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But is it law? An Analysis on the Legal Nature of the Kimberley Process Certification Scheme on Conflict Diamonds and its Treatment of Non-state Actors

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“But is it law? An Analysis on the Legal Nature of the Kimberley Process Certification Scheme on Conflict Diamonds and its Treatment of Non-state Actors”

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Abstract

In 2003, faced with the growing problem of illicit diamonds funding conflict and human rights abuses in Africa, representatives from states, the diamond industry and civil society formed the Kimberley Process Certification Scheme to regulate the flow of the so-called conflict diamonds. Since then, the agreement has developed into an authoritative legal agreement and enforceable regime. It demonstrates an example of a soft law agreement that through state practice, has been elevated to a higher level of obligation in international law.

The Kimberley Process also illustrates a growing trend in international law to incorporate non-state actors, particularly multinational corporations, into the realm of international law. Although far from legally binding, the Kimberley Process presents a scheme where the commitments of the diamond industry can be enforced, and potentially regulated. This may open the door to new approaches regarding the obligations and liability of non-state actors in the wider context of international law.
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Natural resources often act as a curse in Africa, fueling and sustaining conflict and systematic corruption.\(^1\) Generally, the world has done very little to address this problem. However, in the late 1990s, human rights advocates began to notice the role that diamonds play in conflict around the world.\(^2\) Investigations by several non-government organizations ("NGOs") revealed that the sale of illegally smuggled rough diamonds funded rebel military campaigns to the immense profit of not just rebels, but also the diamond industry.\(^3\) The tactics of these rebel groups, who often committed atrocious human rights violations in order to control the diamond flow,\(^4\) brought into question the political, economic, and moral duties of the international community.\(^5\) Negotiations began at the insistence of the diamond industry and NGOs to develop a regulatory scheme that would keep conflict diamonds out of international trade.\(^6\) This resulted in the creation of the Kimberley Process Certification Scheme ("Kimberley Process").\(^7\)

Under the positivist theory of international law, the Kimberley Process in non-binding on its state parties and is not legally enforceable. Yet, the Kimberley Process is just one agreement that is challenging that traditional approach.\(^8\) While the scheme is not a treaty, the actions of the parties to the agreement, including the diamond industry, demonstrate that it was intended to obligate its participants,\(^9\) it is enforceable,\(^10\)
and by the effects of its operation, it is binding on all of its members.\textsuperscript{11}

This comment aims to illustrate the legal character of the Kimberley Process by looking at an alternative approach regarding the sources of international law through the application of four factors—obligation, specificity, delegation, and participation—to the agreement and compare the Kimberley Process to other similar international agreements. Doing so demonstrates the changing nature and importance of international agreements and their participants, especially in the realm of soft law and corporate non-state actors. Part I discusses the background of the Kimberley Process and the current debate between the traditional positivist theory of international law and alternative approaches. Part II applies these factors to the Kimberley Process, analyzing separately at how they relate to state participants, corporate non-state actors, and rebel groups. Part III recommends actions that should be taken to strengthen the Kimberley Process and better assert its position in international law. Finally, this paper concludes by reflecting on the significance of the Kimberley Process in a growing trend towards holding non-state actors accountable for their actions and the growing use of soft law to address critical issues.
I. Background

The diamond industry as it exists today began with the discovery of diamonds in South Africa and with the creation of the De Beers Consolidated Mines Company in 1888. The nature of the diamond industry as notoriously secretive and constantly operating within loopholes of trade regulations, as well as the outbreak of several diamond based wars in Africa led the international community to find a way to regulate the trade in conflict diamonds.

A. The Kimberley Process Certification Scheme

The Kimberley Process began as a simple agreement to stop a hugely unpopular trade practice. But since then it has developed into an important international agreement and established a possible framework for other resource and conflict issues.

i. Africa’s Diamond Wars

Diamonds are the most concentrated form of wealth on the planet, and their nature makes them especially attractive to smugglers. Highly valuable, small in size, easy to hide, not detected by metal detectors, and difficult though not impossible to trace, diamonds allow major financial returns with very little effort. Furthermore, many diamond-rich areas of the world are abundant in alluvial diamond fields, where the stones are located near the surface rather than in deep mines. Because these fields are very large in size, often occupying hundreds of
acres of land, they are difficult to regulate. In several African states, these qualities suited rebel forces in need of cash to fund their military programs. Though not new to Africa, these wars became increasingly violent in the 1990s and once the role that diamonds played in the ongoing hostilities was revealed, they became known as Africa’s diamond wars.

The first and longest of the diamond wars was the Angolan civil war, which started in 1975 and lasted until 2002. While the government forces used their monopoly on oil to fund their campaign, the rebel group National Union for the Total Independence of Angola (“UNITA”) used the country’s diamond resources to fund theirs. However, it was not until the 1990s that the international community paid more attention to the funding of rebel groups in Africa. The attractiveness of diamonds for this purpose was so great, that Liberian President Charles Taylor used civil discontent in Sierra Leone as a pretext for encouraging war there, the only real purpose of which was to exploit that country’s rich diamond fields. Other conflicts in Africa, including in Zaire/Democratic Republic of the Congo and the Central African Republic, are also linked to conflict diamonds.

But these three conflicts, which ended in millions of deaths and displaced persons, brought light to the issue of conflict diamonds as the public discovered that many diamond
companies and traders, known as diamantaires, profited significantly in the trade of conflict diamonds. Until the late 1990s, the existence of Africa’s diamond wars were known within the industry as their “dirty little secret”. However in 1998, the London-based NGO Global Witness released a report on the role of the diamond industry in the ongoing Angolan conflict. Several other NGOs picked up the issue, and forced the issue of conflict diamonds to the front of the diamond industry’s agenda.

Fearing a consumer backlash, the diamond industry began to work on a solution to the problem. For the most part, this was a public relations stunt aimed at consumer damage control, but the NGOs did not allow the issue to go away. African diamond producing states convened an international conference involving the industry, NGOs, and interested states. Thus began the Kimberley Process.

**ii. International Action**

The first international meeting designed to combat the conflict diamond trade occurred in the historic diamond town of Kimberley, South Africa in May 2000. The issue gained increased urgency after the Al-Qaeda terrorist network used conflict diamonds to accumulate wealth and launder the money used to fund the attacks on September 11, 2001. Thus, after only two and a half years of contentious negotiations, forty-eight states
adopted the Kimberley Process Certification Scheme through the Interlaken Declaration in November 2002. Apart for its original members, the Kimberley Process also welcomed industry representatives from the World Diamond Council, and the human rights organizations Global Witness and Partnership Africa Canada as official observer members. Now, three years after its inception, the Kimberley Process has more than seventy member states and enjoys continued international support.

The Kimberley Process is a voluntary non-binding agreement based on collective participation. It involves participant states as well as non-state actors such as NGOs and the diamond industry. Despite the relationship the Kimberley Process has to both human rights and international trade, it is neither a United Nations nor a World Trade Organization agreement. Nonetheless, it continues to be supported by both these organizations, and the United Nations depends on it to help maintain peace and security. In these respects, the Kimberley Process marks a groundbreaking approach to confronting international resource and security issues.

1. Requirements and Structure

The Kimberley Process defines conflict diamonds as those diamonds “which can be directly linked to the fuelling of armed conflicts, the activities of rebel movements aimed at undermining or overthrowing legitimate governments and the
illicit traffic in, and proliferation of, armaments especially small arms and light weapons." The scheme creates a certification system to verify that exports and imports of rough diamonds are not conflict diamonds. Participants agree to trade only among themselves and must pass domestic legislation that creates an internal system of controls and meets the requirements of forgery and tamperproof certificates and shipping containers for the transport of rough diamonds, as well as provide statistics as to the quantity of imports, exports and mining activities. These minimum standards only apply to rough diamonds and import and export controls. Violations of these customs controls are criminal under domestic law.

Beyond these requirements, there are no specific guidelines as to what national legislation should include. The reason for this flexible approach is to encourage widespread participation in the scheme. Not requiring heavy dues or large-scale commitments encourages participation from the Third World states, where the majority of the world’s diamonds.

Currently, the Kimberley Process administrative structure uses three specialized working groups that focus respectively on monitoring, statistics, and diamond expertise, along with two committees involved with selection and participation. These groups operate on a voluntary basis, with states, the World Diamond Council and NGOs volunteering to take on administrative
tasks as well as pay for the cost of the activity.\textsuperscript{60} This structure also encourages participation, although it has the effect of placing a very high burden on a limited number of states.\textsuperscript{61}

2. Enforcement and Compliance

Originally, the scheme contained no structural enforcement mechanism;\textsuperscript{62} this concession aided the rapid adoption of the agreement.\textsuperscript{63} However, participants recognized that the Kimberley Process would not be credible without some form of enforcement.\textsuperscript{64} Therefore, the scheme developed measures to strengthen compliance and enforcement.

For example, in 2003, members of the Kimberley Process noticed that the Republic of the Congo, a participant with no known active diamond mining or diamond imports, was exporting large numbers of diamonds.\textsuperscript{65} The Kimberley Process acted by expelling the Republic of the Congo until they met the requirements of the agreement.\textsuperscript{66} Because all of the major diamond producing, trading, and consuming states are participants, expulsion essentially blocks a state from participating in the world’s diamond trade.\textsuperscript{67} Although the Republic of the Congo is the only participant that has been expelled from the scheme, the event demonstrated the ability and willingness of the Kimberley Process to enforce compliance.\textsuperscript{68}
A more recent example of non-compliance is the role Ghana may be playing in the new diamond war in Côte d’Ivoire. Although Côte d’Ivoire is a member of the Kimberley Process, all of that state’s diamond mines are in rebel-held territory. In response, the Ivorian government banned all diamond exports in November 2002. However, a report by U.N. experts found increased exports of diamonds concurrent with decreased mining activity in neighboring Ghana. Furthermore, testing of a Ghanaian certified diamond parcel seized in the United Arab Emirates revealed that they were not of Ghanaian origin. As a result, Ghana has been red-flagged by the Kimberley Process and is undergoing further investigation. Although Ghana is currently allowed to participate in the scheme, it faces expulsion if the planned review by the Kimberley Process in 2007 finds continued trafficking of Ivorian diamonds.

Sierra Leone and Liberia demonstrate how the Kimberley Process is helping strengthen these post-conflict states and serving as a conduit for these states to re-enter the legitimate diamond trade. Ineffective U.N. sanctions on conflict diamonds coming out of these states in the 1990s fueled the creation of the Kimberley Process. Sanctions remained in place after the fighting ended, but states such as Sierra Leone, which are heavily dependent on diamonds for income, needed to reenter the legitimate diamond trade. The answer to this problem has been
the Kimberley Process; the U.N. Security Council has made participation in the Kimberley Process a prerequisite to the lifting of diamond sanctions, further reinforcing the role the Kimberley Process plays in international trade and security.\(^7^9\)

B. International Law and Non-State Actors

Traditionally, international law applies only to binding law between states.\(^8^0\) However, the focus of international legal discourse has shifted to the status of non-state actors, as well as the role of soft law in response to the increasing influence of multinational corporations and international NGOs.\(^8^1\)

i. The Positive Theory of International Law

International law developed as a way to regulate state relations.\(^8^2\) As a result, states were traditionally the only parties subject to international law.\(^8^3\) Under the traditional positivist approach, agreements are either binding and part of “hard law”, or they are mere political documents and not law at all.\(^8^4\) Such political documents are referred to as “soft law” and are considered to be merely persuasive.\(^8^5\) Most hard law is codified in bilateral or multilateral treaties, where states agree to be bound by their obligations.\(^8^6\) An exception is customary rules of international law, which develop based on widely recognized norms and consistent state practice.\(^8^7\) But generally, positivist theory defines international law as those agreements between states or international organizations that
are entered into with the intention that such duties will be binding. Consequently, there is no place legally for political agreements or for non-state actors.

However, the traditional binary approach is limited in its ability to describe new trends in international law. With the rise of intergovernmental organizations such as the United Nations, soft law has become prevalent. Over time soft law can become binding through customary law, even without fulfilling the traditional requirements of a treaty. One often cited example is the Universal Declaration of Human Rights. Adopted as a resolution by the U.N. General Assembly in 1948 with no legal effect, parts of the Universal Declaration of Human Rights are now part of international customary law.

