

7-1-2005

# Is Diamond Smuggling Forever? The Kimberley Process Certification Scheme: The First Step Down the Long Road to Solving the Blood Diamond Trade Problem

Julie L. Fishman

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## Recommended Citation

Julie L. Fishman, *Is Diamond Smuggling Forever? The Kimberley Process Certification Scheme: The First Step Down the Long Road to Solving the Blood Diamond Trade Problem*, 13 U. Miami Bus. L. Rev. 217 (2014)

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# IS DIAMOND SMUGGLING FOREVER? THE KIMBERLEY PROCESS CERTIFICATION SCHEME: THE FIRST STEP DOWN THE LONG ROAD TO SOLVING THE BLOOD DIAMOND TRADE PROBLEM

JULIE L. FISHMAN\*

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## I. INTRODUCTION

In late October 2003, the United Nations (UN) publicly linked British diamond mining giant, De Beers, to the looting of the Democratic Republic of the Congo's (DRC) diamond supply.<sup>1</sup> According to the UN, two of De Beers' rough diamond dealers allegedly purchased rough diamonds in the

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\* Candidate, J.D., University of Miami School of Law, 2005; A.B., American Studies, Brandeis University. The author would like to thank the following for their contribution and support: my family, Susan Fishman, Amee and Al Fishman, Diane and Jerry Fishman, and Alan Canter; Kelli Vail; Alan C. Swan, Professor of Law, University of Miami School of Law; and The UNIVERSITY OF MIAMI BUSINESS LAW REVIEW Executive and Editorial Board and members.

<sup>1</sup> See Varsha Gupta d'Souza, *DR Congo: U.N. Report Takes Sparkle of De Beers' Diamonds*, INTER PRESS SERVICE, Nov. 6, 2003.

DRC without an accompanying certificate in violation of the newly adopted Kimberley Process Certification Scheme (KPCS).<sup>2</sup> John Oppenheimer, director of De Beers, vehemently denied De Beers' involvement in any illegal transactions, and insisted that his company had been found guilty by association.<sup>3</sup>

The KPCS requires the government of the DRC, the nation where the alleged rough diamond sale occurred, and the government of Great Britain, the place of De Beers' incorporation, to investigate, and if necessary, sanction any person or business found guilty of buying, selling, or trading in uncertified rough diamonds.<sup>4</sup> The Scheme requires these nations to independently, and concurrently, punish violators in an effort to deter the trade in "blood diamonds"<sup>5</sup> from continuing.

This article recognizes the international diamond trading community's commitment to implementing the KPCS in order to end the blood diamond trade. The basic premise of this article is that, while in theory the goals of the initiative are sound and feasible, in practice they will fail to solve the blood diamond trade problem. A system that requires no international watchdog or universal guidelines, and instead merely suggests ways for nations to conduct their investigations and punish violators, invites abuse and inefficiency. Part II provides an explanation of blood diamonds and demonstrates how trade in these jewels has fueled rebellion in many African nations, thus jeopardizing African peace and stability. Part III sets forth the history of the DRC, illustrating how the blood diamond trade has hindered the development and strength of many African nations. Part IV describes the international community's response to the blood diamond problem through the KPCS, the goals the Scheme seeks to achieve, and specifically, what the United States (the largest diamond consumer in the world) has done to comply with the Scheme. Part V argues that while the goals of the

<sup>2</sup> See *id.*

<sup>3</sup> See Press Release, De Beers, De Beers and the UN Panel Report on the DRC (Oct. 29, 2003), available at <http://www.debeersgroup.com>. In December 2003, British Foreign Office Minister Chris Mullin stated that in fact De Beers was not guilty of the allegations. See David Pallister, *UN 'Snubbed Over Congo War Breaches': Government Delays Checks on Whether Firms Broke Rules*, THE GUARDIAN, Dec. 20, 2003.

<sup>4</sup> See Kimberly Process: Kimberley Process Certification Scheme, available at <http://www.kimberleyprocess.com> (last visited Feb. 17, 2005).

<sup>5</sup> "The term 'blood diamonds' [also known as 'conflict diamonds'] specifically refers to diamonds that are extracted and exported from particular regions of sub-Saharan Africa ravaged by vicious armed conflicts. These civil wars are instigated by warlords, renegade militia, and rebel groups that depend on the illegal sale of blood diamonds in exchange for military weapons, guns, fuel, and assorted war materials...." Paul Orogun, *"Blood Diamonds" and Africa's Armed Conflicts in the Post-Cold War Era*, 166 WORLD AFF. 151, Winter 2004. For purposes of this paper, the term "legitimate diamonds" means diamonds which are not "blood diamonds" or "conflict diamonds."

plan are comprehensive in theory, in practice they have not been achieved and therefore will fail to solve the grassroots blood diamond trade problem. The paper then suggests ways by which those goals might be achieved.

## II. THE BLOOD DIAMOND PROBLEM: FUEL FOR AFRICAN REBEL FORCE REBELLION

Blood diamonds play a vital role in fueling war in many African nations. These rough diamonds, also known as conflict diamonds, originate from nations such as Angola, Sierra Leone, and the Democratic Republic of the Congo (DRC).<sup>6</sup> Rebel forces, who oppose the legitimate and recognized governments of these nations, control much of these countries' diamond producing areas.<sup>7</sup> These rebel groups control the mines and sell blood diamonds in order to buy arms and supply cash flow for their military actions against such governments, in contravention of United Nations Security Council resolutions.<sup>8</sup>

The fungible nature of diamonds, their easy portability and concealment, as well as inherent high value and demand, make blood diamonds an easy product to sell on the black market. Worldwide, the blood diamond trade is worth approximately \$300 million a year, comprising between three to fifteen percent of the total world trade in diamonds.<sup>9</sup> However, "these estimates represent only the ascertainable percentage of [the blood diamond] trade... [indicating that] the actual percentage may be [much higher]."<sup>10</sup>

Despite the overall small value of the blood diamond trade worldwide, the practice has compromised international peace and human security, and has hindered the economic and social development of the affected nations.<sup>11</sup> However, it is important to know that despite the harm inflicted upon African economic and political stability, trade in conflict diamonds had

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<sup>6</sup> UNITED NATIONS DEP'T OF PUBLIC INFO. & SANCTIONS BRANCH, SEC. COUNCIL AFF. DIV., DEP'T OF POL. AFF., *Conflict Diamonds: Sanctions and War*, at <http://www.un.org/peace/africa/Diamond.html> (last updated Mar. 21, 2001).

<sup>7</sup> See *id.*

<sup>8</sup> See *id.*

<sup>9</sup> See Tracey Michelle Price, *The Kimberley Process: Conflict Diamonds, WTO Obligations, and the Universality Debate*, 12 MINN. J. GLOBAL TRADE 1, 25 (Winter 2003).

<sup>10</sup> Tracey Michelle Price, *The Kimberley Process: Conflict Diamonds, WTO Obligations, and the Universality Debate*, 12 MINN. J. GLOBAL TRADE 1, 25 (Winter 2003) (citing Ian Smillie, et al, *The Heart of the Matter: Sierra Leone, Diamonds & Human Security* (Partnership Africa Canada, Ontario, Can.), Jan. 2000, at §1.2, available at <http://www.sierra-leone.org/heartmatter.html> (estimating that African rebel groups may supply as much as twenty percent of the world's diamond market)).

<sup>11</sup> See Kimberley Process: Background, at <http://www.kimberleyprocess.com:8080/site/?name=background> (last visited Feb. 17, 2005).

helped the legitimate diamond industry prosper for many years, and was not viewed as an international problem. For decades, De Beers and other legitimate diamond companies actually traded with rebel groups and profited from this practice.<sup>12</sup> The funds received from the sale of these diamonds meant war for African nations. But the sales also meant an increased supply of diamonds available for sale on the legitimate diamond market.<sup>13</sup> As a result, diamond trade with rebel groups was not, until recently, deterred by international law.<sup>14</sup>

### III. BLOOD DIAMONDS AND THE DEMOCRATIC REPUBLIC OF THE CONGO

Blood diamond trade has greatly affected the nations of Sierra Leone, Angola, and the Democratic Republic of the Congo (DRC).<sup>15</sup> While their direct histories differ, the impact of the trade on each nation's development is the same. The following case study of the DRC provides a closer look into the devastating effects of the blood diamond trade.

