Conflict diamonds are forever in southern Africa: the case for a human rights-based approach to the Kimberley process

Atabongawung Tamo

To cite this article: Atabongawung Tamo (2016) Conflict diamonds are forever in southern Africa: the case for a human rights-based approach to the Kimberley process, South African Journal on Human Rights, 32:2, 272-292

To link to this article: http://dx.doi.org/10.1080/02587203.2016.1210886

Published online: 08 Sep 2016.

Submit your article to this journal

Article views: 13

View related articles

View Crossmark data
Conflict diamonds are forever in southern Africa: the case for a human rights-based approach to the Kimberley process

Atabongawung Tamo

Department of International Law and Development, International Institute of Social Studies, Erasmus University Rotterdam, The Hague, The Netherlands

ABSTRACT
The Kimberley process (KP) came into force in 2003 with the goal of regulating and ending the trade in conflict diamonds. The KP focuses primarily on breaking the nexus between rebel movements and the diamond trade, but not necessarily on the broader human rights challenges that are still faced by most diamond-producing communities, including those in southern Africa. In this article, I examine why a human rights mandate is necessary for the KP as part of its governance strategy for the diamond trade. I will present some forward-looking thoughts, by way of outlining what a possible human rights-based approach to the KP would mean and what it would take the KP to bring on board the human rights aspects of the trade in diamonds. For this purpose, I will identify and analyse a set of criteria that can help introduce the KP's human rights credentials and its fight for a conflict-free diamond trade.

I. Introduction
A strong correlation exists between conflicts around the globe and the trade in natural resources.1 The exploitation of natural resources such as minerals is partly blamed for funding and sustaining some of the violence and bloodshed that have transpired in Africa.2 Among the minerals associated with these conflicts are rough diamonds, which in international studies are often referred to as conflict or blood diamonds. Conflict diamonds are defined as ‘rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments.’3 I will critically examine this definition later on in this article, especially as it disregards the human rights aspects of the trade in diamonds.

CONTACT Atabongawung Tamo atabongawung@iss.nl Erasmus Universiteit Rotterdam – International Institute of Social Studies Kortenaerkade 12 The Hague 2518 AX, The Netherlands

aspects (such as forced labour, child labour, slavery, torture, killings, health and safety) linked to the diamond trade.

Diamonds draw much public attention due to their high market value, with annual sales exceeding $72 billion. In the eyes of retail consumers, diamonds signify passion and are treasured as ‘love symbols’. This contrasts strongly with other experiences of the trade in diamonds, especially in some parts of Africa where diamonds represent decades of wars accompanied by gruesome human rights violations. In the context of southern Africa, which is the focus of this article, the link between diamonds and human rights violations has been established in civil wars in Angola, Democratic Republic of Congo (DRC), and Zimbabwe.

Although the trade in diamonds cannot be treated as the cause of the conflicts that have ravaged these countries, the human rights problem of the trade in diamonds arises from their direct funding and sustaining of atrocities committed during the civil wars in the countries mentioned above. In this respect, diamonds are ‘simply the means to an end, but without them the wars [that have affected this part of the globe] would not have lasted as long as they did, and the human cost would not have been nearly so high’. For example in Angola, rebels traded diamonds to fund military campaigns, which sometimes involved the exchange of diamonds for weapons used in the murder of civilians. In the DRC, it is alleged that rebels taxed and tortured artisan diamond miners who refused to cooperate in the conflict. The civil wars in Angola and the DRC together claimed over 5 million lives, while displacing millions of others. In Zimbabwe, the allegations of conflict diamonds have appeared in a different context. They relate to the government of Zimbabwe’s alleged culture of torture, killing and intimidation of artisan miners in the Marange diamond fields located in the Eastern border with Mozambique, as well as the imprisonment of human rights activists who have challenged such practice.

The choice of southern Africa for this article is important because the region presents examples to illustrate that the problem of conflict diamonds exceeds the usual narrative of rebel movements, conflict resolution and prevention to include State-linked

---

7 It should be noted that, contrary to the (partly past) situation in Angola and DRC, the diamond-related conflict in Zimbabwe is no way a civil war. The situation in Zimbabwe relates to its government’s attempt to take over control of diamond mines from artisan miners, which has resulted in clashes and several allegations of human rights violations. See S Ntlhakana ‘Conflict Diamonds in Zimbabwe: Actors, Issues and Implications’ (2014) 3 Southern African Peace and Security Studies 61.
9 Ibid 1004–1005.
violations of human rights. Additionally, South Africa as a State within this region continues to play a key role in the diamond trade, since the discovery of diamonds on the banks of the Orange River in 1866, which subsequently led to the opening of the first large-scale mining operation known as the Kimberley Mine. This was followed in 1888 by the creation of De Beers Consolidated Mines Limited (De Beers Group), which for over a century has dominated the diamond trade and consolidated South Africa’s position within the diamond trade, while vesting its interest in other countries in southern Africa, such as Botswana and Namibia.

Nevertheless, the problem of conflict diamonds is not exclusively southern African. Conflict diamonds have long been associated with some gruesome conflicts in West Africa. For example, the Sierra Leone Civil War (1991–2001) provided a perfect scheme for cash, weapons and diamond trafficking, while claiming the lives of over 75,000 civilians, as well as leaving behind a legacy of an amputee community. The same can be said of the Liberian civil war. More recently, trade in diamonds has also been linked to the conflicts in Ivory Coast and the Central African Republic. Non-governmental organisations (NGOs) such as Global Witness and Partnership Africa Canada have published reports revealing the conflict and human rights aspects of the diamond trade throughout Africa. These reports, coupled with global campaigns such as ‘Fatal Transactions’ led to coordinated international action and formed key contributions to the creation of the Kimberley Process (KP) in 2002.

