

# PADDLES FOR KIMBERLEY

AN AGENDA FOR REFORM

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## Up the creek without a paddle

*A 19<sup>th</sup> century saying meaning to be in deep trouble  
and unable to do anything about it.*

**T**he Kimberley Process was designed to halt the phenomenon of conflict diamonds and to ensure that it would not recur. In many ways the Kimberley Process Certification Scheme was a remarkable initiative in terms of its originality and scope, and in its inclusion of governments, industry and civil society.

Insiders know, however, that in some of its most important obligations the KPCS is failing. Internal controls in many countries, notably those most affected by war, are extremely weak. Smuggling has become widespread. The handling of crises in Venezuela and Zimbabwe has been severely flawed. Other crises simmer below the surface, only because they have not yet been brought to public attention. The KPCS is unable to deliver on its most fundamental promise: a guarantee to consumers that the diamonds they are purchasing are not linked to conflict and human rights abuse.

External observers are increasingly critical. Media reports abound on how the Kimberley Process is 'flawed' or is 'failing'. Despite calls for change, however, a handful of intransigent participants can block solutions because of the KP's consensus decision making model for all questions, great and small. There is also a reluctance to re-open the Core Document of the KPCS, as if the consensus agreed in 2002 is sacred and beyond reproach; as if the KPCS today is in fact the same as it was at the beginning.

In fact, although there was a grave injunction at its outset that the document on which the KPCS was founded should 'not be opened', in actual practice it has been 'opened' many times, and the institutional forms and processes of the KPCS have evolved in response to a range of issues: changes in membership, the need for monitoring, the handling of noncompliance and other issues that were not anticipated in 2002. The KP's response to these challenges demonstrates the dynamic nature KPCS as an adaptive institution.

Rooted in the spirit of continuous improvement which has been part of the Kimberley Process since its inception, this paper examines some of the most pressing issues facing the KPCS today. In addition to proposing ways forward, however, it also looks back, describing important changes that have already taken place since the inception of the KPCS.

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Today there is a critical window of opportunity for the KPCS to evolve once again -- to address issues that, if not resolved, threaten to destroy the entire system, returning the diamond industry to the chaos and bloodshed of the 1990s.

The paper was prepared as a background document for a KP Reform Workshop to be held in conjunction with the June 2010 Kimberley Process Intersessional Meeting in Tel Aviv. Written by former KP insider, Ian Smillie, the paper was sponsored by the International Development Research Centre and Partnership Africa Canada. The views expressed in it are those of the author.

## SUMMARY OF ISSUES AND RECOMMENDATIONS

1. **Decision-making:** The KP decision-making process should be changed as follows: Participants are to reach decisions by consensus. In the absence of consensus, decisions will be made by simple majority of all voting Participants present, except for decisions on those matters specified in Annex \_\_\_ which require a 75% majority of those voting Participants present.
2. **Monitoring:** The Kimberley Process should adopt a mechanism that allows for regular, independent, third party monitoring of compliance. Monitoring should be complemented by rigorous follow-up, credible sanctions in cases of continued non-compliance, and a fair, transparent and objective decision-making process on dealing with non-compliance.
3. **Secretariat:** A small permanent KP secretariat should be established to manage the monitoring function and related follow-up.
4. **A Multi-donor Trust Fund** should be created for timely and appropriate follow-up assistance in helping participants to meet KP minimum standards.
5. **The World Diamond Council** should commission an independent evaluation of its system of warranties, to determine how it could improve the performance of industry actors in meeting KPCS challenges.
6. **The Cutting and Polishing Industry:** Companies that cut and polish diamonds must become an integral part of KPCS minimum standards.
7. **Transparency:** All KP Annual Reports and all reports of KP Reviews should, as a matter of course, be placed on the open KP website, along with details of follow-up action. A transparency working group should be established to develop criteria on exceptions to the rule.
8. **Human Rights:** New wording for the Core Document: The Kimberley Process promotes respect for human rights as described in the Universal Declaration of Human Rights, and it requires their effective recognition and observance, as part of KPCS minimum standards, in the diamond industries of participating countries, and among the peoples, institutions and territories under their jurisdiction.

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## 1 • DECISION MAKING

**C**onsensus was important in the creation of the Kimberley Process Certification Scheme because it was essential for all major diamond producing, trading and processing countries to be involved in, and comfortable with, the outcome. This meant that the KPCS had to be acceptable to all involved in the negotiations, including industry and civil society. While the final agreement was not 100% satisfactory to all parties, it was satisfactory enough to 100% of the parties for it to move forward.