Because of changes in international politics and recent trends in international law, the development of law is more sensible seen as occurring on a spectrum between the two binary poles of soft law and hard law, rather than through the positivist approach. This alternative approach allows for a more nuanced view of international law that is especially helpful in examining recent trends regarding the legal status of non-state actors.

ii. An Alternative to Positivist Theory

Several legal commentators have discussed alternative views to the creation of international law that consider recent
developments in law and politics.\textsuperscript{96} Michael Reisman and Steven Ratner advocate that the authority of international agreements cannot be seen as occurring solely within a legal/non-legal paradigm.\textsuperscript{97} Instead, law occurs on a spectrum, weighed against the factors of obligation, specificity, and delegation.\textsuperscript{98} Although not proposed by Reisman and Ratner, a fourth element, participation, is added here to incorporate an essential element of the positivist approach.

The four elements often overlap but each presents a separate point of analysis. First, obligation is the level by which parties to an agreement place duties upon themselves and the level of expectation that those duties must be fulfilled.\textsuperscript{99} Whether the text refers to concrete action to be taken or mere aspirations is part of this factor.\textsuperscript{100} Second, specificity refers to the preciseness of the language of an agreement regarding its goal.\textsuperscript{101} Precise language on how parties can accomplish the purpose of an agreement demonstrates more intention of commitment than vague language that leaves many details to interpretation.\textsuperscript{102} Third, delegation is the level of enforcement mechanisms built into the structure of an agreement.\textsuperscript{103} This includes referring non-compliance to an international or regional court, allowing violations to be prosecuted in national courts, creating a separate adjudication body, or any other mechanism that compels parties to fulfill their duties.\textsuperscript{104}
Finally, participation refers to who participates in the negotiation and operation of the agreement. Combined, these elements form a basis for determining the level of an agreement’s authority under law. Most treaties are binding because they meet all of these qualifications. However, many so-called political agreements also meet some or all of these qualifications. Under this alternative analysis, some of these agreements do fall under the purview of international law and their authority is determined by how well they conform to these factors.

iii. International Legal Treatment of Non-State Actors

Along with changing views on the sources of international law, there are also changing views regarding the parties that are able to participate in international law. In particular, non-state actors, who are generally not considered under the traditional approach, are becoming more important to the development and enforcement of international law.

Of particular interest is the role, as well as the rights and obligations, of corporations in the international system. With globalization, the economic power and political influence of corporations has grown enormously, without a clear reaction to this increased power regarding to their obligations under international law. The positivist approach concerned itself
only with states because it was believed that states were the only entities powerful enough to need this level of regulation. However, it has become apparent that this view is outdated as corporations increasingly are in positions of political power, sometimes greater than the power of the government.\textsuperscript{110} Yet, because corporations are not states, they cannot enter into treaties or participate in hard law structures. There have been several trends in international law to change the way non-state actors are viewed, leading gradually to the creation of legal obligations for these actors.\textsuperscript{111}

B. International Law on a Spectrum

This changing spectrum between hard law and soft law is best seen by analyzing other international agreements under the factors discussed above. Doing so also aids the analysis of the significance of the enforceability of the Kimberley Process and the involvement of non-state actors in its basic functions. The agreements considered here also involve direct or indirect duties placed on non-state actors, helping illustrate new trends in international law involving non-state actors.


The first example is the International Cyanide Management Code for the Manufacture, Transport and Use of Cyanide in the Production of Gold (“Cyanide Code”).\textsuperscript{112} This is one example of
the increasingly popular corporate codes of conduct used to compel corporations to conform to international norms.\textsuperscript{113} The Cyanide Code is a voluntary, non-binding agreement signed by corporations involved in the gold industry.\textsuperscript{114} The code aims to protect workers and the environment from the adverse effects of cyanide, which is commonly used in gold mining, and to improve the management of mining companies.\textsuperscript{115} Companies that sign onto the Cyanide Code and continue to use cyanide in mining practices agree to be audited by an independent third party to determine compliance.\textsuperscript{116} If a company is found to be compliant, then they receive the right to use a certified trademark to show this.\textsuperscript{117} An independent structure, the International Cyanide Management Institute, was created to coordinate the process.\textsuperscript{118}

To determine the authority this agreement has under international law, we look at the factors highlighted above. The Cyanide Code is very specific about what is required of signatory companies to be compliant.\textsuperscript{119} However, while the agreement does place duties onto signatories, with the promise of reward in the form of the trademark if compliant, there are no penalties for non-compliance.\textsuperscript{120} Therefore, it cannot be said to completely fulfill the element of obligation. The parties to the agreement are all non-state actors; it does not involve governments, and therefore occurs completely outside the positivist legal structure. Thus, even with the creation of a
coordinate body, there are no real measures or methods that can compel enforcement.\textsuperscript{121} As such, the Cyanide Code does not qualify as authoritative law.


The second agreement considered is the International Labour Organization’s Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy ("Tripartite Declaration").\textsuperscript{122} Government, business, and employee representatives negotiated the declaration, which aims to establish a set of labor guidelines for multinational corporations.\textsuperscript{123} The Tripartite Declaration was not intended to be binding, but is subject to periodic monitoring to measure the force it has on government, business, and worker conduct.\textsuperscript{124} Furthermore, if members disagree over the application or interpretation of the Tripartite Declaration, they can bring the issue to the I.L.O. for resolution,\textsuperscript{125} but there are no penalties for non-compliance.

While the Tripartite Declaration has been highly influential, it is still only a set of guidelines.\textsuperscript{126} The agreement recommends actions that governments and multinational enterprises should take to ensure a positive contribution to the communities that they operate in.\textsuperscript{127} These cannot be said to be duties or obligations. However, the text is quite precise in
what is expected in these aspirations, and does provide a permanent structure for raising problems and monitoring, which encourages compliance.\textsuperscript{128} Thus, while the Tripartite Declaration is still far from the hard law of treaties,\textsuperscript{129} it is more authoritative than the Cyanide Code.

\textbf{iii. Hard Law: Convention on Combating Bribery of Foreign Officials in International Business Transactions}

The third agreement is the Organization for Economic Cooperation and Development’s ("OECD") Convention on Combating Bribery of Foreign Officials in International Business Transactions ("Bribery Convention").\textsuperscript{130} Although the Bribery Convention applies the traditional approach of only directly involving state parties, it also makes clear that corporations are obligated to follow the conventions' provisions and must be held accountable for non-compliance under domestic law in member states.\textsuperscript{131}

The Bribery Convention is a treaty, although limited to OECD states.\textsuperscript{132} It clearly meets all four of the factors set out above. The Bribery Convention obligates state parties to criminalize bribery of foreign officials, and uses specific language to convey what the agreement covers.\textsuperscript{133} It also delegates the authority for prosecution of violations of the convention to domestic courts, which compels compliance.\textsuperscript{134} Thus,
the Bribery Convention is an example of hard law at the end of the spectrum of international law.\textsuperscript{135}

These three examples do not comprehensively cover the range of agreements found in international law and politics today, but they are representative of the range in authority that such agreements have.

II. Analysis

The Kimberley Process is often cited as a political agreement that highlights a new way to for states to comprehensively approach resource and security issues. Yet this is not entirely true. First, the Kimberley Process is not merely a political agreement. Through the creation of concrete and enforceable obligations on its members, it has become a legal agreement. Secondly, the Kimberley Process’s effectiveness lies not only in how it relates to states, but also in how it relates to and involves states, business interests, and human rights groups to achieve a common purpose. Lastly, while more comprehensive than soft law agreements such as the Cyanide Code and Tripartite Declaration, there are still areas of the conflict diamond phenomenon that the agreement does not address, namely the treatment of the rebel groups that are the source of the problem. This is seen by analyzing the process and operation of the Kimberley Process under the factors laid out above. Doing
so clearly places the authority of the Kimberley Process short of hard law, but far greater than a persuasive political agreement on the spectrum of international law.

A. The Kimberley Process does obligate state parties because of the binding effect its operation has on the international diamond trade.

The Kimberley Process began as a voluntary, non-binding agreement between forty-eight states;\textsuperscript{136} since then, it has grown in size and in legal significance.\textsuperscript{137} Though the Restatement on Foreign Relations states that international agreements are only binding if they are entered into with the expectation that they will bind its participants,\textsuperscript{138} there are several examples in international law, such as the Universal Declaration of Human Rights, where non-binding agreements through reliance and expectation have become more than voluntary agreements and even enforceable.\textsuperscript{139} While the Kimberley Process has certainly not reached the level of hard law, it is still authoritative.\textsuperscript{140}

There is a range of non-binding agreements in international law and what they call for, as seen with the Cyanide Code and Tripartite Declaration. Traditional non-binding agreements did not commit its participants to obligations under the agreements, but rather served as a statement of shared values and interests.\textsuperscript{141} Increasingly, however, non-binding agreements call on their participants to give up certain rights or commit to
obligations in order to advance the interests stated.\textsuperscript{142} Thus, the reason for a voluntary and non-binding agreement may not be a lack of commitment to agreement’s goals, but rather another more politically acceptable reason.\textsuperscript{143}

\textbf{i. The Kimberley Process is authoritative because of the specific obligations it places on its state parties}

From the beginning, the Kimberley Process required obligations of its participants in order to be part of the scheme, and in return, members can continue to trade in the larger global diamond trade.\textsuperscript{144} Nevertheless, it is clear that at its outset the participants did not intend for the Kimberley Process to be binding, at least in the traditional sense.\textsuperscript{145} Neither the Kimberley Process Certification Scheme technical document, nor the Interlaken Declaration where the Participants formally adopted the scheme, were signed by participating states, and therefore there was no need for ratification by these states.\textsuperscript{146}

According to the “mandate” given by the UN General Assembly and the Security Council, the agreement was to be as inclusive as possible.\textsuperscript{147} This coupled with the pressing need for action led to a final agreement, negotiated in less than three years, designed to be as easy as possible for the participants to commit to.\textsuperscript{148} Although some of the provisions of the Kimberley Process were controversial,\textsuperscript{149} taking this non-binding approach
made it far easier and less time consuming for participants to agree to than the traditional treaty law route.\textsuperscript{150}

Yet, the duties imposed on participants included the passing of domestic legislation that conformed with the Kimberley Process banning trade in conflict diamonds, and the establishment or commitment of a government agency to oversee its enforcement.\textsuperscript{151} These obligations were required within a certain time period if the state was to be a participant; otherwise, the state would cease to be a participant and no other participant would be able to trade rough diamonds with that state.\textsuperscript{152} Although the details of the exact domestic legislation is left to the participants,\textsuperscript{153} and therefore gives considerable flexibility to how the Kimberley Process is enacted in each state, the agreement was more similar in form to traditional treaty law than a traditional non-binding agreement.\textsuperscript{154}

In fact, the domestic enforcement structure of the Kimberley Process follows the position of the Bribery Convention, where violations are criminalized generally, but the exact approach taken by signatory states is left up to them.\textsuperscript{155} As a result, while penalties may vary from state to state, the act of violation is always criminalized.
ii. The Kimberley Process, due to its wide participation, is enforceable upon its state participants

The widespread participation and acceptance of the Kimberley Process by states and industry allows it to be enforceable.\textsuperscript{156} The trade restriction requirement is the main enforcement measure, and because of the participation of nearly the entire diamond trade, it has proven quite effective. Currently, there are sixty-nine participating states, constituting essentially the entire diamond trade pipeline from mining to retail jewelry.\textsuperscript{157} Every major exporter and importer of diamond products is a participant, in effect sealing the entire diamond industry into the Kimberley Process.\textsuperscript{158} As a result, the Kimberley Process obligations have become "part of the cost of doing business in the diamond trade."\textsuperscript{159}

Additionally, the U.N. General Assembly and the Security Council both support the Kimberley Process, and the agreement serves as a tool for the Security Council in lifting sanctions on original conflict diamond exporting states such as Liberia,\textsuperscript{160} and helps bring post-conflict states back into the legitimate fold of international law and trade.\textsuperscript{161} In order to lift sanctions, the Security Council requires these states to conform to the requirement of the Kimberley Process and join the scheme as full participants.\textsuperscript{162} Failure to meet these requirements results in continuing sanctions on all diamond exports.\textsuperscript{163} Thus,
while the Kimberley Process originally grew out of U.N. sanctions, it is now serving as their replacement and validation of a legitimate conflict-free diamond trade.

iii. The authoritativeness of the Kimberley Process on the spectrum of international law

Because of the above reasons, it cannot be logically said that the Kimberley Process is without the force of law for its participants. The scheme now regulates the entire international diamond trade, with specific membership requirements and enforcement mechanisms for non-compliant states who continue to trade in conflict diamonds. The international community relies, both politically and legally, on the Kimberley Process to continue in force and effectiveness, as seen through the Security Council’s actions in continuing to support the scheme and its treatment of Liberia. Thus, while the Kimberley Process may not be traditional hard law under positivist theory, it certainly binds its state participants to certain obligations and legal commitments.

