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Diamonds Are a Smuggler's Best Friend: Regulation, Economics, and Enforcement in the Global Effort to Curb the Trade in Conflict Diamonds

JOSEPH HUMMEL*

African conflict diamonds – being diamonds originating from areas controlled by factions and groups opposed to legitimate government and used to fund such operations – played a central role in many of the civil wars and conflicts that raged throughout sub-Saharan Africa in the 1980s and 1990s. Despite such conflicts having subsided, conflict diamonds remain a pervasive problem for both Africa and the world at large. Current efforts to eradicate the ills associated with conflict diamonds have, in the eyes of many, fallen short, prompting calls for new and stricter regulations and oversight that would at once curb the trade in illegal diamonds while at the same time allow for “legitimate” diamonds to make their way to the marketplace and benefit the ailing African nations from which they are mined. This comment will recall certain of that African history and examine and critique various international enforcement regimes in hopes of shedding new light on the problem.

Ishmael Beah was only thirteen years old when he was abducted from his village in Sierra Leone and forced by the government to take up arms in his country's bloody civil war.¹ Many like Ishmael, and some even younger, were subjected to years of brainwashing and made witness to countless torturous acts,² often while kept high on drugs like marijuana and cocaine.³ Funded by the illicit trade in conflict diamonds, also known as blood diamonds, mined from the country's vast natural deposits, Sierra Leone's civil war that

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1. Andrew Gumbel, *From Child Soldier to Poster Boy; Escaping the Battle*, THE INDEPENDENT (London), Jan. 22, 2007, at 24.

2. Stories abound of the brutality that took place in Sierra Leone during the civil war, including “mass rape of women and children, the amputation of the limbs of men, women, children, and infants, and the forcible recruitment of soldiers among the civilian population, including children.” Amanda Bryant Banat, Note, *Solving the Problem of Conflict Diamonds in Sierra Leone: Proposed Market Theories and International Legal Requirements for Certification of Origin*, 19 ARIZ. J. INT'L & COMP. LAW 939, 941 (2002).

3. Gumbel, *supra* note 1, at 24.

raged during the 1990s,⁴ like those of other sub-Saharan African nations, found its financial backing in the smuggling of diamonds that made their way to the corners of the African continent and often the far ends of the world. While many of these civil wars have abated in scale and degree,⁵ conflict diamonds are still a commodity in parts of the world. And in the eyes of many, the international regulations and protections established to curb the illegal trade have fallen short, prompting many to call for stricter regulations, oversight, enforcement, and punishment for violators.⁶ The tension rests in trying to balance the positive economic contributions the diamond industry can bring to many third world countries with the need to protect those economies and countries from the evils brought on by the sale of illicit conflict diamonds. This comment will offer a perspective on the conflict diamond trade through a look at the recent history of a number of African nations and will then examine and critique various international enforcement regimes in hopes of shedding some new light on the problem.

I. A Diamond Perspective

Martin Chungong Ayafor, the UN Chairman of the Sierra Leone Panel of Experts, said that “diamonds are forever, it is often said. But lives are not. We must spare the people the ordeal of war, mutilations and death for the sake of conflict diamonds.”⁷ Ayafor’s admonition speaks to the growing concern surrounding the plight of Africans affected by conflict diamonds that has only recently received widespread attention.⁸ The UN defines “*conflict diamonds*” as “diamonds that originate from areas controlled by forces or factions opposed to legitimate and internationally recognized governments, and are used to fund military action in opposition to those governments, or in contravention of the decisions of the Security Council.”⁹ Due to their small size, liquidity, great value, and fungible nature, diamonds are highly susceptible to smuggling and illegal trade.¹⁰ Mined in remote areas, often with little governmental oversight at many stages of the process, diamonds “change hands multiple times, are intermingled with other diamonds, follow circuitous trading routes, and are accompanied by little documentation, as the trade functions more on

4. From 1991 to 1999, Sierra Leone was engaged in a bloody civil war between the government and the Revolutionary United Front, who used diamonds to fund the sale of arms for their campaign. See Banat, *supra* note 2, at 941-42.

5. Angola, Liberia, and Sierra Leone all saw civil conflict subside in the later part of the 1990s and the early part of the twenty-first century. See *Conflict Diamonds: Sanctions and War*, <http://www.un.org/peace/africa/Diamond.html> (last visited Sept. 20, 2007).

6. *Id.*

7. *Id.*

8. It was not until 1998, when the human rights watch group and international non-governmental organization (NGO), Global Witness, broke the story of conflict diamonds and the consequent human rights violations. That same year, the United Nations Security Council placed sanctions on Angola “to prohibit the direct or indirect import from Angola to their territory of all diamonds that are not controlled through the Certificate of Origin regime of the GURN.” It was the first recognition of the use of diamonds as a source of financial support for war. S.C. Res. 1173, ¶ 12(b), U.N. Doc. S/RES/1173 (June 12, 1998).

9. See *Conflict Diamonds: Sanctions and War*, *supra* note 5.

10. See Seth A. Malamut, Note, *A Band-Aid on a Machete Wound: The Failures of the Kimberley Process and Diamond-Caused Bloodshed in the Democratic Republic of Congo*, 29 SUFFOLK TRANSNAT’L L. REV. 25, 27 (2005).

honor and trust. Country data on production, import, and export rates is often fraught with error and inconsistencies."¹¹

While it is estimated by some that less than 1 percent of diamonds traded on the open market are conflict diamonds, some advocacy groups, including Global Witness, argue that number does not represent the real situation.¹² Global Witness "now says that conflict diamonds are a part of a controversial stream of stones that also includes smuggled diamonds and diamonds mined in abusive labor situations all over the world."¹³ According to Global Witness, the flow of conflict diamonds is actually closer to 20 percent.¹⁴ Still, given that worldwide, diamond sales in 2005 exceeded \$60 billion,¹⁵ that 1 percent, if accurate, still represents an enormous dollar amount in unofficial, illegal transactions. Although many in the western world, including the United States, do not produce rough diamonds, countries like the United States are large traders of both polished and rough diamonds, with it, in fact, being the "world's largest consumer market for diamond jewelry."¹⁶ In 2005 alone, retail diamond sales in the United Kingdom totaled £1.2 billion.¹⁷ With nearly \$8.4 billion worth of diamonds being exported from African countries,¹⁸ maintaining the stability and fluidity of the legitimate diamond trade is important for keeping the trade of conflict diamonds below the 1 percent estimate and out of the higher ranges that appeared during the 1990s,¹⁹ when the trade in conflict diamonds was estimated to be valued at more than \$10 billion.²⁰

During the civil wars that raged in Angola, Sierra Leone, and the Democratic Republic of Congo near the end of the twentieth century, the trade in conflict diamonds was facilitated in large part by "corporate actors" who purchased diamonds "directly or indirectly from insurgent groups."²¹ De Beers, the largest and most influential of these corporate actors, controls the majority of the world's diamond production and sales²² through its

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

12. See Lynne Duke, *Blood Diamonds: A River or a Droplet?*, WASH. POST, Dec. 27, 2006, at C01.

13. *Id.*

14. *Id.*

15. See GlobalWitness.org, *Combating Conflict Diamonds: The Diamond Industry*, http://www.globalwitness.org/pages/en/the_diamond_industry.html.

16. See U.S. Gov't Accountability Office, Rep. to Cong. Comms., GAO-06-978, *Conflict Diamonds: Agency Action Needed to Enhance the Implementation of the Clean Diamond Trade Act*, Sept. 27, 2006, p. 7. [hereinafter GAO-06-978].

17. See *National: FAQ Conflict Diamonds: Struggling to Shake Off a Blood-Soaked Image*, GUARDIAN (London), Jan. 22, 2007, at 9. [hereinafter *FAQ Conflict Diamonds*]

18. Production in African countries accounts for an estimated 65% of the world's diamonds. Diamond production in Botswana is the largest, valued at an estimated \$3.2 billion. Angola accounts for \$1.5 billion worth of production, while South Africa accounts for \$1.6 billion, and the Democratic Republic of Congo accounts for an estimated \$0.8 billion. See Diamondfacts.org, *Fact #9*, http://www.diamondfacts.org/facts/fact_09.html.

19. During the heights of the civil wars in Congo, Angola, and Sierra Leone, it is estimated that conflict diamonds made up between 4% and 15% of the global diamond trade. Officially, that number has fallen, coinciding with relative peace in the once war-torn countries. See *FAQ Conflict Diamonds*, *supra* note 17.

20. Michael Maggi, Comment, *The Currency of Terrorism: An Alternative Way to Combat Terrorism and End the Trade of Conflict Diamonds*, 15 PACE INT'L L. REV. 513, 518 (2003).

21. Lucinda Saunders, Note, *Rich and Rare are the Gems They War: Holding De Beers Accountable for Trading Conflict Diamonds*, 24 FORDHAM INT'L L.J. 1402, 1427 (2001).