Where future decision making was concerned, early KP negotiations foresaw the need for a method to deal with the absence of consensus.

### Excerpt from KP Working Document nr3/2001, Aug 21, 2001

6. Decisions on substance will be reached by consensus of the participants, decisions on procedural matters by a simple majority of participants.

*Alternative 1:*

Decisions at all Plenary meetings would be by consensus, or in the absence of such consensus by a simple majority of all voting Participants present, except for decisions on those matters specified in Annex \_\_\_\_\_ which would require a \_\_\_\_\_ majority of those voting Participants present.

Failure to reach an agreement on a voting procedure, however, led to a vague formulation:

*Participants are to reach decisions by consensus. In the event that consensus proves to be impossible, the Chair is to conduct consultations.*

Consensus was not defined at the time, although the Oxford English Dictionary says that it means 'general agreement...majority view, collective opinion.' For some participants, however, it took on the meaning that is understood in some intergovernmental organizations such as NATO: unanimity.

The literature on consensus decision making is extensive, and it is considerably more nuanced than this.

### What Consensus Is

- *Cooperative:* Consensus decision making creates a cooperative dynamic. Everyone works together to make it the best possible decision for the group. Concerns are raised and resolved until all voices are heard. Since proposals are no longer the property of the presenter, a solution can be created more cooperatively;
- *Trust and Respect:* For consensus to work well, the process must be conducted in an environment that promotes trust and respect, and the process must be managed well by experienced facilitators;

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- *Personal Responsibility*: In joining a group, one accepts a personal responsibility to behave with respect, good will, and honesty. Each participant is expected to recognize that the group's needs have a certain priority over the desires of the individual. It is important to accept the shared responsibility for helping to find solutions to the concerns of others. It can be difficult for a group to reach consensus internally when participants are part of a larger entity that does not participate in the consensus process. It can be extremely frustrating if those external to the group can disrupt the decision making by interfering with the process by asserting a higher level of authority;
  - *Time*: Consensus cannot be rushed.

## What Consensus is Not<sup>1</sup>

- *Not Voting*: voting is a process in which people express their preference. Voters are usually forced to choose between two proposals, both of which may be unacceptable: 'Would you rather be poked in the eye with a stick or hit on the head with a rock?'
- *Not Unanimity*: unanimity is a voting process in which 100% of the group votes the same way, that is, everyone has the same first choice. Unanimity is almost impossible to achieve with more than two people. If there appears to be unanimity, then there probably has not been enough discussion to really bring out all the different perspectives, or people are tired and are hiding their disagreements;
- *Not Giving In*: If you disagree, then disagree – then decide together if your concerns are important enough to find another solution;
- *Not Bargaining*;
- *Not Appeasement*;
- *Not Finding the Least-Common-Denominator*,

## Limits to Consensus

Analysts have described a number of problems with consensus decision-making. A requirement of unanimity may give a small self-interested minority group veto power over decisions. And consensus decision-making may fail in a situation where there simply is no agreement possible, and interests are irreconcilable.

Critics observe that the process, while potentially effective for small groups of motivated or trained individuals with a sufficiently high degree of affinity, has a number of possible shortcomings, including:

- *Preservation of the Status quo*: the ability of small minorities to block agreement gives an enormous advantage to any who support the existing status quo. This can mean that a specific state of affairs can continue to exist long after a majority of members would like it to change.
- *Susceptibility to disruption*: Giving the right to block proposals to all group members can result in the group becoming hostage to an inflexible minority. As a result, consensus decision-making has the potential to reward the least accommodating group members while punishing the most accommodating.

<sup>1</sup> See, for example, <http://www.vernalproject.org/papers/process/ConsensNotes.pdf>

- *Time Consuming:* Consensus decision-making takes time. This is a potential liability in situations where decisions need to be made speedily.

## Discussion: Consensus As Practiced in the Kimberley Process

On the occasions when consensus decision making works well in the Kimberley Process, it is not noticed. That is the beauty of the model. But when it does not work, serious problems ensue. On a few occasions, the provision that the Chair should 'conduct consultations' has had positive results; in other cases the involvement of the Chair has been very divisive.

