁹³⁰ As Tim Hughes attests, 'recent reports of conflict and illicit diamonds seeping into South Africa from the DRC via

⁹²⁷ *Ibid.*

⁹²⁸ *Ibid.*

⁹²⁹ *Ibid.*

⁹³⁰ *Ibid.*

Zimbabwe are a timely reminder that despite, significant victories, the war on conflict diamonds has not yet been won'.⁹³¹

Like in Angola and the DRC, the Certification Scheme should play a supportive rather than primary role.⁹³² The only way Zimbabwe will be able to stabilise the diamond industry again is through government ownership and control of a domestic resource management system that could be reinforced by the Certification Scheme mechanism.⁹³³ As in Angola and the DRC, the problem of the informal diamond trade in Zimbabwe is exacerbated by the existence of a network of powerful political figures in whose interests it is to maintain the illicit trade. It is impossible for the Certification Scheme to produce positive results in countries where government officials are themselves preying on the mineral wealth of their countries.⁹³⁴

This situation challenges the ambit of the Certification Scheme system that focuses on the diamond trade and not on governance in the different countries. The Certification Scheme can only be effective in an organised state where good governance is respected. The main purpose of the illegal diamond trade is not necessarily to fuel conflict. The trade exists in this informal form in order to maximise profit by evading taxes that would otherwise be due to the state. Typically, conflicts are symptoms of deep-seated divisions in societies.⁹³⁵

To assume that only illicit diamonds fuel conflict is also simplistic. The possibility also exists for legal diamonds to fuel conflict. This happens when diamond revenues are not equitably shared among the population, and instead are used to strengthen and enrich a few who are close to the regime. The Marange diamond rush in Zimbabwe has benefited senior ZANUPF officials and those close to them. In Angola, there are rumours that in an attempt to buy the opposition, the government (MPLA) has given the opposition (UNITA) a concession to mine diamonds.⁹³⁶ This is a strange situation in African politics where a ruling party gives economic boost to an opposition party.⁹³⁷

⁹³¹ *Ibid.*

⁹³² *Ibid.*

⁹³³ *Ibid.*

⁹³⁴ *Ibid.*

⁹³⁵ *Ibid.*

⁹³⁶ *Ibid.*

⁹³⁷ *Ibid.*

Yet it is a clear manifestation of political co-option or a move to weaken the opposition's oversight role. The MPLA's co-option of UNITA through the offer of an economic carrot to allow it to have some continued, if circumscribed, control over mineral wealth, is a sign that all is not well in Angola.⁹³⁸ Equally, a question could be posed about the extent to which UNITA would respect the Certification Scheme's requirements.

The high risk of violent conflict that has been attributed to resource abundance in Angola and the DRC is mediated by critical governance failures.⁹³⁹ Systematic corruption and economic mismanagement and patrimonial rule, often associated with resource abundance, may fuel political and economic grievances by undermining the state's legitimacy and by weakening its capacity to perform core functions.⁹⁴⁰ States' failures to put in place natural resource management systems strongly influence the opportunities for and feasibility of rebellion.⁹⁴¹ This is why governance of natural resources needs to be made a central element of the Certification Scheme if it is to remain relevant.

The main objective of the Certification Scheme finds defiance in Marange and smacks in the face of a different political and social reality. Whereas the Certification Scheme is optimally effective in the EC, who are the biggest importers of rough diamonds and the biggest exporters throughout the world, African countries such as Botswana, Zimbabwe and South Africa are amongst the biggest rough diamond producers with little regard for the Certification Scheme.⁹⁴² Unfortunately the Certification Scheme does not meet its objective in serving those very countries it committed to serve at inception.

The Certification Scheme must evolve beyond conflict prevention and include issues of governance and revenue transparency. For example, the process could constitute a database where it records the quantities of diamonds being traded and the possible revenues from these diamonds and follow through and see how a) the extent to which these revenues have been collected and b) how these revenues have been utilised.⁹⁴³ This could help track a government's use of revenues from diamonds, especially in countries like Angola, the DRC

⁹³⁸ *Ibid.*

⁹³⁹ *Ibid.*

⁹⁴⁰ *Ibid.*

⁹⁴¹ *Ibid.*

⁹⁴² *Ibid.*

⁹⁴³ *Ibid.*

and Lesotho, where resource spoliation is known to be significantly high.⁹⁴⁴ For example, despite the fact that the official diamond revenues increased dramatically from US\$331 million in 1995 to US\$895-million in 2005, the Congolese state cannot explain how the money was used.⁹⁴⁵

Limitation: Structure of diamond production

In Southern Africa, the Certification Scheme has a serious challenge in countries where there are wide and entrenched artisanal mining operations. As much as 90 percent of the production in countries like the DRC, Angola and Lesotho is produced by artisanal labourers using simple tools and equipment, and living in conditions of insecurity and poverty.⁹⁴⁶

The problem with artisanal mining is not that it is illegal, but rather that it is badly regulated and organised.⁹⁴⁷ The absence of any form of organised structure for these miners poses a multiple challenges to the Certification Scheme. Artisanal miners are mostly unregistered, and they operate in conditions that make them vulnerable to buyers.⁹⁴⁸ They tend to have few livelihood options, which means, that they will often sell their stones to whoever comes first. In addition, the distribution channels of diamonds from this sector are not always clear, making it difficult to monitor diamond transactions.

The weakness of the Certification Scheme has been that it focuses more on the trade and export end of the industry and far less on the production of diamonds. The fact that governments in DRC and Angola are not capable of producing reliable statistics is in part a consequence of the high number of under regulated artisanal miners who are involved in the industry.⁹⁴⁹ Because these governments do not control production at the mining stage, they are also not in a position to control trade.⁹⁵⁰ It is possible to assume that plenty of diamonds from the artisanal mining sector go unrecorded through an informal network. The tracking

⁹⁴⁴ *Ibid.*

⁹⁴⁵ *Ibid.*

⁹⁴⁶ *Ibid.*

⁹⁴⁷ *Ibid.*

⁹⁴⁸ *Ibid.*

⁹⁴⁹ *Ibid.*

⁹⁵⁰ *Ibid.*

process can only be effective if it begins at the sites of mining activities, including those where artisanal mining is happening.⁹⁵¹

Another challenge to the Certification Scheme relates to the capacity of even those institutions that have been mandated to maintain peace and regulate the diamond trade.⁹⁵² Recent reports have suggested that United Nations personnel in the DRC have been involved in the illegal diamond trade, and in Zimbabwe the press has noted that a person involved in the United Nations Development Programme are being accused of aiding in the smuggling of diamonds out of Zimbabwe, in violation of the Certification Scheme.⁹⁵³

Limitation: Weak monitoring capabilities

Confiscation of rough diamond parcels from Zimbabwe has been reported to have occurred in India and Dubai.⁹⁵⁴ It has been reported that Angolan rough diamonds have entered Zimbabwe, which end up in South Africa for export. In both the DRC and Angola, there are signs of rampant smuggling, criminality and illegal exploitation of diamonds.⁹⁵⁵ Trustworthy contacts in these countries confirm that significant quantities of diamonds continue to be illegally traded. Yet the KP Secretariat refrained from suspending Zimbabwe from the Certification Scheme in 2009.

Even if the DRC and Angola do submit their statistical records on time in line with the Certification Scheme, it does not mean those statistics are accurate. The design of a system of control is one thing, its implementation is another. Even at the 6 May 2011 Plenary, the KP noted the inability of the DRC to comply with the statistical submissions.