22. In 2001, it was estimated that De Beers controlled about 60% of the world's uncut diamonds. See *id.* at 1430.

"cartel" or "producer's cooperative" structure.²³ Until recently, it was the policy of De Beers to buy up all available diamonds on the market to allow for price control and stabilization,²⁴ be it through its own mining activities or from external suppliers.²⁵ De Beers also maintains long-term contracts with countries that produce diamonds, whereby a country will agree to sell a fixed portion of its diamonds exclusively to De Beers.²⁶ Still, most companies and countries producing diamonds sell their products to the London-based Central Selling Organization (CSO), which is essentially operated by De Beers and "is believed to buy and market roughly 80% of the world's output of rough diamonds."²⁷ "These diamonds are then sold at multiple annual 'sights' (sales) to 'sightholders.' The sightholders are presented with mixed parcels of diamonds, which may include stones from several countries. Sightholders transport the diamonds to other cities, where they are re-sorted and repackaged for cutting and polishing or sale"²⁸

The transparency of the CSO system, through the sheer number of transactions that occur and the middlemen that hold the product before a diamond can even get to an end user or customer, have prompted many to accuse De Beers of buying diamonds from rebel groups who use the proceeds to fund wars or of facilitating a system of sales that makes tracing diamond smuggling more difficult.²⁹ There are widespread reports of De Beers and other legitimate companies dealing and profiting from trade with rebel groups in war-torn African nations.³⁰ Reports indicated that De Beers bought diamonds from rebels in Angola in the 1990s and from Sierra Leone via Liberia during the same time.³¹ In areas where CSO regulations are not enforced, De Beers has found ways to deal for diamonds with rebel forces.³² In October of 1997, Gary Ralfe, De Beers' CEO, said that "[one] of the essential jobs that we at De Beers carry out worldwide is to ensure that diamonds coming onto the markets do not threaten the overall price structure: there is no doubt that we buy many of those diamonds that emanate from the UNITA held areas of Angola."³³ Although De Beers has closed its offices in Sierra Leone³⁴ and no longer operates mines in conflict areas,³⁵ the nature of the transactional system established to move the stones from mine to end user gives the impression that De Beers' system is deliberate, with an end of making a profit regardless of who is hurt.

23. See Maggi, *supra* note 20, at 518.

24. De Beers has since abandoned its policy of buying up all available diamonds. See Saunders, *supra* note 21, at 1430-31.

25. *Id.* at 1428.

26. Matthew R. Dorsett, Note, *Diamond's Are a Cartel's Best Friend: The Rise and Fall of Anticompetitive Business Practices within the De Beers International Diamond Cartel*, 16 IND. INT'L & COMP. L. REV. 145, 154 (2005).

27. See Maggi, *supra* note 20, at 518.

28. Margo Kaplan, Junior Fellow's Note, *Carats and Sticks: Pursuing War and Peace Through the Diamond Trade*, 35 N.Y.U. J. INT'L L. & POL. 559, 581 (2003).

29. See 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, 220 (2005).

30. *Id.*

31. Saunders, *supra* note 21, at 1432-34.

32. *Id.*

33. See Maggi, *supra* note 20, at 521.

34. See Kaplan, *supra* note 28, at 581.

35. Saunders, *supra* note 21, at 1431.

II. The Bane of Civil War in Sub-Saharan Africa

In 1996 alone, fourteen African countries were engaged in conflict of some degree, "accounting for more than half of all war-related deaths worldwide and resulting in more than eight million refugees, returnees and displaced persons."³⁶ Behind every civil strife is a motivation of some sort, be it political, economic, ethnic, a combination, or something else entirely. In 2001, Paul Collier and Anke Hoeffler at the World Bank conducted a study of seventy-eight civil conflicts occurring worldwide from 1960 to 1999 in an attempt to develop a model that would predict the outbreak of civil conflict and war.³⁷ They discovered that civil rebellion was dependent on both motive and opportunity but not necessarily in equal proportion.³⁸ In terms of motive, Collier and Hoeffler found that "rebellion occurs when grievances are sufficiently acute that people want to engage in violent protest" or "by greed, which is presumably sufficiently common that profitable opportunities for rebellion will not be passed up."³⁹ In terms of opportunity, the report noted three common sources of rebellion: "extortion of natural resources, donations from diasporas, and subventions from hostile governments."⁴⁰ But, they declared that "weak government military capability"⁴¹ and social cohesion, meaning a more homogeneous ethnic make-up of rebel groups and organizations, also tended to be opportunistic reasons for civil conflict.⁴²

While Collier and Hoeffler admit that the grievance/motive model elements have an undeniable effect on the formation and development of rebel conflicts, they conclude that the opportunity model is superior,⁴³ noting that primary commodity exports, such as oil or diamonds, are one of the most significant factors in spurring and sustaining civil conflict.⁴⁴ The report found that when primary commodity exports comprised around 32 percent of the country's gross domestic product (GDP), the risk of conflict was at its peak.⁴⁵ At that peak, the risk of civil war rose to about 22 percent, whereas a country that had no exports had a risk of only 1 percent.⁴⁶

As the World Bank report shows, economics is both a means and an end to civil conflict, as the commodity can be both the motive for the conflict and the opportunity that the conflict presents in the form of benefits reaped.⁴⁷ In essence, "rather than a continuation of politics by other means, war may be a continuation of economics by other means . . . [T]he end is to engage in abuses or crimes that bring immediate rewards, whereas the 'means' is the war and the perpetuation of war."⁴⁸ In the case of diamonds, an easily

36. Edward R. Fluet, *Conflict Diamonds: U.S. Responsibility and Response*, 7 SAN DIEGO INT'L L.J. 103, 105 (2005).

37. Paul Collier and Anke Hoeffler, *Greed and Grievance in Civil War 2* (Oct. 21, 2001), available at <http://econ.worldbank.org>.

38. *Id.*

39. *Id.*

40. *Id.* at 3.

41. *Id.* at 5.

42. *Id.* at 6.

43. *Id.* at 10-11.

44. *Id.* at 8.

45. *Id.*

46. *Id.* at 12.

47. *Id.*

48. See Kaplan, *supra* note 28, at 563-64.

transportable and highly desirable commodity, the ease with which they can be traded and the ever-available markets, be they legal or illegal, make the diamond producing countries particularly susceptible to the type of economic anomaly Collier and Hoeffler describe.⁴⁹ During the 1990s, the civil wars in Angola, Sierra Leone, the Democratic Republic of Congo, and Liberia showed that control of diamond production and the ability to distribute such a primary commodity export through various channels and pipelines was “both a means and an end for rebel movements”⁵⁰ and the economic backing for such causes. By the 1990s, “the unregulated trade of diamonds had become the primary financing vehicle for rebel groups in armed conflicts in at least three African nations—Angola, the Democratic Republic of the Congo, and Sierra Leone. And a fourth, Liberia, was also engaged in the trade in support of the Sierra Leonean rebels.”⁵¹

A. SIERRA LEONE

Perhaps no war has brought the scourge of conflict diamonds before the public eye like the diamond-funded civil war that raged in Sierra Leone from 1991 to 2002.⁵² Formerly a British colony, Sierra Leone, since independence, has gone through a tumultuous history of democracy and dictatorship.⁵³ “Initially after independence, Sierra Leone experienced a brief period of democratic rule. Siaka Stevens, representing the All People’s Congress was elected prime minister in 1967, and he established a one party state in 1978. In 1985, Stevens handed power over to his chosen successor, Major General Joseph Saidu Momoh.”⁵⁴ Once a country full of great promise,⁵⁵ Sierra Leone fell victim to problems of resource depletion, corruption, debt, inflation, currency devaluation, and food and energy crises, among others.⁵⁶ In a 1991 campaign to oust then-President Joseph Momoh, the insurgent group, Revolutionary United Front (RUF), led by Foday Sankoh, began the civil war that would eventually leave more than 2 million people displaced, 20,000 abducted, and 75,000 killed.⁵⁷

Claiming to be fighting for justice for the people and against the corruption of the government, the RUF won initial support from a tired and politically distrustful population that saw the group as “a heroic army that would fight for a multi-party government and equitable wealth distribution.”⁵⁸ Allegedly motivated by “systematic government corruption leading to the failure to attend to the needs of the citizens” and “conflicting ideas about who should control the State’s mineral resources,”⁵⁹ it quickly became clear that the

49. *Id.*

50. *See id.* at 565.

51. Wallis, *supra* note 11, at 390-91.

52. *See* Malamut, *supra* note 10, at 30-31.

53. *See* Saunders, *supra* note 21, at 1423-24.

54. *Id.*

55. It is reported that Sierra Leone was home to world’s most prosperous diamond mines. *See* Malamut, *supra* note 10, at 31. The country also had a strong university and highly skilled civil servants. *See* Kaplan, *supra* note 28, at 570.

56. *See* Banat, *supra* note 2, at 942.

57. Laura Forest, Note, *Sierra Leone and Conflict Diamonds: Establishing a Legal Diamond Trade and Ending Rebel Control Over the Country’s Diamond Resources*, 11 *IND. INT’L & COMP. L. REV.* 633, 537-38 (2001).

58. Tracey Michelle Price, *The Kimberley Process: Conflict Diamonds, WTO Obligations, and the Universality Debate*, 12 *MINN. J. GLOBAL TRADE* 1, 13 (2003).