On the spectrum of international law, the authoritative level of the Kimberley Process falls short of hard law, but is much greater than a traditional voluntary agreement such as the Cyanide Code. While all the agreements discussed above did oblige their signatories in some way, the Kimberley Process does so in a very concrete way. Unlike the aspirations of the
Tripartite Declaration, the Kimberley Process specifically details material actions that participants must take to be compliant and continue their membership. The Kimberley Process also provides for monitoring and enforcement, which penalizes states who violate these duties by banning them from the legitimate world diamond trade. While there is no permanent structure in place to field complaints of non-compliance, such as with the ILO, the Kimberley Process can enforce compliance.

Hence, while not officially binding like a ratified treaty, the Kimberley Process has largely met the criteria of obligation, specificity, delegation and participation. It is not hard law, but much further on the continuum than the Cyanide Code or Tripartite Convention and is authoritative under the international system.

B. The Kimberley Process does impose obligations on corporate non-state actors because of the involvement and expectations the scheme has placed on these parties

While the above discussion makes clear the authoritative relationship the Kimberley Process has to its state participants, makes the issue of how authoritative the Kimberley Process is in relation to non-state actors more complex because of the ambivalent relationship of non-state actors to international law generally. However, the Kimberley Process
marks a unique departure from current international norms in how it approaches corporate non-state actors. As a result, the Kimberley Process applies to them in much the same way it does to its state participants.

i. The Kimberley Process places specific obligations on the diamond industry

While most of the text of the technical document concerns the actions of participating governments, it does place a duty on the diamond industry to self-regulate compliance with the general requirements of the Kimberley Process.\textsuperscript{174} Although self-regulation is typically a weak measure for parties to take,\textsuperscript{175} in this case, it underlies the entire agreement.

The definition of conflict diamonds itself under the Kimberley Process points to this new role for corporate non-state actors.\textsuperscript{176} By definition, conflict diamonds are those diamonds not under the control of the state and are instead under the control of business interests, whether they be corporate or individual miners and diamantaires.\textsuperscript{177} The requirement for certification is designed to stop the flow of conflict diamonds by making states certify that such diamonds came from their territory and their control, thus cutting off the route for legitimate trade to rebel groups.\textsuperscript{178} However, extractive industries, such as mining, are different from other types of investment in that the investment is tied specifically
to the land, regardless of who is in control of that territory.\textsuperscript{179} While the state may be explicitly cut off, non-state actors, such as business interests, are still tied to that investment;\textsuperscript{180} and the primary obligation to keep diamond-based funds away from rebel groups falls to them.

Corporations are therefore of vital importance to the Kimberley Process. The only way for the Kimberley Process to effectively function is with the full participation and compliance of corporations. The proscribed activity in question, the mining and selling of rough diamonds for the purposes of funding armed violence, are by their nature not under the control of the state.\textsuperscript{181} While importing states can make a point not to purchase diamonds from conflict areas, without the compliance of the diamond industry they may have no choice as most diamonds are traded among the private diamond bourses in major trading cities such as New York, Antwerp and Tel Aviv, and not between states.\textsuperscript{182} The ongoing trade of conflict diamonds from Cote d’Ivoire mixed with legitimate Ghanaian diamonds by diamantaires and sold through the legitimate diamond pipeline demonstrates how heavily states rely on the diamond industry to certify diamonds for the purpose of issuing the certificates of origin.\textsuperscript{183} Without the cooperation and compliance of the diamond industry, states have little control over the flow of conflict diamonds.\textsuperscript{184}
Full cooperation by all members, including the diamond industry, in the Kimberley Process has meant that the total global trade in conflict diamonds has dropped significantly. It appears that the Kimberley Process has made a substantial impact, because instead of the billions of dollars in conflict diamonds that were seen coming out of Angola and Sierra Leone during those civil wars, there was only an estimated $25 million worth of conflict diamonds from Cote d’Ivoire last year. While $25 million is still a significant sum and points to many gaps in the Kimberley Process, it is still a marked improvement from the West African conflict diamond trade of the 1990s.

ii. The obligations on the diamond industry are partially enforceable but because of the reliance of the Kimberley Process on self-regulation of industry, are not fully enforceable

As discussed in the previous section, the shortcomings of the Kimberley Process and why conflict diamonds are still entering the legitimate global trade stream is in large part due to the activities of members of the diamond industry. The certification scheme aims to create a “clean stream” for diamonds from mine to retail based on warranties given by the diamond miners, traders, cutters, polishers, and finally retail stores. They are the ones, and not states, who are in control of the diamond pipeline, and it is based on their assurances
that diamond parcels are certified by the state prior to export.\textsuperscript{189} In cases of non-compliance, it is mainly the actions of industry members that mix conflict diamonds into the stream with legitimate diamonds.\textsuperscript{190} Thus, without the diamond industry’s active participation and compliance, the Kimberley Process has no chance of succeeding.

This was the reason why the provision for industry self-regulations was included in the technical document.\textsuperscript{191} The World Diamond Council, created by the diamond industry specifically for this purpose,\textsuperscript{192} accepted its unique position within the industry and pledged not only to self-regulate, but to obligate its members to comply in return for continued participation in the diamond industry.\textsuperscript{193} Although reluctant at first, NGOs and the World Diamond Council itself are increasingly calling for this treatment of accountability to be formalized in the Kimberley Process structure.\textsuperscript{194} Additionally, apart from these direct obligations, the Kimberley Process also indirectly obligates the diamond industry to follow the scheme by directly obligating state participants to domestically criminalize intentional non-compliance.

This approach differs from the Cyanide Convention, which is not connected to state action in any way.\textsuperscript{195} As a result, corporate duties under the Kimberley Process are enforced domestically, while any violations of the Cyanide Code alone
cannot be legally enforced.\textsuperscript{196} The Kimberley Process also differs from the Tripartite Convention in that it requires corporations to take material action towards compliance, rather than just recommend it.\textsuperscript{197} While the Tripartite Convention, unlike the Kimberley Process, does provide a permanent formal structure for complaints,\textsuperscript{198} the effect of expulsion from the scheme and the industry itself for consistent violations of the Kimberley Process is more than effective in compelling compliance.\textsuperscript{199}

iii. The inclusive participation of the diamond industry in the Kimberley process in negotiations and operation adds to the authoritative nature of the scheme in regards to corporate non-state actors.

The most significant departure from the positivist approach to international law is the participation of corporate non-state actors in the negotiation and operation of the Kimberley Process.\textsuperscript{200} The Kimberley Process originated from pressures placed on governments by NGOs and the diamond industry.\textsuperscript{201} These parties were very active in the negotiating process,\textsuperscript{202} and in the case of the diamond industry, held concurrent negotiations within the industry to determine how to proceed and with what to finally agree.\textsuperscript{203} While the participation of business interests in international agreements can be seen in other agreements,\textsuperscript{204} what makes the Kimberley Process unusual is the level of participation these parties have continued to have in the operation of the scheme.\textsuperscript{205}
The World Diamond Council participates in the scheme’s working groups and in monitoring state compliance, as well as the annual plenary meetings where new regulations are adopted. Although officially the World Diamond Council is only an “Observer”, it still participates actively in the operation of the Kimberley Process.

In this respect, the Kimberley Process is similar to the Tripartite Declaration which also included representatives from the business sector in its negotiations. However, the Kimberley Process goes farther than the Tripartite Declaration in how it incorporates these representatives in the everyday functions and key issues of the scheme. As previously discussed, the World Diamond Council plays an integral part in compelling compliance and enforcement within the Kimberley Process, and the obligations that the technical document places on it are far greater than seen in the Tripartite Declaration.

C. While covering Many Aspects of the Conflict Diamond Problem, the Kimberley Process Fails to be Fully Comprehensive Because of Its Treatment of Rebel Groups

While a case can be made for the Kimberley Process obligating corporate non-state actors, one important player in the conflict diamond problem is not covered by the agreement: the rebels that are funded through the sale of conflict diamonds. Although these rebel groups play a key role in
creating and sustaining conflict diamonds, they are not liable under international law by way of the Kimberley Process.

i. The Kimberley Process does not specifically address rebel groups, and places no duties on them to fulfill

Unlike the situation with state participants and the diamond industry, rebel groups have no obligations under the Kimberley Process. In fact, the only mention of rebel groups in the technical document is in the preamble and the previously quoted definition of conflict diamonds. Outside of these references, there are no duties, whether material or aspirational, placed on rebel groups to curb the flow of conflict diamonds. As such, the technical document places no obligations on rebel groups.

ii. The Kimberley Process is not authoritative to rebel groups because they have not participated in the scheme in any way

It may be that the nature of rebel groups is what limits their accountability under the Kimberley Process. Rebel groups change with every conflict, and can even change within conflicts by splitting apart or joining with each other. As such, it is not feasible that they could participate in the negotiation of the Kimberley Process as a whole, and there are significant political difficulties in incorporating them into the scheme in practice.
This is because, by definition rebel groups involved in this issue are groups who seek to undermine the legitimate government;\textsuperscript{214} what they are doing in regards to conflict diamonds is illegal. Viewed in this light, some rebels represent a type of organized crime,\textsuperscript{215} which many states would not be keen to work with in a formal political or economic manner.\textsuperscript{216} Similarly, the Bribery Convention, which aims to stop acts of bribery of foreign officials in business transactions,\textsuperscript{217} could easily involve organized crime, but the Bribery Convention does not address that; the act itself is criminalized regardless of who is participating.\textsuperscript{218} The Kimberley Process differs in that the act, by definition, is either directly or indirectly tied to a specific actor, the rebel groups.\textsuperscript{219} Allowing them to operate within the scheme would essentially give rebel groups a free pass to continue their activities, which is exactly what the Kimberley Process aims to stop.\textsuperscript{220}

\begin{italics}
iii. The Kimberley Process does not apply to rebel groups because of its lack of enforcement mechanisms aimed at these groups
\end{italics}

The analysis above effectively precludes the Kimberley Process from applying to rebel groups. However, there is also the issue of delegation, and more specifically enforceability of the scheme upon rebels. This too does not appear to be possible under the current framework, and may be a serious flaw in the Kimberley Process.
The current enforcement mechanisms of the Kimberley Process only allow for states to be expelled if found to be non-compliant; short of this drastic measure, there are no measures to compel compliance.\textsuperscript{221} Although the diamond industry and governments have a duty to self-regulate and impose sanctions on individual members that violate the Kimberley Process,\textsuperscript{222} there is no mention of criminal sanctions for the rebel groups that give rise to this trade. Since rebel groups are not under the control of the state at the time of these transactions, the ability for states to impose sanctions on them is extremely limited.\textsuperscript{223} Thus, it appears that the rebel groups at the heart of this problem are the only major actors not accountable under the Kimberley Process.

How to address this problem is difficult given the dynamics addressed above. However, rebel groups are capable of having legal character.\textsuperscript{224} Rebel groups are expected to follow the Geneva Conventions and other forms of international humanitarian law, and if they do not, they can be held legally accountable for violations.\textsuperscript{225} There is no similar provision in the Kimberley Process, and it without one, it appears unlikely that a court would prosecute rebels on the basis of illegal diamond trading. This might be because the primary concern underlying conflict diamonds is the gross human rights abuses that they funded more than the economic crime itself.\textsuperscript{226} The International Criminal
Court and other specialized international tribunals do prosecute these human rights abuses, calling into question whether it is necessary to criminalize the economic crime of the actual trade.\textsuperscript{227}

This is by and large a policy question, but one that can have significant legal consequences. Without any explicit criminal sanctions, the trade itself is easier in terms of risk, and thus more likely to take place.\textsuperscript{228} The Kimberley Process does not address this factor at all, and predominantly follows the positivistic approach of placing most of the direct obligations and liability on states.\textsuperscript{229} The problem is that states in these situations have no control over these acts, making the scheme appear weak in regards to the core cause of the conflict diamond issue.

