

The (Re-)Regulation of International Economic Relations: The example of Conflict Diamonds and the Kimberley Process

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Abstract: Over the years, diamonds, which are meant to be symbols of beauty and love, have become more and more associated with situations of conflict and violations of human rights. The Kimberley Process (KP) was created to ensure that certified diamonds were free of conflict, specifically that they had not been used by rebel groups to finance their wars against legitimate governments. This chapter aims to demonstrate why the issues related to blood diamonds are still relevant more than twenty years after they were brought to the attention of the international community, and how the trade regime put in place to regulate the flow of blood diamonds, the KP, is falling behind due to modern understandings of what a conflict diamond means, and how consumers have become more socially conscious and expect more transparency in the supply chain.

I. Introduction

For some, a diamond can be a symbol of status, luxury, or, thanks to the ‘slogan of the century’ “A Diamond is Forever” (courtesy of the De Beers Group), a symbol of eternal love. The same company speaks of the importance of symbols of enduring strength “in a world of short-term fixes where so much is disposable”.¹ And while behind every diamond is a story, it might not be one you wish to tell when passing down said diamonds to your descendants, because, for others, a diamond can be a symbol of war, suffering, and loss.

‘Blood’ diamonds, also known as conflict diamonds, are rough diamonds generally used by rebel movements or their allies to finance armed conflicts aimed at undermining legitimate governments.² Such operations lead to important human rights violations and

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¹ <https://www.debeersgroup.com/about-us/a-diamond-is-forever>

² UNGA Resolution 55/56.

serious violations of international humanitarian law (including sexual violence) but also massive displacements of persons.

This chapter aims to demonstrate why the issues related to blood diamonds are still relevant more than twenty years after they were brought to the attention of the international community, and how the trade regimes put in place to regulate the flow of blood diamonds are falling behind due to modern understandings of what a conflict diamond means, and how consumers have become more socially conscious and expect more transparency in the supply chain. To do so, in section II, we will document the case of the blood diamond by explaining the reason behind the regulation of the international trade of blood diamonds before detailing how the Kimberley Process works. Then, in section III, we will present the latest developments regarding the Kimberley Process, specifically the outdated definition of conflict diamonds and the possible inclusion of responsible sourcing practices in the Kimberley Process. We then offer some concluding remarks in section IV.

II. Blood Diamonds and the Kimberley Process

A. Why Regulate the International Trade of Blood Diamonds?

The concern over issues related to blood diamonds first started in the context of the Angolan civil war. By observing the annual reports of the De Beers group, which had policies to purchase as much of the global diamond production as it could, the Non-governmental organisation (NGO) Global Witness discovered that diamonds purchased from Angola during the 1991-1992 period came largely from mines controlled by the Angolan rebel group National Union for the Total Independence of Angola (UNITA), which controlled most of the major diamond production areas at the time, thus allowing them to fund the ongoing civil war.³ After Global Witness brought international attention to conflict diamonds in 1998, the United Nations Security Council (UNSC) adopted Resolution 1173 and Resolution 1176, which sought to bring an end to the conflict by

³ NIGEL DAVIDSON, *The Lion that didn't Roar: Can the Kimberley Process stop the Blood Diamonds Trade?*, Canberra, ANU Press, 2016, p. 11-12.

imposing sanctions against the UNITA movement, specifically targeting its ability to finance the war through the sale of blood diamonds.

Despite these sanctions, the Fowler Report, a UN report released on the 14th of March 2000, detailed the ways in which different governments and companies, had violated the Lusaka Protocol as well as UN-imposed sanctions, by acting as intermediaries for UNITA.⁴ The report brought widespread international attention to the link between the illicit diamond trade and third-world conflicts.

Another civil war that brought attention to the link between the illicit diamond trade and violations of human rights was the Sierra Leonean civil war. Once again, Global Witness demonstrated the connection between diamonds sold to consumers and the armament of militias such as the Revolutionary United Front (RUF), backed by Liberia, which had been known to commit atrocities to instil fear in local populations, notably amputation of hands and feet.⁵

So far, we have discussed the role diamonds have played in civil wars, but something that is worth mentioning is that diamonds can also be at the root of conflict because one of the major causes of internal conflict is poverty.⁶ Although diamonds can serve as great development tools, the geological nature of diamonds can make it complicated for governments to regulate their mining,⁷ and bad governance can be a driver of poverty if communities are excluded from the benefits diamonds can provide.⁸

Alluvial diamond fields, which allow for artisanal mining without heavy machinery, generally act as magnets for people in extreme poverty, hoping to find a “way out”. In such cases, concessions to largescale mining companies, for example, can be seen as

⁴ ROBERT FOWLER, *Report of the Panel of Experts on Violations of Security Council Sanctions Against UNITA (The ‘Fowler Report’)*, n^{os} 27-29.