59. *See* Banat, *supra* note 2, at 941.

RUF had no such lofty ideals, much less any "credible political demands."⁶⁰ The rebellion began with rebel forces entering Sierra Leone from Liberia to the south,⁶¹ taking control of the alluvial diamond fields of the eastern Sierra Leone Kono region and using the mines as ransom against the government and for financing its own guerilla campaigns.⁶² In fact, many RUF soldiers were diamond miners and traders before taking up arms with the rebel group.⁶³ In a perfect example of Collier and Hoeffler's thesis, the RUF rebels were never motivated by the ideals of anti-corruption and wealth distribution they supposedly espoused but were instead driven to take over the diamond-rich areas of the country as a means of fueling the war economy and making a profit for themselves.⁶⁴ At one time during the civil war, the RUF controlled nine-tenths of the country's diamond mines,⁶⁵ generating between \$25 and \$125 million annually in diamond sales.⁶⁶

Sierra Leone's diamond trade is a telling history of corruption and misplaced potential. Since diamonds were first discovered in Sierra Leone in the 1930s, the country has been known as an exporter of high quality diamonds.⁶⁷ Diamonds from Sierra Leone are octahedral, making them very rare and very valuable.⁶⁸ From 1930 to 1998, Sierra Leone officially mined 55 million carats of diamonds, and in 1996, the average price per carat was \$267.⁶⁹ Yet as an official exporter of rough diamonds, Sierra Leone's reputation is not as sound. "From a high of over two million carats in 1970, legitimate diamond exports dropped to 595,000 carats in 1980 and then only to 48,000 in 1988. The Bank of Sierra Leone . . . reported that revenue from diamond exports totaling US \$20,600,000 in 1991, fell to US \$800,000 by 1995."⁷⁰

The RUF's access to and control over such an enormous source of wealth and war-financing demonstrates the "brutal conflict where diamonds are but one of many resources sustaining war and where resources are but one of many sources of conflict."⁷¹ Yet, the illicit diamond trade that funded and provided for the weapons and recruiting for Sierra Leone's civil war took effect not only on the macroeconomic strength of the country but also on the human toll in the form of countless atrocities of war.⁷² The RUF was known for using violent tactics, targeting children and civilians with such acts as burning them alive or hacking off limbs with machetes.⁷³ With tactics that amounted to "tectonic

60. See Kaplan, *supra* note 28, at 569.

61. See Banat, *supra* note 2, at 943.

62. The Kono region was not only the targeted objective, but also the center of the fighting between the RUF and the military. See Kaplan, *supra* note 28, at 567-68.

63. See Saunders, *supra* note 21, at 1426.

64. See Kaplan, *supra* note 28, at 567-68.

65. See Forest, *supra* note 57, at 634.

66. See Malamut, *supra* note 10, at 31.

67. See Forest, *supra* note 57, at 640-41.

68. *Id.*

69. *Id.*

70. See *id.* at 641.

71. Kaplan, *supra* note 28, at 566.

72. In the eyes of Fluet, "[t]he movement of conflict diamonds has created some of the most serious human rights issues of the twentieth and twenty-first centuries." See Fluet, *supra* note 36, at 105. It is estimated that the "[t]rade of diamonds for weapons has resulted in six million war-related fatalities in Africa over the last fifty years, mostly by small arms and light weapons." *Id.* at 107.

73. In an attempt to prove that "people without hands could not vote against the RUF," the RUF mutilated over 20,000. See Price, *supra* note 58, at 12; see also Fluet, *supra* note 36, at 106; Kaplan, *supra* note 28, at 571.

population shifts away from the diamond areas,"⁷⁴ the RUF's campaign of violence granted them further control over the diamond-rich areas while contributing to the country's instability.⁷⁵ "With no alternative source of money in a failed state, the profits gained from mining and pillaging gave the RUF and the often complicit military little incentive to take the peace process seriously, or even to attempt to win the war."⁷⁶ With so much money coming in from the illicit diamond trade, the economics of the situation only make the war seem logical in the eyes of the RUF.⁷⁷ It was only after a global response from humanitarian organizations⁷⁸ that the world and the UN intervened.⁷⁹ In May of 1999, the RUF and Sierra Leone signed the Lome Peace Accord, a cease-fire agreement that gave Sankoh the title of Chairman of the Commission on the Management of Strategic Resources.⁸⁰ The agreement seemed tentative, at best. With the title of Chairman, Sankoh would "officially have control over the diamond mines that his forces were already controlling."⁸¹ The agreement also left many uneasy, as it granted amnesty to rebel fighters. Violence continued for a time after the signing, and the diamond channels were still open.⁸² The UN passed Resolution 1306 in July of 2000,⁸³ imposing a ban on all imports of rough diamonds from Sierra Leone except those certified by the government. The UN Resolution dictated that "all States shall take the necessary measures to prohibit the direct or indirect import of all rough diamonds from Sierra Leone to their territory."⁸⁴ The Resolution also requests the "Government of Sierra Leone to ensure, as a matter of urgency, that an effective Certificate of Origin regime for trade in diamonds is in operation in Sierra Leone."⁸⁵ The agreement, however, failed initially when the RUF took a number of UN soldiers hostage.⁸⁶ Six months after the Lome Agreement was established, troops from the Ceasefire Monitoring Group (ECOMOG), which had fought the RUF alongside the government army, were attacked by the RUF.⁸⁷ Five-hundred UN soldiers were taken hostage, but they were released or rescued by British forces between May and September of 2000.⁸⁸ Yet in January of 2002, the disarmament of Sierra Leone was completed, and elections were held the following May.⁸⁹ Although technically there should not have been anymore conflict diamonds in Sierra Leone, the trade of illicit diamonds continued to threaten national and regional stability.⁹⁰

74. Fluet, *supra* note 36, at 106.

75. See Kaplan, *supra* note 28, at 569.

76. *Id.* at 568.

77. Malamut, *supra* note 10, at 31.

78. See *supra* note 8 and accompanying text.

79. See Kaplan, *supra* note 28, at 571.

80. See Saunders, *supra* note 21, at 1425.

81. *Id.*

82. *Id.*

83. S.C. Res. 1306, ¶¶ 1, 2, U.N. Doc. S/RES/1306 (July 5, 2000).

84. *Id.*

85. *Id.*

86. See Price, *supra* note 58, at 12-15.

87. *Id.* at 14-15

88. *Id.*

89. See Kaplan, *supra* note 28, at 572.

90. *Id.*

B. LIBERIA

The RUF in Sierra Leone was fueled not only by the trade in conflict diamonds but also by support from a cadre of foreign nations who saw a chance at profit.⁹¹ Countries such as the Ukraine, Burkina Faso, Libya, and Liberia have all been accused in the past by the Economic Community of West African States (ECOWAS) of aiding RUF rebels with the aim of exploiting Sierra Leone's diamond industry.⁹² Of these states, none was more complicit in the trafficking and smuggling of diamonds out of Sierra Leone than neighboring Liberia.⁹³ In addition to providing the RUF a launching platform from which to ignite its war,⁹⁴ Liberia was a conduit to the outside world for conflict diamonds from Sierra Leone. Former Liberian President Charles Taylor "reportedly assisted in the operations of the RUF by recruiting citizens of Sierra Leone for the rebel forces, and by supplying their efforts with arms in exchange for smuggled diamonds."⁹⁵ Liberia, during the civil war in Sierra Leone, "has been the principle route for smuggling of Sierra Leonean diamonds on to the world markets, a refuge for RUF fighters, a diplomatic supporter of the RUF, and an alleged transit point for arms shipments."⁹⁶ These smuggled diamonds were then exported to Antwerp to be part of the CSO process, but the sheer number of diamonds that left Liberia raised the eyebrows of many who saw a discrepancy in actual Liberian diamond production versus capability of production.⁹⁷ "While the annual Liberian diamond mining capacity [was] between 100,000 and 150,000 carats, rough diamond imports to Antwerp from Liberia were recorded at 31 million carats between 1994 and 1998—an average of over 6 million carats per year."⁹⁸ After the UN passed Resolution 1306 and banned all sales of rough diamonds from Sierra Leone, diamond production in Liberia increased 162.1 percent over 1999 production.⁹⁹ In 2001, diamond production in Liberia increased over 75 percent in the first quarter alone.¹⁰⁰

The increased output caught the attention of the UN, who noted that diamonds "represent a major and primary source of income for the [RUF], that the bulk of RUF diamonds leave Sierra Leone through Liberia, and that such illicit trade cannot be conducted without the permission and involvement of Liberian government officials at the highest levels."¹⁰¹ The Resolution called for a ban on all imports of diamonds from Sierra Leone, regardless of whether those diamonds originated in Sierra Leone, except for those "controlled through the Certificate of Origin regime of the Government of Sierra Leone."¹⁰² With the obvious intention of curbing the illicit trade and smuggling of Sierra Leonean conflict diamonds through neighboring Liberia, the UN reiterated its desire "to break the link between diamonds and armed conflict" and to target "the link between the

91. See Banat, *supra* note 2, at 943.

92. *Id.*

93. *Id.*

94. The RUF entered Sierra Leone and launched its offensive by going through Liberia. See *supra* note 53 and accompanying text.