III. Recommendations

The Kimberley Process may not be a treaty, but for its participants, is very authoritative and violations are enforceable. Yet, there are still areas of the scheme that could be improved regarding its obligations and operation.
A. A working group dedicated to compliance and enforcement should be established to better monitor and enforce the Kimberley Process in regards to both participant states and the diamond industry

While the Kimberley Process has several working groups, none of them are specifically focused on compliance and enforcement.\textsuperscript{230} This may be a key reason why action on non-compliance issues seems to take so long to outside observers.\textsuperscript{231} If such a working group were formed, it would allow the Kimberley Process to better control compliance issues, and be able to intervene in a problem state before expulsion is considered. This would help stem the flow of conflict diamonds, because illicit diamond traders would not be able to rely as easily on set trade routes out of conflict diamond states, and it would help the Kimberley Process gain credibility in the international community.\textsuperscript{232}

Such a group could also better develop compliance and enforcement mechanisms, subject to the approval of the Plenary, and better procedures for enforcement. It would help states with less capacity for internal controls get a handle on the situation before it grew to uncontrollable proportions, and would also reassure diamond producing African states, many of whom are heavily dependent on the diamond trade, to join the Kimberley Process or better commit to their obligations under the agreement. By doing so, the U.N. mandate for wide
participation would be furthered, along with the actual substantive purpose of the Kimberley Process.

B. The role and duties of non-state actors, particularly in regards to the diamond industry, should be formalized in the technical document along with specific enforcement measures for individuals in the industry that are fund to be non-compliant.

While it has been established that the Kimberley Process likely applies to non-state actors, this should be formalized in the technical agreement. Currently, there is only the provision for self-regulation by the diamond industry, and this is not enough to gain full compliance.233

The diamond industry should be brought all the way into the agreement, instead of being the only party left slightly on the outside. Industry self-regulation is an acceptable method of policing compliance, but it should be done jointly with some oversight from other elements of the Kimberley Process, either NGOs or government agencies. This is analogous to the peer-review mechanism for Participant states, where often governments, the diamond industry, and NGOs work together in their assessment.234 Without this full inclusion and oversight, it is unlikely that the Kimberley Process will be able to continue to grow and impact the global conflict diamond trade.

C. The Kimberley Process should continue in its “voluntary” nature and encouragement of wide participation, but given its compulsory effect,
better assistance should be made available to developing states in order to better facilitate full and effective compliance

The Kimberley Process started out as a voluntary agreement in order to facilitate the widest participation possible. However, because this has been so successful, the agreement is now compulsory to any state that wants to participate in any aspect of the diamond trade and is also binding on its members since non-compliance results in expulsion.\(^{235}\) Unfortunately, the diverse make up of the Kimberley Process also means that not all the participants are fully capable of meeting their obligations. The minimum standards are actually quite high, especially for developing states that do not have the capacity for government oversight or industry self-regulation.\(^{236}\) This is especially true for states producing the conflict diamonds, where state resources are understandably devoted to other areas of the state while it is in crisis.\(^{237}\) As a result, conflict diamonds continue to make their way into the legitimate market.

Although this difference in capacity was one of the main reasons for the flexible approach of the Kimberley Process at its outset\(^{238}\), as the Kimberley Process becomes binding, there is a significant risk that this element of flexibility will be lost. In order to better facilitate compliance, many developing states, especially in Africa, will need additional assistance. While potentially costly at the outset, this assistance would
give the Kimberley Process increased credibility and help achieve its goal of combating conflict diamonds.

IV. Conclusion

In many ways, the Kimberley Process illustrates the changing nature of both international law and politics. It was born out of an NGO campaign for better transparency and accountability on the behalf of the diamond industry, and ended up becoming an international agreement with the active participation of governments and the diamond industry which regulates the global diamond trade. It also began as a non-binding agreement, definitely not a treaty and at the most constituting “soft law.” But it has grown into an agreement that is binding not only on its state participants, but on the non-state actors that contribute as well. It also demonstrates a meeting of international human rights law with international economic and regulatory law. This, along with its widespread establishment and compliance by its members demonstrates the direction that international law is likely to be headed to in the future regarding to corporate non-state actors.

1 See Legwaila Joseph Legwaila, Under-Sec’y-Gen., U.N. Office of the Special Advisor to Afr., Opening Remarks at the U.N.
Conference on Natural Resources and Conflict in Africa: Transforming a Peace Liability into a Peace Asset (Jun. 17, 2006) (text available at http://www.un.org/africa/osaa/speeches/Natural%20Resources%20and%20Conflict%20in%20Africa%2016-6-06.pdf) (noting that Africa is especially rich in natural resources but that these resources are at the root of several conflicts in Africa). Several studies have been done to try and determine why resource-rich states are often in conflict. See e.g., Ola Olsson, Conflict Diamonds (Jun. 8, 2004) (revised for Journal of Development Economics), available at http://www.ioes.hi.is/events/DEGIT_IX/Papers/Olsson.pdf (statistically analyzing the presence of diamonds to the occurrence of conflict); see also Ingrid Samset, Conflict of Interests or Interests in Conflict? Diamonds & War in the DRC, 93 Rev. of Afr. Pol. Econ. 463 (2002) (analyzing the political role resources have played in the multinational “civil” war in the Democratic Republic of the Congo).


4 See, e.g., Greg Campbell, Blood Diamonds: Tracing the Deadly Path of the World’s Most Precious Stone xv-xvi (Basic Books 2004) (citing the tactics of the rebel group in Sierra Leone, the Revolutionary United Front, which included arbitrary executions, amputations, mass rape, and cannibalism in order to secure and maintain control of the country’s diamond fields).

06.pdf (stating the importance of human rights to the issue of conflict diamonds).


8 See generally Steven R. Ratner, Corporations and Human Rights: A Theory of Legal Responsibility, 111 Yale L.J. 443 (2001-2002) (analyzing agreements in several different areas of international law that challenge the traditional approach to non-state actors and the distinction between non-binding soft law and binding hard law).

9 See Kimberley Process Certification Scheme, supra note 7, art. 4 (stating that a condition of participation in the Kimberley Process is that states must enact domestic legislation in line with the scheme); see also Ian Smillie, Partnership Africa Canada, The Kimberley Process Certification Scheme for Rough Diamonds 5 (Sept. 2005) (detailing the delay of admission of Lebanon in the Kimberley Process because of the failure of Lebanon to implement legislation); Press Release, Ministry of Economy & Trade, Republic of Lebanon, Readmission of Lebanon Into the Kimberley Process (Sept. 20, 2005), available at
http://www.economy.gov.lb/MOET/English/Navigation/News/ReaccessionKimberlyProcess.htm (reporting that Lebanon had been readmitted to the Kimberley Process after adopting legislation on import and export control of diamonds).

10 See generally Smillie, supra note 9, at 5 (detailing how the Republic of the Congo, a state participant, was expelled for non-compliance).

11 See id. at 4 (noting that the Kimberley Process creates a situation where in order for any state or diamond interest to participate in the international diamond trade, they must adhere to the Kimberley Process).


13 See Roberts, supra note 12, at 7-8. One example of how the diamond trade operates outside normal trade practices is its common use of Free Trade Zones found at international airports, where diamonds would be imported from Africa and then re-exported the next day as diamonds from another state, without ever leaving the airport. This allowed diamonds from all over
the world to be mixed together, making it extremely difficult to identify where a particular diamond came from or whether it was legally produced. See id. at 7-8; see also Lucinda Saunders, Rich and Rare Are the Gems They War: Holding De Beers Accountable for Trading Conflict Diamonds, 24 Fordham Int’l L.J. 1402, 1413-14 (2000-2001) (citing the smuggling culture of the diamond industry as a serious issue confronting transparency).

14 See id. at 6-12; Global Witness, Making It Work: Why the Kimberley Process Must Do More to Stop Conflict Diamonds 1 (2005) (explaining the role diamonds were having in funding conflict in Africa and the international political effect it had).

15 See e.g., Rudy Salo, When the Logs Roll Over: The Need for an International Convention Criminalizing Involvement in the Global Illegal Timber Trade, 16 Geo. Int’l Envtl. L. Rev. 127, 137-39 (2003-2004) (citing the Kimberley Process as a possible model framework that could be adapted to create an international treaty on illegal timber); No Dirty Gold Campaign, http://www.nodirtygold.org (targeting companies involved in the retailing of gold and getting them to agree only to sell gold products from those production companies that adhere to the “Golden Rules”, a set of economic, social, and environmental standards). While conflict diamonds are certainly a problem in
Africa, there are many other resources, including timber, oil, and other mineral resources, that serve the same purpose as conflict diamonds in funding war. See Eboe Hutchful & Kwesi Aning, The Political Economy of Conflict, in *West Africa’s Security Challenges: Building Peace in a Troubled Region* 195, 210-11 (Adekeye Adebajo & Ismail Rashid eds. Lynne Rienner Publishers 2004) (describing how other mineral resources besides diamonds, including gold, iron ore, and bauxite, funded the war in Sierra Leone); *International Crisis Group, The Kivus: The Forgotten Crucible of the Congo Conflict* 23-26 (Jan. 24, 2003) (detailing how the exploitation of mineral resources, especially of the mineral coltan, is funding the various militia groups in eastern Democratic Republic of the Congo); Salo, supra, at 131-34 (describing the use of illegally logged timber to fund conflict in Cambodia, Liberia, and Sierra Leone); Andreanna M. Truelove, *Oil, Diamonds, and Sunlight: Fostering Human Rights Through Transparency in Revenues From Natural Resources*, 35 *Geo. J. Int’l L.* 207, 215-16 (2003-04) (describing the use of oil in Angola to fund the civil war there and fuel general corruption).
rley.pdf (stating that diamonds are so valuable because of their high value to weight ratio).

17 See Matthew Hart, Diamond: The History of a Cold-Blooded Love Affair 183-85 (Plume 2002) (describing the long history of diamond smuggling in Africa); Partnership Africa Canada, supra note 16, at 2 (noting the attractiveness of diamonds, especially given the “endemic corruption” of the diamond industry).

18 See Hart, supra note 17, at 185-87 (describing newly developed scientific methods for identifying the origin of both rough and polished diamonds, and the inherent difficulties in widespread usage of these methods); Global Witness, supra note 14, at 6 (describing the qualities that make diamonds ideal for smuggling, including their ability to keep their value over long periods of time, the ease in which they can be converted to cash, and how easily they can be transported); Partnership Africa Canada, supra note 16, at 2 (citing the high value of diamonds compared to the ease of alluvial mining makes diamond smuggling especially appealing).

19 See Partnership Africa Canada, supra note 16, at 7.

20 See id. at 7 (noting that because the large land area alluvial mining takes place over makes regulation difficult and an unattractive investment for private companies, resulting in most alluvial mining occurring in the informal economic sector).
21 See Global Witness, supra note 14, at 6.

22 See Olsson, supra note 1, at 5 (noting that diamonds were the source of conflict between Medieval Indian kingdoms).

23 See, e.g., Hart, supra note 17, at 182-83.


25 See Grant & Taylor, supra note 2, at 387-88 (stating that UNITA used a “war chest” of diamonds to purchase weapons and fuel in order to sustain their military actions against the Angolan government).

26 See International Crisis Group, Liberia: The Key to Ending Regional Instability 1-2, 35 (Apr. 24, 2002) (stating that both Taylor’s National Patriotic Front of Liberia (“NPFL”) and its rival faction United Liberation Movement for Democracy in Liberia (“ULIMO”) both used control over diamond fields as a way to fund their war and maintain political power).