As one of the world's most important diamond producing countries,<sup>16</sup> diamonds serve as one of the DRC's greatest economic resources.<sup>17</sup> However, as much as eighty-five percent of Congolese diamonds are smuggled out of the country and not reported to the DRC government, depriving millions of dollars from the nation's gross domestic product.<sup>18</sup> Each year, at least forty million dollars in taxes go unpaid, leaving the DRC

<sup>12</sup> See *Trade in African Diamonds: Hearing Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 106th Cong. 10 (2000) (statement of Rep. Tony P. Hall, Member, House Comm. on Ways and Means).

<sup>13</sup> See *id.*

<sup>14</sup> See *id.* (commenting that diamond traders were willing to trade with rebels throughout the 1990s, and specifically that "[f]or eight years, traders dealt gladly with rebels who tried to overthrow Sierra Leone's elected government, and briefly succeeded.").

<sup>15</sup> See *The Kimberley Process*, at <http://www.kimberleyprocess.com> (last visited Feb. 17, 2005).

<sup>16</sup> In the 1930s, Sir Ernest Oppenheimer, a leader in the De Beers Diamond Cartel concluded that control over the diamond mines in the then called Belgium Congo was the key to the cartel's control of world production. Edward Jay Epstein, *Have You Ever Tried to Sell a Diamond*, THE ATLANTIC MONTHLY ONLINE (February 1982), available at <http://www.theatlantic.com/issues/82feb/8202diamond1>. See *Timeline: Democratic Republic of Congo*, BBC News, at [http://news.bbc.co.uk/1/hi/world/africa/country\\_profiles/1072684.stm](http://news.bbc.co.uk/1/hi/world/africa/country_profiles/1072684.stm) (last updated Jan. 8, 2005); *Country Profile: Democratic Republic of Congo*, BBC News, at [http://news.bbc.co.uk/1/hi/world/africa/country\\_profiles/1076399.stm](http://news.bbc.co.uk/1/hi/world/africa/country_profiles/1076399.stm) (last updated Feb. 16, 2005).

<sup>17</sup> *D.R. Congo to Set up Certification Scheme for Diamonds*, at [http://www.conflictdiamonds.com/pages/Newsarchive/27\\_04\\_00.htm](http://www.conflictdiamonds.com/pages/Newsarchive/27_04_00.htm) (last visited Feb. 17, 2005).

<sup>18</sup> Price, *supra* note 9, at 26 (citing 148 Cong. Rec. E908 (daily ed. May 24, 2002) (Statistic provided by Congressman Tony Hall on the floor of the H.R.)).

government without benefit of one of its greatest economic resources.<sup>19</sup> The diamond, a resource which could potentially improve the economic status of the DRC, has instead thrown the country into the center of Africa's "world war."<sup>20</sup>

The recent history of the DRC begins in 1960. After sixty years of Belgium colonization, the Congo<sup>21</sup> gained its independence.<sup>22</sup> Independence in a land of vast natural resources, however, did not guarantee peace and stability. Following five volatile and turbulent years,<sup>23</sup> Joseph Mobutu, a rebel leader, gained control of the DRC after a coup d'état, and established a strong dictatorship that lasted for the next thirty years.<sup>24</sup> In 1971, he renamed the nation "Zaire."<sup>25</sup>

In the early 1980s, Mobutu abruptly ended an exclusive contract between Zaire and a subsidiary of De Beers in order to exploit his nation's diamond resources through more lucrative deals.<sup>26</sup> Regardless of the actual intent behind this change, the sudden removal of De Beers from Zaire's diamond industry drastically undercut the stability of the diamond market, demonstrating just how valuable diamonds were to the economic welfare of the country.<sup>27</sup> After a brutal conflict between rebels and Mobutu's government soldiers, Mobutu's reign ended between 1996 and 1997.<sup>28</sup>

In February 1997, the United Nations attempted to establish peace in Zaire through a five-point plan calling for: (1) the cessation of hostilities; (2) the withdrawal of all external forces; (3) the reaffirmation of the sovereignty and territorial integrity of Zaire; (4) the protection of all refugees and displaced persons; and (5) the rapid and peaceful settlement of the conflict through dialogue, the electoral process, and an international conference on

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<sup>19</sup> *Id.*

<sup>20</sup> See *Timeline: Democratic Republic of Congo*, *supra* note 16; See *Country Profile: Democratic Republic of Congo*, *supra* note 16.

<sup>21</sup> Over the last 50 years, the DRC had been called Belgian Congo, Congo, Zaire, as well as the DRC. Congo, Democratic Republic of the, at <http://www.infoplease.com/ipa/A0198161.html> (last visited Feb. 19, 2005).

<sup>22</sup> See *Timeline: Democratic Republic of Congo*, *supra* note 16; See *Country Profile: Democratic Republic of Congo*, *supra* note 16 (providing a background summary of the DRC's history, politics, and economics).

<sup>23</sup> In the five years following the Congo's independence from Belgium, armed forces threatened the stability of the nation, ending with a military coup, which resulted in the assassination of the country's Prime Minister, Patrice Lumumba. See GEORGES NZONGOLA-NTALAJA, *THE CONGO FROM LEOPOLD TO KABILA: A PEOPLE'S HISTORY*, 95 (2002).

<sup>24</sup> See CH. DIDIER GONDOLA, *THE HISTORY OF CONGO*, 128-29 (2002).

<sup>25</sup> See *id.* at 142.

<sup>26</sup> See Epstein, *supra* note 16.

<sup>27</sup> See *id.*

<sup>28</sup> See GONDOLA, *supra* note 24, at 159-62.

peace in the region.<sup>29</sup> Despite these efforts for peace, rebels, led by Laurent-Désiré Kabila, captured eastern Zaire, and then the capital.<sup>30</sup> Kabila named himself president, and changed the country's name back to the "Democratic Republic of the Congo."<sup>31</sup>

Despite the new government under Kabila, rebellion in the DRC continued. Kabila's "[p]romise of a new Congo without Mobutism remained unfulfilled..." and the economy continued to falter.<sup>32</sup> In an effort to improve the economy, Kabila entered into a new agreement with Rwanda and Uganda to exploit the DRC's natural resources through an intricate network of mining companies and financial institutions.<sup>33</sup> Diamonds were a vital aspect of this plan.

By 1998, this political and financial endeavor fell apart when, "Rwanda and Uganda encouraged [an] anti-Kabila group, the Congolese Democratic Rally... to take arms against [Kabila],"<sup>34</sup> and to support this uprising by trading rough diamonds for arms and money. The rebellion eventually evolved into a complex full scale civil war involving seven African nations.<sup>35</sup> In April 1999, the United Nations called for a cease-fire,<sup>36</sup> which was eventually complied with by August 1999.<sup>37</sup> Under the terms of the Lusaka Peace Agreement cease-fire, Zambia, Angola, Namibia, Rwanda, Uganda, and Zimbabwe agreed with the DRC to stop fighting and to withdraw their forces from the DRC.<sup>38</sup>

The 1999 Lusaka Peace Agreement, however, created a misperception of peace. Anti-Kabila rebel groups residing in the DRC did not fully comply, and they continue to wreak havoc, violence, and turmoil in the country.<sup>39</sup> In December 2000, the United Nations Security Council expressed "serious concern" over the humanitarian crisis and again called for the immediate withdrawal of all Rwandan and Ugandan forces.<sup>40</sup> As of May

<sup>29</sup> See S.C. Res. 1097, U.N. SCOR, 52d Sess., 3741st mtg. ¶ 1, U.N. Doc. S/RES/1097 (1997).

<sup>30</sup> See GONDOLA, *supra* note 24, at 161.

<sup>31</sup> NZONGOLA-NTALAJA, *supra* note 23, at 1.

<sup>32</sup> GONDOLA, *supra* note 24, at 166.

<sup>33</sup> See *id.* at 167.

<sup>34</sup> *Id.*

<sup>35</sup> These nations include: The DRC, Zambia, Angola, Namibia, Rwanda, Uganda, and Zimbabwe. *Id.*

<sup>36</sup> See S.C. Res. 1234, U.N. SCOR, 54th Sess., 3993d mtg. at 2, U.N. Doc. S/RES/1234 (1999).

<sup>37</sup> Bush Speaks Death Penalty Gaffe at <http://home.mindspring.com/~katrap/LAGAI/UVMarch2001.htm>.

<sup>38</sup> See GONDOLA, *supra* note 24, at 171.

<sup>39</sup> See S.C. Res. 1332, U.N. SCOR, 55th Sess., 4247th mtg. ¶ 10 at 2, U.N. Doc. S/RES/1332 (2000). See also U.N. Security Council "Concerned" by Resumption of Fighting in DR Congo, Agence France-Presse, Dec. 23, 2000, available at 2000 WL 24786586.

<sup>40</sup> See U.N. Security Council "Concerned" by Resumption of Fighting in DR Congo, *supra* note 39.