95. Banat, *supra* note 2, at 943.

96. See Forest, *supra* note 57, at 642.

97. See Kaplan, *supra* note 28, at 570.

98. *Id.*

99. *Id.*

100. *Id.*

101. See S.C. Res 1343, U.N. Doc. S/RES/1343 (March 7, 2001).

102. *Id.* at ¶2(c).

trade in conflict diamonds and the supply to rebel movements of weapons, fuel or other prohibited material."¹⁰³

C. ANGOLA

Like Sierra Leone, the role of conflict diamonds in Angola's history stems from problems rooted in the country's colonial history.¹⁰⁴ A Portuguese colony since explorers first arrived there in 1483,¹⁰⁵ Angola was an essential part of the Portuguese empire and economy, initially because of its export of slaves and later because of its trade in, and supply of, coffee, oil, and diamonds.¹⁰⁶ The exploitation of Angolan resources and people, however, left many Angolans uneasy with their colonial rulers, and it ushered in nationalist movements that would form the basis of civil conflict in post-colonial Angola.¹⁰⁷ During the 1950s and 1960s, three nationalist movements emerged in response to the growing anti-colonialist sentiment, each with its own political philosophy and idea of how Angola should be run.¹⁰⁸ The ruling party in Angola, the Popular Movement for Liberation of Angola (MPLA), was founded in 1956 and "drew support from urban dwellers and professed a Marxist ideology."¹⁰⁹ The National Front of Liberation of Angola (FNLA) was "composed mostly of Kikongo, or Bakongo, people who had significant ties to Zaire," while the National Union for the Total Independence of Angola (UNITA), founded by Jonas Savimbi in 1966,¹¹⁰ drew support from the Ovimbundu people, the largest ethnic group in Angola and the group residing in the diamond producing areas of Angola.¹¹¹ UNITA's ideology was largely Savimbi's own ideals and personal political vision, which began as Maoist and evolved into anti-communist.¹¹² Many saw this move as an attempt to win the support and assistance of the United States during the Cold War.¹¹³

Although the groups shared a common vision of an Angola freed from colonialist rule, the three groups differed greatly in their theories as to the means to accomplish that goal.¹¹⁴ When the MPLA gained control of the capital city, Luanda, after Portugal abdicated control and granted independence to Angola in 1975, UNITA and FNLA came together to launch a civil war against the MPLA-run government.¹¹⁵ Acknowledging that they could not defeat the ruling power alone, the two nationalist groups agreed to come together under the banner of UNITA and launch a civil war.¹¹⁶ The civil war caught the attention of both the United States and the Soviet Union, who were vying for political influence in the Third World and saw the African continent as just another battlefield in

103. *Id.* at 1.

104. See *supra* note 37 and accompanying text.

105. Saunders, *supra* note 21, at 1417.

106. See Maggi, *supra* note 20, at 522.

107. *Id.*

108. The three groups were distinct in their politics but also in their popular bases of support. See Saunders, *supra* note 21, at 1416-17.

109. *Id.* at 1418.

110. See *id.* at 1417-18.

111. *Id.* at 1420.

112. *Id.*

113. Maggi, *supra* note 20, at 523.

114. See *id.*

115. See *id.* at 523-24.

116. *Id.*

the Cold War.¹¹⁷ With support coming in from both sides, there was no need to exploit the country's natural resources beyond simple supply and demand trade. Yet as the Cold War drew to a close, support from the East and the West dried up, which forced UNITA "to sell its stockpiles of diamonds to supply its army with weapons."¹¹⁸

After a May 1991 peace agreement that resulted in a cease-fire and lead to free elections in September of the next year,¹¹⁹ UNITA and MPLA again were engaged in war. With repeated attempts at peace,¹²⁰ Angola spent the next ten years in and out of peace and cease-fires. Established peace arose only recently after Savimbi's death in February 2002 and the Luena Memorandum was signed, leading to a relatively lasting period of peace, cease-fire, and free elections in Angola.¹²¹ Yet, the relative peace that exists now did not come without a cost, as it is estimated that due to the violence that erupted between UNITA and MPLA during the 1990s, hundreds of thousands were killed or displaced, with 182,000 killed between May and October of 1993 alone.¹²² During this time, the diamond trade and the diamond mines controlled by UNITA allowed the rebel group to finance and continue their war, with revenue from illicit sales estimated to be nearly \$4 billion between 1992 and 1998.¹²³ Looking to Collier and Hoeffler's thesis, diamonds, again, may have been more than a source of funding and, perhaps, even the "goal of the conflict."¹²⁴ "Two of UNITA's major wars were launched at a time of significant recession in the diamond industry, and during the 1997 recession, UNITA withdrew from the Cuango Valley mines, cutting back supplies in an overstocked industry."¹²⁵ During the fighting, UNITA attempted to shut down official diamond mining in an attempt to prevent the government from profiting from the diamond trade.¹²⁶ Utilizing tax havens and an elaborate system of transport between small traders, mining companies, and "relief agencies," UNITA was able to trade diamonds overseas and throughout the African continent while avoiding UN oversight and concealing their origin.¹²⁷ Reports indicate that UNITA sold diamonds to a "smaller diamond trader, who buys African diamonds from a range of countries and who is in contact with UNITA's diamond traders. The trader is the agent of a larger diamond cutter, and these diamonds are moved via tax havens from the first trader to the second."¹²⁸ The system is designed to conceal that the diamonds

117. In line with the "containment policy" and its mission to quash communism, the United States pledged its support for the democratic leaning UNITA, while the Soviet Union lent its support to the Marxist-leaning Angolan government under MPLA. See Malamut, *supra* note 10, at 30; see also Maggi, *supra* note 20, at 524.

118. See Malamut, *supra* note 10, at 30.

119. The U.N. ruled free and fair the 1992 elections which won the MPLA control of the government, but Savimbi rejected the results and fighting continued. See Maggi, *supra* note 20, at 524.

120. In 1994, UNITA and the MPLA signed the Lusaka Protocol in an attempt to end the fighting, but the peace was tentative at best. UNITA breached the Protocol and Savimbi took the opportunity to undergo a rearmament. In a 1999 government offensive, UNITA lost control of key diamond mining areas in Angola. See Kaplan, *supra* note 28, at 573-74.

121. See Maggi, *supra* note 20, at 525. UNITA converted into a political party in 2003, electing leaders to run in general elections. See Kaplan, *supra* note 28, at 574.

122. Kaplan, *supra* note 28, at 573.

123. See Malamut, *supra* note 10, at 30. During this time, "diamond output was under near-exclusive control of UNITA." See Kaplan, *supra* note 28, at 574.

124. See Kaplan, *supra* note 28, at 574.

125. *Id.*

126. *Id.*

127. See Maggi, *supra* note 20, at 525-26.

128. *Id.* at 525.

originated in Angola. UN reports also indicate that "UNITA was able to maintain funding through various 'relief agencies' in Africa and Europe. These 'relief agencies' would publicly solicit funds to end the violence in Angola, but would actually act as a front and solicit funds for the war effort."¹²⁹

For its "failure to implement fully its obligations contained in the Lusaka Protocol, [and] relevant Security Council resolutions," the UN, in passing Security Council Resolution 1173, condemned¹³⁰ UNITA and levied sanctions, including dictating that states "prohibit the direct or indirect import from Angola to their territory . . . all diamonds that are not controlled through the Certificate of Origin regime."¹³¹ While the volume of conflict diamonds reaching the market did decrease after sanctions were levied, some see the end of armed conflict as the motivating factor in curbing the illicit practice.¹³² It was not until the assassination of Savimbi and the signing of Luena Memorandum that peace was ushered into Angola and the trade in conflict diamonds noticeably receded. "Since its signing, the Luena Memorandum has served as the foundation that the new Angolan government has used to help draft a constitution and legitimize its authority."¹³³ The civil conflict in Angola shows that sanctions were most effective when coinciding with peace, suggesting that cooperation among the international community and a lack of incentive to profit illegally went a long way toward stabilization.¹³⁴

D. DEMOCRATIC REPUBLIC OF CONGO

One of the richest countries in the world in terms of natural resources,¹³⁵ the Democratic Republic of the Congo (DRC), was also the centerpiece in what has been called "Africa's First World War."¹³⁶ When the Congo gained independence in 1960, after sixty years of Belgian colonialist rule, it saw five turbulent years before rebel leader Joseph Mobutu came to power after a coup d'etat.¹³⁷ While many thought that the vast natural resources would bring prosperity to the Congo following independence, such predictions or hopes turned out to be false, as the resources instead became a source of conflict.¹³⁸ Mobutu renamed the country Zaire and ran it as a military dictatorship but "[f]ailed foreign investments, cancelled development programs, and riots by unpaid soldiers characterized his thirty-year reign."¹³⁹ During his reign, Mobutu made a number of changes to his trade policies, including ending an exclusive contract between his country and a De Beers subsidiary.¹⁴⁰ In the early 1980s, Mobutu

129. *Id.* at 526.