The Certification Scheme is a non-binding instrument which relies upon good faith and political commitment for its success. To date, this is precisely what made the commitment of Participants stand. However, such a notion has its failings in the face of a lack of mechanisms of accountability. This has been demonstrated through so called violations of the Certification

⁹⁵¹ *Ibid.*

⁹⁵² *Ibid.*

⁹⁵³ *Supra.*

⁹⁵⁴ Ploch 'Zimbabwe' (2010) at 37.

⁹⁵⁵ *Supra.*

Scheme by Venezuela, the DRC, Guinea, Liberia and other Participant countries.⁹⁵⁶ Perhaps the Certification Scheme was overzealous in its infancy. This, does not, however detract from much needed improvements to the Certification Scheme to bolster its efficacy.

A well structured 'Certificate of Origin' regime can be an effective way of ensuring that only legally mined diamonds, that is, those from government controlled areas reach the international diamond market. Additional controls by State Participants and the diamond industry are needed to ensure that such a regime is effective. These measures might include the standardisation of the certificate among diamond exporting countries, transparency, auditing and monitoring of the regime and new legislation against those who fail to comply. Despite the standardisation sought by the Certification Scheme, Participant Countries such as Zimbabwe has violated the Certification Scheme.⁹⁵⁷

However, even if the Participants' initial aspiration was to constitute a political agreement, the Certification Scheme impetus has developed the kind of legitimate status that 'typical' international treaties enjoy.⁹⁵⁸ Most Participants feel compelled to cooperate with the Certification Scheme. Participants want to be a part of the Certification Scheme. Equally, Participants fear the consequences of non compliance, even if no proper legal basis for sanctioning exists.

The fact that the Certification Scheme's impetus has received such a broad following, gives it somewhat of a legal authority, making it difficult for diamond trading countries not to join the voluntary scheme. On the one hand, in successfully establishing a Community system the EU had to ensure an effective control of its external borders. On the other hand the EU had to preserve its structure of internal free trade. Earlier implementation of UN Resolutions that sanctioned the trade in conflict diamonds provided the EU Member States with ideas on alternative diamond trade regulation in the EU.⁹⁵⁹ Unfortunately, UN sanctions were not sufficient to overcome loopholes in the global trading system and not every country had implemented effective and harmonised control mechanisms.

⁹⁵⁶ PAC 'Annual Review' (2009).

⁹⁵⁷ PAC *ibid.*

⁹⁵⁸ Schmidt TM 'TNCs responsibility for environmental and human rights violations' (2005-2006) 36 *Cal W Int'l LJ* at 5.

⁹⁵⁹ *Ibid.*

Of pivotal importance is the application of the Certification Scheme. The Certification Scheme addresses situations of rebel movements exploiting rough diamonds to overthrow legitimate governments. The Certification Scheme is not sufficiently broad in ambit to include Participants or State Parties that embark upon human rights abuses whilst engaged in the mining and production of rough diamonds, such as the situation typified in Zimbabwe's Marange region.

The Certification Scheme should be strengthened by broadening its ambit to include pariah nations such as Zimbabwe which will be consonant with ethos, purport and objectives of the Certification Scheme.

Diamonds are a fungible commodity, which means that they are a particularly attractive means of moving value across borders, in other words, money laundering.⁹⁶⁰ Presently, the Certification Scheme defines 'conflict diamonds' as rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments. It is suggested that the following modification be considered:

'Conflict diamonds' means 'rough diamonds used by rebel movements or its allies, or a state or its agents or its allies, to finance conflict aimed at undermining legitimate governments; or where a state or its allies or agents use rough diamonds to perpetrate human rights abuses, or engage in acts contrary to international human rights and international humanitarian law'.

It is anticipated that the aforementioned working definition will provide the impetus for reconsideration of the intention of the Certification Scheme. After all, the Certification Scheme has a two fold mandate: firstly, to curb the illicit trade in rough diamonds; and secondly to prevent human rights violations.

⁹⁶⁰ *Ibid.*

3. Legal characterisation and the evolution of the Certification Scheme

Amongst the aims of this study is to characterise the legal nature of the Certification Scheme. With the legal characterisation of the Certification Scheme, it becomes possible to determine its efficacy, its meaning in international law and long term sustainability.

Regarding the process of its implementation, the Certification Scheme has logically striven toward minimising legislative and logistical steps for its Participants. A pivotal diamond trading Participant, the EU by presenting itself as a single Participant, effectively succeeded in making the Certification Scheme a part of its Member States' national systems, through legislative measures under the EC Regulation (Common Foreign and Security Policy).

The rules of international trade, upheld by the WTO, could have been a hindrance for a new system that tried to alter the way in which diamonds are traded internationally, even if it were to serve a 'noble' cause. It should be noted, however, that the Certification Scheme as such does not constitute a trade restriction in WTO terms, but rather the execution of its provisions by the Certification Scheme Participants that are also members of the WTO. The WTO Council instead decided to issue a waiver. This waiver expressly gave its member states permission to proceed with their trade restricting measures against non-Participants to the Certification Scheme.

Still, with its waiver decision the WTO indirectly recognised that the Certification Scheme stands as a significant, autonomous agreement in which almost all diamond trading WTO members have decided to adhere to alternative rules governing the trade in a potentially pernicious product. The WTO supports the existence of the Certification Scheme.

The Kimberley Process approach to the quandary of conflict diamonds provides an interesting example of political, economic and social developments in the international sphere. Indeed the Certification Scheme is a noteworthy multilateral endeavour seeking an economic-political solution to sever the relationship between the trade in diamonds and human rights violations and humanitarian disasters.

Despite the lack of legal authority of the Certification Scheme, Participants have indicated that their intentions to be ‘bound’ by the contents of the Certification Scheme are indeed serious.⁹⁶¹ Manifestation of this intent is evidenced by the passage of domestic legislation arising from the Certification Scheme commitment. The WTO, the UN and the EU have given recognition to the Certification Scheme.⁹⁶²

The role which international organisations have played in the Certification Scheme must not be ignored for they provide crucial indicators as to the perception and acceptance of the Certification Scheme. The UN GA, the UN SC, the WTO and of note, the EU have given recognition to the Certification Scheme through indirect requests made by Participants. Such a drive has caused the Certification Scheme to gather sufficient momentum that by far counterbalances most international instruments’ impact in recent decades.

The response by international organisations must be tempered with social, political, legal, economic and other objectives. Inasmuch as the Certification Scheme was intended to curb the illicit trade of rough diamonds, which gives rise to human rights abuses, Participants also had other pressing concerns that bolstered the momentum for the formation and acceptance of the Certification Scheme. Out of volition, Participants accepted the contents of the Certification Scheme into their respective domestic legislation. The international diamond trade was in dire need of a legitimate diamond trading environment.

The character of the Certification Scheme is in keeping with Dupuy’s view, which have followed suit with many other international instruments in the past three decades or so.⁹⁶³ The Certification Scheme is not prescriptive. Evidence of the Certification Scheme’s non prescriptive nature arises from its request for annual reports from Participants in order to monitor the progress of implementation by Participants. According to Dupuy’s analysis, this constitutes evidentiary proof of the intention not to be bound in the strict sense.⁹⁶⁴ Juxtaposed against Brierly’s argument with regard to the legal fiction pertinent to the ‘consent to be bound’ by a state, Dupuy has gained support.⁹⁶⁵

⁹⁶¹ The EC passed Council Regulation 2628 (2000).