2002, the U.N. had verified that only Namibia had withdrawn all of its combat troops from the DRC.<sup>41</sup>

Since 1998 over 3 million people have died as a result of the continued fighting.<sup>42</sup> Despite the nation's potential wealth from its vast resources in diamonds, cobalt, and timber, sixteen million people were reported starving in 2001, while two out of every five children died in infancy.<sup>43</sup> In October 2002, a United Nations Panel of Experts reported that, although the Seven-Nation War had diminished in strength, the overlapping conflicts it created still continue.<sup>44</sup> The rebel factions associated with the armies of Uganda, Rwanda, Zimbabwe, and the anti-Kabila groups in the DRC continue to benefit from the conflicts over natural resources, including rough diamonds.<sup>45</sup>

By December 2003, however, Kabila formed a "unity" government, which most of the DRC rebel groups joined, in an effort to stabilize the nation.<sup>46</sup> "[The] new government includes four vice presidents and thirty-six ministers, sixteen of [whom] are former rebels."<sup>47</sup> Despite the good intentions of this "unity of rebels" to promote peace and stability in the DRC, the old corrupt culture of the DRC continues under the new, broad-based government.<sup>48</sup> The effort at unity has proven unfulfilled. Violence still terrorizes the nation.<sup>49</sup> In May 2004, an insurgency located in an eastern city of the DRC erupted, resulting in a resurgence of Rwandan support for various rebel groups fighting against the new DRC government.<sup>50</sup> While at least some rebels are working with the government rather than against it, the propensity of rebel groups to rise up against any government they disapprove of is not likely to disappear.

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<sup>41</sup> See *Report of the Security Council Mission to the Great Lakes Regions*, 27 April-7 May 2002, U.N. SCOR, 56th Sess., 3406th mtg. at 3, U.N. Doc. S/2002/537 (2002).

<sup>42</sup> See Orogun, *supra* note 5, at 157.

<sup>43</sup> See *Congo in Dire Trouble, Say Agencies*, BBC News, available at <http://news.bbc.co.uk/1/hi/world/africa/1477003.stm> (last visited Feb. 19, 2005).

<sup>44</sup> See *Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo*, U.N. SCOR, 57th Sess., 1146th mtg. ¶ 12, U.N. Doc. S/2002/1146 (2002).

<sup>45</sup> See *id.*

<sup>46</sup> See Carter Dougherty, *Sifting Through a Dark Business; Does Congo's Diamond Trade Defy Change? Kimberly Reforms may not be Working Fully*, NEWSWEEK INT'L, Dec. 8, 2003, at 34.

<sup>47</sup> Congo, Democratic Republic of the, at <http://www.infoplease.com/ipa/A0198161.html> (last visited Feb. 19, 2005).

<sup>48</sup> Dougherty, *supra* note 46.

<sup>49</sup> See Congo, Democratic Republic of the, *supra* note 47.

<sup>50</sup> See *id.*



#### IV. TAKING A STAND TO END BLOOD DIAMOND TRADE

##### A) *The Kimberley Process Certification Scheme*

The turbulent history of the Democratic Republic of the Congo (DRC) is very much a product of the blood diamond trade; a trade that has been the essential fuel for a bitter war adversely affecting national stability and regional peace. The recently established peace in Sierra Leone and in Angola, as well as the cease-fire in the DRC, has slightly helped to decrease the trade in conflict diamonds.<sup>51</sup> Moreover, the diamond industry itself has finally recognized the continued need for a system to protect legitimate worldwide channels of diamond distribution from blood diamonds.<sup>52</sup> It is this recognition that has resulted in the development of the Kimberley Process Certification Scheme (KPCS) for diamonds.<sup>53</sup>

Negative publicity, growing public awareness about the existence of blood diamonds, and pressure from non-governmental organizations (NGOs) motivated the South African government to summon all interested governments, members of the diamond industry, and NGOs, to meet and discuss ways to solve the blood diamond problem.<sup>54</sup> The efforts of this group became known as "The Kimberley Process."<sup>55</sup> In December 2000, after gaining worldwide recognition, "all 191 members of the United Nations General Assembly voted unanimously to support the [P]rocess."<sup>56</sup>

Two years later, on November 5, 2002, thirty-nine diamond-trading<sup>57</sup> nations<sup>58</sup> officially adopted the KPCS, through the Interlaken Declaration,<sup>59</sup>

<sup>51</sup> See THE WORLD DIAMOND COUNCIL, THE ESSENTIAL GUIDE TO IMPLEMENTING THE KIMBERLEY PROCESS 10 (2003) available at <http://www.worlddiamondcouncil.com/Kimberley%20Process%20Implementation%20Guide.pdf> [hereinafter *Essential Guide*].

<sup>52</sup> See *id.*

<sup>53</sup> See *id.* at 11.

<sup>54</sup> See *id.*

<sup>55</sup> See *id.*

<sup>56</sup> *Id.*

<sup>57</sup> As of February 2003, the Kimberley Process included forty-four countries, accounting for approximately 98% of the production and global trade in rough diamonds. See *WTO Goods Council Approves Kimberley Process Waiver*, BRIDGES WKLY. TRADE NEWS DIG., Feb. 27, 2003, available at <http://www.ictsd.org/weekly/03-02-27/story3.htm>.

<sup>58</sup> As of April 2005, the following states participate in the Kimberley Process, having met the minimum requirements of the KPCS: Angola, Armenia, Australia, Belarus, Botswana, Brazil, Bulgaria, Canada, Central African Republic, People's Republic of China, Democratic Republic of Congo, Cote d'Ivoire, Croatia, the European Community, Ghana, Guinea, Guyana, India, Israel, Japan, Republic of Korea, Democratic Republic of Laos, Lethoso, Malaysia, Mauritius, Namibia, Norway, Romania, Russian Federation, Sierra Leone, South Africa, Sri Lanka, Switzerland, Tanzania, Thailand, Togo, Ukraine, United Arab Emirates, United States of America, Venezuela, Vietnam, Zimbabwe. See

a declaration designed to formally recognize and address the conflict diamond problem,<sup>60</sup> in order to protect the approximate \$7 billion legitimate diamond trade and business.<sup>61</sup> Named after the South African city of Kimberley, the KPCS supplements the existing United Nations sanctions targeted at preventing the blood diamond trade.<sup>62</sup>

The KPCS establishes a mandatory certification system for all rough diamonds, in order to break the link between rough diamond trade and armed conflict in African nations like the DRC.<sup>63</sup> The purpose of such a certification scheme is to make it more difficult for warlords, rebel militias, and rogue regimes to flood the international market with diamonds, meaning that diamonds will no longer serve as a means of funding revolts.<sup>64</sup> Overall, the KPCS seeks to help African countries regain control of their potentially great natural wealth, which in turn will foster political stability, economic diversity, and growth.<sup>65</sup> International recognition of the need for a program like the KPCS demonstrates the importance of the diamond industry to the economies of many African nations.

On January 1, 2003, the Scheme was simultaneously implemented by all participating nations.<sup>66</sup> The KPCS requires each participating nation to

Kimberley Process: List of Participants, at <http://www.kimberleyprocess.com:8080/site/?name=participants&PHPSESSID=8f15b6bb4b3bebf72fb4853a8f8f21c> (last visited Apr. 10, 2005).

<sup>59</sup> This document formally declared the commitment of the above-mentioned nations to promote prosperity through the diamond trade and to work to end the blood diamond trade. See INTERLAKEN DECLARATION OF 5 NOVEMBER 2002 ON THE KIMBERLEY PROCESS CERTIFICATION SCHEME FOR ROUGH DIAMONDS, at [http://www.kimberleyprocess.com:8080/site/www\\_docs/plenary\\_meetings9/interlaken\\_declaration.pdf](http://www.kimberleyprocess.com:8080/site/www_docs/plenary_meetings9/interlaken_declaration.pdf).

<sup>60</sup> See *id.*

<sup>61</sup> See generally, World Diamond Council: Productivity, at <http://www.worlddiamondcouncil.com> (last visited Feb. 17, 2005).

<sup>62</sup> See Price, *supra* note 9, at 69 n.9 (stating that "Diamonds from Angola, Sierra Leone, and Liberia are subject to mandatory UNSC sanctions, pursuant to UNSC Resolutions 1127 (1997), 1306 (2000), and 1343 (2001), respectively."). See generally Angola (UNITA) Sanctions Regulations 31 C.F.R. pt. 590 (2001); *Illicit Diamonds, Conflict and Terrorism: The Role of U.S. Agencies in Fighting the Conflict Diamond Trade*, Subcomm. on Oversight of Gov't Mgmt., Restructuring, and the District of Columbia of the Comm. on Governmental Aff., 107th Cong., 2d Sess. (Feb. 13, 2002) (statement of Alan W. Eastham, Special Negotiator for Conflict Diamonds, Bureau of Econ. and Bus. Aff.) (stating that the Kimberley Process will "supplement and enhance the Security Council measures").