130. S.C. Res. 1173, at 1, U.N. Doc. S/RES/1173 (June 12, 1998).

131. *Id.* at ¶ 12(b).

132. See Maggi, *supra* note 20, at 529.

133. *Id.*

134. *Id.*

135. The DRC has a natural abundance of diamonds, gold, cobalt, copper, timber, and coltan, an ore used in the aerospace industry and in the production of electronics capacitors. See Kaplan, *supra* note 28, at 578.

136. See Price, *supra* note 58, at 16.

137. See Fishman, *supra* note 29, at 221.

138. *Id.*

139. Price, *supra* note 58, at 18.

140. See Fishman, *supra* note 29, at 221.

abruptly ended an exclusive contract between Zaire and a subsidiary of De Beers in order to exploit [Zaire's] diamond resources through more lucrative deals. 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.¹⁴¹

The move showed just how vital diamonds were to the economy of the country.

The UN attempted to establish peace when Mobutu's reign ended after continued conflict between rebels and his government soldiers,¹⁴² but rebels, led by Laurent-Desire Kabila, captured eastern Zaire and took control of the government and country.¹⁴³ After capturing eastern Zaire and the capital, Kinshasa, Kabila named himself president and changed the country's name back to the Democratic Republic of the Congo.¹⁴⁴ "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."¹⁴⁵ The arraignment did not last, and neither did the peace; soon after, the rebellion turned into a civil war that eventually brought some seven African nations into conflict with one another.¹⁴⁶ In 1998, Tutsi rebels supported by Rwandan and Ugandan forces attempted to overthrow the government in an uprising that eventually brought troops from Zimbabwe, Chad, Namibia, Angola, and Burundi into the conflict in the DRC.¹⁴⁷ Not only was the uprising supported "by trading rough diamonds for arms and money"¹⁴⁸ but also "[t]he geographical proximity of Rwanda and Uganda allowed their soldiers to enter and occupy the bordering regions, and to establish their own diamond extraction networks within the DRC."¹⁴⁹ Like Sierra Leone, Angola, and Liberia before it, the civil strife in the DRC showed a clear connection between the conflict and economic opportunity in the form of exploited resources.¹⁵⁰

E. STATELESS ENEMIES

While the trade in conflict diamonds has surely left its mark on the African continent, the effects of the trade are felt elsewhere around the globe, particularly in nations that have fallen victim to terrorist attacks by stateless organizations such as al Qaeda.¹⁵¹ In the wake of 9/11, reports surfaced of the group's use of "conflict diamonds for financing and money laundering."¹⁵² From as far back as the 1998 bombings in Kenya and Tanzania, the

141. *Id.*

142. The United Nations peace plan called 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 peace in the region." See S.C. Res. 1097, ¶ 1, U.N. Doc. S/RES/1097 (Feb. 18, 1997); Fishman, *supra* note 29, at 221-22.

143. Fishman, *supra* note 29, at 222.

144. *Id.*

145. *Id.*

146. See Malamut, *supra* note 1, at 32.

147. *Id.*

148. See Fishman, *supra* note 29, at 222.

149. Malamut, *supra* note 10, at 32.

150. See Kaplan, *supra* note 28, at 578.

151. *Id.* at 617, n1.

152. Fluet, *supra* note 36, at 107. The Washington Post reported that al Qaeda bought diamonds from Sierra Leonean rebels and sold them in Europe for millions of dollars. See Kaplan, *supra* note 28, at 122.

group had attempted to evade U.S. attempts to freeze al Qaeda and Taliban bank accounts by converting their cash into a more liquid, fungible, and untraceable asset.¹⁵³ Investigations by the Federal Bureau of Investigations (FBI) into al Qaeda-lined diamond merchants showed large surges in business in diamonds prior to 9/11,¹⁵⁴ indicating that the conflict diamond trade “channels billions of dollars into black market economies turning it into easy money for terrorists whose cells are involved in a range of money making activities that include diamond trading.”¹⁵⁵ Other terrorist groups, such as Hamas and Hezbollah, have also bought African diamonds and sold them outside the continent, making a large profit and using it to buy arms.¹⁵⁶ Hezbollah, specifically, “has funneled millions of dollars through the DRC to its organization.”¹⁵⁷ The ability of international terrorists to utilize a commodity such as conflict diamonds has awoken many in Europe and the West to the reality that the conflict diamond trade is not just Africa’s problem, but is a far-reaching problem, even if many of the other conflicts in Africa have subsided.¹⁵⁸

III. An International Response—Diamond Certification and the Kimberley Process

A. THE KIMBERLEY PROCESS

In response to UN sanctions, many African countries established internal mechanisms and certification systems aimed at controlling the trade of smuggled and illicit conflict diamonds; but without effective enforcement, these internal schemes had little real effect.¹⁵⁹ In hopes of making these enforcement regimes more effective and creating a “stronger multilateral effort to proscribe illicit trading,”¹⁶⁰ Africa’s diamond producing nations, non-governmental organizations (NGOs), and members of the diamond industry met in Kimberley, South Africa,¹⁶¹ in May 2000 to “establish normative trade standards to prevent the conflict diamond trade”¹⁶² and to “discuss the development of an international certification scheme aimed at preventing ‘conflict diamonds from entering legitimate markets.’”¹⁶³ The UN, in its General Assembly Resolution adopted in January 2001, gave its official recognition of the conflict diamond problem and offered its support and backing for an international diamond certification scheme.¹⁶⁴ Specifically, the UN acknowledged “that the problem of conflict diamonds is of serious international concern, and that mea-

153. See Maggi, *supra* note 20, at 536. Converting their cash to diamonds allowed al Qaeda “to hold several million dollars of assets in ‘the most compact form of wealth known to man.’” See Fluet, *supra* note 36, at 108.

154. Before being apprehended by Belgian authorities, Aziz Nassour, an al Qaeda operative and Lebanese diamond merchant, saw his diamond company see a surge in business of over \$1 billion prior to 9/11. See Maggi, *supra* note 20, at 536.

155. *Id.* at 536-37.

156. Fluet, *supra* note 36, at 108.

157. *Id.*

158. See *id.* at 109.

159. See Malamut, *supra* note 10, at 38-39.

160. Banat, *supra* note 2, at 957.

161. Kimberley, South Africa, is the site of De Beers’ first mine. See *id.*

162. See Fluet, *supra* note 36, at 111.

163. Malamut, *supra* note 10, at 39.

164. G.A. Res. 55/56, ¶ 1, U.N. Doc. A/RES/55/56 (Jan. 29, 2001).

asures to address the problem should involve all concerned parties, including producing, processing, exporting, and importing countries, as well as the diamond industry."¹⁶⁵ The Resolution

[emphasized] that these measures should be effective and pragmatic, consistent with international law, including relevant trade provisions and commitments, and should not impede the current legitimate trade in diamonds or impose an undue burden on Governments or industry, particularly smaller producers, and not hinder the development of the diamond industry.¹⁶⁶

The meeting of diamond producing nations and NGOs led to the creation of the "Kimberley Process," "a program of voluntary negotiation among state governments to build an international Kimberley Process Certification Scheme for the import and export of rough diamonds."¹⁶⁷ In 2002, two years after negotiations began, the participating members' work resulted in the Kimberley Process Certification Scheme (KPCS), which built off of existing UN sanctions and regulations.¹⁶⁸ The primary goal of the Kimberley Process is to "legitimize the governments that rely on the trade of diamonds by setting forth a regulated import and export system that will attempt to stabilize the trade of diamonds in these African countries."¹⁶⁹ Once a stable government is in place, "it is believed that those who have been severely affected by the ongoing conflicts funded by the trade in rough diamonds will be eliminated."¹⁷⁰

The KPCS began in November of 2003 when fifty-two governments ratified and adopted the agreement.¹⁷¹ Today, seventy-one governments, with the support of the diamond industry and various NGOs, are participating members of the KPCS.¹⁷² The KPCS participants receive "reports and recommendations from the World Diamond Council in order to develop a comprehensive method to stem the flow of conflict diamonds while minimizing the impact on legitimate trade."¹⁷³ The Kimberley Process consists of three basic components: an internal control system, requirements for shipping rough diamonds, and a method of tracking diamonds after export.¹⁷⁴ The Kimberley Process dictates that diamonds follow an established path and go through a system of security measures before reaching the end user.¹⁷⁵ After rough diamonds are mined, they are sent to Government Diamond Offices, where they are certified as "conflict free."¹⁷⁶ The diamonds are then placed in tamper-resistant containers and accompanied by a government-issued Kimberley Process Certificate bearing an individual serial number.¹⁷⁷ In ad-

165. *Id.* at ¶ 5.

166. *Id.*; see also G.A. Res. 56/263, ¶¶ 9-11, U.N. Doc. A/RES/56/263 (Feb. 6, 2003).

167. Kaplan, *supra* note 28, at 587.

168. See Fluett, *supra* note 36, at 111.

169. Maggi, *supra* note 20, at 530.

170. *Id.*

171. Diamondfacts.org, *Eliminating Conflict Diamonds*, http://diamondfacts.org/conflict/eliminating_conflict_diamonds.html#kim (last visited Sept. 23, 2007).