⁵ NIGEL DAVIDSON, *The Lion that didn’t Roar*, cit., p. 12-13.

⁶ PARTNERSHIP AFRICA CANADA AND GLOBAL WITNESS, *Rich Man, Poor Man, Development Diamonds and Poverty Diamonds: The Potential for Change in the Artisanal Alluvial Diamond Fields of Africa*, 2004, p. 1.

⁷ *Idem*, p. 3-4.

⁸ KIMBERLEY PROCESS CIVIL SOCIETY COALITION, *Real Care is Rare: An on-the-ground perspective on blood diamonds and the fifth ‘C’*, 2019, p. 15.

unfair because communities see it as depriving them of their land and livelihood, causing conflicts with government authorities.⁹ When artisanal miners have left no choice but to operate illegally because governments have made it illegal or are unable to provide proper formalisation, this only exacerbates the proliferation of illicit trade which in turn facilitates the trade of conflict diamonds.¹⁰ Furthermore, artisanal miners are also vulnerable in cases when armed groups manage to take control over diamond mining areas, eventually recruiting miners into their ranks, or forcing them to dig for diamonds. “The poverty, the hundreds of thousands of willingly exploited adults and children, and the volatility of the diamond fields make for a highly flammable social cocktail, one that has ignited several times in recent years, with tragic results”.¹¹

From a more general view, it is no surprise that diamonds show up as a common denominator in situations of conflict and human rights violations when an unregulated diamond industry is auspicious to secretive trade practices where buyers are willing to turn a blind eye to atrocities to lower prices.¹²

Thankfully, in the aftermath of the Fowler report, it was clear that the industry could not remain unregulated, and the United Nations General Assembly (UNGA) adopted Resolution 55/56, which served as the basis for the core document of the Kimberley Process Certification Scheme (KPCS).

B. The Kimberley Process

“The Kimberley Process (KP) unites administrations, civil societies and industry in reducing the flow of conflict diamonds [...] around the world.”¹³

⁹ KPCS, *Real Care is Rare*, cit., p. 15.

¹⁰ *Idem*, p. 10.

¹¹ PARTNERSHIP AFRICA CANADA AND GLOBAL WITNESS, *Rich Man, Poor Man*, cit., p. 6-7.

¹² *Idem*, p. 4.

¹³ <https://www.kimberleyprocess.com/>

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The KP is a multilateral “trade regime” established in 2003 with the goal of preventing the flow of conflict diamonds to combat serious international crime in the areas of organised crime, terrorist financing, money laundering, corruption, and economic crime.

The KP participants are states and regional economic integration organisations that are eligible to trade in rough diamonds. In total, there are 59 participants representing 85 countries, with the European Union (EU) counting as a single participant.¹⁴ The participants include all major rough diamond-producing, exporting, and importing countries. The diamond industry, through the World Diamond Council (WDC), for example, and civil society groups, represented by the Kimberley Process Civil Society Coalition (KP CSC) are also integral parts of the KP.¹⁵ These organisations have been involved from the start and continue to contribute to its effective implementation and monitoring, even though they have no voting rights, and can only be granted observer status.

Strictly speaking, the KP is not an international organisation, nor is it based on a treaty. It has no permanent offices or staff. It relies on the contributions – under the principle of ‘burden-sharing’ – of participants, supported by industry and civil society observers. The KP cannot be considered an international agreement from a legal perspective either, even though it is in the form of a treaty, because its principles are only implemented through the national legislations of its participants, and it is not signed or ratified as a standard treaty would.¹⁶

The participants of the KP must: satisfy ‘minimum requirements’ and establish national legislation, institutions, and import/export controls; commit to transparent practices and to the exchange of critical statistical data; trade only with fellow members who also satisfy the fundamentals of the agreement; and certify shipments as conflict-free and provide the supporting certification.¹⁷ The KPCS is at the core of the KP. Under it, States

¹⁴ <https://www.kimberleyprocess.com/en/participants>

¹⁵ <https://www.kimberleyprocess.com/en/observers>

¹⁶ NIGEL DAVIDSON, *The Lion that didn't Roar*, cit., p. 77.