<sup>63</sup> See generally, The Kimberley Process, *supra* note 15.

<sup>64</sup> See Orogun, *supra* note 5, at 154.

<sup>65</sup> For example, in Sierra Leone, since the rebel disarmament and restoration of control of the diamond mines to the government of Sierra Leone, the country's gross domestic product increased by 5.4 percent and inflation decreased sharply to three percent. See *IMF Unblocks Aid for Sierra Leone*, BBC News, available at <http://news.bbc.uk/1/hi/world/africa/1870259.stm> (last visited Feb. 19, 2005).

<sup>66</sup> See Kimberley Process for Rough Diamonds- Background, at [https://mmsd1.mms.nrcan.gc.ca/kimberleyprocess/intro\\_e.asp](https://mmsd1.mms.nrcan.gc.ca/kimberleyprocess/intro_e.asp) (last visited April 10, 2005).

enact legislation putting the following authorities in place: "a requirement that all shipments of rough diamonds imported to or exported from [the nation is] certified under the scheme[,]. . . trade prohibitions, banning the trade in rough diamonds with [non-participating countries]," <sup>67</sup> an official commitment reflecting and upholding the goals of the KPCS, and to meet annually to discuss and monitor the progress of the program.<sup>68</sup> The KPCS does not, however, require each participating nation to provide any official means for enforcing this legislation.<sup>69</sup> As a result, much discretion is left in the hands of each participating nation.

The KPCS requires that each import or export of rough diamonds be transported in a tamper-resistant container and accompanied by a government-validated Kimberly Process Certificate, which attests that the diamonds are not blood diamonds.<sup>70</sup> These certificates seek to ensure that diamonds traded through the "diamond pipeline"<sup>71</sup> are not the product of rebel groups, and that the diamonds in each "shipment have been handled in accordance with the provisions of the Kimberley Process Certification Scheme."<sup>72</sup> Each certificate must be resistant to forgery, with the country of origin clearly labeled on parcels of unmixed diamonds.<sup>73</sup> Various identifications must be included, such as a unique tracking number, dates of issuance and expiration, the issuing authority, the identity of the exporter or importer, carat weight, the United States dollar value, and a description of the shipment's contents.<sup>74</sup> The KPCS restricts diamond trade to *only certified diamonds*, and prohibits trade between KPCS participants and non-participants.<sup>75</sup>

In addition to the Kimberley Process Certificate, the World Diamond Council, a leading diamond organization, proposed, and the Kimberley Process participants endorsed, a system of warranties, whereby all buyers and sellers of both rough and polished diamonds must make the following

<sup>67</sup> See *id.*

<sup>68</sup> See generally, The Kimberley Process, *supra* note 15.

<sup>69</sup> See *id.*

<sup>70</sup> See *Essential Guide*, *supra* note 51, at 1.

<sup>71</sup> The "diamond pipeline" refers to the various stages a diamond goes through before ultimately reaching the consumer. The pipeline begins at diamond mines on four continents, in about twenty-six countries. Diamonds are then processed in one of approximately thirty countries, and then sold throughout the world. See Price, *supra* note 9 at 69 n.19. See also World Diamond Council: Presentations: White House Conference (Jan.10, 2001), available at <http://www.worlddiamondcouncil.com>.

<sup>72</sup> Official statement that must be included on every certificate. See Kimberley Process: Kimberley Process Certification Scheme, *supra* note 4.

<sup>73</sup> See *Essential Guide*, *supra* note 51, at 1.

<sup>74</sup> See *id.* See also Kimberley Process: Kimberley Process Certification Scheme, *supra* note 4.

<sup>75</sup> See *Essential Guide*, *supra* note 51, at 3.

affirmative statement on all invoices: "The diamonds herein invoiced have been purchased from legitimate sources not involved in funding conflict and in compliance with United Nations resolutions. The seller hereby guarantees that these diamonds are conflict free, based on personal knowledge and/or written guarantees provided by the supplier of these diamonds."<sup>76</sup> Once a certified shipment has entered its intended country, the shipment may be traded, in whole or in part, and mixed with other parcels of certified rough diamonds as long as all subsequent trades or sales are also accompanied by the necessary warranties.<sup>77</sup> Rough diamond dealers within a country's borders are expected to comply with the same guidelines for warranties as importing and exporting dealers, except that the rough diamond dealers need not include the Kimberley Process Certificate.<sup>78</sup> They only need ensure that the rough diamonds purchased are from venders who can provide an invoice with the warranties declaration.<sup>79</sup> The invoice must read, "The diamonds herein invoiced have been purchased from legitimate sources not involved in funding conflict and in compliance with United Nations resolutions. The seller hereby guarantees that these diamonds are conflict free, based on personal knowledge and/or written guarantees provided by the supplier of these diamonds."<sup>80</sup> Failure to comply with these procedures can lead to confiscation of the diamonds or the rejection of parcels offered for sale, and criminal sanctions against the importer or exporter.<sup>81</sup> In order to participate in the Scheme, countries needed to comply and implement legislation by July 31, 2003, or face isolation from the legitimate diamond-trading world.<sup>82</sup>

In addition to national compliance with the KPCS, diamond industry organizations and their members adopted a system of self-regulation.<sup>83</sup> Additionally, leading international organizations within the diamond industry, such as the World Diamond Council, Jewelers of America, the

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<sup>76</sup> *Id.* at 2.

<sup>77</sup> *Id.*

<sup>78</sup> *See id.*

<sup>79</sup> *Id.* at 5.

<sup>80</sup> *Id.*

<sup>81</sup> *See id.* at 3.

<sup>82</sup> *See* Conflict Prevention: Final Communiqué, available at [http://www.humansecurity.gc.ca/conflictprev\\_sun\\_city-en.asp](http://www.humansecurity.gc.ca/conflictprev_sun_city-en.asp) (last visited Apr. 11, 2005).

<sup>83</sup> These diamond industry organizations have pledged to trade only with companies that include warranty declarations on their invoices, to refuse to buy diamonds from suspect sources or unknown suppliers or from nations that have not implemented the KPCS, to refuse to buy diamonds from any sources that, after a legally binding due process system, have been found to have violated government regulations, to not knowingly buy or sell or assist others in buying or selling conflict diamonds, and to ensure that all company employees be kept abreast as to trade resolutions and government restrictions restricting the trade in conflict diamonds. *See Essential Guide*, *supra* note 51, at 2-3.

World Federation of Diamond Bourses, and the International Diamond Manufacturers Association, vowed to expel any trader found trading in contravention of the KPCS from the diamond industry.<sup>84</sup> To avoid abuses and to ensure that the system of warranties is both employed and effective, the World Diamond Council requested that diamond jewelry retailers insist that their suppliers provide warranties for all diamonds polished after January 1, 2003.<sup>85</sup>

In addition to the diamonds currently being excavated from diamond mines, the KPCS drafters recognized that billions of dollars worth of rough and polished diamonds presently exist in industry inventories, as well as in the hands of past consumers. Both of these diamond supplies may easily re-enter the marketplace over time. Instead of confiscating all diamonds mined and sold pre-January 1, 2003, the drafters recommended that all owners of such diamonds in the market to sell these diamonds stipulate to the best of their ability that the diamonds are not blood diamonds and indicate the place of origin, preferably with a statement from the seller attesting to this fact.<sup>86</sup> The World Diamond Council suggests sellers of diamonds that pre-date January 1, 2003 include a statement saying: "The diamonds herein invoiced have been purchased prior to January 1, 2003 from sources that, to the best of our knowledge, are reliable. The seller hereby guarantees that they have no personal knowledge or reason to believe that these diamonds are involved in funding conflict and/or have been traded in violation of any United Nations Resolution."<sup>87</sup>

In early April 2003, in Johannesburg, South Africa, KPCS participants met for their first Plenary Meeting,<sup>88</sup> to assess the strengths and weaknesses of the KPCS.<sup>89</sup> Representatives in attendance from NGOs<sup>90</sup> welcomed the international commitment made to taking additional effective steps to break the link between diamonds and human rights violations and conflict in Africa.<sup>91</sup> However, the meeting revealed that several governments failed to

<sup>84</sup> See Orogun, *supra* note 5, at 160.

<sup>85</sup> See Essential Guide, *supra* note 51, at 9.