⁹⁶² *Ibid.*

⁹⁶³ Dupuy *supra* at 422-423.

⁹⁶⁴ *Ibid.*

⁹⁶⁵ Brierly (1948) at 39-50.

From a theoretical standpoint, the prerequisite of an ultimate authority for legitimacy of international law remains. In practice though, this notion has deference to the pervasive legal and social realities. The core issue lies not entirely in an attempt to identify the ultimate source of law in order to determine the validity of a norm. Rather, cognisance must be taken of the fact that fundamental principles have opened new avenues for cogency of argumentation in order to determine the sources of law for the purposes of ascertaining the veracity of a norm.

Inasmuch as Article 38 of the International Court of Justice purports to contain the sources of international law, it by no means purports to be exhaustive in its listings. The pertinent elements for the creation and development of new rules of customary international law lie in satisfying two legal elements.

In the first instance, competent state authorities must demonstrate a ‘consistency and generality of similar acts’. In the second instance, there must be an expression of the notion that such acts are performed in response to a legal obligation, namely *opinio juris*.⁹⁶⁶ It is difficult to prove the existence of *opinio juris* or the so called mental element. With regard to *opinio juris*, Brownlie states that the general practice raises a presumption of *opinio juris* and it is for the opponent to prove that this is not the case.⁹⁶⁷ Otherwise put, the party contesting the existence of a general practice must prove that the general practice in fact does not exist. Here, a civil onus must be discharged.

The courts rely on the actual existence of a general practice. This means that the court will not be satisfied with the existence of a general practice until the contrary is successfully demonstrated through the assessment of facts. In general, courts are not satisfied with the mere presence of a presumption in favour of the existence of a general practice because courts are less concerned with the analysis of a mental state. The court is concerned more with an outward manifestation of intent with respect to the existence of a general practice.

With the passage of time, norms or standards of conduct have the propensity to develop into legal rules. Unless couched in a law making treaty that arises from the entrenched international culture, norms and standards of conduct do not automatically qualify as legal

⁹⁶⁶ Dupuy *supra* at 432; see also Weil *supra* at 423-424.

⁹⁶⁷ Dupuy *ibid*.

rules. At the point of inception, norms possess the potential to assume the character of legal rules in international law and the international community. Therefore, norms and standards that are legally binding on the international plane must arise from a law making treaty or the trajectory of development through factual practice, must be demonstrated.

However, the contemporary international community demonstrates an understanding of acceptance to the emergence of new rules and normative conduct.⁹⁶⁸ New rules and normative conduct do not necessarily undergo the process of transition into an emergence of new rules or new norms arising from normative conduct by states and international organisations, as Weil has stated. Instead, they demonstrate a rapid transition that realises the short term growth of rules into new rules and norms.

The EU's regulations have laid the foundations for the contents of the Certification Scheme which have been transported into hard law.⁹⁶⁹ In the main, almost all the contents of the Certification Scheme have been transformed into hard law. With 49 Member States implementing the contents of the Certification Scheme, it is difficult not to state that the Certification Scheme has acquired the force of law, at least on the municipal level.

Whether the EU regulation would become the subject of dispute remains to be seen. In this instance, one must ponder over the relevant bodies of adjudication. It is not possible to speculate on the adjudication of possible disputes, at this stage, because the Certification Scheme, to date, has utilised expulsion from participation in the instance of a so called 'breach'.

The reasoning for the Certification Scheme's legal categorisation is dependent on various institutions and legal factors.

The UN used to be regarded as the primary organisation for establishing internationally accepted standards of conduct. Despite the resistance of some scholars to recognise that Resolutions of the UN are generally not regarded as sources of law, UN GA Resolution 55/56 (2000) paved the way for the formation of the Certification Scheme. As such, the

⁹⁶⁸ Dupuy supra at 432-3; see also Weil supra at 427.

⁹⁶⁹ For a discussion on non state actors, see Kammerhofer J 'Non state actors from the perspective of the pure theory of law' (2010) *Theoretical Perspectives* at 3-5.

international community recognises that Resolutions of the UN GA and the UN SC have limited legal effects. Resolutions impact upon the conduct of States and international organisations thereby giving rise to the formation of new rules and standards of conduct.

Even though Resolutions lack the authority of legal force, there is recognition by States and international organisations to observe the Resolutions in a particular light. At the very least, the observance not to oppose the Resolutions is considered to be compliance. The opposition of a Resolution calls into question the so called breaching party conduct into question by the rest of the international community. Zimbabwe's non-recognition of recent UN Resolutions and statements by NGOs has been called into question by the international community.⁹⁷⁰

Consequently, Zimbabwe's non-recognition of UN Resolutions has resulted in public shaming and scolding by the international community at large. Therefore, it must be seen that at a most fundamental level, the notion of good faith in consideration and observance must be present even though the Resolution is non-binding in character. The UN is the principle organisation that establishes international norms and standards.

It is necessary to distinguish between the authority of a Resolution and the legal consequences that arise from it. Because an agreement is not legally binding does not mean that agreement has no standing in the international community or in international law. The agreement, despite its non-legally binding nature must at least be observed. However, there can be no real demand for compliance with the contents of the agreement from the point of view of enforcement mechanisms.

The EU's involvement in the battle against conflict diamonds began with the implementation of UN sanctions as enshrined in Security Council Resolutions 1173 (1998), 1176 (1998), 1295 (2000), 1306 (2000) and 1343 (2001) which are legally binding on all Member States to the UN.⁹⁷¹ These Resolutions prohibited the import of rough diamonds coming directly or indirectly from Sierra Leone or Angola, unless accompanied by certificates of origin, and all direct and indirect import of rough diamonds from Liberia.

⁹⁷⁰ *Ibid.*

⁹⁷¹ Article 25 of the UN Charter.

After EC Council Regulation 1745/2000 had been extended by Regulation 303/2002,⁹⁷² it was felt that the existing measures would have to be enhanced by effective controls of the international trade in rough diamonds. Therefore, a new Regulation was passed in 2006. The UN GA and the UN SC have both passed Resolutions recognising the role of conflict diamonds. The UN GA recognised the need for a certification scheme for the trade in rough diamonds. Brownlie advances the argument that such recognition indeed opens the doors to the creation of new norms.

Cognisance must therefore be taken of the fact that States indeed are swayed by the Resolutions of the UN. Inasmuch as UN GA Resolutions may not be regarded as legally binding, the fact remains that UN GA Resolution 55/56 has become synonymous with the Certification Scheme. Passage of said Resolution permitted the community of nations together with other stakeholders to embark upon a process of establishing the Certification Scheme.

The form and language of the Certification Scheme appears consistent with a 'declaration of principle' and not of a legal obligation to comply. Usage of terminology appears to have been carefully selected by Participants. The language employed by the document of the Certification Scheme seemingly reflects a compromise between the various Participants.

The language used in formal documents is often indicative of their legal status. Terminology typically used to indicate an intention to enter into a formal treaty are words like 'shall', 'agree', 'undertake', 'rights', 'obligations' and 'enter into force'.⁹⁷³ The Certification Scheme text, however, makes use of less imperative phrasing such as 'Participants recommend', 'are encouraged', 'should ensure', and 'should be established'.⁹⁷⁴

The language, together with the lack of formal, treaty-like final clauses, or a registration requirement, is strongly indicative that the document is a political agreement or

⁹⁷² Council Resolution (EC) No 303/2002 of February 17, 2002, OJ L 47/8, February 19, 2002, Prohibition on the Importation into the Community of Rough Diamonds from Sierra Leone.