172. See *id.*

173. See Fluett, *supra* note 36, at 111-12.

174. See Kaplan, *supra* note 28, 587.

175. See *Eliminating Conflict Diamonds*, *supra* note 171.

176. *Id.*

177. *Id.*

dition to being forgery resistant, the certificate must identify the country of the diamond's origin, and it must include 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."¹⁷⁸ Each participant nation is required to ensure that the diamonds being legally imported come only from one of the other seventy-one KPCS member-states.¹⁷⁹ Diamond shipments lacking the Kimberley Process Certificate are subject to impound or rejection.¹⁸⁰ Kimberley Process participants

through whose territory rough diamond shipments pass are not required to meet [the importing requirements], provided that the authorities of that territory ensure that the shipment leaves the territory in a state identical to that when it entered (the shipment may not be opened or tampered with in any way).¹⁸¹

Those diamonds entering legitimately and in compliance with KPCS requirements are sent out to be cut, but each time a diamond changes hands, it must be accompanied by a warranty verifying that the diamond is not from a conflict region.¹⁸² This warranty system is required of diamond traders at almost every stage in the process, from "rough diamond importers to in-country traders, polishers, dealers, and manufacturers."¹⁸³ The affirmative statement accompanying the warranty dictates that "[t]he diamonds herein invoiced have been purchased from legitimate sources not involved in funding conflict and in compliance with UN 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."¹⁸⁴ "Under the terms of the Kimberley Process, it will be considered a violation to issue a warranty declaration on a sales invoice unless it can be corroborated by warranty invoices received for purchases."¹⁸⁵ If a country does not comply with the Kimberley Process principles and guidelines, including the warranty provisions, that country could be made subject to an investigation or face expulsion from certain diamond industry institutions.¹⁸⁶ The Kimberley Process also calls for cooperation requirements among its participants, providing that "[p]articipants should provide each other with information to assist the operation of the controls, such as the identification of the authorities in each state who are responsible for implementing the certification scheme and relevant laws."¹⁸⁷ The process also provides for monitoring and dispute resolution procedures whereby "[r]eview missions must be conducted with the consent of the Participant concerned."¹⁸⁸ In addition to the KPCS, many diamond industry organizations and affiliate groups adopted a system of self-regulation.¹⁸⁹

178. See Fishman, *supra* note 29, at 226.

179. See *Eliminating Conflict Diamonds*, *supra* note 171.

180. *Id.*

181. Kaplan, *supra* note 28, at 590.

182. See *Eliminating Conflict Diamonds*, *supra* note 171.

183. See Wallis, *supra* note 11, at 396.

184. *Id.*

185. See *Eliminating Conflict Diamonds*, *supra* note 171.

186. *Id.*

187. Kaplan, *supra* note 28, at 590.

188. *Id.*

189. See Fishman, *supra* note 29, at 227.

B. U.S. EFFORTS TO HALT THE TRADE IN CONFLICT DIAMONDS

Ranking as the world's largest market for diamonds and its leading consumer, the United States was in the unique position to assume responsibility and act against the trafficking of conflict diamonds.¹⁹⁰ "[D]emand for diamonds in the United States is the largest in the world."¹⁹¹ "In fiscal year 2000, over \$800 million in rough diamonds entered the United States from fifty-three countries through several U.S. ports of entry. These imports contribute significantly to the U.S. diamond jewelry market, which was worth an estimated \$26 billion in 2000."¹⁹² Aside from any moral obligation to curb human rights violations or civil unrest,

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. 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.¹⁹³

If the United States did not become a participating member of the KPCS, its diamond trade would be limited to other non-participating members, which, for all intent and purpose, would be diamond-producing nations already facing UN sanctions for diamond-trade violations or failure to comply with KPCS requirements.¹⁹⁴ The result of not becoming a member would also be that legitimate diamond-exporting countries would lose the benefit of U.S. markets and revenues.¹⁹⁵

Acknowledging the link to supporting the legitimate diamond trade and acting to cut off terrorist financing,¹⁹⁶ the U.S. Senate and House of Representatives passed the Clean Diamond Trade Act (CDTA or the "Act") on April 25, 2003.¹⁹⁷ On July 30, 2003, one day before the deadline passed for authorizing the certification process, President Bush signed the Act.¹⁹⁸ The Act was sponsored by Congressman Tony Hall. Hall, an Ohio Democrat, has made a mission out of addressing humanitarian causes, including the eradication of conflict diamonds.¹⁹⁹

A born again Christian and Peace Corps volunteer in the 1960s, Hall had long shown a profound commitment to the fight against world hunger. In 1993, he protested Congress' decision to abolish its Select Committee on Hunger with a three-week hunger strike. Oxfam, the international humanitarian group, honored him in 1992.²⁰⁰

190. Price, *supra* note 58, at 42.

191. *Id.*

192. *Id.*

193. Fishman, *supra* note 29, at 230.

194. *Id.* at 231.

195. *Id.*

196. See Kaplan, *supra* note 28, at 122.

197. 19 U.S.C.A. § 3901 (2003).

198. See Fishman, *supra* note 29, at 231.

199. See Daniel L. Feldman, *Conflict Diamonds, International Trade Regulation, and the Nature of Law*, 24 U. PA. J. INT'L ECON. L. 835, 845 (2003).

200. *Id.*

The Act concludes that “[f]unds derived from the sale of rough diamonds are being used by rebels and state actors to finance military activities, overthrow legitimate governments, subvert international efforts to promote peace and stability, and commit horrifying atrocities against unarmed civilians.”²⁰¹ Not only does the Act acknowledge the “consumer backlash” of not complying with the KPCS,²⁰² but it also provides “[m]easures for the importation and exportation of rough diamonds.”²⁰³

The CDTA gives the President authority to “prohibit the importation into, or exportation from, the United States of any rough diamond, from whatever source, that has not been controlled through the Kimberley Process Certification Scheme.”²⁰⁴ This requirement can be waived if the President determines that a country is taking steps to implement the KPCS or if the interests of national security predominate.²⁰⁵ “[T]he CDTA permits the President to prohibit or seize diamond and jewelry shipments if the traders violate or attempt to violate provisions of the CDTA.”²⁰⁶ Both civil and criminal penalties can be levied against violators of the Act,²⁰⁷ although as of 2005, “[n]o individual, however, has been tried or convicted in the United States for attempting, or actually importing or exporting, uncertified diamonds.”²⁰⁸

IV. What’s Wrong with the System?

A. THE FALLACY OF THE CDTA

The CDTA also contains provisions setting forth monitoring and recording measures for “annual reviews” of procedures “for the exportation from the United States of rough diamonds to determine whether such standards, practices, and procedures are in accordance with the Kimberley Process Certification Scheme.”²⁰⁹ The results of a current report from the Government Accountability Office (GAO),²¹⁰ conducted as required by the CDTA,²¹¹ highlight certain problems and deficiencies with the contemporary enforcement scheme. The report made a number of observations on the current state of diamond importing and exporting in the United States and found that in many instances effective enforcement of KPCS procedures was below-par.²¹²

201. § 3901(2)(1).

202. § 3901(2)(6)-(7). “Without effective action to eliminate trade in conflict diamonds,” the Act concludes, “the trade in legitimate diamonds faces the threat of a consumer backlash that could damage the economies of countries not involved in the trade of conflict diamonds and penalize members of the legitimate trade and people they employ.” The Act also singles out Botswana, Namibia, South Africa, and Tanzania as African countries that would be adversely affected by the United States’ reluctance to become a participating member of the KPCS.

203. § 3903.

204. § 3903(a).

205. § 3903(b)(1)-(2).

206. Flueter, *supra* note 36, at 113-14.

207. § 3907(a)(1)-(2)(b).

208. Fishman, *supra* note 29, at 233.

209. § 3904(c).