As I will elaborate later, the KP is an international regulatory scheme with a mandate to stem the flow of conflict diamonds into the legitimate international diamond trade. Although not device as a human rights instrument, the KP has come under increasing scrutiny for failing to address the human rights violations linked to the diamond trade. As a result, there are demands from human rights advocates for the KP to embrace as part of its mandate, prescribed international human rights standards. Some have called for it to adopt a human rights-based approach (HRBA) to enable it to confront the human rights problems arising from the diamond trade. There is no

---

13 ‘Non-conflict’ is used in this context to refer to a non-civil war conflict, such as those witnessed in Angola, Sierra Leone or the DRC.
20 Fatal Transactions was a campaign launched by some international human rights organisations to raise awareness on the link between diamonds and the human rights violations in conflicts in Africa. <http://www.africa.upenn.edu/Hornet/irin_10499.html>.
21 For a brief account on the events leading to the creation of the KP see <http://www.kimberleyprocess.com/en/about/>.
22 Ibid.
23 NGOs such as Global Witness have called for the KP to embrace human rights accountability. See for example <https://www.globalwitness.org/archive/global-witness-leaves-kimberley-process-calls-diamond-trade-be-held-accountable/>. 
single definition for a HRBA. As I will examine further below, a HRBA to governance can be said to be ‘normatively based on international human rights standards and operationally directed to promoting and protecting human rights’. In this article, I argue that a specific human rights mandate is necessary for the KP. Drawing on examples from cases in southern Africa, I will argue that two important human rights elements in particular remain relevant and must be addressed by the KP. These are State sanctioned violations of human rights and the need for governments and business to protect and respect human rights in the course of the diamond trade.

Unlike other studies on conflict diamonds that have focused primarily on the institutional design of the KP and its fight against conflict diamonds, I will present and critically analyse a set of criteria that are forward-looking, and regarded as important benchmarks for the KP to consider if it chooses to adopt a HRBA. The criteria to be analysed include the use of human rights principles, participation and accountability. I consider them as important benchmarks (though not exclusively so) for any governance tool that seeks to project a HRBA. Unlike other governance models, the heuristic attraction for a HRBA resonates with the view that since the early 1990s, both governance and development theorists have underscored the need to incorporate human rights norms in governance regimes and the global governance discourse is increasingly being ‘framed in the language of human rights’. Therefore, my analysis will be guided by a careful examination of conflict diamonds and the mandate of the KP as well as literature on HRBAs from a governance perspective. In addition, I will draw some facts from selected expert interviews, which I have conducted on the subject of conflict diamonds.

I begin by examining the current understanding of conflict diamonds and human rights with examples drawn from conflicts in southern Africa. I then revisit the events leading to the creation of the KP and its mandate in regulating the trade in conflict diamonds. A HRBA projection of the KP is then considered. I will conclude that the KP can only continue to be a relevant regime for regulating the diamond trade if it articulates and resolves the human rights problems resulting from the trade in diamonds.

27 These interviews form part of the findings of the Doctoral Thesis I wrote on the subject of conflict diamonds. For more information on these interviews and their transcripts see A Tamo Diamonds, Corporate Responsibility and International Law. Case Study: Antwerp Diamond Sector Doctoral Thesis University of Antwerp (2014) <http://lib.ugent.be/catalog/rug01:002102036>-. 
II. Conflict diamonds and human rights violations in southern Africa

(a) Towards an understanding of conflict diamonds

As briefly introduced above, conflict diamonds are those ‘rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments’. The UN General Assembly has endorsed this definition while the UN Security Council has used it as the basis for several resolutions dealing with conflicts that have an underlying diamond trade motive. However, objections have been raised as to the utility of this definition especially as it limits the conflict dimension of the diamond trade to rebel movements. Some critics argue that the current definition of conflict diamonds is market driven and ‘ignores what could be the gruesome [human rights] reality regarding diamond-mining practices’ especially in Africa. The only direct reference to human rights in the KP text alludes to ‘the devastating impact of conflicts fuelled by the trade in conflict diamonds on the peace, safety and security of people in affected countries and the systematic and gross human rights violations that have been perpetrated in such conflicts’. While some have so far interpreted the above formulation to project the KP as incorporating human rights, others do observe differently. There is still the view that the KP was not negotiated with a human rights mandate and protagonists of this view claim that the KP is rather a political agreement aimed at breaking the links between the trade in rough diamond and conflicts.

By limiting conflict diamonds to rebel movements, the current understanding does not address any possible vertical violations of human rights; those violations perpetuated by the State (and its institutions) against individuals in the course of the diamond trade. Government-linked violations may arise in both conflict and non-conflict situations. In the current framework, governments can use diamonds to fund human rights violations, or may simply disregard their responsibility to protect individuals from the inhumane practices associated with the trade. Antagonists of the current definition of conflict diamonds maintain that limiting the current understanding of conflict diamonds to rebel movements makes it difficult for consumers to purchase a diamond with the full assurance that it is completely conflict free. Meaning that such a diamond has not resulted at any stage in the violation of human rights, even those violations that despite not arising in the context of civil wars might be perpetrated by other actors including the State.

I will contend that any narrative that dissociates the KP from human rights considerations fails to accommodate or recognise that the ultimate goal of establishing the

28 KP (note 3 above).
31 KP (note 3 above) para 2 (emphasis added).
33 Interview with S Chardon (Commission Européenne: Service des Instruments de Politique Extérieure - Sanctions et processus de Kimberley, 22 February 2012). For more see Tamo (note 27 above).
34 Winetroub (note 25 above) 1426.
KP was to bring closure to human rights atrocities resulting from the protracted civil wars in parts of Africa. This deep-rooted human rights motive may explain why some close observers of the KP now feel that it must be more explicit on human rights concepts, and possibly accountability, should the need arise.35 The US in its capacity as the KP Chair during the 2012 Plenary Session expressed the need for the KP to pay closer attention to human rights by indicating that:

[The] KP must meet the current [human rights] challenges if its mandate is to remain relevant. When founded, the [KP] focused on rebel movements seeking to use diamonds to fund their efforts to overthrow legitimate governments. Today, we see diamonds emerging from conflicts that do not involve the same types of rebel movements, but from broader contexts of conflict, and we believe the [KP] should carefully consider how best to address this.36

Ambassador Gillian Milovanovic, who was the US Representative and the KP Chairperson during 2012 Plenary Session, also reiterated that for the KP to pass public scrutiny of its human rights approach, it must evolve and not simply take pride in its past achievements of contributing towards the resolution of some diamond-linked conflicts.37 Other actors within the diamond industry have also acknowledge that there is a human rights problem plaguing the diamond trade, especially with the persistent reports of deplorable mining conditions in some parts of Africa.38

To situate the analysis offered in this article on a possible HRBA for the KP, I propose a definition of conflict diamonds that includes any rough diamond whose procurement and trading results in a violation of human rights, regardless of who is in control of the process.39 My proposed definition aims at addressing two key issues missing in the current KP definition. Firstly, it expands the current understanding of conflict diamonds by embracing the broader human rights dimension of the rough diamond trade. Secondly, it defuses the current myth that seems to suggest that only rebels can be involved with conflict diamonds. Accordingly, it presents the case that States, individuals and groups can use the trade in diamonds to cause or sustain violence, which might result in serious violations of human rights. The examples presented below, which are drawn from cases arising from southern Africa, and in particular Angola, Zimbabwe and the DRC, further justify this expansion of the definition of conflict diamonds.

(b) Cases from southern Africa

In Angola, despite the fact that the União Nacional para a Independência Total de Angola (UNITA) controlled between 60 per cent to 70 per cent of the total Angolan

36 See Blog Note from G Milovanovic <http://www.kimberleyprocess.com/web/kimberley-process/blog/>.
37 Speech delivered by G Milovanovic (Joint Meeting of the World Federation of Diamond Bourses and the International Diamond Manufacturers Association held in Mumbai, October 2012) <http://www.diamonds.net/News/NewsItem.aspx?ArticleID=41345&ArticleTitle=KP%20Chair%20Calls%20for%20New%20Definition%20of%20Conflict%20Diamonds>&.
38 Interview with K Basselier, Public Affairs Officer Antwerp World Diamond Council (1 July 2012). For more see Tamo (note 27 above).
39 Tamo (note 27 above) 263.
diamond trade during its civil war,\(^40\) some reports have linked the Angolan government to human rights violations related to diamond trade.\(^41\) In particular, the Angolan government and its security forces have been accused of torture and the rape of illegal diamond miners, most of who are from neighbouring DRC. It is alleged that:

Angolan soldiers, along with security guards for mining companies, have been brutally cracking down on these foreign migrants as well as on local Angolan miners. Soldiers routinely demand bribes, beating and killing miners who do not cooperate.\(^42\)

Likewise, those who dare to question the human rights implications of the practices of the Angolan State and its agents in the diamond trade have been either intimidated or imprisoned. Such is the case of Angolan journalist Rafael Marques de Morais, who has been imprisoned for raising these questions, including accusing seven Angolan generals of being linked to murder, torture and land grabs in Angola’s lucrative diamond fields.\(^43\) Morais, reveals several allegations of human rights violations in his book: *Blood Diamonds: Corruption and Torture in Angola*, including for example, the killing of more than 100 individuals and several cases of torture allegedly perpetrated by security guards and soldiers in the diamond fields of the Lundas region.\(^44\)

In Zimbabwe, similar allegations of intimidation against activists have been reported.\(^45\) The allegations of conflict diamonds in Zimbabwe relate to its government’s attempt to take control of the Marange diamond fields located in the Eastern border with Mozambique.\(^46\) As of December 2006, an estimated 15,000 to 20,000 ‘illegal’ artisan diamond miners occupied different plots of land around Marange.\(^47\) In October 2008, the Zimbabwean military launched an air offensive on artisan miners working on the Marange fields with the aim of bringing the mines under government control.\(^48\) Reports indicate that up to 200 artisan miners were shot dead from military helicopters.\(^49\) Since 2008, there have been other reports of police or military abuse, including forced labour and the rape of women and girls.\(^50\)

In the DRC it is reported that during the civil war that started in 1998 and is still on-going, the Laurent Kabila’s government traded diamonds to finance its...
military campaign. Such allegations involved deals with the US-Canadian company – American Mineral Fields, which had a ‘monopoly over the diamond-buying counters of Kisangani’.

The Kabila’s government equally gave diamond concessions to Zimbabwean ventures as compensation for Harare’s troop support in staging off attacks from Rwandan and Ugandan sponsored rebellion against his regime. These deals included the ‘right to exploit two of [DRC’s] richest diamond deposits, Tshibwe and Senga Senga, for [a period of] 25 years’. This strong demand for diamonds then transformed the conflict in the DRC into a proxy war of interest fought by Rwanda, Uganda, Zimbabwe and Angola, contributing to not only the death of civilians but also other crimes such as rape.

The above examples highlight three important limitations of the current definition of conflict diamonds. They indicate that:

1. not only rebel movements are involved with conflict diamonds;
2. legitimate governments can also use diamonds to finance conflicts and
3. conflict diamonds can also arise in non-civil war scenarios.

The examples mentioned above reveal that human rights issues are and still central to the trade in diamonds. It is also an indication that the human rights issues arising from the diamond trade, which are not rebel-linked, are crucial, and can just as well be framed in the context of conflict diamonds. Yet the KP does not specifically address them as part of its regulatory mandate within the diamond trade. Therefore, to adequately address these issues in the future, for example, State links with conflict diamonds, the KP would be expected to embrace an expanded understanding of conflict diamonds similar to the definition that I have proposed in this article. That is an understanding of conflict diamonds, which is explicit on human rights and can help hold all those involved in the diamond trade to account should a violation occur. In what follows, I will build on this proposition as a starting point for my analysis on a possible (future) HRBA for the KP. However, before I present these arguments, a brief introduction of the KP and its current mandate in the diamond trade is important, to help situate this analysis.