¹⁷ Kimberley Process Certification Scheme Core Document.

implement safeguards on shipments of rough diamonds and certify them as “conflict-free”.

Given the nature of the KP, it is up to the participating countries to implement it into national law. An example of such implementation is EU Regulation 2368/2002, which sets up a Community system of certification and import and export controls for rough diamonds (art. 1). To fulfil the different criteria, rough diamonds must be: accompanied by a certificate from the competent authorities of a participating country (art. 3 let. a); contained in tamper-resistant containers with intact seals applied at export by the other participating country (art. 3 let. b); and the certificate must clearly identify the consignment it refers to (art. 3 let. c).

If the exporter of the rough diamond in question is not a country but an organisation, specifically one that represents traders in rough diamonds, they can apply to be included in the list laid out in Annex V of Regulation 2368/2002. However, they must prove that they have established a system of warranties and a system self-regulation for the purposes of applying the KPCS. If they meet all the criteria of Article 17, they no longer have to provide a certificate, but can simply provide a signed declaration to the effect of lawful import (article 13).

Furthermore, the presence of both industry groups and civil society groups in the Kimberley Process is part of its strengths, even though they play different roles and have different interests.

The industry, for example, is driven by the fact that it wants to maintain diamonds as symbols of beauty and love, which cannot be done if consumers associate diamonds with conflict and violence. In fact, the Kimberley Process has always been driven by the needs and interests of the industry, since the beginning. This creates an interesting outcome, where the system works as a hybrid between government regulation and industry self-regulation.¹⁸ Oddly enough, the industry oftentimes wishes to go further than

¹⁸ NIGEL DAVIDSON, *The Lion that didn't Roar*, cit., p. 106.

governments, as will be discussed below in section III. Civil society groups, on the other hand, are there to hold governments and industry ‘accountable’ by using their independent research networks to monitor KP obligations, acting as a moral compass.¹⁹

While the KP has played a vital role in reducing the number of conflict diamonds in the trade of rough diamonds, it does have quite a few shortcomings that have been the subject of extensive criticism over the years. We will now address the two main critiques: the outdated definition of conflict diamonds, and the lack of implementation of responsible sourcing practices.

III. Latest Developments Regarding the Kimberley Process

A. The Definition of Conflict Diamonds

The definition of conflict diamond has stayed the same for over 20 years, since its inception. This has consistently been one of the major critiques of the KP for more than a decade.²⁰

The definition of what constitutes a conflict diamond is indeed very narrow; as mentioned above, conflict diamonds are diamonds “used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments”. This proved to be an issue when, for example, in 2009 and 2010, different armed groups in the Central African Republic (CAR) were violently preying on diamond mining communities, but since they were not ‘rebels’, the KP did not get involved, and CAR diamonds continued to be labelled “conflict-free”. However, once those groups came together in 2013 and overthrew the government and civil war ensued, the KP put an embargo on diamonds from CAR. This ‘after the fact’ intervention completely undermines the KP’s ability to prevent conflict in the first place.

Moreover, by limiting the definition of conflict only to situations where a rebel movement undermines a legitimate government, it ignores any other situations of violence,

¹⁹ NIGEL DAVIDSON, *The Lion that didn't Roar*, cit., p. 110.

²⁰ KPCS, *Real Care is Rare*, cit., p. 8.

including, for example, those where a legitimate government is the perpetrator. The KP CSC has documented many situations where state forces violently took control of previously artisanal diamond mines to make way for industrial mining or military officials taking control over diamond mines for their own benefit, and many other situations where corruption and organised crime can be linked to military and government officials.²¹

This specific limitation of the KP quickly became obvious regarding diamonds originating from the Marange region in Zimbabwe; in 2008, the Zimbabwean military deployed over 800 soldiers to take control of the region due to the proliferation of, illegal, artisanal miners, which resulted in over 200 deaths.²² Although the KP did conclude that Zimbabwe did not meet minimum requirements, an embargo was placed only on diamonds from the Marange region, rather than on all Zimbabwean diamonds. Following the six-month deadline to meet minimum requirements, the KP found that they had been met, despite contradictory reports by human rights groups, which allowed for a supervised auction of Marange diamonds.²³ Unsurprisingly, it was the KP's narrow definition of conflict diamond that ultimately prevented it from putting any effective pressure on the Zimbabwean government, because Marange diamonds did not fit the definition.²⁴

Furthermore, the KP ignores situations of international conflict. This is especially striking given the ongoing war on Ukraine by Russia. Russia is responsible for over one-third of the world's diamond production. However, since Russia's invasion of Ukraine in 2022, the KP has refused to put an embargo on Russian diamonds, even though Russian diamonds can continue to be used to finance Russia's war against Ukraine. This inaction has led to multiple countries imposing their individual sanctions on the matter, raising the question of the KP's efficiency in preventing diamonds from financing conflict, which is its mandate.²⁵

²¹ KPCS, *Real Care is Rare*, cit.