<sup>86</sup> *Id.* at 9.

<sup>87</sup> *Id.*

<sup>88</sup> The Plenary Meetings are the annual meetings that all members of the KPCS must attend in order to be good standing participants.

<sup>89</sup> News Release: Kimberley Process Still in Process: Progress Made, but Key Issues Remain, AMNESTY USA (May 1, 2003), available at <http://www.amnestyusa.org/news/2003/world04302003.html>.

<sup>90</sup> These NGOs included: Action Aid (UK and Sierra Leone, Amnesty International (International Secretariat), Cenadep (DRC), Fatal Transactions (The Netherlands), Global Witness (UK), Network Movement for Justice and Development (Sierra Leone), Oxfam International, Partnership Africa Canada, World Vision (USA), among others. *Id.*

<sup>91</sup> See *id.*

implement a system of regular and independent monitoring of all participants; a measure necessary to ensure that the Process does not become abused.<sup>92</sup> Despite this revelation, no action was taken at the meeting to establish any regular monitoring mechanism to assess all national diamond control systems over time, which would thereby meet consumer expectations of trust and credibility.<sup>93</sup>

Troubled by the lack of progress made, the NGOs called for the strengthening of four critical elements of the Kimberley Process: monitoring, membership criteria, participant coordination, and accurate collection of trade and production statistics.<sup>94</sup> During the October Plenary Meeting, in an effort to increase the Kimberley Process' credibility and force, and to address the concerns of the NGOs, the participating nations agreed to establish a peer review mechanism.<sup>95</sup> This would create a comprehensive framework for monitoring implementation of the process, through a combination of reporting, voluntary "review visits," and "review missions" to participating nations.<sup>96</sup> The mechanism includes a clear requirement that all participants report annually on the implementation of the Scheme within the participating nation.<sup>97</sup> While reporting is required, review visits to participating nations is voluntary, however, the participating nations agreed it would be "desirable for the largest number of participants possible to volunteer to receive a review visit."<sup>98</sup> The "review missions" would be conducted in an impartial manner by other members of the KPCS, and would report their findings to the current Chair of the KPCS.<sup>99</sup> The DRC, in particular, indicated its desire to hold discussions on statistics, and to host review visits during the coming year.<sup>100</sup>

To date, the first and only country to face expulsion from the KPCS is the Republic of Congo, due to a discrepancy between the millions of dollars worth of uncut diamonds exported from the country and the minimal amount of diamond resources within the nation.<sup>101</sup> "This disparity raised

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<sup>92</sup> See *id.*

<sup>93</sup> See *id.*

<sup>94</sup> See *id.*

<sup>95</sup> See Kimberly Process, Final Communiqué: Kimberley Process Plenary Meeting Sun City, South Africa, 29-31 October 2003, at [http://www.kimberleyprocess.com:8080/site/www\\_docs/plenary\\_meetings13/1sun\\_city\\_final\\_communique.pdf](http://www.kimberleyprocess.com:8080/site/www_docs/plenary_meetings13/1sun_city_final_communique.pdf).

<sup>96</sup> See *id.*

<sup>97</sup> See *id.*

<sup>98</sup> *Id.*

<sup>99</sup> See The Kimberley Process: Kimberley Process Certification Scheme, *supra* note 15.

<sup>100</sup> Kimberly Process, Final Communiqué: Kimberley Process Plenary Meeting Sun City, South Africa, 29-31 October 2003, *supra* note 95.

<sup>101</sup> See Nicole Itano, *Diamond Trade Cleans Up: Last Week 43 Nations Agree to Stop Trading with the*

suspicious that the country served as a clearinghouse for conflict diamonds..." resulting in its July 9, 2004 expulsion.<sup>102</sup> However, on Oct. 7, 2004, the Chair of the Kimberley Process and the Government of the Republic of Congo issued a joint statement indicating that based on the Republic of Congo's recognition that it improperly utilized the Kimberley Process certificates, and its promise to implement policies and legislative measures to address this problem, the Chair welcomed the Republic of Congo to continue its efforts in order to re-integrate into the Kimberly Process.<sup>103</sup> Therefore, provided the Republic of Congo keeps its promise to "put in place policies and legislative measures" to address the problems which resulted in their expulsion, the Republic of Congo likely will again be recognized as a participating nation.<sup>104</sup>

As of April 2005, forty-three states and regional economic integration organizations have met the minimum requirements of the KPCS.<sup>105</sup> An additional twenty states have applied for membership and are currently attempting to meet the requirements of the Scheme.<sup>106</sup>

#### B) *The United States Takes A Role: The Clean Diamond Trade Act*

As the world's largest marketplace for diamonds and leading consumer,<sup>107</sup> the United States recognized that without its participation in the quest to eliminate trade in conflict diamonds, world trade in legitimate diamonds would face the threat of consumer backlash.<sup>108</sup> If the United States did not participate in the KPCS, the world's largest consumer of diamonds would face isolation from the non-conflict diamond-trading world.<sup>109</sup> Without participating, the United States would only be able to purchase diamonds from other non-participating nations, therefore

*Congo Republic, a Source of Illicit Diamonds*, CHRISTIAN SCI. MONITOR, July 16, 2004, at 7.

<sup>102</sup> *Id.*

<sup>103</sup> See *Meeting Between the Chair and the Republic of Congo Joint Statement*, Oct. 7, 2004.

<sup>104</sup> See *id.*

<sup>105</sup> These include: Angola, Armenia, Australia, Belarus, Botswana, Brazil, Bulgaria, Canada, Central African Republic, People's Republic of China, Democratic Republic of Congo, Cote d'Ivoire, Croatia, the European Community, Ghana, Guinea, Guyana, India, Israel, Japan, Republic of Korea, Democratic Republic of Laos, Lethoso, Malaysia, Mauritius, Namibia, Norway, Romania, Russian Federation, Sierra Leone, South Africa, Sri Lanka, Switzerland, Tanzania, Thailand, Togo, Ukraine, United Arab Emirates, United States of America, Venezuela, Vietnam, Zimbabwe. See Kimberley Process: List of Participants, *supra* note 58.

<sup>106</sup> *Id.*

<sup>107</sup> American consumers buy two-thirds of all the world's diamonds. *Trade in African Diamonds*, *supra* note 12.

<sup>108</sup> See 19 U.S.C.A. §3901(6) (2003).

<sup>109</sup> See *id.*

supporting blood diamond trade and further damaging the economies of diamond producing nations affected by the conflict diamond trade.<sup>110</sup> Moreover, refraining from participation would penalize members of the legitimate trade.<sup>111</sup> The United States realized its obligation to help sever the link between diamonds and conflict and the need to press for the implementation of an effective solution.<sup>112</sup> In fiscal year 2000, over \$800 million in rough diamonds entered the United States from fifty-three countries,<sup>113</sup> significantly contributing to the United States estimated \$26 billion jewelry industry.<sup>114</sup> Recognizing the importance of the initiative, the United States joined the KPCS to work toward ending the blood diamond trade.<sup>115</sup>

As per the KPCS requirement,<sup>116</sup> on April 25, 2003, the United States Senate and House of Representatives passed the Clean Diamond Trade Act.<sup>117</sup> The Act bans the importation of uncertified diamonds into the United States in an effort to guarantee that conflict diamonds stay out of the country.<sup>118</sup> On July, 30, 2003, President Bush signed the Clean Diamond Trade Act, just one day before the deadline for implementing the certification process passed.<sup>119</sup>

In passing the Bill, Congress recognized that "funds derived from the sale of rough diamonds are being used by rebel and state actors to finance military activities, overthrow governments, subvert international efforts to promote peace and stability, and commit horrifying atrocities against unarmed civilians."<sup>120</sup> Additionally, Congress acknowledged that during the past decade, war over the control of diamond mining areas forced more than

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<sup>110</sup> "Failure to curtail the trade in conflict diamonds or to differentiate between the trade in conflict diamonds and the trade in legitimate diamonds could have a severe negative impact on the legitimate diamond trade in countries such as Botswana, Namibia, South Africa, and Tanzania." 19 U.S.C.A. §3901(7) (2003).

<sup>111</sup> See *id.*

<sup>112</sup> See 19 U.S.C.A. §3901(5) (2003).

<sup>113</sup> U.S. Gen. Accounting Office, GAO-2-02-425T, *International Trade: Significant Challenges Remain in Deterring Trade in Conflict Diamonds: Testimony Before the Subcomm. on Oversight of Gov't Mgmt, Restructuring and the Dist. of Columbia, Comm. on Gov't Aff.*, U.S. Senate 11 (2002)(statement of Loren Yager, Director, Internal Affairs and Trade), available at [www.gao.gov](http://www.gao.gov).