27 See id. at 2-3 (asserting that Taylor used the weakness and large numbers of disaffected youths to fuel the Revolutionary United Front (“RUF”) in order to gain control over the diamonds of Sierra Leone); see also, Hart, supra note 17, at 186-87 (arguing that the diamond wars were purely economic in nature.
and aimed solely at control of the diamond stream rather than concerning any political ambition); Hutchful & Aning, supra note 15, at 209-10 (stating that economic opportunities were a major factor in the wars in Sierra Leone and Liberia, eventually determining the Taylor’s military and political strategy, as well the determining the attitude of some non-African states towards the conflicts as they benefited from the war-fueled resource trade).

28 See Samset, supra note 1, at 471 (asserting that diamonds have sustained the conflict in the DRC by funding purchases of military equipment, food, and paying soldiers of the various rebel groups fighting there); Keith Somerville, Diamonds fuel CAR conflicts, B.B.C. News, Oct. 31, 2002, available at http://news.bbc.co.uk/2/hi/africa/2372153.stm (describing the connection between Central African Republic diamonds, which makes up fifty-four percent of the country’s exports, and the unrest that the country has typically experienced throughout its history).

29 See Campbell, supra note 4, at xxiii (stating that the wars in Liberia, Sierra Leone, the Democratic Republic of the Congo, and Angola resulted in an estimated 3.7 million deaths and 6 million displaced persons).
30 See Grant & Taylor, supra note 2, at 388 (pointing out that while rebel groups profited from the trade of conflict diamonds, so did many “clean” actors, mainly through the diamonds placed on the world market by companies such as De Beers).

31 See Hart, supra note 17, at 187 (stating that the issue of conflict diamonds was only known in the industry until its revelation by Global Witness in 1998).

32 See generally, Global Witness, supra note 3.

33 See Grant & Taylor, supra note 2, at 390-91 (detailing the creation of the anti-conflict diamond movement, specifically with the formation of the “Fatal Transactions” campaign by a coalition of NGOs); Smillie, supra note 9, at 2 (reporting that there were more than 200 international NGOs who took part in the Fatal Transaction campaign, which helped keep the issue of conflict diamonds in the public eye and politically relevant).

34 See Daniel L. Feldman, Conflict Diamonds, International Trade Regulation, and the Nature of Law 24 U. Pa. J. Int’l Econ. L. 835, 842 (Winter 2003) (describing the process the diamond industry internally initiated once it became clear from the NGO campaign that conflict diamonds posed a major public relations problem); Grant & Taylor, supra note 2, at 391 (stating that the diamond industry quickly realized after the start of the Fatal
Transactions campaign that the issue of conflict diamonds had to be addressed).

35 See Feldman, supra note 34, at 841 (citing that the diamond industry’s actions were based on the fear of a consumer boycott of diamonds analogous to the boycott of fur that resulting from PETA campaigns).

36 See id. at 846-47 (noting that the initial purpose of the diamond industry’s position on conflict diamonds was to avoid a “public relations disaster” and keep the NGOs from gaining additional influence that could result in a boycott).

37 See id. at 848 (citing the public demonstrations by the international NGOs Amnesty International and World Vision when it appeared to them that the diamond industry was not taking serious action on preventing the ongoing trade of conflict diamonds).

38 See Global Witness, supra note 6, at 2 (finding that the conflict diamond issue perhaps made African diamond producing states the most nervous, since a negative consumer perception of African diamonds would effect their ability to compete with other non-African diamond states).

39 Global Witness, supra note 6, at 1.

used a network of diamond and arms dealers in Sierra Leone and Liberia to launder funds leading up to the events of September 11, 2001). Other terrorist groups have been known to use conflict diamonds for financing as well. See Edward R. Fluet, Conflict Diamonds: U.S. Responsibility and Response, 7 San Diego Int’l L.R. 103, 108 (2005-06) (stating that Hezbollah laundered millions of dollars through the Democratic Republic of the Congo with conflict diamonds); Global Witness, supra, at 20-21 (asserting diamond trading connections between UNITA rebels in Angola and Hezbollah in Lebanon).

41 Interlaken Declaration of 5 November 2002 on the Kimberley Process Certification Scheme for Rough Diamonds, Nov. 5, 2002, available at http://www.kimberleyprocess.com:8080/site/www_docs/plenary_meetings9/interlaken_declaration.pdf [hereinafter Interlaken Declaration]; see also Global Witness, An Independent Commissioned Review Evaluating the Effectiveness of the Kimberley Process 5 (2006) (noting that although the negotiations were controversial at times, the scheme was negotiated very quickly by normal international law standards).

42 See Global Witness, supra note 41, at 5. The initial participants included Angola, Australia, Botswana, Brazil, Burkina Faso, Canada, Côte d’Ivoire, China, Cyprus, Czech
Republic, Democratic Republic of Congo, Gabon, Ghana, Guinea, India, Israel, Japan, Republic of Korea, Lesotho, Malta, Mauritius, Mexico, Namibia, Norway, Philippines, Russia, Sierra Leone, South Africa, Swaziland, Switzerland, Tanzania, Thailand, Ukraine, United Arab Emirates, United States, Zimbabwe, and the 25 states that made up the European Community. Although not officially a member because of objections from China, Taiwan has also participated in the Kimberley Process from the beginning of negotiations and is fully compliant with the scheme. See Interlaken Declaration, supra note 41, at 1 (adopting the Kimberley Process Certification Scheme).

to regulating the actions of transnational businesses in the area of human rights).

44 See Feldman, _supra_ note 34, at 836 (stating that the Kimberley Process was not in the form of a treaty).

45 See Partnership Africa Canada, _supra_ note 16, at 8 (outlining the participation of the diamond industry and the two official NGO participants, Global Witness and Partnership Africa Canada, in the operations of the Kimberley Process in relation to peer review).

46 See Global Witness, _supra_ note 41, at 5 (noting that despite the initiation of the formal process of negotiating a conflict diamond certification scheme came from the United Nations, the Kimberley Process continues to exist as a “stand-alone arrangement”).

47 See G.A. Res. 60/182, _supra_ note 49 (continuing the U.N. General Assembly’s support for the scheme). In regards to the World Trade Organization, support for the Kimberley Process is inferred from the fact that the trade restrictions inherent in the scheme were granted a waiver for W.T.O. members. See Decision by the General Council, Kimberley Process Certification Scheme for Rough Diamonds, WT/L/676 (Dec. 19, 2006), available at http://www.kimberleyprocess.com:8080/site/www_docs/related_docs1


49 Global Witness, supra note 41, at 4 (noting the importance of the Kimberley Process’s voluntary nature and reliance on national legislation to address an international problem).

50 Interlaken Declaration, supra note 41, at 1. The definition given in the Kimberley Process technical document includes the above definition, as well as definitions given by bodies of the United Nations such as the U.N. General Assembly and the Security Council. See Kimberley Process Certification Scheme,

51 Kimberley Process Certification Scheme, supra note 7, sec. 2-3.

52 Id. sec. 3-5, Annex I (explaining the minimum requirements for compliance that a Participant must make).

53 See id. sec. 3. Beyond these minimum standards, anything stated in the technical document is merely a recommendation with no requirement by member states to abide. See also Global Witness, supra note 41, at 17-18 (describing the limits to actual requirements under the Kimberley Process, although also admitting that many non-required recommendations such as peer-monitoring have become customary for members to participate in).

54 See, e.g., Clean Diamond Trade Act, 19 U.S.C. §§ 3902, 3907 (2003) (stating that under the U.S. Clean Diamond Trade Act, an individual or entity found to be violating the law is liable for a civil penalty not to exceed a $10,000 fine, or if willfully committed, criminal sanctions of a fine not to exceed $50,000, no more than ten years in jail, or both); Precious and Semi Precious Stones (Protection) Act, (2004), Cap. 66:03 (Bots.) (stating that any person caught importing or exporting rough diamonds not in line with the statute face a fine not to exceed 500 Pula or six months in jail, or both).
See Global Witness, supra note 14, at 7 (asserting that the Kimberley Process does not mandate any specific system of internal controls for the member states to adopt or conform to); see also Global Witness & Partnership Africa Canada, The Key to Kimberley Internal Diamond Controls: Seven Case Studies 1-2 (2004) (noting that there is no uniform system of internal controls within the Kimberley Process, but pointing out several member states that have implemented good internal controls as "best practices" that should be followed by other member states).

See, e.g., Global Witness, supra note 41, at 5, 17 (discussing the balance between the need for wide participation in order to make the Kimberley Process successful and the problem of inaction caused by this large participation and need for consensus). The desire for as wide of participation as possible in the scheme has also been backed by the U.N. See G.A. Res. 55/56, supra note 50, ¶ 3 (stating that the members of the Kimberley Process should focus on “securing the widest participation as possible.”); see also Feldman, supra note 34, at 855 (noting how participants in the negotiations viewed the U.N. opinion as a mandate).

See Partnership Africa Canada, supra note 45, at 8 (approving of the voluntary nature of the structure and financing of the
But see Global Witness, supra note 6, at 4 (finding that the current ad hoc nature of the scheme is not sustainable and places a heavy burden on few members for the entire system to function properly). The entire scheme is based on volunteerism, so whichever member state participates in a leadership role agrees to cover the costs for that activity, whether it is acting as the annual Chair or heading one of the working groups, or maintaining the Kimberley Process website. See Partnership Africa Canada, supra note 45, at 8 (analyzing the voluntary nature of the Kimberley Process when it comes to work burden and financial funding).

See Olsson, supra note 1, at 4 (noting that while Australia had the highest annual production of diamonds during the 1990s, Africa contains 12 out of the world’s 18 diamond producing states).


See Partnership Africa Canada, supra note 16, at 8.

See id. at 8 (addressing the strain that this system is causing within the Kimberley Process because only a few states have taken on these obligations).
62 See id. at 7 (stating that originally no monitoring program was established in the technical agreement).

63 See Feldman, supra note 34, at 856-57 (describing the contentions negations over enforcement and why they were mostly left out of the technical document); see also Ian Smillie, Partnership Africa Canada, The Kimberley Process: The Case for Proper Monitoring 5 (Sept. 2002) available at http://www.verifor.org/case_studies/KimberleyProcess.pdf (discussing the debate between government, industry, and NGO officials on the issue of monitoring during the Kimberley Process negotiations and how such measures were left out of the technical document for the sake of consensus).

64 See Global Witness, supra note 41, at 4 (arguing that is the Kimberley Process is to be credible, then some enforcement of its provisions is necessary).

65 See Smillie, supra note 63, at 7 (noting that in 2001, the Republic of the Congo accounted for $223.8 million worth of rough diamonds entering Belgium, along with other diamonds entering Israel and the United States).

66 See Smillie, supra note 9, at 5; African State Seeks Diamond Gain, B.B.C. News (Sept. 1, 2005), available at http://news.co.uk/go/pr/fr/-/2/hi/business/4198408.stm (reporting the details of the Republic of Congo’s expulsion and
the process of attempting to bring the state back into compliance).

67 See Global Witness, supra note 41, at 5 (stating that the “unprecedented level of cooperation” among the diamond industry, NGOs, and most of the states involved in the diamond trade means that most of the diamond trade has been incorporated into the structure of the Kimberley Process).

Band-Aid on a Machete Wound: The Failures of the Kimberley Process and Diamond-Caused Bloodshed in the Democratic Republic of the Congo, 29 Suffolk Transnat’l L. Rev. 25, 44-46 (2005) (arguing that the expulsion of the Republic of the Congo only increased the demand for conflict diamonds being smuggled into other neighboring states from the Democratic Republic of the Congo and therefore benefited rebel groups by increasing the value of the conflict diamonds).


by 2003 when the Kimberley Process came into effect, the war in Côte d’Ivoire is the first diamond war to seriously test the Kimberley Process. See Global Witness, supra note 14, at 8-9.

71 See Group of Experts on Côte d’Ivoire, supra note 69, ¶¶ 37-40 (stating that further investigation did reveal that diamonds certified as Ghanaian were in fact of Ivorian origin).

72 See id. ¶ 41 (detailing how scientific tests of the diamond parcel revealed that the diamonds did not originate from Ghana, despite the Ghanaian Kimberley Certificate that accompanied it).

73 See Final Communiqué, The Kimberley Process Plenary, ¶ 1 (Nov. 6-9, 2006), available at http://www.kimberleyprocess.com:8080/site/www_docs/plenary_meetings22/final_communique_gaborone_plenary.pdf (detailing the agreement that had been reached between Ghana and other participants of the Kimberley Process for their continued admission in the scheme).