⁹⁷³ Aust (2000) at 20; see also Baxter *supra* at 557-558.

⁹⁷⁴ See 'Essential elements of an international scheme for certification for rough diamonds with a view to breaking the link between armed conflict and the trade in rough diamonds' in: *Kimberley Process Working Document*, nr 1/2002, March 20 (2002) Section I. Available at: <http://action.web.ca/home/pac/attach/March%202002%20Kimberley%20Process%20Working%20Document%20nr%201%20of%202002.doc>. Last visited 08 July 2011.

‘Memorandum of Understanding’ (MoU)⁹⁷⁵ and not a proper treaty according to Schram.⁹⁷⁶ Although the language employed in the Certification Scheme may also be viewed as a document of another kind.

⁹⁷⁵ Aust (2000) at 26.

⁹⁷⁶ See in general Klabbbers J ‘The concept of treaty in international law’ (1996) 22 *Kluwer Law International*. The author extensively discusses the notion and definition of ‘treaty’ and gives an account of the different views upheld by several other authors on international treaty law on determining the legal nature of an agreement.

4. How the Certification Scheme attained juridical force

In order to attain juridical force, an agreement must ordinarily be reduced to a treaty form. Treaties are international instruments that determine legal relations between parties.⁹⁷⁷ The Certification Scheme, being a so-called ‘living agreement’,⁹⁷⁸ has since its adoption gradually acquired a quasi-legal status, rendering much of the debate arising from the legal paraphernalia on the international level void of meaning.⁹⁷⁹ What matters at this point is that the Participants have implemented the Certification Scheme in their domestic law and have thereby demonstrated consent to be bound.

Still no international obligation was established and this is why the Certification Scheme should be expanded into a formal international treaty. If an agreement is a law making agreement, then legal recourse may be had in the instance of a breach, pursuant to the provisions of the agreement. In the absence of a legally binding agreement, compliance *per se* is sought in other ways, namely ostracising, peer pressure and lobbying by civil society.⁹⁸⁰ Inasmuch as compliance may not be secured through legal avenues, acts which flow from the agreement are deemed valid amongst the community of nations.⁹⁸¹ As such, they may not be retracted despite the voluntary, non-legally binding nature of the agreement.

Like Resolutions, the value of international agreements, are context dependent for their respective veracities.⁹⁸² Thus, the value of a Resolution or an international agreement depends upon the context which gave rise to the formation of the international agreement, the degree of consensus attained for the formation of the international agreement, the institutions which the international agreement create, the issues of implementation and monitoring of the international agreement, the practice of the provisions of the international agreement. It may then be considered that the legal authority of the international agreement *per se* is less important than the actual impact of the said agreement.

⁹⁷⁷ Aust (2000) at 40-1.

⁹⁷⁸ Alvarez JE ‘The new treaty makers’ (2010) 25 *BC Int’l & Comp LRev* at 221-222.

⁹⁷⁹ Baxter *supra* at 558 and 561.

⁹⁸⁰ Schram *supra* at 15-17.

⁹⁸¹ Schram *supra* at 8.

⁹⁸² Weil *supra* at 417.

In contemporary international law, certain normative phenomena occur which influence and control the behaviour of States and international organisations that do not have their basis in hard law in the strictest sense. All the same, the legal effects of the normative phenomena are experienced by the international community. The sphere of normative phenomena of ‘soft law’ has remained the subject of academic controversy.

Soft law exists independently of a legally binding agreement. The name accorded to an instrument of international law is insufficient for its characterisation or classification in international law.⁹⁸³ In the first instance, ‘soft law’ attempts to influence international law unilaterally.⁹⁸⁴ In other words, new international norms are created for states and by states. States generally observe new international norms, especially when the applicability of new international norms has a direct impact on a particular state’s behaviour.

In the second instance, not all international agreements are able to secure full consensus from the international community, or a consensus that is sufficiently meaningful for new norm creation.⁹⁸⁵ Generally speaking, ‘soft law’ lacks the character of hard law. ‘Soft law’ instruments or agreements exist outside the normal parameters of legal agreements give credibility to the seriousness of commitment of the parties’ intention to create new standards of conduct for the international community. In this way, a new paradigm for international cooperation is created.

In the third instance, new norms may be couched in the form of organised international cooperation.⁹⁸⁶ These new norms arise from legitimate expectations that are embedded in the socio political compact agreed to by the states concerned. These new norms form the basis of realistic expectations that arise from the international agreement. As such, states and international organisations elect to abide by the new norms created, in the absence of the imposition of hard law nuances.

⁹⁸³ Baxter *supra* at 560-561.

⁹⁸⁴ Dupuy *supra* at 420.

⁹⁸⁵ Dupuy *supra* at 421.

⁹⁸⁶ *Ibid.*

In order to determine which of the above three instances of ‘soft law’ an international agreement most conforms to, an empirical exercise is necessary.⁹⁸⁷ Consequently, the impact of the international agreement, and the manner in which the international community has received it, must be examined.

Participant States most affected by the contents of the Certification Scheme are those directly engaged in the production, import and export of rough diamonds. The World Diamond Council, the WTO and the UN are also impacted upon due to the various roles they play in the diamond trade industry.

Of international organisations, specifically civil society organisations, Partnership Africa Canada and Global Witness have meticulously followed the Certification Scheme from before inception. They have been the foremost critics of the Certification Scheme in poignantly pointing to its so-called loopholes or deficiencies in achieving its two-fold mandate, as enunciated by the UN GA Resolution 55/56.⁹⁸⁸

However, Participant countries in the EU, Africa, and the Americas have reacted positively to the introduction of the Certification Scheme. Some Participant countries have pointed to the shortfalls of the Certification Scheme, as illustrated in the Third Year Review. However, in the main, Participant countries, most notably the EU have passed domestic legislation, or are in the throes of passing domestic legislation, to give effect to the contents of the Certification Scheme. Inasmuch as Third World nations such as Côte d’Ivoire has voiced its many concerns with implementation and monitoring of the Certification Scheme, it has not resisted the norms created by the Certification Scheme.⁹⁸⁹

The reactions of the EU, Africa and the Americas have been so despite the lack of juridical or legal force of the Certification Scheme. Demonstrably, there is a defined and clear commitment by Participant States to adhere to the contents of the Certification Scheme. The Certification Scheme was introduced to the international community at a time when the illicit trade in rough diamonds contributed significantly to gross human rights violations.⁹⁹⁰ In some

⁹⁸⁷ Baxter *supra* at 560-561.

⁹⁸⁸ Smillie ‘Loupe holes’ (2008) at 12-13.

⁹⁸⁹ Feldman *supra* 844-846.

⁹⁹⁰ Feldman *supra* at 845-854.

instances, the significant contribution of the illicit diamond trade contributed to humanitarian crises in Liberia, Angola, the DRC and Sierra Leone.

Countries such as the US and the EU member states, reacted through the passage of sanctions against diamond producing countries.⁹⁹¹ The UN GA passed several Resolutions in an attempt to curb the illicit diamond trade and to remove pariah diamond trading nations from the international trade sphere.⁹⁹² There was also reaction by the UN SC seeking a certificate of origin scheme from Angola for legitimate diamond trade in the international arena. This paved the path for an international certification of origin of rough diamonds scheme.