<sup>114</sup> See Price, *supra* note 9, at 42.

<sup>115</sup> See generally 19 U.S.C.A. §3901 (2003).

<sup>116</sup> Under the terms of the Kimberley Process, each participating nation must implement national certification schemes through legislation. See Kimberley Process: Background, *supra* note 11.

<sup>117</sup> See 19 U.S.C.A. §3901 (2003).

<sup>118</sup> See *id.*

<sup>119</sup> Victoria Gomelsky, *U.S. Kimberley Legislation Makes July 31 Deadline: Twenty-three Countries Do Not Meet Compliance Requirements*, NAT'L JEWELER, Sept. 1, 2003, at 6.

<sup>120</sup> 19 U.S.C.A. §3901(1) (2003).



6.5 million people from their homes in Sierra Leone, Angola, and the DRC, resulting in roughly 3.7 million deaths.<sup>121</sup>

To guarantee that buyers and sellers of rough diamonds in the United States adhere to the requirements of the law, the Clean Diamond Trade Act grants the United States Bureau of Customs and Border Protection importing authority, and grants exporting authority to the Bureau of the Census.<sup>122</sup> Both bureaus are given an updated list of all participating nations to ensure that no diamond is imported from, or exported to, a non-participating nation.<sup>123</sup>

With regard to diamonds entering the country, the United States Bureau of Customs and Border Protection instructs its Field Operators, including all Port Directors, Trade Specialists, Inspectors, and Import and Entry Specialists, to ensure that an original Kimberley Process Certificate accompanies every shipment of rough diamonds entering the nation.<sup>124</sup> The Bureau of Customs and Border Protection defines an original Kimberley Process Certificate as a "tamper and forgery resistant document," that bears identifying information about the parcel, as well as the KPCS compliance statement.<sup>125</sup> The shipment of rough diamonds must be imported from a participating nation in a sealed and tamper-resistant container, defined as a "packaging having an indicator or barrier to entry that could reasonably be expected to provide visible evidence that tampering had occurred."<sup>126</sup>

A Customs official has the right to demand that an importer provide the appropriate certificate, and if the certificate is missing or the diamonds are not contained in the proper container, the parcel must be seized by the Customs official and stored in a permanent storage vault.<sup>127</sup> If a shipment of rough diamonds from a non-participating country reaches the United States,<sup>128</sup> these diamonds will be seized and barred from entering the

<sup>121</sup> See *id.*

<sup>122</sup> "For purposes of this Act—(1) the importing authority shall be the United States Bureau of Customs and Border Protection...(2) the exporting authority shall be the Bureau of the Census." 19 U.S.C.A. §3905(a) (2003).

<sup>123</sup> 19 U.S.C.A. §3905(b) (2003).

<sup>124</sup> See Memorandum from Exec. Dir., Trade Compliance and Facilitation, to Directors, Field Operations of the U.S. Bureau of Customs and Border Protection, available at [http://www.cbp.gov/linkhandler/cgov/import/commercial\\_enforcement/rough\\_diamonds.ctt/rough\\_diamonds.doc](http://www.cbp.gov/linkhandler/cgov/import/commercial_enforcement/rough_diamonds.ctt/rough_diamonds.doc) (last visited Feb. 15, 2005).

<sup>125</sup> *Id.*; These requirements are essentially the same as those promulgated by the World Diamond Council. See *Essential Guide*, *supra* note 51, at 1.

<sup>126</sup> Memorandum from Exec. Dir., *supra* note 24.

<sup>127</sup> *Id.*

<sup>128</sup> The Customs official must refer to the list of participants, made available by the President in the Federal Register, in order to determine whether the shipment comes from a participating nation. 19 U.S.C.A. §3905(b) (2003).

country.<sup>129</sup> United States law imposes a civil penalty up to \$10,000 upon any person who violates or attempts to violate, any license, order or regulation.<sup>130</sup> A willful or attempted violation, upon conviction, attaches a maximum fine of \$50,000, or maximum prison sentence of 10 years, or both.<sup>131</sup> The United States Bureau of Customs and Border Protection and the United States Bureau of Immigration and Customs Enforcement are authorized to enforce the provisions of the law, and can bring charges against any violator.<sup>132</sup>

The passage and practice of the Clean Diamond Trade Act demonstrates the United States' commitment to ending the blood diamond trade. No individual, however, has been tried or convicted in the United States for attempting, or actually importing or exporting, uncertified diamonds.<sup>133</sup> Therefore, to date, an assessment of the Act's actual effectiveness in punishing and deterring blood diamond trade cannot be made. But, by passing the Act, the United States took a stand to end its involvement in the blood diamond trade, and recognized the importance of its participation in the success of the KPCS. The Act tells those who trade in contravention of the KPCS that, as of July 2003, the world's largest consumer of diamonds will no longer trade with just anybody. As the world's leading consumer, the United States plays an intricate role in the success of the KPCS.

## V. WHY THE KIMBERLEY PROCESS CERTIFICATION SCHEME IS NOT ENDING THE BLOOD DIAMOND TRADE

The Kimberley Process Certification Scheme (KPCS) seeks to break the link between trade in blood diamonds and armed conflict in much of Africa, and in doing so help nations, such as the Democratic Republic of the Congo (DRC), regain possession and control over their natural resources in order to promote stability, diversity, and overall national growth.<sup>134</sup> While forty-three nations currently participate in the Scheme, and another twenty are

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<sup>129</sup> Memorandum from Exec. Dir., *supra* note 124. However, the Secretary of State may waive the prohibition of imports from a non-participating country. If such a waiver has occurred, "...[t]he Secretary of State will publish a notice in the *Federal Register* identifying any country...to which [the] waiver applies and [indicating] the relevant time period during which the waiver will apply." *Id.*

<sup>130</sup> 19 U.S.C.A. §3907(a)(1) (2003).

<sup>131</sup> 19 U.S.C.A. §3907(a)(2) (2003).

<sup>132</sup> "The United States Bureau of Customs and Border Protection and the United States Bureau of Immigration and Customs Enforcement are authorized, as appropriate, to enforce the provisions of subsection (a) of this section and to enforce the laws and regulations governing exports of rough diamonds, including with respect to the validation of the Kimberley Process Certificate by the exporting authority." 19 U.S.C.A. §3907(c) (2003).

<sup>133</sup> This statistic is correct as of January 2005.

<sup>134</sup> See generally Kimberley Process: Background, *supra* note 11.

taking steps to meet the criteria necessary to become trading members of certified diamonds,<sup>135</sup> this international commitment to ending the blood diamond trade has failed, and is likely to continue to fail in providing enough structure to truly cease blood diamond trade. Already, the Republic of Congo has been expelled from the Kimberley Process,<sup>136</sup> indicating that maintaining the requirements of the process may prove more difficult than anticipated by the KPCS drafters. As currently implemented, the KPCS is nothing more than a voluntary agreement between nations that lacks the strength necessary to compel uniform global compliance. In order for the KPCS to be successful, tighter control and stricter requirements over all aspects of the diamond pipeline are necessary.

#### A) *The Road Is But a Path*

The blood diamond trade problem is a worldwide problem. As a result, the KPCS seeks to end *global* trade in blood diamonds; therefore, in order for the Scheme to truly be effective, *global* participation is imperative. However, despite unanimous support for the Scheme from all members of the United Nations General Assembly,<sup>137</sup> only forty-three nations, with twenty more attempting to meet the criteria for membership,<sup>138</sup> currently participate. The commitment of approximately sixty-three nations by no means amounts to *global participation*. In order to increase the muscle of the Scheme, the United Nations must fervently encourage all nations to participate. With more United Nations encouragement, the KPCS will have the clout and power necessary to achieve its goals.

#### B) *The Road Needs Patrolling*

The Scheme currently does not provide for an independent monitoring system to ensure that each nation actually complies with the regulations and suggestions of the KPCS.<sup>139</sup> Global Witness, a leading NGO, has argued that certifying parcels of gemstones as conflict-free is not enough supervision.<sup>140</sup> They assert that without an independent monitoring and supervisory agency institutionalized to oversee the conduct and business practices of the diamond industry, ample opportunities for corruption and diamond

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<sup>135</sup> This statistic is correct as of January 2005. See *id.*

<sup>136</sup> See Itano, *supra* note 101.

<sup>137</sup> See *Essential Guide*, *supra* note 51, at 11.

<sup>138</sup> This statistic is correct as of January 2005. See Kimberley Process: Background, *supra* note 11.

<sup>139</sup> See *SA Must Push AU for Diamond Watchdog*, S. AFR. PRESS ASS'N, May 7, 2003.