²² <https://www.crisisgroup.org/africa/southern-africa/zimbabwe/time-rethink-kimberley-process-zimbabwe-case>

²³ *Ibidem*.

²⁴ *Ibidem*.

²⁵ Press Release Kimberley Process Civil Society Coalition, 14 June 2022, p. 2.

What is interesting on the matter of the definition of conflict diamonds, is that both industry groups and civil society representations have been in favour of enlarging the scope of the KP to include all situations of violence leading to human rights abuses for years now.²⁶ The KP could take the example of the many regulations on other conflict minerals, for example, Regulation 2017/821 of the EU, which deals with minerals sourced from “conflict-affected and high-risk areas” (art. 1). They define “conflict-affected and high-risk areas” as “areas in a state of armed conflict or fragile post-conflict as well as areas witnessing weak or non-existent governance and security, such as failed states, and widespread and systematic violations of international law, including human rights abuses” (art. 2 let. f).

By ignoring modern understandings of what conflict diamonds have come to represent, the KP risks falling behind and losing the confidence of consumers, to whom the KP CSC is one of the only guarantees they can have when it comes to purchasing diamonds.

Furthermore, one of the major critiques of the KP has been that by focusing solely on conflict diamonds, as understood by the KP, it does not concern itself with responsible sourcing practices.²⁷

B. Responsible Sourcing Practices

In the field of international economic law, the liberalisation of international economic relations has been the main focus for a long time. Traditionally speaking, international economic relations were established to facilitate the opening of markets, promote liberalisation and eliminate trade obstacles.²⁸ However, deregulation of markets can only go so far before reaching certain limits, especially in certain fields where human rights and democracy, for example, are involved. In the case of the diamond industry, the situations and examples we have given above demonstrate that whatever systems are in place, whether they come from industry self-regulation or government regulation, are

²⁶ <https://www.kimberleyprocess.com/en/news>

²⁷ <https://www.jckonline.com/editorial-article/kimberley-process-framework/>

²⁸ ANDREAS R. ZIEGLER, *Droit international économique*, Bern, Stämpfli Editions, 2017, n° 592.

insufficient or ineffective at preventing human rights violations. Questions regarding the traceability and the origin of diamonds are becoming more and more important to consumers.²⁹ This is why market (re-)regulation is needed to ensure the stability of the diamond industry in the long term (e.g., competition) and to fight against abuse (integrity).³⁰

The diamond industry has always been concerned with the images associated with diamonds, which is why they were very much in support of developing the Kimberley Process when the link between diamonds and conflict was brought to the international stage.³¹ When it comes to responsible sourcing practices, the industry is well aware that in order to compete with the rise of synthetic/lab-made diamonds on the market, which are *de facto* conflict (and blood) free, they must find ways to gain the consumer's trust.³² Unfortunately, the industry alone is unable to solve these concerns on its own and has, so far, been ineffective in preventing recent diamond-related abuses. Furthermore, adopting ethics guidelines simply to remain competitive can have the opposite effect of facilitating abuses in certain situations, for example by accidentally creating a secondary market for less expensive unethical diamonds, or even presenting industrially produced diamonds as being better than artisanal ones, indirectly encouraging governments to assert industrial mining, which they have been known to do violently in the past.³³ Industry efforts to encourage more transparency include, for example, GemFair, put in place by the DeBeers group, which allows for diamonds to be traced back to their origin, and encourages sourcing from small-scale miners.³⁴

The KP certification, as it is, serves as a way to guarantee consumers that their diamonds are conflict-free, but even with the KP certification, they might have no information about where the diamond is from, or how it was mined, and, therefore, if it is ethical.³⁵ While

²⁹ KPCS, *Real Care is Rare*, cit., p. 17.

³⁰ ANDREAS R. ZIEGLER, *Droit international économique*, cit., n° 592.

³¹ NIGEL DAVIDSON, *The Lion that didn't Roar*, cit., p. 106.

³² KPCS, *Real Care is Rare*, cit., p. 17.

³³ *Idem*, cit., p. 18.