74 See Partnership Africa Canada, The Kimberley Controls: How Effective?, http://blooddiamond.pacweb.org/kimberlyprocess/ (last visited Feb. 8, 2007) (noting that the future of Ghana’s continued admission to the Kimberley Process is dependent on the outcome of the February 2007 review that will be conducted and how much progress the country has made on its internal export controls).
See Security Council Report, supra note 48 (arguing the importance of the Kimberley Process in building a legitimate mining industry).

See S.C. Res. 1306, S/RES/1306 (July 5, 2000) (placing sanctions on all diamond exports from Sierra Leone); S.C. Res. 1173, S/RES/1173 (June 12, 1998) (placing sanctions on all diamond exports from Angola unless accompanied with a government certificate); see also Feldman, supra note 34, at 844 (describing how many states saw an international framework as a better alternative to U.N. sanctions, which had not been very successful).

See Usman Boie Kamara, Deputy Director, Sierra Leone Ministry of Mines, Paper Presented at the Sub-Regional Conference on Diamond[s] for Development (Jun. 28-30, 2006) available at http://www.lr.undp.org/D4D_BoieKamaraSpeech_EN.pdf (reporting that sanctions on Liberia were still in place, but that the United Nations lifted the sanctions on Sierra Leone in 2000 after they developed an independent diamond certification scheme).

See generally Global Witness, Experience and Lessons Learned: Monitoring the Integrated Diamond Management Program’s Diamond Tracking System in Sierra Leone (May 2006) (analyzing the needs
of Sierra Leone and its diamond industry after the end of the civil war).

79 See S.C. Res. 1731, ¶ 1(c), U.N. Doc. S/RES/1731 (Dec. 20, 2006) (keeping diamond sanctions in place for Liberia until it can meet the minimum standards of the Kimberley Process); see also Kovanda, supra note 5 (stating the anticipation of the expected entrance of Liberia in the Kimberley Process in 2007).

80 See, e.g., Restatement (Third) Foreign Relations Law of the United States § 101 (1987) (stating that international law generally “consists of rules and principles of general application dealing with the conduct of states and of international organizations and with their relations”).

81 See Summary of the Chatham House International Law Discussion Group, Chatham House (Feb. 23, 2006), available at www.chathamhouse.org.uk/pdf/research/il/ILP230206.doc (detailing the changes in international law in regards to criminal liability and business transactions).

83 See id. at 9, (stating that international law developed as a system solely applicable to states because it was believed that states were the parties in the best position to effect people’s rights).


85 See id. at 609 (stating that under positivist theory, non-legal agreements constitute political agreements that cannot be binding under international law); International Council on Human Rights, supra note 82, at 8 (stating that soft law agreements are not legally enforceable but rather more in the nature of guidelines).

86 See International Council on Human Rights, supra note 82, at 5 (defining hard law as that law which is found in international treaties, convention and covenants that are entered into by state parties who intend to be bound by the agreement’s obligation); see also Kal Raustiala, Form and Substance in International Agreements, 99 A.J.I.L. 581, 586-87 (2005) (arguing that soft law, in comparison to hard law, cannot be binding because it is not in agreement with state practice and
states only pledge but not obligate themselves to these agreements).

87 See International Council on Human Rights, supra note 82, at 5 (describing how state practice led to the development of these rules, while often not codified, still demonstrated that states felt obliged to follow).

88 See id. at 5.

89 See Ratner, supra note 84, at 609-10 (concluding how the legal/non-legal distinction stated by Ratner excludes the possibility of political agreements or soft law from being binding).

90 See, e.g., Ratner, supra note 8, at 486-89 (discussing the growing use of soft law to address new issues such as the growing influence of multinational corporations).

91 See International Council on Human Rights, supra note 82, at 5 (detailing the rise of soft law in the form of resolutions and standards developed by international bodies such as the United Nations in the post-World War II period).

92 See Mark D. Kielsgard, Unocal and the Demise of Corporate Neutrality, 36 Cal. W. Int’l L.J. 185, 201 (2005) (outlining the development of international law from soft law norms to hard law and in some cases, treaties).

94 See International Council on Human Rights, supra note 82, at 60-61 (stating that despite its initial non-binding nature, few documents have acquired such legal authority as the Universal Declaration of Human Rights and that it is widely accepted that certain provisions of the Universal Declaration, such as those regarding slavery, torture, and discrimination, are binding on states).

95 See Ratner, supra note 84, at 612-14 (arguing that the “hardness” of a law should be based on its application and operation, and not just its creation, and analyzing agreements made by the Organization for Security and Cooperation in Europe to demonstrate how there are varying degrees of law that occur between the binary poles of the positivist system).

See Ratner, supra note 84, at 609-10, 612-14 (advancing a theory of the enforceability of the law based on practice and expectation).

See id. at 612-14. Ratner uses the elements developed by Reisman in analyzing European agreements on minority rights. The terms he puts forth are content, authority, expectation, and subject matter. The language used has been changed here for clarity, but the underlying theory is the same. See id. at 612-14.

See id. at 613.

See id. at 612-13.

See id. at 613.

See id. at 612-13; see also Raustiala, supra note 86, at 611 (noting that a contract will always be stronger than a pledge and applying this concept to the authority and legality of international agreements).

See Ratner, supra note 84, at 613-14; Paul F. Fiehl, Charlotte Ku & Daniel Zamora, The Dynamics of International Law: The Interaction of Normative and Operating Systems, 57 Int’l Org. 43 (2003) (listing the elements need for a law to be “legal”, including a structure or framework for the full operation of the law).
See Ratner, supra note 84, at 613 (comparing the low authoritativeness of the 1992 U.N. Declaration on Minorities which has no formal mechanism for the resolution of conflict with the high authoritativeness of the European Convention on Human Rights, which has binding judicial review).

See id. at 612 (challenging that some soft law agreements that exhibit all the features of law but under the binary theory of the positivist approach, will still not be binding).

See, e.g., Restatement (Third) Foreign Relations Law of the United States § 101 (1987) (stating that international law generally concerns the relations of states and international organizations with each other). Note that there is no mention of non-state actors. See id. § 101. However, non-state actors are liable under certain areas of international law, especially human rights and humanitarian law, as seen with the establishment of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. See generally S.C. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) (establishing the International Criminal Tribunal for Rwanda for the purpose of trying person for serious violations of humanitarian law); S.C. Res. 808, U.N. Doc. S/RES/808 (Feb. 22, 1993) (establishing the International Criminal Tribunal for the Former Yugoslavia). Although the statutes of the ICTY, ICTR,
See Fiehl, Ku & Zamora, supra note 103, at 92-96 (discussing the changing views of non-state actors in line with the changing dynamic of international law).

See generally Joel R. Paul, Eighteenth Annual Symposium: Holding Multinational Corporations Responsible Under International Law, 24 Hastings Int’l & Comp. L. Rev. 285 (discussing the various ways that multinational corporations can be held liable under international law and those areas of law where they cannot); Ratner, supra note 8 (discussing the various approaches that international legal agreements are taking in directly or indirectly incorporating corporations into international law, especially regarding international human rights norms).

See International Council on Human Rights, supra note 82, at 9-10 (addressing the issue that many multinational corporations have grown in political strength as states privatize their domestic duties and are financially overpowered by the wealth of corporations, while at the same time have not been held to the same legal standards under international law that states are held to). Even multinational corporations are beginning to recognize that the growth in their influences requires an increase in social responsibility. See Doreen McBarnet, Human Rights, Corporate Responsibility and the New Accountability, in
Human Rights and the Moral Responsibilities of Corporate and Public Sector Organisations 63, 64-65 (Tom Campbell & Seumas Miller eds., Kluwer 2004) (detailing the creation and rise of the “triple bottom line” for multinational corporations that includes not only profits, but social and environmental responsibility as well).

110 See id. at 9-10 (noting that in some areas of the world, especially regarding small states, multinational corporations are becoming more powerful than governments and slowly eroding the concept of state sovereignty); see also Ratner, supra note 8, at 446 (finding that there has been a fundamental shift in the attention of legal observers from previously viewing states as the main threat to the population to now seeing corporations as presenting the most danger).

111 See generally Ratner, supra note 8 (outlining many different approaches involving non-state actors in areas such as international labor law, environmental law, human rights law, and criminal law); see also Andrew Clapham, The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court, in Liability of Multinational Corporations under International Law 139, 193-95 (Menno T. Kamminga & Saman Zia-Zarifi eds., Kluwer Law International 2000) (noting the increase
in national prosecutions of corporations by extending the jurisdiction of the courts to legal persons, which in many countries creates additional jurisdiction over crimes under international law).


113 See, e.g., Ann Florini, Business and Global Governance: The Growing Role of Corporate Codes of Conduct, Brookings Rev., Spring 2003, at 4 (providing an overview of the growing use of corporate codes of conduct by multinational enterprises for a variety of reasons, including public relations and a genuine attempt to bring corporate practices into the scope of international law and legal norms).

in the gold industry, as seen in Baia Mare, Romania in 2000); see also Overview, *International Cyanide Management Code for the Gold Mining Industry*, 2006, http://www.cyanidecode.org/about.php [hereinafter Cyanide Overview] (describing the Cyanide Code as a voluntary agreement with corporations involved in gold mining that aims to address the specific safety issues surrounding the use of cyanide in mining operations).

115 See Cyanide Overview, supra note 114 (stating that the purpose of the Cyanide Code is to “improve the management of cyanide used in gold mining and assist in the protection of human health and the reduction of environmental impacts.”).

116 See Cyanide Code, supra note 112, at 6-8 (detailing the process for certification, which involves a comprehensive review by a third-party auditor every three years, and the public relations benefits of certification).

117 See id. at 7 (stating that those businesses that are found to be compliant are publicly listed on the International Cyanide Management Institute website and allowed to publicly state their involvement and certification in the program).

118 See Shinya, supra note 114, at 2.

119 See Cyanide Code, supra note 112, at 2-5 (detailing a list of principles and standards of practice in the areas of production, transportation, storage and handling, operations,
decommissioning, worker safety, emergency response, training, and dialogue that each signatory must meet in order to be certified under the code.

120 See id. at 7 (stating that a facility or company that is not found to be compliant when audited will not be certified, but has the additional opportunity to reapply for certification when the facility meets the Cyanide Code’s standards).

121 See Dispute Resolution Procedure, International Cyanide Management Code for the Gold Mining Industry, 2006, http://www.cyanidecode.org/about_dispute.php (stating that while there is a dispute resolution mechanism available for participants regarding the application of the Cyanide Code and its auditing procedures, it is in the form of non-binding mediation and is not intended to have any legal effect).


123 See id. ¶ 2 (asserting that the aim of the Tripartite Declaration is to support the positive contribution that multinational enterprises can make in the communities they
operate in and encourage these companies to aid in the economic
and social progress of these communities); Ratner, supra note 8, at 486-87 (stating the importance and continuing influence of
the Tripartite Agreement because the three component parts of
the ILO—states, industry, and labor—negotiated and adopted the
agreement which represents “a fair balance among the interests
of all three”).

124 See Tripartite Declaration, supra note 122, at v (declaring
that periodic surveys are completed in order to gauge the effect
the Tripartite Declaration has on the achievement of the
guidelines it sets forth and all reports and commentaries on
this monitoring is available to the public for viewing).

125 See ILO, Procedure for the Examination of Disputes Concerning
the Application of the Tripartite Declaration of Principles
Concerning Multinational Enterprises and Social Policy by Means
of Interpretation of its Provisions (Mar. 1986), compiled in
reprinted in Tripartite Declaration, supra note 122, at 19
(establishing the means by which a member of the ILO can
specifically dispute the application or interpretation of the
Tripartite Declaration).
See Ratner, supra note 8, at 486-87 (citing that the Tripartite Declaration only establishes a set of principles and extremely soft duties on its participants).

See, e.g., Tripartite Declaration, supra note 122, ¶¶ 2, 5 (defining the purpose of the agreement is to guide states, industry, and labor towards a positive social policy regarding the societies where multinational enterprises operate in).