<sup>140</sup> See Orogun, *supra* note 5, at 160.

laundering exist.<sup>141</sup> In addition, they worry that "...the use of the proceeds from such...activities [will] continue to fund the purchase of arms for rebel militias to unleash their reign of terror on the citizens of war-devastated African countries."<sup>142</sup> Without an actual enforcement requirement or an international monitoring system, many nations may opt out of fully enforcing their laws against the blood diamond trade. The institution of an independent monitoring system is a necessary measure to ensure better compliance with the KPCS. While the KPCS does currently provide for a system of voluntary peer review,<sup>143</sup> the fact that the KPCS itself is *voluntary* does not provide enough structure to ensure compliance. One way to solve this problem is, again, through greater participation of the United Nations. Creating a task force or commissioning an organization to keep a closer watch on all participating nations (that has the power to sanction those which do not comply with the fullest force possible) may serve as a monitoring system that can eradicate some of the current problems with compliance.

Additionally, while the diamond industry has pledged to monitor itself and only buy and sell diamonds that are in compliance with the KPCS, as currently drafted, the KPCS does not permit a private right of action whereby an individual can bring suit against another person or company violating the KPCS. By allowing such a private right of action, the members of the industry themselves would be able to more actively participate in the prevention of the blood diamond trade, and would serve as an additional "check" on the system. Moreover, fear of being personally prosecuted for a violation would deter industry persons from trading, selling, or buying conflict diamonds.

### C) *Punishments for Violations Need to be Uniform*

The current punishment requirement of the KPCS serves as yet another flaw of the Scheme. As drafted, the KPCS places no specific international or domestic enforcement duty upon participating nations, and instead allows each nation to implement its own punishment mechanism.<sup>144</sup> In theory, as long as each nation implements similar punishments, then this requirement poses no problem. However, nothing in the KPCS requires uniformity of

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> The KPCS does not require "Peer review" of its participants, however, will provide such a service for those participating nations who choose to participate in it. See *The Kimberley Process: Kimberley Structure*, *supra* note 15.

<sup>144</sup> See *supra* Part IV.

punishment or that any punishment is actually enforced.<sup>145</sup> Therefore, a blood diamond trader in one participating nation might receive a penalty as extreme as capital punishment, while a blood diamond trader in another participating country could face little more than a slap on the wrist. Under the terms of the Scheme as currently drafted, however, both nations are complying with the requirements for membership and are considered participants in good standing. A mechanism that allows for such a wide range of punishments will not deter blood diamond trading, but rather may have the adverse affect and actually encourage such traders to choose to trade in a country with softer punishments. Therefore, the current Scheme is nothing more than a "watchdog without teeth,"<sup>146</sup> doing nothing to ensure that each participating nation implements effective control over its diamond supply and actually punishes blood diamond traders. While the power to decide how to punish criminals remains the sovereign right of every nation, at least some minimum punishment must uniformly be required of every participating country. Just as the KPCS requires certain information to be supplied on every shipment of diamonds in and out of each participating nation, so too must the KPCS require a minimum punishment for violators. As encouragement for implementing and upholding such punishments, studies should be undertaken in order to demonstrate the positive effects that keeping checks on offenders has toward deterring the blood diamond trade.<sup>147</sup> In order for the Scheme to be effective, both in theory and in practice, stricter guidelines for punishment must be included in the KPCS itself.

Success of the KPCS depends not only upon the commitment of the diamond producing and purchasing nations, but also hinges upon the integrity and dedication of the major diamond trading centers, such as Belgium and Israel, to carefully scrutinize all imported diamonds to ensure that illegal gems do not slip into the stream of commerce.<sup>148</sup> Currently, a major problem rests in the fact that Belgium itself is not a participating member of the KPCS.<sup>149</sup> In order to serve as a major diamond-trading center, Belgium must support the KPCS in order to give the plan clout. Moreover, the laws of the diamond trading hubs must effectively preclude illegal diamonds from

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<sup>145</sup> *Id.*

<sup>146</sup> Diamonds.net, Rapaport News, *International Coalition Issues Kimberley Report Card* (Feb. 13, 2002), at <http://www.diamonds.net/news/newsitem.asp?num=6265&type=all&searchfor=Report&card&author>.

<sup>147</sup> These effects include an increase in a country's gross domestic product, reduced inflation, as well as decreased violence.

<sup>148</sup> See Chris McGreal, *Hopes and Fears as Plan to Ban War Gems Begins*, GUARDIAN, Sept. 16, 2000, at 20.

<sup>149</sup> See Kimberley Process: List of Participants, *supra* note 58.

slipping into the stream of commerce.<sup>150</sup> Critics claim that current Belgian laws are not consistently enforced and customs agents screen flights with a “casual eye.”<sup>151</sup> This again demonstrates how, even though laws may be enacted, there is no guarantee that they will be followed or even enforced; or, if they are, that they will be vigorously enforced to prevent abuses. The diamond industry must strictly police its own members in order to curtail the “free rider” mentality, which eases the ability for some of the more deceitful members of the diamond trade to engage in the illegal sale of blood diamonds in the world’s major trading centers.<sup>152</sup>

*D) Diamond Producing Nations Must Maintain Tighter Control Over Diamonds at the Source*

Additionally, the governments of the diamond producing countries must gain tighter control over their diamond mines to minimize the likelihood of diamonds getting into the hands of people who will trade the diamonds for arms. Unlike the excavation of natural resources such as copper, cobalt, and oil, which require industrial scale machinery, diamond excavating requires little to no technological assistance.<sup>153</sup> In the DRC, for example, the diamond industry is so decentralized that thousands of miners sift through loose soil for diamonds.<sup>154</sup> Since becoming a KPCS participant, and in an effort to gain more control over the diamond industry, the DRC has established the Center for Evaluation, Expertise, and Certification.<sup>155</sup> Under government supervision, diamond experts track and scrutinize legitimately mined DRC rough diamonds, assigning each a precise value.<sup>156</sup> While the Center has succeeded in tracking and valuing diamonds that make it to the center, diamond experts say the Center and KPCS have done little to slow the trade of *illegal* diamonds that never make it to the Center.<sup>157</sup> The process of mining diamonds itself invites thievery and smuggling. Without more control over the actual mining process at the mines themselves, DRC

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<sup>150</sup> See Price, *supra* note 9, at 64.

<sup>151</sup> See Elizabeth Bryant, *Antwerp and Dirty Diamond Rumors*, UNITED PRESS INT’L, March 7, 2002.

<sup>152</sup> See Orogun, *supra* note 5, at 158.

<sup>153</sup> See CHRISTIAN DIETRICH, *HARD CURRENCY: THE CRIMINALIZED DIAMOND ECONOMY OF THE DEMOCRATIC REPUBLIC OF THE CONGO AND ITS NEIGHBORS* 8 (Partnership Africa Canada, *The Diamonds and Human Security Project*, Occasional Paper No. 4), available at [http://www.pacweb.org/e/images/stories/documents/hc\\_report\\_e.pdf](http://www.pacweb.org/e/images/stories/documents/hc_report_e.pdf).

<sup>154</sup> See Dougherty, *supra* note 46.

<sup>155</sup> See *id.*

<sup>156</sup> See *id.*

<sup>157</sup> See *id.*

government regulators can do little to stop the robbery of diamonds each year that never make it to the certification stage because they are first smuggled out of the country.<sup>158</sup> Once these diamonds are smuggled out of the mines, they may be traded for arms by groups such as the Congolese Rally for Democracy and the Congolese Liberation Movement, both of whom have continued to be unaffected by the implementation of the Kimberley Process.<sup>159</sup> The fact that these rebel groups continue to prosper raises questions about whether a scheme to halt the influx of blood diamonds can even be successful.

In order to more effectively curtail the blood diamond trade and the stealing of diamonds from legitimate mining sites, security efforts within diamond-producing nations must be implemented at diamond mines and excavation sites. Botswana serves as a good example of a nation where the government effectively secures all diamond mines by keeping a tight reign over excavation.<sup>160</sup> The Botswanian mines are heavily guarded, and at the end of each workday, all excavators are thoroughly searched for diamonds.<sup>161</sup> While government ownership *alone* has proven insufficient to completely eliminate diamond stealing,<sup>162</sup> such government direction can help improve the overall economies of these nations.<sup>163</sup> Close and non-corrupt government supervision and inspection of the diamond miners and the mining process from the beginning of the pipeline is an important aspect necessary in minimizing the number of diamonds that reach the hands of rebels, and will serve as a significant step toward economic growth.