³⁴ MEIKE SCHULTE, SREEJITH BALASUBRAMANIAN and CODY MORRIS PARIS, *Blood Diamonds and Ethical Consumerism: An Empirical Investigation*, in *Sustainability*, 2021, p. 557-558.

³⁵ *Idem*, p. 557.

the industry alone cannot solve this issue, the KP is the only body which, due to its position, would be able to address human rights issues in an effective manner across the whole diamond sector.

Recently, the KP has made some apparent progress on the topic of responsible sourcing. During its plenary in 2021, it passed a Declaration on Supporting Principles for Responsible Diamond Sourcing Best Practices, also known as ‘Frame 7’. This declaration simply recognizes the importance of certain principles “including labor and human rights, development of diamond mining communities, environmental protection and anti-money-laundering and anti-corruption policies”.³⁶ It has been made clear, however, that the passing of the declaration does not mean that those principles are officially part of the KP, simply that the KP supports such principles. We find the press release made by the KP Civil Society Coalition on the matter to be quite striking: “It was a sad sight to see participants tone down the language of this non-binding document and seek continuous assurances that it would in no way require them to take any action on giving effect to it”.³⁷ This demonstrates that participants are fully aware of different irresponsible sourcing practices but wish to limit themselves to “supporting” the principles and collaborating with “interested external organizations”.

This unwillingness to adopt responsible sourcing practices in the KP also goes in contradiction with the KP’s mandate of preventing conflict, as reaffirmed in the resolution adopted by the UNGA in 2020.³⁸ This is because responsible sourcing practices would include better redistribution of diamond mining benefits to mining communities, which would encourage their development, therefore, reducing poverty, a known source of conflict and violence.

The lack of consensus regarding including responsible sourcing practices into the KP is even more difficult to explain when, for years, both the KP CSC and the WDC, albeit for different reasons, have urged KP participants to adopt reform measures.³⁹ This begs the

³⁶ <https://www.jckonline.com/editorial-article/kimberley-process-framework/>

³⁷ *Ibidem.*

³⁸ UNGA A/74/L.39.

³⁹ <https://www.kimberleyprocess.com/en/news>

question of why industry and civil society are represented in the first place if KP participants choose to ignore them rather than taking advantage of their presence to “develop a diamond governance mechanism that genuinely prevents conflict and promotes development”.⁴⁰

The insignificance of the passing of ‘Frame 7’ in 2021 is highlighted even further by the fact that the KP chair’s final communiqué in the following year bears no mention of ‘Frame 7’ or responsible sourcing practices.⁴¹ We can only hope that the *ad hoc* committee on reform set up after the 2022 plenary will tackle issues of responsible sourcing practices on top of trying to redefine conflict diamonds.

IV. Conclusion

Throughout this chapter, we have demonstrated that the blood diamond issue is still very much as relevant today as it was in 1998. However, it has become evident that the definition given to conflict diamonds over twenty years ago is a product of its time that must catch up to the current ways in which diamonds are involved in conflict and violations of human rights.

Since the KP’s inception, there have been far too many situations where the KP would have been the ideal body to get involved but, due to its narrow scope, was not able to do so. Most recently, the KP being unable to do anything about Russian diamonds, which are still certified ‘conflict-free’, leaving individual states to impose unilateral internal restrictions. In the long run, if states must resolve to internal regulations, this will negatively impact the trade of diamonds, which is why common regulations are preferable in order to ensure market stability.

Unfortunately, the KP’s inability/unwillingness to adopt reform measures is putting the utility/efficiency of the certification scheme into question. The KP CSC has gone so far as to describe the KP as appearing to be a tripartite process on paper while “in reality it

⁴⁰ Press Release Kimberley Process Civil Society Coalition, 4 March 2020, p. 2.

⁴¹ <https://www.kimberleyprocess.com/en/2022-final-communiqué-gaborone-botswana>.

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is a government-dominated body that fails to transcend national interests”⁴² and “remains a process that only serves to protect state interests against rebels seeking to overthrow them”.⁴³ And if the KP continues to fail to adopt meaningful reforms due to KP participants blocking such efforts, we have no choice but to agree with these statements.

Despite this, we still believe that the KP has the potential to deal with the issues surrounding blood diamonds. To do so, it must fully take advantage of the presence of both civil society and industry representations to better understand how to address issues while considering what is in the best interest of all parties involved.

⁴² Press Release Kimberley Process Civil Society Coalition, 22 November 2019, p. 2.

⁴³ Press Release Kimberley Process Civil Society Coalition, 22 November 2019, p. 1.