Despite the difficulties encountered, Participants express their seriousness of intention toward the Certification Scheme through their vociferous complaints and moves for assistance with implementation of the Certification Scheme.⁹⁹³ They seek assistance with technological capacities, language barriers, cooperation and the like.⁹⁹⁴ This is a specific issue that the future Certification Scheme or treaty mechanism can address.

Societies respond to the needs communicated to the law makers in given circumstances. They attempt to articulate compromises of a political, economic, social and moral nature. Contemporary societies attempt to compromise in a more modern fashion, creating pacts and relying upon good faith. The demands of modern international law are not as severe as traditional international law.

Modern international law, especially in the recent three decades has demonstrated a willingness to allow ‘newcomers’ onto the international playing field.⁹⁹⁵ This has been especially in light of the delicacy of situations and commodities that have been the subject of regulation. International instruments, like the Certification Scheme, which lacks the force of law, have come to acquire the force of law. The movement from precepts of norms of ‘soft law’ gave way to hard law.

⁹⁹¹ Schram *supra* at 15.

⁹⁹² Schram *supra* at 15-18.

⁹⁹³ Baxter *supra* at 563-566.

⁹⁹⁴ Baxter *supra* at 556-561.

⁹⁹⁵ Dupuy *supra* at 427.

Common alignment of interests between nation states and international organisations appear more prominently in the international arena.⁹⁹⁶ Therefore, they have acquired more importance than the semantics of legal jargon. In meeting this new challenge, often non-legally binding instruments have become the popular choice. The choice creates avenues for political compromise and international cooperation.⁹⁹⁷ Hard law would be unable to accomplish the same objectives.

It may be stated that on the national level, the Certification Scheme is legally recognised.⁹⁹⁸ On the international level, the document has wielded strong political influence, granting the Certification Scheme a special status, thus making it more binding than most conventional treaties.

The reason that the Participants are eager to adhere to the agreement probably lies with the discrete nature of the diamond trade. Diamonds are at the heart of a multinational, multibillion dollar industry that has prospered on tradition, elitism and secrecy for hundreds of years.⁹⁹⁹

The fact that 70 to 80 percent of global annual production passes through the EU, implies that the EU regulation can have a huge impact on the trade in conflict diamonds.¹⁰⁰⁰ Apart from humanitarian motives, the EU's participation in the Certification Scheme was deemed necessary and desirable for foreign and security policy reasons and economic considerations. Europe is an essential hub for diamonds, with London and Antwerp being two of the world's largest diamond trading centres.¹⁰⁰¹ Naturally, these centres are sensitive to the effects conflict diamonds can have on the legitimate trade. The Certification Scheme merely outlines

⁹⁹⁶ At the 7th Annual Meeting with the KP agreement on export of diamonds from Marange, the WCDC took a decision to have two supervised exports from Zimbabwe despite continued non compliance with the Certification Scheme. The WDC and KP Chair gave firm undertakings that exports will be supervised. It was also agreed that a review mission will ensue prior to the exports. St Petersburg, Russia July 15, 2010. Available on www.wdc.org last visited 08 July 2011; see also Feldman (2003) 872-873.

⁹⁹⁷ KP Chair wrote to Participants informing of continued diamond trading in violation of what he called 'KPCS restrictions.' The DRC is the current Chair of the KP. Letter dated 15 February 2011 available at www.kimberleyprocess.com/documents. Last visited 08 July 2011.

⁹⁹⁸ A good example would be the EU who adopted Regulation no. 2368/2002 implementing the Certification Scheme in the European Community.

⁹⁹⁹ Price 'The Kimberley Process' (2003) at 29.

¹⁰⁰⁰ Donahue PJ 'EU plans tough conflict diamond rules' (2002) August 8 *Professional Jeweler*.

¹⁰⁰¹ Schram *supra* at 14-21.

a framework and, assuming good faith, relies upon Participants to implement effective legislation.

Exclusion from the diamond trading system, or obtaining a blemish on its reputation due to trade in illicit diamonds the Certification Scheme, would be untenable for any diamond-producing country or diamond trader.¹⁰⁰² As Feldman states, ‘in industry circles, such exclusion is often compared to excommunication by the church’.¹⁰⁰³

Concretely, the association of a country and its diamond industry with the trade in conflict diamonds could be interpreted as inability or unwillingness to comply with the Certification Scheme’s minimum requirements.¹⁰⁰⁴ These instances may lead to expulsion or suspension from the Certification Scheme as a Participant or a denial of application for membership.¹⁰⁰⁵

Since the Certification Scheme prohibits trade in diamonds between Participants and non-Participants, the latter become pariahs in the world diamond trade. Therefore, the considerable negative consequences of non-compliance seem to make up for the Certification Scheme’s lack of legal enforcement, giving it more credence of ‘soft law’ characteristics.

The Certification Scheme has proven itself to be a constituent of ‘soft law’ insofar as it confirms the nature of ‘soft law’ instruments. Soft law instruments, by definition, reflect informal cooperation, recognition and acceptance amongst Participants. Soft law reflects a common stance toward the quandary of conflict diamonds. All this constitutes sufficient evidence to prove that the Certification Scheme is ‘soft law’ in nature since inception. Further, it may be said that the Certification Scheme may be considered to be an instrument of international law.

The Certification Scheme is an extraordinary example of how a document with no formal legal force has successfully attained a sound juridical force in its eight years since inception. The case of the Certification Scheme corroborates the view of several authors that law does

¹⁰⁰² Schram *supra* at 10-11.

¹⁰⁰³ Feldman ‘Conflict diamonds’ (2003) at 866.

¹⁰⁰⁴ *Ibid.*

¹⁰⁰⁵ Expulsion from the system is based on a negative result of a compliance assessment by special review missions sent to Participants. For the system of review missions, see *KP Working Doc 1/2002* Section VI at 13. In this manner, countries such as the Central African Republic, the Republic of Congo (Brazzaville) and Lebanon have been visited and were (temporarily) expelled from the Certification Scheme.

not only develop out of the formal sources of its authority, but also to a great extent out of the activity that sustains it.¹⁰⁰⁶

This indeed is true for the Kimberley initiative, which has successfully mustered diamond trading countries' indispensable political willingness to institutionalise non-legal rules into sustained practice. Consequently, it may also be stated that the moral force of practice has culminated in a defined sense of legal obligations among Participants, which in turn has crystallised in the actual implementation of the Certification Scheme in national legislation.

¹⁰⁰⁶ Feldman *supra* at 837-839.