See, e.g., id. ¶ 9 (calling on all members to the agreement who have not yet ratified certain ILO Conventions do so as quickly as possible); see also, e.g., id. ¶ 29 (strongly encouraging states to develop employment training programs in cooperation with multinational enterprises).

See Ratner, supra note 8, at 486 (citing the Tripartite Declaration as soft law).


See id. art. 2 (applying the jurisdiction of the convention to legal persons and not natural persons).

See Ratner, supra note 8, at 482.

See id. at 482
134 See Bribery Convention, supra note 130, art. 3 (“The bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties.”).

135 See Ratner, supra note 8, at 482 (citing the Bribery Convention as an example of hard law that places indirect duties on corporate non-state actors).

136 See Feldham, supra note 34, at 835-36 (stating that during negotiations, it was the intention of the state parties that the Kimberley Process was designed to have no formal or diplomatic status).

137 See List of Participants, Official Site of the Kimberley Process Certification Scheme, Jan. 1, 2007, available at http://www.kimberleyprocess.com:8080/site/?name=participants. Since 2003, the Kimberley Process has grown to 42 states, plus the 27 states of the European Community, and Taiwan. See id.

138 Restatement (Third) of Foreign Relations Law of the U.S. § 301 (1987) (defining an international agreement as one where the parties enter into it with the intent of it being binding).

139 See Raustiala, supra note 86 (noting that some voluntary agreements or pledges do become binding law); Truelove, supra note 15, at 215-16 (detailing how the OECD’s Bribery Convention started as a soft law initiative of the United States modeled after its own Foreign Corrupt Practices Act before finally
becoming internationally binding through its codification in an official treaty).

140 See Smillie, supra note 9, at 4 (noting that the greatest strength of the Kimberley Process is its almost compulsory nature, which was not intended or evident at the outset of the agreement).

141 See Hartmut Hillgenberg, A Fresh Look at Soft Law, 10 E.J.I.L. 499, 502 (1999) (stating that the difference between treaties and non-treaty agreements is normally due to anticipated political costs of obligations and not on the basis of lack of cooperation).

142 See id. at 504-06 (discussing how many non-binding agreements are similar in substance to treaties, but lack the ability for non-compliance to be considered a breach of international law which is what differentiates them from hard law).

143 See id. at 501 (listing several reasons why states may choose non-binding agreements over treaties, including confidence building, the creation of a preliminary regime to be built on in the future, the risk of failure for a “hard law” treaty, the ability to conclude an agreement quickly with simpler procedure, avoidance of national processes for ratification, the ability to conclude agreements with parties that are not generally able under international law to enter into treaties, and the ability
for other parties to not recognize the agreement); see also Oscar Schachter, The Twilight Existence of Nonbinding International Agreements, 71 Am. J. Int’l L. 296, 300 (1977) (arguing that the only real difference between binding and non-binding agreements is that non-binding agreements do not invoke legal responsibility that can result in “a claim for reparation or for judicial remedies.”).

144 See Kimberley Process Certification Scheme, supra note 7, sec. 3 (stating that it is the duty of participants to ensure that no rough diamonds are imported or exported with a state that is not part of the Kimberley Process).

145 See Feldman, supra note 34, at 836 (addressing the fact that the Kimberley Process did not follow the traditional process for creating binding international law).

146 See id., at 836 (noting that instead of officially signing or ratifying the Interlaken Declaration or the Kimberley Process Certification Scheme, both of these documents were “adopted”).

147 See G.A. Res. 55/56, supra note 50, ¶ 5 (encouraging the participating states to expand the membership of the scheme to make the certification process as effective as possible).

148 See Global Witness, supra note 41, at 5 (noting the speed and reliance on consensus that the negotiations and operations of the Kimberley Process has).
149 See, e.g., Feldham, supra note 34, at 853-57 (detailing the major issues of contention throughout the negotiating process, including the definition of “participant”, the duties of the diamond industry, monitoring and enforcement mechanisms, and the possible conflict with W.T.O. commitments).

150 See Global Witness, supra note 41, at 5 (finding that the speed of Kimberley Process negotiations were much quicker than normal U.N. treaties).

151 See Kimberley Process Certification Scheme, supra note 7, sec. 3.

152 See id. sec. 3. In at least one example, an applying state had to undergo a special investigative review prior to admission because of their unwillingness to pass the relevant domestic legislation in a timely fashion. See Smillie, supra note 9, at 5 (detailing the circumstances around Lebanon’s admission in 2005).

153 See Kimberley Process Certification Scheme, supra note 7, sec. 4(1) (stating that it is the duty of participants to develop a system of internal controls, but not specifying and duties beyond the creation of the system).

154 See generally Raustiala, supra note 86 (based on her analyses of treaty law in terms of depth, structure, scope and state practice).
See Clean Diamond Trade Act, 19 U.S.C. §§ 3902, 3907 (2003); Precious and Semi Precious Stones (Protection) Act, (2004), Cap. 66:03 (Bots.); see also supra note 54 (comparing the differences between the domestic law implementing the Kimberley Process in the United States and Botswana).

See Smillie, supra note 9, at 4 (arguing that the large-scale participation and size of the Kimberley Process makes this voluntary agreement effectively compulsory and enforceable on any state or diamantaire that wants to participate in the wider diamond trade). One legal theory to explain this is that it is the standard of recognition and compliance that deems whether an agreement is binding. Thus, if states and other parties make efforts to comply with an agreement, then it is binding through the “rule of recognition.” It is not a widely accepted theory in international law, and therefore is not discussed in depth in this paper, but is nonetheless another perspective on the fluidity of binding and non-binding agreements. See Feldman, supra note 34 (analyzing how the Kimberley Process is binding law because of the compliance of the participants and through the rule of recognition which establishes the binding expectation that the scheme will be followed).

See Feldman, supra note 34, at 864 (noting that when the agreement was first adopted, roughly 90% of the world’s legal
diamond trade was covered by the Kimberley Process, and that the Kimberley Process has continued to grow in size since then).

158 See Feldman, supra note 34, at 870 (stating that the widespread change in behavior and implementations of new laws by the participants of the Kimberley Process demonstrates its effectiveness in implementing the scheme); Smillie, supra note 9, at 4; see also supra note 172 (asserting that the Kimberley Process is now essentially compulsory part of the diamond trade).

159 Smillie, supra note 63, at 5. There is additional support for this by the fact that the Kimberley Process was granted a waiver for its trade restrictions by the World Trade Organization. See Decision by the General Council, supra note 47; Chairman’s Non-Paper on the Kimberley Process Workshop on WTO Conformity, supra note 47; see also supra note 50 and accompanying text (detailing the involvement of the World Trade Organization with the Kimberley Process).

160 See S.C. Res. 1731, ¶ 1(c), supra note 79 (encouraging Liberia to continue its progress of instituting the minimum standards of the Kimberley Process, but electing to keep sanctions on diamond exports in place until the standards are complete).

161 See Global Witness, supra note 14, at 18-19 (stating that the Security Council has made clear that sanctions will remain in
place until Liberia is able to adopt and enforce strong internal diamond controls); Security Council Report, supra note 48 (citing the continued smuggling of diamonds out of Liberia as a legitimate reason for continuing sanctions and technical aid on developing an effective certification scheme in Liberia).

162 See S.C. Res. 1731, supra note 79.

163 See id.


165 See Smillie, supra note 63, at 5 (noting that continued participation in based on meeting the minimum standards, which are compulsory for all participants, and that most participants had to amend their national laws in order to comply and stay in the scheme).
See Kimberley Process Certification Scheme, supra note 7, sec. 2-4 (detailing the specific requirements of Participants); Global Witness, supra note 41, at 5 (outlining the gains that have been made in the area of monitoring and enforcement since the Kimberley Process was launched).

See Global Witness, supra note 14, at 18-19 (detailing the history of the U.N. Security Council with the conflict in Liberia and the issue of conflict diamonds); see also supra note 161 (asserting the current position Liberia is in regarding the Kimberley Process and U.N. sanctions).

See Feldman, supra 34, at 836, 869 (declaring that the Kimberley Process does have the force of law by obligating its participants to certain duties and commitments).

Compare Kimberley Process Certification Scheme, supra note 7 with Tripartite Declaration, supra note 122. While the Tripartite Declaration recommends and urges actions to be taken by its participants, the Kimberley Process requires it as a basis for membership. See Kimberley Process Certification Scheme, supra note 7, sec. 3 (requiring the establishment of a certification scheme in line with the provisions of the technical document); Tripartite Declaration, supra note 122, ¶ 12 ("Governments of home countries should promote good social practice in accordance with this Declaration"); see also,
Smillie, supra note 9, at 4 (describing how several states were temporarily dropped from the Kimberley Process for failing to implement the legislation and controls called for in section three of the technical document).

170 See Partnership Africa Canada, supra note 16, at 4 (describing the peer-review system and the expulsion of the Republic of the Congo as effective measures for combating conflict diamonds).


172 See Partnership Africa Canada, supra note 16, at 4; see also supra notes 65-66 (describing the violations of the Kimberley Process and subsequent expulsion of the Republic of the Congo from the scheme in 2004).

173 See International Council on Human Rights, supra note 82, at 9-10 (discussing the changing views of legal scholars regarding corporate non-state actors and their treatment under international law). See generally Ratner, supra note 8 (highlighting various areas of international law that are
beginning to approach the role of non-state actors differently than under the traditional positivist approach).

174 See Kimberley Process Certification Scheme, supra note 7, at sec. 4 (detailing the agreement and commitment of the industry to self-regulate).

175 See Florini, supra note 113, at 6-7 (describing the lack of effectiveness in self-regulation for most corporate codes of conduct); see also International Council on Human Rights, supra note 82, at 8-10. (asserting that voluntary corporate codes of conduct that are self-regulated are often criticized for being ineffective and self-serving for the companies and industries that adopt them, and illustrate the need for some forms of binding obligations on corporate parties in addition to such self-regulation).

176 See Kimberley Process Certification Scheme, supra note 7, sec. 1 (defining conflict diamonds as “rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments”).

177 See id.

178 See Fluet, supra note 40, at 111-12 (stating that the Kimberley Process was designed to create “normative trade standards” throughout the entire diamond pipeline, thus
minimizing the effect of conflict diamonds in the international diamond trade).

179 See Truelove, supra note 15, at 219-20 (describing how extractive industries are a greater risk for investors because they are tied to the land, and therefore especially prone to corruption and misuse).

180 See id. at 219-20.

181 See Kimberley Process Certification Scheme, supra note 7, sec. 1 (stating that conflict diamonds are those under rebel control and are used for the purposes of undermining the legitimate government).


183 See Group of Experts on Côte d’Ivoire, supra note 69, ¶¶ 37, 41; see also supra notes 71-72 and accompanying text (detailing the evidence against Ghana’s suspected involvement in trading conflict diamonds from Côte d’Ivoire).

burden for overall compliance with the Kimberley Process falls to the global diamond industry through its system of warranties).

185 See Marcus Noland and J. Brooks Spector, Reforms are Helping Africa’s Diamonds Sparkle Again, Christian Sci. Monitor, Dec. 11, 2006, available at http://www.csmonitor.com/2006/1211/p09s02-coop.html (stating that while conflict diamonds used to be estimated at accounting for four to fifteen percent of the world diamond trade, they are now estimated to make up less than one percent).

186 See Saunders, supra note 13, at 1421 (asserting that billions of dollars came out of Africa in the form of conflict diamonds in the 1990s); see also Chantal de Jonge Oudraat, UN Sanction Regimes and Violent Conflict, in Turpulent Peace: The Challenges of Managing International Conflict 323, 334 (Chester A. Crocker, Fen Osler Hampson & Pamela Aall eds., U.S. Institute of Peace Press 2001) (citing estimates that from 1993 to 1998, UNITA alone sold between $2.3 to $3.7 billion dollars worth of conflict diamonds).

187 See Global Witness, supra note 14, at 9 (citing the Ivorian government’s monetary estimate of the worth of the 300,000 carats of diamonds that are being smuggled out of Côte d’Ivoire by rebels in the North).
See Feldman, supra note 34, at 852-53 (detailing how the chain of warranties is supposed to provide for a diamond to be traced from the mine to the counter, and therefore ensuring that the diamond is conflict free).

See World Diamond Council, supra note 183, at 4-8 (detailing the system of warranties for every sector of the diamond industry that underlies the issuance of a Kimberley Process certificate by the exporting state).