### E) *The Kimberley Process Ignores the Fact that Incentives Make the World Go Round*

Yet another flaw of the current KPCS rests in the certificates themselves. Certificates of authenticity, like those required of every parcel of dia-

<sup>158</sup> See *id.*

<sup>159</sup> See Orogun, *supra* note 5, at 153.

<sup>160</sup> See *Today Show*: "Where in the World is Matt Lauer?" segment on Botswana (NBC television broadcast, Feb. 7, 2004).

<sup>161</sup> See *id.*

<sup>162</sup> For example, in the DRC in 2000, allegations arose of diamond theft from Miba, the state-owned diamond company that accounts for about one quarter of the legitimate diamond exports. See Orogun, *supra* note 5 at 153.

<sup>163</sup> For example, in Sierra Leone, since the rebel disarmament and restoration of control of the diamond mines to the government of Sierra Leone, the country's gross domestic product increased by 5.4 percent and inflation decreased sharply to three percent. See IMF *Unblocks Aid for Sierra Leone*, BBC News, at <http://news.bbc.uk/1/hi/world/africa/1870259.stm> (last visited Feb. 19, 2005).

monds,<sup>164</sup> have in other markets been proven an ineffective method of verifying the good's authenticity.<sup>165</sup> With regard to arms procurement, end-user certificates are required of buyers and sellers, and must accompany every sale.<sup>166</sup> Many African nations,<sup>167</sup> however, have repeatedly provided false end-user certificates to disguise their arms shipments to rebels in Sierra Leone, Angola, and the DRC.<sup>168</sup> These nations engage in such illegal trade because rebel groups handsomely reward each country for participation.<sup>169</sup> Having demonstrated a history of disregard for the law, it is not unlikely that these same countries would also falsify KPCS certificates if provided a good enough incentive from rebel groups to do so. Thus, the certificates themselves mean nothing. Therefore, the KPCS must provide participating diamond producing nations some greater incentive to stay committed to the Scheme, and deter such nations from succumbing to outside pressure and influences.

One possible incentive is to incorporate into the KPCS a commitment to reduce import limits on each diamond producing country's chief import, in exchange for continued commitment to the KPCS.<sup>170</sup> The United Nations could broker agreements between nations such as the DRC, and their major trading partners, whereby trading requirements or taxes are reduced.<sup>171</sup> Alternatively, importing requirements could be eliminated completely, however, this is more extreme, and the idea would likely face opposition from importing nations.

Additionally, a trade agreement mechanism could be incorporated into the KPCS where, if any country violates the KPCS, all other participating countries can retaliate against that violator by refusing to import goods from that nation. The United States currently implements such a system through its participation in the World Trade Organization.<sup>172</sup> Fear of a worldwide

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<sup>164</sup> See discussion *supra* Part IV.

<sup>165</sup> See Orogun, *supra* note 5, at 158.

<sup>166</sup> See *id.* at 159.

<sup>167</sup> These nations include: Zaire, Burkina Faso, Togo, Ivory Coast, Republic of Congo, Liberia, and Zambia. See *id.*

<sup>168</sup> See *id.*

<sup>169</sup> See *id.*

<sup>170</sup> According to THE WORLD FACTBOOK, the chief imports to the DRC are foodstuffs, mining and other machinery, transport equipment, fuels, comprising about \$933 million per year as of 2002. CIA, THE WORLD FACTBOOK, available at <http://www.cia.gov/cia/publications/factbook/geos/cg.html#Econ> (last updated Feb. 10, 2005).

<sup>171</sup> The major trading partners with the DRC are: Belgium, U.S., Zimbabwe, Finland, South Africa, France, Germany, Netherlands, and Kenya. See *id.*

<sup>172</sup> See 19 U.S.C.A. 2416 (2000).



retaliation system could help motivate participating countries to follow the KPCS requirements more stringently.

#### F) *Diamond Fingerprinting Technology Needs Support*

Importing countries, like the United States and other developed nations, can help improve the effectiveness of the KPCS by encouraging science and technology sectors to refine diamond identification technology so that each diamond can be identified and tracked.<sup>173</sup> Tracking and identifying diamonds can provide a “check” on the certification process, and can prevent abuse of the system. One way of tracking diamonds is through “geo-chemical” identification.<sup>174</sup> This scientific technology compares trace elements and impurities within diamonds in order to determine the region from which they originate.<sup>175</sup> Technology such as this enables diamond “fingerprinting.”<sup>176</sup> Another method, the “tagging” approach, uses laser and focused ion beam technologies to mark each diamond at the source.<sup>177</sup> Technologies such as these tend to lesson the fungible nature of diamonds because, if utilized, all diamonds would be marked and identifiable. Employing such marking procedures on all imported diamonds would improve the ability to discern whether a diamond was from a country not participating or violating the KPCS, and would discourage the blood diamond trade. In addition to providing a marking system, such technology would serve as a means of validating KPCS participant compliance by verifying that a diamond is, in fact, from the country the accompanying certificate claims. Advancements in science and technology create a potential safeguard that currently does not exist.

### VI. CONCLUSION

Although a good attempt, the current version of the Kimberley Process Certification Scheme (KPCS) fails to solve the worldwide problem of the blood diamond trade. The KPCS operates as a system of national laws. The Scheme can work, however, only to the extent that each participating nation

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<sup>173</sup> Amanda Bryant Banat, *Solving the Problem of Conflict Diamonds in Sierra Leone: Proposed Market Theories and International Legal Requirements for Certification of Origin*, 19 ARIZ. J. INT'L & COMP. LAW 939, 947 (Fall 2002).

<sup>174</sup> *Id.* (citing Nicolas Cook, *Congressional Research Service, Diamonds and Conflict: Policy Proposals and Background*, at 974 n.2).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

enforces the ban on blood diamond trade at its own borders. Not surprisingly, with so many politically and economically unstable and constantly changing countries participating, the Scheme has not ended the blood diamond trade. The main problem rests in expecting third-world-nations to act like modernized countries. As a result, the pledge these nations make to actively prevent the trade is nothing more than an empty promise. Even though the intentions of the Scheme are sound, the system as it stands can only provide a false sense of security for governments and consumers.<sup>178</sup> The only way to effectively eradicate the influx of blood diamonds into the world diamond market is by dismantling the tripartite alliance among the peddlers of blood diamonds, the opportunistic arms dealers, and the transient countries.<sup>179</sup> Before this alliance can be broken, however, the nations themselves must stabilize and learn to solve their national problems through means other than rebellion and corruption. In order to stabilize, these countries need investors to help legally and profitably utilize their natural resources. Investors, however, are hesitant to invest in countries where the risk of entanglement with political alliances is likely.<sup>180</sup> Therefore, this dismantling cannot be achieved currently through any agreement between nations, and therefore the KPCS will fail.

As drafted and implemented today, the KPCS cannot eliminate illegal trade in rough diamonds. However, the attention generated from the KPCS has, at the very least, initiated movement for change. In a recent press release, chief prosecutor Louis Moreno Ocampo, of the International Criminal Court (ICC), announced that the body would soon initiate an investigation of companies and businesses located in at least 29 countries that had been suspected of dealing in blood diamonds that were originally extracted from the DRC.<sup>181</sup> According to Ocampo, "if [the alleged war-profiteering businesses] received diamonds and knew that the people delivering them were getting them because of genocide then they could well be part of the crime."<sup>182</sup> The institution of legal action against such suspected participants is the right step toward diminishing the blood diamond trade. At the very least, the KPCS has helped limit and deter the practice of blood

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<sup>178</sup> See Price, *supra* note 9, at 66.

<sup>179</sup> See Orogun, *supra* note 5, at 159.

<sup>180</sup> See James Lamont, *Congo's President Keen to Recruit New Generation of 'Clean' Foreign Investors*, FIN. TIMES, Feb. 7, 2004, at 8.

<sup>181</sup> *Firms Face 'Blood Diamond' Probe*, BBC News, available at <http://news.bbc.co.uk/2/hi/business/3133108.stm> (last updated Sept. 23, 2003). In a press release dated June 23, 2004, the ICC announced the official opening of an investigation into the crimes committed in the DRC. Int'l Criminal Ct., *The Office of the Prosecutor of the International Criminal Court Opens its First Investigation* (June 23, 2004), available at [http://www.icc-cpi.int/pressrelease\\_details&cid=26&l=en.html](http://www.icc-cpi.int/pressrelease_details&cid=26&l=en.html).

<sup>182</sup> *Firms Face 'Blood Diamond' Probe*, *supra* note 181.

diamond smuggling, clearing the path to the end of the blood diamond problem. Now, the international diamond producing, buying, selling, and trading community must continue the task of paving the road.