III. The Kimberley process

The KP is named after the South African diamond-mining city of Kimberley, where southern African diamond-producing States first met in May 2000 to discuss ways of ending the trade in conflict diamonds.

By this time, the link between the trade in diamonds and some of the conflicts in Africa, including, those in the southern African region had been established. The countries in this region and, in particular, South Africa, played a significant role in the process that saw several rounds of negotiations
involving governments, human rights groups and representatives of the diamond industry, and eventually led to the establishment of the KP in November 2002 in the Swiss town of Interlaken, with the endorsement of the Interlaken Declaration by governments’ representatives.\(^{56}\) The Interlaken Declaration adopts the standards and certification scheme that forms the core document of the KP.\(^{57}\) The KP came into force in January 2003 and has as its mandate to curtail the trade in conflict diamonds.\(^{58}\)

The KP has a tripartite structure comprising governments as ‘participants’ and civil society organisations, together with the diamond industry having ‘observer’ status. The KP is a ‘political agreement’ meaning that, while backed by the UN, it is not a legally binding instrument in the same way, as one would talk of an international treaty.\(^{59}\) The UN Security Council has, however, referred the KP on several occasions when acting under Chapter VII of the UN Charter dealing with threats to international peace and security.\(^{60}\)

There is a view held by some that the KP despite not an international treaty might, however, be considered as legally binding on those States that have agreed to participate and implement the KP.\(^{61}\) Internationally speaking, the legal imposition of the KP is not limited to its participants especially as in several instances the KP has been implemented as part of the UN Security Council sanctions regime, which is binding on all UN member States.\(^{62}\) Within national legal orders, KP participants are expected to enact national legislation that incorporates KP’s principles as part of their domestic law.\(^{63}\) The requirement to enact national enforcement legislation serves as a membership requirement for KP aspirants and also ensures that participants keep to the prescriptions of the KP, a deviation of which can trigger sanctions. The KP once expelled the Republic of Congo for breaching its obligation, although the country has since been re-admitted.\(^{64}\)

The KP is the main regulatory framework within the diamond industry, although it is still limited to rough diamonds.\(^{65}\) As of January 2016, the KP has a membership of

---

\(^{56}\) The Interlaken Declaration on the Kimberley Process Certification Scheme for Rough Diamonds (2002). For more see, \(<https://www.worlddiamondcouncil.org/download/resources/documents/Interlaken%20Declaration%20(5-11-2002).pdf>\).

\(^{57}\) Ibid.

\(^{58}\) Note 3 above.

\(^{59}\) Note 35 above. Bindenagel has expressed the view that the KP is a political agreement with no legal binding effect since it was not negotiated through diplomatic channels. This notwithstanding the fact that its negotiations often involved high-level meetings of government ministers and designated ambassadors. For a counter view see J D Holmes ‘The Kimberley Process: Evidence of Change in International Law’ (2007) 3 International Law & Management Review 213.

\(^{60}\) See UN Security Council Resolution 2134 (2014) on the Central African Republic. The Resolution notes ‘Kimberley Process Certification Scheme’s temporary suspension of rough diamond trading by the CAR and expressing concern that diamond smuggling and other forms of illicit natural resource exploitation, including wildlife poaching, are destabilizing forces in CAR’.

\(^{61}\) Santiago (note 25 above) 413.


\(^{64}\) In July 2004, the Republic of Congo was expelled from the KPCS for failing to abide by the KP rules. Following UN sanctions on rough diamonds from the DRC, the Republic of Congo became the main channel for diamonds smuggling out of the DRC. See \(<http://eeas.europa.eu/blood_diamonds/docs/communique_2007_en.pdf>\); F Bieri From Blood Diamonds to the Kimberley Process: How NGOs Cleaned Up the Global Diamond Industry (2010) 132.

\(^{65}\) Section I of the KP limits its mandate to ‘rough diamonds’.
81 countries. This membership represents ‘99.8 per cent of the global production of rough diamonds’.67 Within the southern African region, South Africa alone accounts for at least 11 per cent of the global rough diamond production.68 The first session of the KP was hosted by South Africa in 2003 and since then, KP participants and observers meet yearly in a plenary session, to discuss matters relating to the implementation of the scheme. The chairperson, a position that rotates amongst participants on a yearly basis, coordinates the activities of the KP and sets its agenda.

The KP remains the first ever internationally driven tool aimed at breaking the links between minerals and conflicts. Some have even argued for the ‘modelling’ of the KP in other mining sectors.69 Within the business and human rights discourse, the KP is often cited as an example of how a multi-stakeholder initiative (MSI) could help enhance corporate accountability for human rights violations.70 In this context MSIs are complementary regimes capable of tackling complex governance issues such as the corporate accountability for human rights violations. Just as is the case with the KP, a MSI consists of norms or principles emerging from a direct negotiation process, whereby States, civil society organisations and corporations can agree on a set of principles on how best to hold corporations to account for human rights’ violations.72

(a) Scope of the KP’s regulation

The current KP mandate involves trade restrictions on the participants, which is supposed to ensure that ‘no shipment of rough diamonds is imported from or exported to a non-participant’.73 Although the current practice of trade restrictions is contrary to the liberal rules of the World Trade Organisation (WTO) that call for an open global trade with limited restrictions, there exists a WTO Waiver Agreement allowing KP participants to refuse trade in diamonds with non-KP participants.74 This interaction between the KP and other regimes of international law such as the WTO further concretises the claim outlined earlier that despite the KP being a political process (unlike an international treaty), it thus create impacts within the international legal order.75 In this regard, KP participants are expected to ensure that ‘rough diamonds [both import

---

66 For a full list of participants and observers, see <http://www.kimberleyprocess.com/en/kp-participants-and-observers>.
71 Jarbi ibid 1028.
72 Civil society representation as employed here will include human rights NGOs and other rights’ organisations.
73 Section III(c) KP (note 3 above).
75 For a discussion on the KP and the WTO see Tamo (note 27 above) 308.
and export] are accompanied by a duly validated certificate'.\textsuperscript{76} The participants are enjoined to maintain detailed records of purchases and sales of rough diamonds, a failure of which can result in sanctions.\textsuperscript{77}

So far, most of the States that have been placed on diamond sanctions are those in whom a rebel movement has or threatens to unseat its government and there are indications of rebels being in control of diamond sites.\textsuperscript{78} With the increasing calls for the KP to expand its mandate to include human rights standards, especially those arising in a non-rebel-conflict scenario, what exactly would this necessitate? Next, I will explore what a possible expansion of the KP’s mandate entail, with attention paid to a HRBA.