See Global Witness, supra note 14, at 8-8-9, 12-14 (outlining the process by which many conflict diamonds from Côte d’Ivoire are being smuggled by diamantaires into Ghana and then certified as legitimate); see also Mark Doyle, CAR ‘is diamond hub’, says report, B.B.C. News, Jan. 13, 2003, available at http://news.bbc.co.uk/2/hi/africa/2652257.stm (reporting that the Central African Republic is a major location legitimately certifying conflict diamonds smuggled by diamantaires from the Democratic Republic of the Congo).

See Feldman, supra note 34, at 853 (noting that the diamond industry was given an option between self-regulation being included in the technical document or government regulation, and specifically chose the option of self-regulation).

See World Diamond Council, supra note 183, at 12-13 (declaring that the non-profit organization was created by the
World Diamond Congress in July 2000 to negotiate on behalf of the entire industry on the issue of conflict diamonds).

193 See Press Release, World Diamond Council, Statement from the World Diamond Council (Oct. 10, 2002) (on file with author) (accepting the role of responsibility that the diamond industry has within the Kimberly Process and the critical need for effective and enforceable industry self-regulation if the Kimberley Process is to be successful); see also, World Diamond Council, supra note 183, at 2-3 (stating that failure to abide by the standards set out by the World Diamond Council in relationship to the Kimberley Process will result in an individual’s expulsion from industry organizations, including diamond bourses where most of the diamond trade takes place).

194 See Partnership Africa Canada, supra note 16, at 1 (revealing that at the 2006 Kimberley Process Plenary Meeting, representative from various NGOs requested minimum standards to replace the voluntary standards for the diamond industry that are currently in place and better government oversight, and for the first time received support from the World Diamond Council for these proposals).

195 See Cyanide Code, supra note 112 at 1 (stating that the Cyanide Code is only intended for business participants of the gold mining industry).
196 See id. at i (explicitly stating that the Cyanide Code does not “create, establish, or recognize any legally enforceable obligations or rights on the part of its signatories, supporters or any other parties”).

197 See Kimberley Process Certification Scheme, supra note 7, sec. 4 (establishing a system of industry self-regulation); World Diamond Council, supra note 183, at 1-2 (stating that all members of the diamond industry must comply with the industry’s self-regulation and be routinely audited).


199 See Smillie, supra note 9, at 4 (asserting that the monitoring and enforcement mechanisms that the Kimberley Process has developed thus far place it far ahead of many formal international treaties in dealing with compliance issues).

200 See World Diamond Council, supra note 183, at 11 (noting that although the early stages of negotiating the Kimberley Process scheme was mostly intergovernmental, in the end it was concluded with the full participation of industry and human rights representatives, making the first time that an international
industry had cooperated with governments and civil society NGOs to address a human rights issue).

201 See Feldman, supra note 34, at 840-843 (detailing the start of the public campaign for diamond reforms).

202 See Global Witness, supra note 41, at 5 (noting the “unprecedented level of cooperation among countries, the private sector and NGOs” and the diamond industry’s continued vital role in the Kimberley Process); Feldham, supra note 34 (describing how the diamond industry has been active in the Kimberley Process from the beginning of negotiations); Smillie, supra note 9, at 2-3 (detailing how diamond industry officials were treated as full Participants in the negotiation and in the current scheme).

203 See Feldham, supra note 34, at 856-58, 860-62 (reporting the process of negotiations that took place within the industry starting in New York and then extending to the World Diamond Congress and the creation of the World Diamond Council).

204 See e.g., Cyanide Code, supra note 112; Tripartite Declaration, supra note 122.

205 See Global Witness, supra note 41, at 5 (citing the important role that NGOs and the World Diamond Council play in the Kimberley Process); Smillie, supra note 9, at 2-3 (detailing how diamond industry officials and NGOs are treated as full
participants and actively cooperate in the operation of the Kimberley Process).

206 See Smillie, supra note 9, at 2-3 (detailing the high level of participation by the diamond industry in the scheme).

207 See Kimberley Process Certification Scheme, supra note 7, sec. 1 (defining an observer as representatives from civil society, industry, international organizations or non-member governments that are invited to attend the annual Plenary Meeting, with permission of the Kimberley Process Chair).

208 See Ratner, supra note 8, at 486.

209 See Kimberley Process Certification Scheme, supra note 7, sec. 4 (establishing the obligation for industry self-regulation); see also World Diamond Council, supra note 183, at 1-2 (stating that the self-regulation scheme established in the Kimberley Process technical document is binding and enforceable on the entire industry).

210 See Hart, supra note 17, at 186-87 (stating that many analysts believe that resources such as diamonds are the only reason why rebels fight); see also International Crisis Group, Côte d’Ivoire: No End in Sight 21-22 (Jul. 12, 2004) (detailing the war economy of Côte d’Ivoire and the lack of motivation of the rebel groups for peace).
211 See Kimberley Process Certification Scheme, supra note 7, at preamble, sec. 1.

212 See International Crisis Group, supra note 26, at 1-9 (describing the changing loyalties of rebel groups in Sierra Leone and Liberia in the quest for diamonds).

213 But see, e.g., The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict art 4, May 25, 2000, U.N. GAOR, U.N. Doc A/54/RES/263 (entered into force Feb. 12, 2002) (applying the terms of the protocol to non-state armed groups); International Council on Human Rights, Ends & Means: human rights approaches to armed groups 62 (2000) (noting that the optional protocol adopted in 2000 regarding the use of child soldiers as an international crime applied to rebel groups as well as states, even though rebel groups were not a party to the original convention or part of the negotiations with the additional protocol); see also Warrant of Arrest (Prosecutor v. Thomas Lubanga Dyilo), No. ICC-01/04-01/06 (Feb. 10, 2006) (issuing arrest warrant for Thomas Lubanga Dyilo, leader of the rebel militia the Forces Patriotiques pour la Libération du Congo (FPLC), for recruiting child soldiers in violation of international law).

214 See Kimberley Process Certification Scheme, supra note 7, sec. 1.
215 See International Council on Human Rights, supra, note 213, at 4 (finding that while traditionally rebel groups are different from organized crime in that rebel groups have are politically-motivated, today that distinction is difficult to rely on as grave human rights abuses by some rebel groups are increasingly motivated purely by economic interests and not connected to any substantial political goal).

216 See id. at 5-6 (noting that the politicization and public sentiment towards rebel groups makes it difficult for parties to deal with the diplomatically). This of course does not preclude states from interacting with rebel groups in informal spheres not commonly seen by the public, especially when it is in the state’s interest. See e.g., Hutchful & Aning, supra note 15, at 210 (stating that in the 1990s, many French companies established connections in Côte d’Ivoire in order to facilitate trade timber with Taylor’s NPFL outside of normal export controls); Salo, supra note 15, at 133, 139 (stating that during the 1990s, Liberian conflict timber accounted for one-third of France’s tropical hardwood imports and that any attempt to sanction such business activity would most likely be blocked at the U.N. Security Council by France and China, both of whom are profiting from this trade).

217 See Bribery Convention, supra note 130, art. 1(1).
218 See id. art. 1-3 (criminalizing the act of bribing a foreign official, regardless of whether the perpetrator is a natural or legal person).

219 See Kimberley Process Certification Scheme, supra note 7, art. 1 (defining conflict diamonds in relation to rebel groups).

220 See Fishman, supra note 68, at 225 (stating that the Kimberley Process was created support U.N. sanctions on conflict diamonds in a permanent and structural way); see also Kovanda, supra note 79 (stating that the basis for the Kimberley Process was to end the gross human rights abuses that they funded).

221 See Global Witness, supra note 41, at 17 (noting that while expulsion is the appropriate and effective action in situations involving serious non-compliance, there are no lesser sanctions to implement in the situation of a less serious violation).

222 See Kimberley Process Certification Scheme, supra note 7, art. 4 (establishing a duty for industry self-regulation); World Diamond Council, supra note 183, at 2-9 (outlining guidelines for the entire diamond industry on how to comply with the Kimberley Process, the industry’s self-regulation scheme, and the penalties for non-compliance).

223 This is because of the general volatile nature of these wars and the fact that most governments do not have control or authority over the territory where the diamonds are being mined.
See, e.g., Country Profile: Ivory Coast, supra note 79 (reporting on the division of Côte d’Ivoire and the lack of control the government has on the northern portion of the country).


225 See id. at 260-69 (finding that rebel groups are liable under the laws of war if meet the elements of either Protocol II or Common Article III such as territorial control and organization); International Council on Human Rights, supra note 215, at 61-62 (stating that the wars of law apply to all parties of a conflict regardless of their normative legal status, and there are many acts that armed non-state actors can be held
accountable for under international law, including widespread acts of murder, enslavement, arbitrary imprisonment, persecution, and rape).

226 See Kovanda, supra note 5 (citing human rights as the underlying concern of the Kimberley Process).

227 But see Frans van Anraat, supra note 106 (reporting on the conviction of van Anraat for complicity in war crimes for by means of his economic activities in Iraq that enabled Sadaam Hussain to commit gross human rights abuses, including genocide); Guus van Kouwenhoven, supra note 106 (reporting on the conviction of Kouwenhoven for trading arms with Liberian President Charles Taylor, who used the weapons to continue the wars in Liberia and Sierra Leone, and continue his hold on the conflict diamond trade of West Africa).

228 See Hutchful & Aning, supra note 15, at 210 (arguing that the ease by which Taylor could exploit the natural resources of Liberia and Sierra Leone to his advantage was probably what accounted for the failure of thirteen peace accord attempts from 1990 to 1996); see also Partnership Africa Canada, supra note 16, at 3 (noting that the Kimberley Process has had a substantial effect on not just stemming the flow of conflict diamonds, but also on other related activities such as drug smuggling and money laundering as a result of increasing the
risk for those receiving the diamonds and bring criminal connections to light).

229 See Kimberley Process Certification Scheme, supra note 7, art. 1 (defining an active participant as a state or regional economic organization, such as the European Union, on whom the Kimberley Process is effective on).

230 See Kimberley Structure, supra note 59 (explaining the current structure of the Kimberley Process as including working groups on monitoring, statistics, and diamond experts, as well as two committees for participation and selection).

231 See Global Witness, supra note 41, at 6 (discussing the significant time it has taken the Kimberley Process to respond to cases of non-compliance in Ghana, Côte d’Ivoire, and the Democratic Republic of the Congo).

232 See Global Witness, supra note 41, at 6 (indicating the loss of credibility the Kimberley Process has sustained as a result of slow action in the face on ongoing trade in conflict diamonds, particularly in regards to the situation in Côte d’Ivoire).

233 See Kimberley Process Certification Scheme, supra note 7, sec. 4; see also Global Witness, Broken Vows: The Diamond Industry’s Failure to Deliver on Combating Conflict Diamonds 1-3 (Nov. 2006) (noting that the diamond industry has thus far
failed to create an adequate diamond tracking system, forcefully implement their industry code of conduct or sanction those individuals within the industry that have been found to be in violation of the Kimberley Process and the industry’s standards).

234 See Smillie, supra note 9, at 5 (noting that the diamond industry officials and the human rights NGOs take part in almost every part of the Kimberley Process, including in peer reviews for Participant compliance, which may be unprecedented in an international scheme of this size).

235 See Smillie, supra note 63, at 5 (noting that while the Kimberley Process is still referred to as voluntary and non-binding, it is compulsory both in membership and compliance for any state that wishes to participate in any aspect of the diamond trade, thus binding its participants to the requirements of the scheme).

236 See Smillie, supra note 9, at 4 (noting that there are wide differences in the capacity of states, especially regarding internal controls, to meet the requirements of the Kimberley Process).

237 See Global Witness, supra note 14, at 18-19 (stating that although Liberia has passed strict diamond controls, it still lacks the funding and capacity to enforce it).
See Kimberley Process Certification Scheme, supra note 7, at preamble ("taking into account that differences in production methods and trading practices as well as differences in institutional controls thereof may require different approaches to meet minimum standards"); G.A. Res. 55/56, supra note 50, ¶ 3(a); see also Smillie, supra note 9, at 3 (commenting on the role that this provision has in forming the Kimberley Process to gain wide participation).