210. GAO-06-978, *supra* note 16, at 1.

211. See *Eliminating Conflict Diamonds*, *supra* note 171.

212. GAO-06-978, *supra* note 16, at 2.

The GAO report found, among other things, that while U.S. authorities have moved closer to implementing the CDTA's importing and trade provisions, the United States was still vulnerable to illicit trade.²¹³ "Because most of these vulnerabilities involve limited government monitoring and oversight, U.S. control systems cannot help deter illicit rough diamonds from entering the legitimate trade."²¹⁴ Furthermore, the report finds that U.S. trade data on rough diamond imports leaves much work to be done.²¹⁵ As the KPCS has expressed growing concern over the reliability of data submitted by the United States, the report noted that U.S. rough diamond trade data submitted to the KPCS indicated a significantly higher volume of diamond imports than exports.²¹⁶ Specifically, the GAO report stated "that the United States had exported about 3 million carats more than it imported in 2003. As a non-producing nation, this excess in exports was not plausible and raised concerns about the accuracy of the U.S. trade data and the potential laundering of rough diamonds through the United States."²¹⁷

In addition to inaccurate reporting on importing and exporting data, the GAO also found weaknesses in the imported rough diamond inspection plan.²¹⁸ U.S. Customs and Border Protection (CBP), which handles the inspection of diamond import shipments for documentation review, uses a system of inspection that seeks to identify "high-risk" shipments for physical inspection, but the selection is random, and "[l]ess than one percent of rough diamond shipments each year are selected for a physical inspection through this program."²¹⁹ Not only are a scant number of imported diamonds physically inspected, but the "CBP does not have a policy or plan for conducting physical inspections periodically or regularly."²²⁰ The report also found that "[t]he United States has not fully complied with the KPCS standard that requires KPCS participants to confirm rough diamond import receipts to the relevant foreign exporting authority."²²¹ The report concludes that "the United States had not confirmed receipt of most import shipments to foreign exporting authorities of four KPCS participants, which are key U.S. trading partners, and the United States did not know the extent to which it had not confirmed import receipts with the rest of the participants."²²² The report also cites a lack of vigilance with regards to tracking these receipts.²²³ According to the report, "[t]he United States has not made any U.S. agency responsible for tracking these import confirmations, and has only learned about the U.S. failure to confirm import receipts when exporting authorities from other countries have complained about this problem."²²⁴ Further still, weaknesses are exposed in the system to control rough diamonds, as the current system "involves little direct U.S. government monitoring, thereby preventing the United States from being sure that illicit

213. *Id.* at 13.

214. *Id.*

215. *Id.*

216. *Id.* at 13-14.

217. *Id.*

218. *Id.* at 20.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* at 22.

224. *Id.*

shipments are not leaving the country.”²²⁵ This lack of oversight may have spilled over to the certificates themselves, as “[s]ome countries have reported quality control problems with the U.S. Kimberley Process certificates.”²²⁶ Reported problems include certificates with corrections (including the use of correction fluid), typographical errors, and incorrect dates.²²⁷ The quality control problems are a concern for many not only for formality issues, but because they raise the possibility that the certificates have been tampered with and are therefore not in compliance with KPCS requirements.²²⁸

B. WHY THE KIMBERLEY PROCESS MAY NOT BE WORKING

The observations made in the GAO report about the shortcomings of the CDTA echo many of the criticisms levied by NGOs and academics on the Kimberley Process itself, including deficient monitoring and lack of enforcement.²²⁹ Global Witness notes that “[t]here is still a flourishing illicit trade in diamonds globally,” even years after the Kimberley Process has been implemented.²³⁰ But to some, the continuing flow of conflict diamonds will not be stopped even by a fully implemented Kimberley Process.²³¹ Seeing as diamonds are among the “most concentrated forms of wealth and offer huge returns due to their price and ease which they can be smuggled,” there is no guarantee that any type or degree of certification scheme would stop already-determined smugglers or diamond mining officials who continue to be “amenable to bribery.”²³² Yet if the goal of the Kimberley Process is to stop the trade in conflict diamonds, a necessary first step is clearly and effectively defining a “conflict diamond” to distinguish it from other diamonds, but conflicting or inconsistent definitions among documents and organizations may present problems in effective enforcement.²³³

The UN defines conflict diamonds as “diamonds that originate from areas controlled by forces or factions opposed to legitimate and internationally recognized governments, and are used to fund military action in opposition to those governments, or in contravention of the decisions of the Security Council.”²³⁴ UN General Assembly Resolution 55/56 defines conflict diamonds as “rough diamonds which are used by rebel movements to finance their military activities, including attempts to overthrow legitimate Governments.”²³⁵ The Kimberley Process working document defines conflict diamonds in a more expansive way, as

rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments, as described in relevant UN Security Council (UNSC) resolutions insofar as they remain in effect, or other similar UNSC resolu-

225. *Id.* at 23.

226. *Id.* at 28.

227. *Id.*

228. *Id.*

229. See Fluet, *supra* note 36, at 115-16.

230. GlobalWitness.org, *Combating Conflict Diamonds: Is the Kimberley Process Working?*, Global Witness, http://www.globalwitness.org/pages/en/the_kimberley_process.html.

231. See Fluet, *supra* note 36, at 118.

232. *Id.*

233. See Kaplan, at 594-95.

234. See *Conflict Diamonds: Sanctions and War*, *supra*, note 5.

235. G.A. Res. 55/56, *supra* note 161, ¶ 2.

tions which may be adopted in the future, and as understood and recognized in United Nations General Assembly (UNGA) Resolution 55/56, or in other similar UNGA resolutions which may be adopted in the future.²³⁶

While these definitions are consistent in their reference to diamonds that fund rebel movements and diamonds classified by UN Security Council resolutions, they do not take into account that labels such as "rebel movement" or "factions opposed to legitimate and internationally recognized governments" can be ambiguous or even counter-productive.²³⁷ "Furthermore, conflicts may arise in which the Security Council, due to either political circumstance or to other reasons, does not issue a resolution with regard to the conflict."²³⁸

One of the most common criticisms of the KPCS is that its system of internal controls is voluntary in nature.²³⁹ Although the Kimberly Process requires participants to "amend or enact appropriate laws or regulations to implement and enforce the Certification Scheme and to maintain dissuasive and proportional penalties for transgressions, the document provides little enlightenment as to what constitutes appropriate laws."²⁴⁰ Without clear definitions of what these standards and laws are meant to be, the Kimberley Process becomes "reliant on the good faith of participating countries"²⁴¹ and "is only as strong as the will of the Participants to execute it."²⁴² Given the nature of political stability in certain of these diamond-producing countries, especially during times of civil unrest, self-regulation as a policy for enforcement should give reason to question the strength of the KPCS.²⁴³ For example, the system established in Angola some years ago provides "no guarantee that the nation's internal controls prevent diamonds from being imported or exported illegally."²⁴⁴ Without an established system for determining, "beyond an incomplete paper system," where diamonds originate or enter the stream of trade, there is an inherent danger that "self-regulation only amounts to a statement on an invoice that is not verifiable and is not supported by any policies that prevent the purchase of conflict diamonds."²⁴⁵

Still, even if the good faith of KPCS participants in promoting internal controls led to a reduction in the trafficking of conflict diamonds, such actions may have come about too late. Global Witness first brought conflict diamonds to the world's attention in 1998, but the Kimberley Process was not fully in place until July 2003, when many of the human rights violations had subsided with the end of civil conflicts and when the time for the greatest impact on saving lives had passed.²⁴⁶ The lapse between the conflicts that fueled

236. Kaplan, *supra* note 28, at 594.

237. Existing definitions "may not account adequately for the variety of conflicts that diamonds fuel." *See id.* at 595.

238. *Id.*

239. *See* Wallis, *supra* note 11, at 405.

240. Kaplan, *supra* note 28, at 591.

241. Fluet, *supra* note 36, at 116.

242. Kaplan, *supra* note 28, at 591.

243. *See* Fluet, *supra* note 36, at 117.

244. *Id.*

245. *Id.* (internal quotations omitted).

246. "It simply took too long for the world community to react to the failed UN sanctions, and even after the Kimberley Process was underway, discord and disagreement caused significant delays in its implementation." *See* Wallis, *supra* note 11, at 401.

the trade in conflict diamonds and the global effort to create procedures and policies to deal with the problem may have caused focus and public attention to be misplaced, or at least untimely.²⁴⁷

Additionally, there is no independent monitoring system “to ensure that each nation actually complies with the regulations and suggestions of the KPCS,” and “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 laundering exist.”²⁴⁸ Furthermore, statistical reporting submitted by participating countries is not based on any uniform reporting methodology, which makes statistical comparison about imports and exports between or among countries particularly difficult.²⁴⁹ There are also indications that while the Kimberley Process was being implemented, retail jewelers were not taking it seriously by failing to provide end users and consumers with “a meaningful account of their policy” through a system of warranties.²⁵⁰

Although there are flaws in the Kimberley Process and the CDTA, that is not to say they are entirely ineffective or that they cannot be amended to be improved.²⁵¹ To create a more effective system to prevent the importation or exportation of conflict diamonds, the U.S. GAO made a number of recommendations, including directing the Treasury Department to analyze “what constitutes a normal excess of exports over imports” to improve the “accuracy of U.S. rough diamond trade data.”²⁵² In addition, they recommended a stricter plan for regular or periodic inspections of rough diamond imports and exports, “a plan for confirming the receipt of imports,”²⁵³ and to the development and implementation of “a plan for providing some of the diamond-related assistance using a regional approach so that countries within a region can harmonize aspects of their systems for controlling the rough diamond trade across porous borders.”²⁵⁴

While many of the GAO’s recommendations concerned issues of quality control, oversight is no doubt a large concern, just as it is with the KPCS.²⁵⁵ Global Witness recommends, as do others, that “without an independent monitoring and supervisory agency

247. While certain media campaigns have recently brought conflict diamonds into a much greater public light, during the years after the Kimberley Process was implemented, the NGO community’s “vigilance” seemed to wane. The number of press releases from NGOs such as Global Witness, Amnesty International, and Partnership Africa Canada decreased significantly after the October 2004 Kimberley Process plenary meeting, explained (and perhaps also compounded) by a “seeming intimation that the Kimberley Process alone may not provide an adequate framework to solve all of the problems arising from the diamond trade.” *See id.* at 402-03.