\textbf{(b) The KP and a possible human rights based approach (HRBA)}

The human rights aspects of the diamond trade merit closer attention even if the current KP mandate excludes human rights considerations. One way of addressing this issue might require the KP’s adoption of a HRBA. As indicated earlier, a HRBA to governance constitutes a governance paradigm that regards operationalising, protecting and promoting human rights as part of its goal.

A HRBA incorporates benchmarks, which, if properly explored and operationalised, can help the KP deal with the problems faced by both diamond producing States and the industry, provided a human rights mandate is adopted. For example, the use of clear human rights principles or references can help situate and clarify the currently ambiguous position that the KP has regarding human rights. In addition, the HRBA insists on an inclusive and equal participation that places the individual (for example victims or those affected by the trade in diamonds) directly as the subject of both human rights protection and governance. Lastly, accountability is one of the ultimate goals of human rights governance as it allows for individuals to hold institutions accountable and for such institutions to hold perpetrators to account, while providing victims with a possible platform for restitution.

The above criteria are relevant for any HRBA to governance. A full appraisal of human rights governance may suggest standards beyond those outlined here.\textsuperscript{79} Nevertheless, I limit my exploration of a HRBA to the KP to these three standards for two reasons: first, a full analysis of a HRBA to governance is beyond the purview of this article. Secondly, the criteria just mentioned are capable of directly addressing the human rights problems confronting the KP and the diamond trade. Within the good governance and human rights discourse, the UN Commission on Human Rights (now Human Rights Council) in its Resolution 2000/64 has specifically linked the upholding of human rights, participation and accountability to the HRBA.\textsuperscript{80}

The HRBA is particularly crucial for the KP as some of its founding members, such as Global Witness, have since withdrawn their support citing the reluctance of the KP

\begin{footnotesize}
\textsuperscript{76} Section III (a) KP (note 3 above).
\textsuperscript{77} Section IV KP (note 3 above); Wright (note 5 above) 702.
\textsuperscript{78} See for example the current KP sanctions on the Central African Republic, which have been in place since May 2013 <http://www.kimberleyprocess.com/en/2013-administrative-decision-car>.
\textsuperscript{80} UN Commission Resolution 2000/64 (The Role of Governance in the Promotion of Human Rights) para 1.
\end{footnotesize}
to embrace the human rights concerns of the diamond trade and its failure to hold those responsible for human rights violations to account. A human rights mandate for the KP would be a novel attempt to appease its critics, and require a commitment to universally-recognised human rights standards, greater participation and more robust accountability mechanisms. I will elaborate on these three aspects.

(i) The KP and human rights principles

Human rights are a set of universally recognised standards or principles that guarantee and protect individuals and groups ‘against actions and omissions that interfere with fundamental freedoms, entitlements and human dignity’. Human rights and governance mechanisms such as the KP can be mutually reinforcing especially as ‘human rights principles provide a set of values’ or ‘performance standards against [...] which] actors can be held accountable’.

Two important steps would be necessary for the KP to bring on board human rights principles as part of its mandate, especially if it seeks to address the human rights problems facing the diamond trade. Firstly, the KP must state clearly the links between the diamond trade and human rights. This requires the identification of the different categories of human rights that are particularly vulnerable and likely to be the subject of a violation in the course of rough diamond trade. As I have noted earlier, some human rights violations that are notorious with the diamond trade include, torture, killing and intimidation of artisan miners. Child labour is extensively used at mining sites, while claims of poor labour standards, forced relocation of communities cannot be ignored.

Secondly, the KP should state the need for all actors involved in the diamond trade to respect recognised human rights standards and principles in the course of doing business. This should include baseline principles against all forms of discrimination and inhumane treatment. These are prohibited under several international human rights frameworks. For example, the elimination of all forms of inhumane treatment in diamond mines, including torture and forced labour are all guaranteed under the International Bill of Human Rights, as well as the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The UN Convention on the Rights of the Child explicitly prohibits all forms of child labour and child exploitation, although there continue to be disagreements as to what qualifies ‘child

82 See <http://hrbaportal.org/faq>.
84 See examples mentioned earlier of Angola and Zimbabwe.
86 Article 3 Universal Declaration of Human Rights, adopted by GA res .217A (III), of 10 December 1948; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; UNTS 1465 (concluded 10 December 1984 and entered into force 26 June 1987).
work’ as opposed to child labour.\footnote{\textit{Child Work} is often referred to as the ‘positive participation of children in an economic activity, which is not detrimental to their health or mental and physical development.’ See <http://www.unicef.org/protection/files/child_labour.pdf>.} International Labour Organisation (ILO) Conventions such as Worst Forms of Child Labour Convention also make similar pronouncements.\footnote{ILO Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999).} The KP can effectively make reference to these established standards, which participants are already bound by them in international law.