APPENDIX A

KIMBERLEY PROCESS CERTIFICATION SCHEME

PREAMBLE

PARTICIPANTS,

RECOGNISING that the trade in conflict diamonds is a matter of serious international concern, which can be directly linked to the fuelling of armed conflict, the activities of rebel movements aimed at undermining or overthrowing legitimate governments, and the illicit traffic in, and proliferation of, armaments, especially small arms and light weapons;

FURTHER RECOGNISING the devastating impact of conflicts fuelled by the trade in conflict diamonds on the peace, safety and security of people in affected countries and the systematic and gross human rights violations that have been perpetrated in such conflicts;

NOTING the negative impact of such conflicts on regional stability and the obligations placed upon states by the United Nations Charter regarding the maintenance of international peace and security;

BEARING IN MIND that urgent international action is imperative to prevent the problem of conflict diamonds from negatively affecting the trade in legitimate diamonds, which makes a critical contribution to the economies of many of the producing, processing, exporting and importing states, especially developing states;

RECALLING all of the relevant resolutions of the United Nations Security Council under Chapter VII of the United Nations Charter, including the relevant provisions of Resolutions 1173 (1998), 1295 (2000), 1306 (2000), and 1343 (2001), and determined to contribute to and support the implementation of the measures provided for in these resolutions;

HIGHLIGHTING the United Nations General Assembly Resolution 55/56 (2000) on the role of the trade in conflict diamonds in fuelling armed conflict, which called on the international community to give urgent and careful consideration to devising effective and pragmatic measures to address this problem;

FURTHER HIGHLIGHTING the recommendation in United Nations General Assembly Resolution 55/56 that the international community develop detailed proposals for a simple and workable international certification scheme for rough diamonds based primarily on national certification schemes and on agreed minimum standards;

RECALLING that the Kimberley Process, which was established to find a solution to the international problem of conflict diamonds, was inclusive of concerned stake holders, namely producing, exporting and importing states, the diamond industry and civil society;

CONVINCED that the opportunity for conflict diamonds to play a role in fuelling armed conflict can be seriously reduced by introducing a certification scheme for rough diamonds designed to exclude conflict diamonds from the legitimate trade;

RECALLING that the Kimberley Process considered that an international certification scheme for rough diamonds, based on national laws and practices and meeting internationally agreed minimum standards, will be the most effective system by which the problem of conflict diamonds could be addressed;

ACKNOWLEDGING the important initiatives already taken to address this problem, in particular by the governments of Angola, the Democratic Republic of Congo, Guinea and Sierra Leone and by other key producing, exporting and importing countries, as well as by the diamond industry, in particular by the World Diamond Council, and by civil society;

WELCOMING voluntary self-regulation initiatives announced by the diamond industry and recognising that a system of such voluntary self-regulation contributes to ensuring an effective internal control system of rough diamonds based upon the international certification scheme for rough diamonds;

RECOGNISING that an international certification scheme for rough diamonds will only be credible if all Participants have established internal systems of control designed to eliminate the presence of conflict diamonds in the chain of producing, exporting and importing rough diamonds within their own territories, while taking into account that differences in production methods and trading practices as well as differences in institutional controls thereof may require different approaches to meet minimum standards;

FURTHER RECOGNISING that the international certification scheme for rough diamonds must be consistent with international law governing international trade;

ACKNOWLEDGING that state sovereignty should be fully respected and the principles of equality, mutual benefits and consensus should be adhered to;

RECOMMEND THE FOLLOWING PROVISIONS:

SECTION I

Definitions

For the purposes of the international certification scheme for rough diamonds (hereinafter referred to as ‘the Certification Scheme’) the following definitions apply:

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

COUNTRY OF ORIGIN means the country where a shipment of rough diamonds has been mined or extracted;

COUNTRY OF PROVENANCE means the last Participant from where a shipment of rough diamonds was exported, as recorded on import documentation;

DIAMOND means a natural mineral consisting essentially of pure crystallised carbon in the isometric system, with a hardness on the Mohs (scratch) scale of 10, a specific gravity of approximately 3.52 and a refractive index of 2.42;

EXPORT means the physical leaving/taking out of any part of the geographical territory of a Participant;

EXPORTING AUTHORITY means the authority(ies) or body(ies) designated by a Participant from whose territory a shipment of rough diamonds is leaving, and which are authorised to validate the Kimberley Process Certificate;

FREE TRADE ZONE means a part of the territory of a Participant where any goods introduced are generally regarded, insofar as import duties and taxes are concerned, as being outside the customs territory;

IMPORT means the physical entering/bringing into any part of the geographical territory of a Participant;

IMPORTING AUTHORITY means the authority(ies) or body(ies) designated by a Participant into whose territory a shipment of rough diamonds is imported to conduct all import formalities and particularly the verification of accompanying Kimberley Process Certificates;

KIMBERLEY PROCESS CERTIFICATE means a forgery resistant document with a particular format which identifies a shipment of rough diamonds as being in compliance with the requirements of the Certification Scheme;

OBSERVER means a representative of civil society, the diamond industry, international organisations and non-participating governments invited to take part in Plenary meetings; *(Further consultations to be undertaken by the Chair.)*

PARCEL means one or more diamonds that are packed together and that are not individualised;

PARCEL OF MIXED ORIGIN means a parcel that contains rough diamonds from two or more countries of origin, mixed together;

PARTICIPANT means a state or a regional economic integration organisation for which the Certification Scheme is effective; *(Further consultations to be undertaken by the Chair.)*

REGIONAL ECONOMIC INTEGRATION ORGANISATION means an organisation comprised of sovereign states that have transferred competence to that organisation in respect of matters governed by the Certification Scheme;

ROUGH DIAMONDS means diamonds that are unworked or simply sawn, cleaved or bruted and fall under the Relevant Harmonised Commodity Description and Coding System 7102.10, 7102.21 and 7102.31;

SHIPMENT means one or more parcels that are physically imported or exported;

TRANSIT means the physical passage across the territory of a Participant or a non-Participant, with or without transshipment, warehousing or change in mode of transport, when such passage is only a portion of a complete journey beginning and terminating beyond the frontier of the Participant or non-Participant across whose territory a shipment passes;

SECTION II

The Kimberley Process Certificate

Each Participant should ensure that:

- (a) a Kimberley Process Certificate (hereafter referred to as the Certificate) accompanies each shipment of rough diamonds on export;
- (b) its processes for issuing Certificates meet the minimum standards of the Kimberley Process as set out in Section IV;
- (c) Certificates meet the minimum requirements set out in Annex I. As long as these requirements are met, Participants may at their discretion establish additional characteristics for their own Certificates, for example their form, additional data or security elements;
- (d) it notifies all other Participants through the Chair of the features of its Certificate as specified in Annex I, for purposes of validation.

SECTION III

Undertakings in respect of the international trade in rough diamonds

Each Participant should:

- (a) with regard to shipments of rough diamonds exported to a Participant, require that each such shipment is accompanied by a duly validated Certificate;

- (b) with regard to shipments of rough diamonds imported from a Participant:
 - require a duly validated Certificate;
 - ensure that confirmation of receipt is sent expeditiously to the relevant Exporting Authority. The confirmation should as a minimum refer to the Certificate number, the number of parcels, the carat weight and the details of the importer and exporter;
 - require that the original of the Certificate be readily accessible for a period of no less than three years;
- (c) ensure that no shipment of rough diamonds is imported from or exported to a non-Participant;
- (d) recognise that Participants through whose territory shipments transit are not required to meet the requirement of paragraphs (a) and (b) above, and of Section II (a) provided that the designated authorities of the Participant through whose territory a shipment passes, ensure that the shipment leaves its territory in an identical state as it entered its territory (ie unopened and not tampered with).

SECTION IV

Internal Controls

Undertakings by Participants

Each Participant should:

- (a) 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;
- (b) designate an Importing and an Exporting Authority(ies);
- (c) ensure that rough diamonds are imported and exported in tamper resistant containers;
- (d) 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;
- (e) collect and maintain relevant official production, import and export data, and collate and exchange such data in accordance with the provisions of Section V.
- (f) when establishing a system of internal controls, take into account, where appropriate, the further options and recommendations for internal controls as elaborated in Annex II.