248. Fishman, *supra* note 29, at 234-35.

249. Some participating countries report statistics late or not at all. Russia has long refused to submit any statistics about its diamond industry, “despite the fact that it is one of the world’s largest diamond producers, [that] it has been a significant participant in the Kimberley Process almost since its inception” and was at one time the Chair of the Kimberley Process. Often there is no penalty for late submissions or no submissions at all. *See Wallis, supra* note 11, at 407-08.

250. *See id.* at 406-07 (internal quotations omitted).

251. That the Kimberley Process exists at all should be evidence that the problem has gained widespread attention. For a general discussion of why the inception of the Kimberley Process, along with the pressure and reporting brought by NGOs has helped the cause, *see Wallis, supra* note 11, at 398-400.

252. GAO-06-978, *supra* note 16, at 40.

253. *Id.*

254. *Id.* at 41.

255. “A system for controlling the trade in rough diamonds will be effective only if it has control mechanisms designed to curtail or deter the trade in conflict diamonds.” *Id.* at 38.

institutionalized to oversee the conduct and business practices of the diamond industry, ample opportunities for corruption and diamond laundering exist.”²⁵⁶ If there is no reliable, independent monitoring system “to ensure that countries actively and responsibly control their diamond trade, membership [in the KPCS] may lack true meaning.”²⁵⁷ The KPCS may also benefit from a uniform system of punishment for violations; as it is 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.”²⁵⁸ In addition, technological innovations like “geo-chemical” identification can be used to make tracking diamonds a more efficient and accountable process.²⁵⁹ At the local level, increased security and control at the mines themselves can go far in making sure that diamonds are not smuggled out without first being certified. “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.”²⁶⁰

V. Conflict Diamonds Today—The Calm After the Storm?

Today, Sierra Leone, Angola, and Liberia are at a relative peace, and yet despite the fact that more than 99 percent of diamonds are now “conflict free” and traded under the Kimberley Process, diamonds, and in particular conflict diamonds, are still a major issue in working toward the stability of Africa as a continent.²⁶¹ In 2006, on the third anniversary of the Kimberley Process, Global Witness acknowledged that progress had been made but noted the “need for more monitoring on the ground, to the ‘excessive reliance on industry self-regulation’ and to the persistent refusal to make countries’ diamond trading statistics public.”²⁶² Such calls for increased scrutiny of the KPCS have been resurrected with the growing concern over the Ivory Coast, which since 2002 has been involved in civil conflict.²⁶³ According to the UN, millions of dollars’ worth of conflict diamonds have been smuggled out of the Ivory Coast through neighboring Ghana, where they are certified as conflict free.²⁶⁴ The situation in the Ivory Coast highlights the shortcomings of the

256. Fishman, *supra* note 29, at 234-35.

257. Kaplan, *supra* note 28, at 610.

258. The problem of not having an independent system of punishment is the apparent inconsistency that may result, as one country’s punishment for violations may be inconsequential when compared to another’s. See Fishman, *supra* note 29, at 235. Domestically, the USA Patriot Act, through its anti-money laundering provisions, is a possible enforcement tool. See Maggi, *supra* note 20, at 540. For a good discussion on whether De Beers can be held liable under U.S. antitrust laws, see Dorsett, *supra* note 26, at 161-74.

259. See Fishman, *supra* note 29, at 240.

260. *Id.* at 238.

261. Diamondfacts.org, *The Facts*, <http://diamondfacts.org/facts/index.html>

262. Nicol Degli Innocenti, *Diamonds: Time to Review the Monitoring System The Kimberley Process*, FIN. TIMES (London), July 17, 2006, at 2.

263. “Ivory Coast has been divided into a rebel-held north and government south since a 2002/03 civil war and both rebels and allies of Laurent Gbagbo, the president, have been criticised for using natural resources, including cocoa and oil as well as diamonds, to fund war efforts.” See Dino Mahtani, *Conflict Diamonds Smuggled into Ghana*, SAYS UN REPORT, FINANCIAL TIMES (London), Oct. 7, 2006, at 6.

264. Nicol Degli Innocenti, *Call for More Action to Ban Conflict Diamonds*, FINANCIAL TIMES (London), Nov. 4, 2006, at 8.

Kimberly Process; as recently as 2005, a Kimberley Process resolution was passed setting “unprecedented controls in west Africa to stop diamond smuggling.”²⁶⁵ Ten months after a team of Kimberley Process experts was sent to monitor the situation in the Ivory Coast, their report had still not been drawn up.²⁶⁶

While the diamond-trading rebels from the Ivory Coast deny receiving revenues from the diamonds, claiming that taxes on cocoa, cotton, and timber pay for their movement,²⁶⁷ the more likely reality—that diamonds are once again being used to fund civil war—underscores the sheer economic impact that diamonds are having on Africa, be that for better or worse. Until the early 1990s, Zimbabwe was a thriving agricultural-based nation and economy that provided food for nearly all countries in Southern Africa and brought in foreign dollars through exports to both Asia and the West.²⁶⁸ With the collapse of the agricultural industry, mining was adopted as an alternative source of generating revenue, and diamonds are now “the most talked about and most sought after mineral in Zimbabwe.”²⁶⁹ The sudden boom and interest in the diamond market has prompted many already-impoorished Zimbabweans to try their hands at smuggling diamonds to neighboring South Africa and Botswana, where they can fetch considerably higher prices.²⁷⁰ The World Diamond Council has launched an investigation into the Zimbabwean diamonds, fearing that they could make their way to illegal markets to be mixed with conflict diamonds.²⁷¹ So far, 20,000 small miners have been arrested.²⁷²

What is so striking about Zimbabwe is that it is not only showing how much diamonds can sway an economy but also how sanctions or a ban on diamonds could be counter-productive. Because the diamonds mined in Zimbabwe would not fit with the Kimberley Process working document definition of conflict diamond,²⁷³ Kimberley Process sanctions such as restrictions on who the nation can trade diamonds with, would hurt an already fledgling economy by further restricting its trade capabilities and possibly by encouraging further illicit trading and smuggling through mere necessity. Such a reality echoes the sentiments of many in the diamond industry who point to the economic benefits diamonds bring to Africa.²⁷⁴ For instance, “an estimated five million people have access to appropriate healthcare globally thanks to revenues from diamonds,”²⁷⁵ and “the revenue from diamonds is instrumental in the fight against the HIV/AIDS pandemic.”²⁷⁶ In Botswana, GDP annual growth has averaged seven percent since diamonds were discovered in Botswana,²⁷⁷ and today, every child, up to the age of thirteen, can receive free education because of revenues from diamond exports.²⁷⁸

265. *Id.*

266. *Id.*

267. *Ivorian Rebels Deny Illicit Diamond Trading; U.N. Panel Has Cited Millions in Sale*, WASH. POST, Dec. 8, 2006, at A34.

268. *Zimbabwe Turns to Diamonds to Boost its Troubled Economy*, AFR. NEWS, Jan. 23, 2007.

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

273. See *supra*, note 191.

274. See *The Facts*, *supra* note 261, at 214.

275. Diamondfacts.org, *Fact #1*, http://www.diamondfacts.org/facts/fact_01.html

276. Diamondfacts.org, *Fact #12*, http://www.diamondfacts.org/facts/fact_12.html

277. Diamondfacts.org, *Fact #18*, http://www.diamondfacts.org/facts/fact_18.html

278. Diamondfacts.org, *Fact #5*, http://www.diamondfacts.org/facts/fact_05.html

These conflicting realities would seem to put the end consumer, to use the phrase lightly, between a rock and hard place. A backlash against diamonds would injure the legitimate market and counteract the progress that has been made since the plight of conflict diamonds first came to the world's attention in 1998,²⁷⁹ and yet the need to end the trade in conflict diamonds is very much alive. Whether the answer is in the Kimberley Process, the CDTA, a united effort combining the two, or through some global effort to eradicate Africa's social ills that give rise to the civil strife that fuel the fire of the conflict diamond trade, change can and must come. After all, the Kimberley Process is just that, a process. All one needs to do to see that is look at Ishmael.

After three years as a child soldier in the RUF, Ishmael Beah entered a Unicef-sponsored rehabilitation program after he was confined to a government hospital due to a wound he received in battle.²⁸⁰ Gifted with poise and an articulate tongue, Beah became a popular figure among UN officials and NGOs trying to bring awareness to the plight of child soldiers around the globe.²⁸¹ He eventually made his way to the United States, where he enrolled in Oberlin College and graduated with a degree in political science.²⁸² His memoir of his days in the RUF, *A Long Way Gone: Memoirs of a Boy Soldier*, sits on bookshelves and in Starbucks' across the country, and his face graces magazines and talk shows alike.²⁸³ Through his now-public journey, Ishmael has become a human face to a problem for that for so very many, had always been so very far away.

If only they all could have been so lucky.

279. See *supra* note 8 and accompanying text.

280. See Gumbel, *supra* note 1.

281. *Id.*

282. *Id.*

283. *Id.*