States (including KP participants) are expected under international law to protect, respect and promote human rights.\footnote{By becoming a party to international human rights treaties, States assume international obligations and duties that follow and include the duty to respect, protect and fulfil human rights. For more see, ‘International Human Rights Law’, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx>.} In some scenarios, governments and businesses are likely to be accomplices in human rights violations.\footnote{A Tamo ‘Corporate Complicity for Human Rights Violations in Africa Post-Kiobel Case’ in J L Cernic and T Van Ho Human Rights and Business: Direct Corporate Accountability for Human Rights (2015) 447, 461.} Within the southern African region, and South Africa, in particular, Meetal Jain and Bonita Meyersfeld, have illustrated how business abetted State violations of human rights during apartheid rule.\footnote{M Jain & B Meyersfeld ‘Lessons from Kiobel V Royal Dutch Petroleum Company: Developing Homegrown Lawyering Strategies Around Corporate Accountability,’ (2014) 30 South Africa Journal on Human Rights 430, 449.} Most recent examples in South Africa include, the deadly confrontation between the South African police and disgruntled miners in Marikana demanding for better working conditions.\footnote{P Sorensen ‘The Marikana Tragedy’ (2012) 69 International Journal of Environmental Studies 871.} Although the human rights instruments listed above do not directly bind private actors such as companies, States do have the primary duty to protect individuals from horizontal violations of human rights, for example those claims arising between businesses and individuals.\footnote{J Hessbruegge ‘Human Rights Violations Arising from Conduct of Non-State Actors’ (2005) 11 Buffalo Human Rights Law Review 1.} If the KP as regulatory regime choses to incorporate the above standards as part of its mandate, it can also make them binding (even if not in the ‘legally-binding’ sense of an international treaty) on both participant States and other entities involved in the diamond trade. This requirement can be enforced through domestic legislation similar to how the KP is currently being implemented nationally. Likewise, participants that fail to abide by these human rights standards should face existing KP sanction regime, which include, suspension and expulsion.

The human rights requirement that should follow the KP can be presented in a similar style as those adopted by other corporate governance regimes such as the OECD Guidelines for Multinational Corporations and the UN Global Compact. Both regimes call on governments and businesses to avoid violating fundamental human rights principles in the course of doing business.\footnote{Section IV, OECD Guidelines for Multinational Corporations (Updated 2011); UN Global Compact (2000).} The UN Guiding Principles on Business and Human Rights (UN Guiding Principles) also embody valuable lessons for any possible KP human rights alignment, in terms of allocation of duties and responsibilities.\footnote{UN Guiding Principles on Business and Human Rights (2011).} In this respect, the UN Guiding Principles make clear that States, as part of their international human rights obligations, must protect human rights. On the other hand, corporations and other businesses including those involved in the diamond trade should respect human rights. If any violations arise in the course of business, all
stakeholders involved must ensure accountability by providing victims with proper access to a remedy.97

The ‘due diligence’ procedures on business and human rights addressed in the UN Guiding Principles, can also present valuable lessons for the KP.98 Due diligence as human rights concept requires businesses and States to:

[I]dentify, prevent, mitigate and account for how they address their adverse human rights impacts, [including] assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.99

Some companies within the diamond sector have incorporated the UN Guiding Principles, thus offering the KP an opportunity to integrate or at least refer to these standards, which could help strengthen its own position as the main governance regime within the industry.100 Some countries within the southern African region, such as South Africa have offered initial support for the UN Guiding Principles and the South African Human Rights Commission, in particular, has explicitly stated that it will be ‘engaging in a broad strategy to engage the business sector on these set of principles’.101 In this way, South Africa as the main economic and political leader within the SADC blog and the southern African region in general can influence the operationalisation of these principles on diamond trade-related activities, as well as influencing good practice in neighbouring States accused of engaging in diamond trade related human rights violations. This is not an endorsement of South Africa’s track record on human rights, considering, its abstentious voting pattern at recent UN Human Rights Council sessions. For example, in 2014 South Africa abstained from all UN Human Rights Council’s country resolutions including those on Syria, Sri Lanka, North Korea, Belarus and Iran.102 Nonetheless, South Africa is positioning itself as a champion in the domain of corporate accountability. The UN Human Rights Council Resolution establishing an intergovernmental open-ended working group to elaborate on a possible international legally binding instrument on business and human rights is co-sponsored by South Africa.103

For the KP to properly incorporate human rights as part of its mandate and present itself as a governance regime with HRBA there is a need for equal and inclusive participation of all stakeholders whose interests may be affected by the diamond trade, especially the human rights’ victims of the trade in diamonds.

97 Ibid. See the three pillars developed by John Ruggie on the State Duty to Protect; Corporate Responsibility to Respect; and Access to Remedy.
98 Principle 17 (note 96 above).
99 Ibid.
(ii) Participation

Participation as a human right is considered in governance to include a ‘process through which stakeholders, influence and share control over [governance] through decision-making and resources which affect them’. In a HRBA to governance, participation further involves ‘enhancing the awareness of rights and responsibilities of citizens, lobbying and advocacy, often aimed towards developing a more informed citizenry who could hold [different actors] accountable’.105

For regimes such as the KP to be regarded as incorporating a HRBA, there is a need for equal and inclusive participation of all stakeholders involved or affected by the diamond trade.106 The main stakeholders within the framework of the KP are governments, civil society organisations and the diamond sector or industry. The emphasis on equal and inclusive participation of stakeholders as such is now commonplace in governance and is also seen as an essential element for development.107 Equal and inclusive participation in the context of the KP would require that all stakeholders be represented in the process, and must be able to table proposals while given the opportunity to raise objections in decision making and implementation of the KP.