Principles of Industry Self-Regulation

Participants understand that a voluntary system of industry self-regulation, as referred to in the Preamble of this Document, will provide for a system of warranties underpinned through verification by independent auditors of individual companies and supported by internal penalties set by industry, which will help to facilitate the full traceability of rough diamond transactions by government authorities.

Section V

Co-operation and Transparency

Participants should:

- (a) provide to each other through the Chair information identifying their designated authorities or bodies responsible for implementing the provisions of this Certification Scheme. Each Participant should provide to other Participants through the Chair information, preferably in electronic format, on its relevant laws, regulations, rules, procedures and practices, and update that information as required. This should include a synopsis in English of the essential content of this information;
- (b) compile and make available to all other Participants through the Chair statistical data in line with the principles set out in Annex III;
- (c) exchange on a regular basis experiences and other relevant information, including on self-assessment, in order to arrive at the best practice in given circumstances;
- (d) consider favourably requests from other Participants for assistance to improve the functioning of the Certification Scheme within their territories;
- (e) inform another Participant through the Chair if it considers that the laws, regulations, rules, procedures or practices of that other Participant do not ensure the absence of conflict diamonds in the exports of that other Participant;
- (f) cooperate with other Participants to attempt to resolve problems which may arise from unintentional circumstances and which could lead to non-fulfilment of the minimum requirements for the issuance or acceptance of the Certificates, and inform all other Participants of the essence of the problems encountered and of solutions found;
- (g) encourage, through their relevant authorities, closer co-operation between law enforcement agencies and between customs agencies of Participants.

Section VI

Administrative Matters

MEETINGS

1. Participants and Observers are to meet in Plenary annually, and on other occasions as Participants may deem necessary, in order to discuss the effectiveness of the Certification Scheme.
2. Participants should adopt Rules of Procedure for such meetings at the first Plenary meeting.
3. Meetings are to be held in the country where the Chair is located, unless a Participant or an international organisation offers to host a meeting and this offer has been accepted. The host country should facilitate entry formalities for those attending such meetings.
4. At the end of each Plenary meeting, a Chair would be elected to preside over all Plenary meetings, *ad hoc* working groups and other subsidiary bodies, which might be formed until the conclusion of the next annual Plenary meeting.
5. Participants are to reach decisions by consensus. In the event that consensus proves to be impossible, the Chair is to conduct consultations.

ADMINISTRATIVE SUPPORT

6. For the effective administration of the Certification Scheme, administrative support will be necessary. The modalities and functions of that support should be discussed at the first Plenary meeting, following endorsement by the UN General Assembly.
7. Administrative support could include the following functions:
 - (a) to serve as a channel of communication, information sharing and consultation between the Participants with regard to matters provided for in this Document;
 - (b) to maintain and make available for the use of all Participants a collection of those laws, regulations, rules, procedures, practices and statistics notified pursuant to Section V;
 - (c) to prepare documents and provide administrative support for Plenary and working group meetings;
 - (d) to undertake such additional responsibilities as the Plenary meetings, or any working group delegated by Plenary meetings, may instruct.

PARTICIPATION

8. Participation in the Certification Scheme is open on a global, non-discriminatory basis to all Applicants willing and able to fulfill the requirements of that Scheme.
9. Any applicant wishing to participate in the Certification Scheme should signify its interest by notifying the Chair through diplomatic channels. This notification should include the information set forth in paragraph (a) of Section V and be circulated to all Participants within one month.
10. Participants intend to invite representatives of civil society, the diamond industry, non-participating governments and international organisations to participate in Plenary meetings as Observers.

PARTICIPANT MEASURES

11. Participants are to prepare, and make available to other Participants, in advance of annual Plenary meetings of the Kimberley Process, information as stipulated in paragraph (a) of Section V outlining how the requirements of the Certification Scheme are being implemented within their respective jurisdictions.
12. The agenda of annual Plenary meetings is to include an item where information as stipulated in paragraph (a) of Section V is reviewed and Participants can provide further details of their respective systems at the request of the Plenary.
13. Where further clarification is needed, Participants at Plenary meetings, upon recommendation by the Chair, can identify and decide on additional verification measures to be undertaken. Such measures are to be implemented in accordance with applicable national and international law. These could include, but need not be limited to measures such as;
 - a. requesting additional information and clarification from Participants;
 - b. review missions by other Participants or their representatives where there are credible indications of significant non-compliance with the Certification Scheme.
14. Review missions are to be conducted in an analytical, expert and impartial manner with the consent of the Participant concerned. The size, composition, terms of reference and time-frame of these missions should be based on the circumstances and be established by the Chair with the consent of the Participant concerned and in consultation with all Participants.
15. A report on the results of compliance verification measures is to be forwarded to the Chair and to the Participant concerned within three weeks of completion of the mission. Any comments from that Participant as well as the report, are to be posted on the restricted access section of an official Certification Scheme website no later than three

weeks after the submission of the report to the Participant concerned. Participants and Observers should make every effort to observe strict confidentiality regarding the issue and the discussions relating to any compliance matter.

COMPLIANCE AND DISPUTE PREVENTION

16. In the event that an issue regarding compliance by a Participant or any other issue regarding the implementation of the Certification Scheme arises, any concerned Participant may so inform the Chair, who is to inform all Participants without delay about the said concern and enter into dialogue on how to address it. Participants and Observers should make every effort to observe strict confidentiality regarding the issue and the discussions relating to any compliance matter.

MODIFICATIONS

17. This document may be modified by consensus of the Participants.
18. Modifications may be proposed by any Participant. Such proposals should be sent in writing to the Chair, at least ninety days before the next Plenary meeting, unless otherwise agreed.
19. The Chair is to circulate any proposed modification expeditiously to all Participants and Observers and place it on the agenda of the next annual Plenary meeting.

REVIEW MECHANISM

20. Participants intend that the Certification Scheme should be subject to periodic review, to allow Participants to conduct a thorough analysis of all elements contained in the scheme. The review should also include consideration of the continuing requirement for such a scheme, in view of the perception of the Participants, and of international organisations, in particular the United Nations, of the continued threat posed at that time by conflict diamonds. The first such review should take place no later than three years after the effective starting date of the Certification Scheme. The review meeting should normally coincide with the annual Plenary meeting, unless otherwise agreed.

THE START OF THE IMPLEMENTATION OF THE SCHEME

21. The Certification Scheme should be established at the Ministerial Meeting on the Kimberley Process Certification Scheme for Rough Diamonds in Interlaken on 5 November 2002.

Annex I Certificates

A. Minimum requirements for Certificates

A Certificate is to meet the following minimum requirements:

- Each Certificate should bear the title ‘Kimberley Process Certificate’ and the following statement: ‘The rough diamonds in this shipment have been handled in accordance with the provisions of the Kimberley Process Certification Scheme for rough diamonds’
- Country of origin for shipment of parcels of unmixed (ie from the same) origin
- Certificates may be issued in any language, provided that an English translation is incorporated
- Unique numbering with the Alpha 2 country code, according to ISO 3166-1
- Tamper and forgery resistant
- Date of issuance
- Date of expiry
- Issuing authority
- Identification of exporter and importer
- Carat weight/mass
- Value in US\$
- Number of parcels in shipment
- Relevant Harmonized Commodity Description and Coding System
- Validation of Certificate by the Exporting Authority

B. Optional Certificate Elements

A Certificate may include the following optional features:

- Characteristics of a Certificate (for example as to form, additional data or security elements)
- Quality characteristics of the rough diamonds in the shipment
- A recommended import confirmation part should have the following elements:
 - Country of destination
 - Identification of importer
 - Carat/weight and value in US\$
 - Relevant Harmonised Commodity Description and Coding System
 - Date of receipt by Importing Authority
 - Authentication by Importing Authority

C. Optional Procedures

Rough diamonds may be shipped in transparent security bags.