According to the OHCHR, the ‘concept of participation is of fundamental importance’ in governance as it allows the subject (the governed) to be involved and to take an active part in the process of planning and implementing governance targets.108 The HRBA requires participation in governance to be ‘free and meaningful’ and mere formal consultation is seen as insufficient.109 A ‘true process of participation inevitably raises issues of ownership […] and should] involve stakeholders in all stages of the decision making process’.110

Inclusive participation within the context of KP is of particular significance for Africa. African-based civil society organisations such as NGOs are largely absent in the KP mechanism, even though the African continent harbours the majority of victims of conflict diamonds. The few African-based organisations that are sometimes represented during the KP plenary meetings as observers tend to act more like corporate lobby groups. Such is the case of African Diamond Producers Association (ADPA) whose primary goal is to defend the global-market interests of African diamond-producing States and not necessarily the interests of human rights victims.111

---

109 Twomey (note 107 above).
110 Ibid.
111 The African Diamond Producers Association was the only African organisation represented during the KP 2014 Plenary Meeting held in Guangzhou (China), 14 November 2014 <http://www.kimberleyprocess.com/en/2014-final-plenary-comunic%3A9-guangzhou-eng>. Although the KP boosts of a coalition with some NGOs in less than six African participant States, these NGO do not and cannot afford to participate directly in any KP’s events <http://www.kimberleyprocess.com/en/civil-society-coalition>.
There is a need to foster the involvement of African-based NGOs in KP activities, such as their direct participation in KP annual plenary sessions. It can be assumed that local-based NGOs are in a better position to articulate the concerns of human rights victims in the communities in which they operate, especially the voices of those communities particularly affected by the diamond trade. In 2015, it was estimated that artisanal diamond miners produce about 15 per cent of the world’s gem diamonds a year.112

Having the voices of artisanal miners heard can strengthen the effectiveness of the KP as a responsive governance regime. Achieving this goal definitely requires a well-coordinated awareness campaign by way of introducing the goals of the KP to those NGOs, which are active locally in the areas of human rights and natural resource governance or accountability. One reason to account for the weak participation and engagement by some African-based community groups in the KP’s activities could be that some African States do not allow free speech and advocacy concerning human rights and the diamond trade. Such is the case in some southern African States, as discussed earlier, where activists have been tortured and imprisoned.113 Nevertheless, it must be noted that despite the insignificance of their influence, some local NGOs such as the Network Movement for Justice and Development in Sierra Leone have engaged and participated in some KP meetings.

The KP has relied mainly on inputs from international (northern) civil society groups and these are the same groups that can afford to engage participant States during KP annual plenary sessions. It is argued by some that such reliance on northern-based civil society groups is relevant for the kind of governance that regimes such as the KP envisaged to achieve in Africa and that this cannot be attained except when there is support and ‘access to those international organisations that can influence governments and global regulatory processes’.114 I contend that even when northern expertise is necessary, it is still important for the KP to ensure that local community-based organisations are engaged as partners in the enforcement and implementation of the KP.

As Kaldor has noted, to achieve effective governance while protecting local rights, ‘participatory institutions cannot be [solely] imported from abroad, but must reflect the needs, traditions and experiences of the local population’.115 Hughes has also noted that the incorporation of grass root organisations representing the interests of local communities should be encouraged to ensure inclusive participation and representation.116 The lack of inclusion of local NGOs in the KP can lead to the scheme being perceived as ‘a global neo-liberal project’, a pattern increasingly being resisted in Africa, especially when governance regimes fail to incorporate local concerns and values.

There are some initiatives that serve as a model for participation. The Extractive Industry Transparency Initiative (EITI), which is active in the mineral resources sector, incorporates this participatory governance approach by involving and creating

113 Notes 43 & 45 above.
115 Ibid.
partnerships with local organisations, while forming a strong network of South-based NGOs to check on transparency and accountability. Other initiatives such as the Diamond Development Initiative (DDI) have engaged in an inclusive and participatory approach with a network of African-based NGOs. The DDI is another organisation active in the quest for conflict free diamonds. It seeks to bring together ‘all interested parties to a process that will address, in a comprehensive way, the political, social and economic challenges facing the artisan diamond mining sector in order to optimize the beneficial impact of artisanal diamond mining to miners and their communities.’ In that respect, the DDI treats conflict diamonds as both a human rights and security problem in Africa. The G8 Meeting of World’s Largest Economies has endorsed the participatory approach taken by the DDI. The DDI is based in the US and Canada but forms partnerships with local networks of NGOs in diamond producing States including those in Southern Africa like Angola and the DRC. These local networks can in turn create space for victims, not only to voice their concerns but also to serve as a forum to hold those responsible for any human rights violations to account.

In addition to participation in global governance processes, to which can be added several human rights treaty body mechanisms, the concept of participation has also been articulated at the regional governance level. In the African regional context, the African Charter on Human and Peoples’ Rights (ACHPR) also calls for a participatory approach to governance. In short, it can be contended that an endorsement of a participatory governance model as part of a HRBA to governance by the KP can ‘increase the likelihood of compliance.’ It can also strengthen accountability, to which I now turn.

(iii) Accountability

One of the goals of attaining participatory governance is to ensure accountability, as it enables both the institution and violators to be easily scrutinised by the intended subjects of the regime. Some scholars consider accountability as a ‘hallmark’ of governance. Nevertheless, the concept itself remains ‘elusive’ and ‘tricky’ among governance scholars. Some have defined accountability as ‘any mechanism that
makes powerful institutions responsive to their particular publics’. This means that for any organisation, institution or mechanism to claim to be accountable, it must be open to scrutiny from those it is created to serve. The intention here is not to engage with the conceptual debates surrounding accountability as others have dealt with this extensively. I will rather frame accountability to fit the analyses being presented, one that suggests the concept as a ‘virtue’ or a ‘positive quality of organisations’ that requires ‘transparency and trustworthiness’. Within the HRBA to governance, accountability represents the process of holding institutions and individuals responsible for acts that violate internationally recognised human rights standards.

The accountability structure within the KP is limited to the certification process and statistical data collecting on the rough diamond trade, which I mentioned earlier. The KP dictates that rough diamonds imports and exports should be secured by a tamper-proof packaging, accompanied with a certificate testifying that the diamonds do not originate from a conflict scenario. There is no uniformity as to what information should be included on KP certificates. Therefore, KP participants design and print their own certificates. The accountability that follows this certification process simply ensures that rough diamond trading can only take place between KP participants, while leaving the industry with self-compliance. Industry self-compliance within the diamond trade allows for the World Diamond Council, which acts as the mouthpiece industry to conduct internal monitoring. Within the EU, industry self-regulation is further enhanced by EU Regulation No 2368/2002, which enforces the core principles of the KP throughout the EU. Among others it requires the creation and maintenance for at least three years records of invoices received from suppliers and issued to customers and the verification of such records by an independent auditor to attest authenticity.

However, a major drawback for the KP endorsed industry-led compliance model is that it is ‘limited to what the corporation already does well and ignores problematic issues’ such as human rights accountability, as long as this is not seen as an immediate threat to the corporate image. The current KP industry-led model seems to serve the industry well, by way of distracting public attention away from the ongoing human rights atrocities that are connected with the diamond trade.

A possible move by the KP towards a HRBA would necessitate that the current accountability and compliance model should also report and investigate on any human rights violations, as well as possible international crimes. For example, the UN Security Council Sanction Committee on 20 August 2015 while referring to the KP has blacklisted an affiliate of a Belgian Diamond Company (Kardiam Bvba), for its alleged role in the ongoing conflict in the Central African Republic, which has seen serious allegations of international war crimes being committed. This validates the view that while the KP may still claim a mandate that excludes human rights accountability, externally,
the KP is continuously being used as a reference for UN sanctions regime aimed at both conflict resolution and human rights protection.

Ensuring human rights accountability through the existing KP enforcement design should not be overly challenging. As earlier mentioned, participants are obliged to enact national laws as part of their domestic enforcement of the KP, and more recently this serves as an accession requirement to the KP. The KP can require that such legislation uphold international human rights standards. Therefore, unlike the case in the current model, the institutions of participating States could holistically take up human rights accountability, certification and statistical reporting on the trade in diamonds.

Other problems of accountability include corruption, which ought to be treated as a human rights governance issue. Like in most mining or natural resource sectors, corruption has been and continues to be a protracted problem with human rights implications. In southern Africa, the extractive industries, including the diamond sector, represents a very tough problem to solve. Although these natural resources provide great opportunities to improve the lives of poor people, ‘bad management and lack of transparency of these resources [has] led to poverty, conflicts and corruption’.133

The corrupt practices that accompany the diamond trade in Africa have the potential of slowing down development and economic growth in many countries, including, those in southern Africa. This has an impact on human rights since revenues from the trade end up in the private bank accounts of some government officials, thus starving national treasuries of the resources needed to embark on socio-economic projects that can improve the overall human rights situation in these countries. Corruption increases poverty and widens inequality with a major consequence being the deprivation of basic socio-economic rights.134 In this context, some have even argued the case for kleptocracy to be recognised as an international crime.135 While other initiatives exist to tackle the issue of corruption in the mining and extractive industry, such as Publish What You Pay (PWYP) and the EITI, these programmes have been criticised for overlooking the human and environmental impacts of resource extraction.136 As Human Rights Watch has noted, promoting any forms of transparency while ignoring human rights conditions undermines the goal of accountability.137 By endorsing a HRBA, the KP can make important contributions in this respect, by clinically connecting the fight against corruption in the diamond sector to the global human rights governance challenge.

In southern Africa, accountability within the diamond trade can be achieved through collaboration between participant States and with institutional support from the KP. Some southern African KP participants such as the DRC are still faced with post-conflict political transitions and like a majority of African States, they grapple with poor governance. Poor governance has a negative impact on these States’ ability to deal properly with KP enforcement, especially the setting up of effective internal

---

controls that can track not only conflict diamonds trade but also their human rights footprints. The endemic governance problem that prevails in some of these States has even resulted in ‘cheating [including the] falsification of certification documents by industry and government officials’. Some KP participants ‘have all demonstrated the inability or unwillingness to control the diamond trade within their borders’. In that respect, participants with stronger institutions and adequate resources like South Africa can lend support either directly or through the KP, to enhance accountability in institutionally weak States. However, these drawbacks are not limited to Africa as studies also indicate flaws in the US government’s enforcement of the KP through its Clean Diamond Trade Act.

IV. Conclusion

I have argued that the KP currently does not address the human rights problems affecting the trade in diamonds despite being the key reference when it comes to corporate regulation within the diamond industry. The KP governance regime could be strengthened if it were to embrace human rights standards and adopt a HRBA. In doing so, the KP stands a chance of winning over its critics while at the same time gaining the trust of those who suffer the negative impacts of the diamond trade in Southern Africa and elsewhere. The KP can present itself as a model of a global regulatory regime on corporate accountability for human rights violations. South Africa as a key architect of the KP and a leading actor within the international diamond trade can influence this process especially within the southern African region. This can be achieved through its influence within the KP as well as being the leading political figure within SADC, where some of the worst diamond-related human rights mentioned above still occur.

In order for the KP to remain relevant and to be seen as a governance regime that can effectively respond to Africa’s human rights need, it must seriously consider accommodating a HRBA. There is a need for a more robust human rights reference in the KP’s governance approach, involving more attention to inclusive participation and a transparent process wherein human rights accountability is also dealt seriously.

While it might be presumed that ‘diamonds are forever’ it is important to ensure that the pain inflicted by the trade in diamonds is urgently redressed and not to be perpetuated forever, as the examples from southern Africa discussed in this article seem to suggest.

138 Haufler (note 2 above) 411.
139 Ibid.
140 Ibid.
141 Gooch (note 25 above) 198-207.
143 Hauffer (note 2 above) 412.
145 The slogan ‘A Diamond is Forever’ was first used by the De Beers Group in an advert in 1947.
Disclosure statement

The authors report no conflicts of interest. The authors alone are responsible for the content and writing of this article.

Notes on contributor

Atabongawung Tamo, Post-doc researcher in International Law and Development, at the International Institute of Social Studies, The Hague (Erasmus University Rotterdam), The Netherlands.