The unique Certificate number may be replicated on the container.

Annex II

Recommendations as provided for in Section IV, paragraph (f)

General Recommendations

1. Participants may appoint an official coordinator(s) to deal with the implementation of the Certification Scheme.
2. Participants may consider the utility of complementing and/or enhancing the collection and publication of the statistics identified in Annex III based on the contents of Kimberley Process Certificates.
3. Participants are encouraged to maintain the information and data required by Section V on a computerised database.
4. Participants are encouraged to transmit and receive electronic messages in order to support the Certification Scheme.
5. Participants that produce diamonds and that have rebel groups suspected of mining diamonds within their territories are encouraged to identify the areas of rebel diamond mining activity and provide this information to all other Participants. This information should be updated on a regular basis.
6. Participants are encouraged to make known the names of individuals or companies convicted of activities relevant to the purposes of the Certification Scheme to all other Participants through the Chair.
7. Participants are encouraged to ensure that all cash purchases of rough diamonds are routed through official banking channels, supported by verifiable documentation.
8. Participants that produce diamonds should analyse their diamond production under the following headings:
 - Characteristics of diamonds produced
 - Actual production

Recommendations for Control over Diamond Mines

9. Participants are encouraged to ensure that all diamond mines are licensed and to allow only those mines so licensed to mine diamonds.
10. Participants are encouraged to ensure that prospecting and mining companies maintain effective security standards to ensure that conflict diamonds do not contaminate legitimate production.

Recommendations for Participants with Small-scale Diamond Mining

11. All artisanal and informal diamond miners should be licensed and only those persons so licensed should be allowed to mine diamonds.
12. Licensing records should contain the following minimum information: name, address, nationality and/or residence status and the area of authorised diamond mining activity.

Recommendations for Rough Diamond Buyers, Sellers and Exporters

13. All diamond buyers, sellers, exporters, agents and courier companies involved in carrying rough diamonds should be registered and licensed by each Participant's relevant authorities.
14. Licensing records should contain the following minimum information: name, address and nationality and/or residence status.
15. All rough diamond buyers, sellers and exporters should be required by law to keep for a period of five years daily buying, selling or exporting records listing the names of buying or selling clients, their license number and the amount and value of diamonds sold, exported or purchased.

16. The information in paragraph 14 above should be entered into a computerised database, to facilitate the presentation of detailed information relating to the activities of individual rough diamond buyers and sellers.

Recommendations for Export Processes

17. An exporter should submit a rough diamond shipment to the relevant Exporting Authority.
18. The Exporting Authority is encouraged, prior to validating a Certificate, to require an exporter to provide a declaration that the rough diamonds being exported are not conflict diamonds.
19. Rough diamonds should be sealed in a tamper proof container together with the Certificate or a duly authenticated copy. The Exporting Authority should then transmit a detailed e-mail message to the relevant Importing Authority containing information on the carat weight, value, country of origin or provenance, importer and the serial number of the Certificate.
20. The Exporting Authority should record all details of rough diamond shipments on a computerised database.

Recommendations for Import Processes

21. The Importing Authority should receive an e-mail message either before or upon arrival of a rough diamond shipment. The message should contain details such as the carat weight, value, country of origin or provenance, exporter and the serial number of the Certificate.
22. The Importing Authority should inspect the shipment of rough diamonds to verify that the seals and the container have not been tampered with and that the export was performed in accordance with the Certification Scheme.
23. The Importing Authority should open and inspect the contents of the shipment to verify the details declared on the Certificate.
24. Where applicable and when requested, the Importing Authority should send the return slip or import confirmation coupon to the relevant Exporting Authority.
25. The Importing Authority should record all details of rough diamond shipments on a computerised database.

Recommendations on Shipments to and from Free Trade Zones

26. Shipments of rough diamonds to and from free trade zones should be processed by the designated authorities.

Annex III Statistics

Recognising that reliable and comparable data on the production and the international trade in rough diamonds are an essential tool for the effective implementation of the Certification Scheme, and particularly for identifying any irregularities or anomalies which could indicate that conflict diamonds are entering the legitimate trade, Participants strongly support the following principles, taking into account the need to protect commercially sensitive information:

- (a) to keep and publish within two months of the reference period and in a standardised format, quarterly aggregate statistics on rough diamond exports and imports, as well as the numbers of certificates validated for export, and of imported shipments accompanied by Certificates;
- (b) to keep and publish statistics on exports and imports, by origin and provenance wherever possible; by carat weight and value; and under the relevant Harmonised Commodity Description and Coding System (HS) classifications 7102.10; 7102.21; 7102.31;
- (c) to keep and publish on a semi-annual basis and within two months of the reference period statistics on rough diamond production by carat weight and by value. In the event that a Participant is unable to publish these statistics it should notify the Chair immediately;
- (d) to collect and publish these statistics by relying in the first instance on existing national processes and methodologies;
- (e) to make these statistics available to an intergovernmental body or to another appropriate mechanism identified by the Participants for (1) compilation and publication on a quarterly basis in respect of exports and imports, and (2) on a semiannual basis in respect of production. These statistics are to be made available for analysis by interested parties and by the Participants, individually or collectively, according to such terms of reference as may be established by the Participants;
- (f) to consider statistical information pertaining to the international trade in and production of rough diamonds at annual Plenary meetings, with a view to addressing related issues, and to supporting effective implementation of the Certification Scheme.

Table of figures

| | |
|--|-----|
| Figure 1: A copy of the Kimberley Process Certificate used by the Republic of Liberia. Source: www.kimberelyprocess.com | |
| Also displayed is an ‘Import confirmation’ document..... | 43 |
| Figure 2: Global production of diamonds 2009 | 44 |
| Figure 3: PAC Occasional Paper 2010 available at www.pacweb.org/zimbabwe | |
| This table demonstrates the events in the Marange (Zimbabwe) diamond fields despite Zimbabwe being a Participant in the Certification Scheme..... | 54 |
| Figure 4: Global production of diamonds 2010 at www.kimberleyprocess.com | 55 |
| Figure 5: Import of rough diamond parcels compliant with the Certification Scheme requirements for the year 2010 | 56 |
| Figure 6: Import of rough diamond parcels compliant with the Certification Scheme requirements for the year 2011..... | 57 |
| Figure 7: Export of rough diamond parcels compliant with the Certification Scheme requirements for the year 2010 | 58 |
| Figure 8: Kimberley Process Certificate counts for year 2010 | 59 |
| Figure 9: Kimberley Process Certificate counts for year 2011 | 60 |
| Figure 10: Table: Annual Global Summary for 2010..... | 61 |
| Figure 11: Structure of the Kimberley Process Certification Scheme..... | 94 |
| Figure 13: Top diamond producing countries in 2008..... | 257 |
| Figure 10 Diamond exports 2008..... | 259 |
| Figure 14: Top diamond importing countries 2008..... | 260 |
| Figure 15: Sierra Leone diamond exports 2003 -2008..... | 269 |
| Figure 16: PAC Occasional Paper..... | 286 |

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