There are growing numbers of important, public issues on which the KP has failed to reach consensus. Given the description above, reasons for the failure to reach consensus include the following:

- Trust and respect are frequently absent;
- Consensus decision making requires good facilitation; the KP is notoriously weak in this area;
- People do not participate in KP meetings as individuals; they represent governments and organizations, and may not come to the table with any degree of independence.

While consensus cannot be rushed, some of the decisions facing the KP are urgent. The KP is a regulatory body dealing with laws, lawbreakers and international conflict. Time is often of the essence.

KP inability to reach consensus on key issues has resulted in textbook outcomes: minorities blocking forward movement, disruption, time-wasting, appeasement, lowest-common denominator decisions, ineffectual management of critical issues and a general lack of confidence and trust in an organization with an important, high-profile mandate.

If the KP is to retrieve its reputation and meet its objectives, its decision making process will require adjustment.

## Recommendation

The most obvious approach is to introduce a voting arrangement along the lines originally envisaged. This could include a super majority in cases where consensus cannot be achieved. This might be worded as follows:

### FOOD FOR THOUGHT

In October 1935, Italy invaded Ethiopia, then known as Abyssinia. Abyssinia was a member of the League of Nations, whose Covenant required its members to halt aggression against a fellow member. The League had already been tested and found wanting when Hitler began to rearm Germany, breaking the peace treaties on which the League of Nations had been founded. When the invasion of Ethiopia began, the League responded with outrage, condemnation, saber-rattling and sanctions. The export to Italy of aluminum, scrap iron and iron ore was banned, and there was heightened British fleet action in the Mediterranean.

But the sanctions stopped short of oil, the only thing that might have made a difference. Italy was a net exporter of aluminum, and had little use for iron ore and scrap, not least because steel billets and pig iron had not been embargoed. As Churchill put it, "The League of Nations proceeded to the rescue of Abyssinia on the basis that nothing must be done to hamper the invading Italian armies." In fact, despite the appearance of high-level political action, the only real assistance to Ethiopia came from humanitarian agencies, and they, like the Ethiopians, paid a heavy price.

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**Participants are to reach decisions by consensus. In the absence of consensus, decisions will be made by simple majority of all voting Participants present, except for decisions on those matters specified in Annex \_\_\_ which require a 75% majority of those voting Participants present.**

The Annex would cover such issues as additions to or deletions from the Participants list, suspension of participants and the application of other interim measures relating to non compliance.

## **2 • PARTICIPATION**

**S**ection VI, Paragraph 8 of the KP Document states, 'Participation in the Certification Scheme is open on a global, non-discriminatory basis to all Applicants willing and able to fulfill the requirements of that Scheme.'

Apart from the need for a new applicant to provide the Chair with 'its relevant laws, regulations, rules, procedures and practices, and update that information as required,' there were no other stipulations.

By agreeing to the Interlaken Declaration of November 2, 2002, all Ministers and Heads of Delegation present at the Interlaken KP Meeting signified their intention to join the Kimberley Process Certification Scheme. Thirty seven countries and the European Union expressed their readiness to join, and apart from a statement that they were willing and able to meet KP minimum standards, little more seemed to be required.

### **Adaptation and Change**

Within a few weeks, however, it had become clear that the vaguely worded participation criteria were inadequate. In order to meet the requirements of the KPCS, many participants had passed new laws and all had enacted new regulations that became binding upon their diamond industries, their customs officials and their law enforcement agencies.

All participating countries had to be named, and examples of their KP certificates had – at a minimum – to be made available to the customs officials of other countries. For certificates to be meaningful, it was essential not just for new applicants to provide the Chair with 'relevant laws and regulations' etc. All those who had raised their hands at Interlaken to signify their participation would have to do the same.

Several had not done so within the first few months of KPCS operations, and matters had become critical by the end of April 2003 when a special KP Plenary Meeting was held in Johannesburg. It was agreed at that meeting that a 'Participation Committee' would be struck to examine the credentials of all existing and prospective KPCS participants, to determine whether or not they could meet the minimum standards. It was agreed that there would be a 'tolerance period' until May 31, 2003 during which all participants and prospective participants would submit information relevant to their membership. The tolerance period was extended to June, then to the end of July, and finally, with a 'Chair's Notice' at the end of July, to August 31.

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The Participation Committee included seven governments (Angola, Canada, the EC, Israel, Russian Federation, South Africa and the United States), NGOs (Global Witness and Partnership Africa Canada) and the World Diamond Council. During this period, the Committee examined the legislation, regulations and relevant documentation of every Participant.

At this time a euphemism for removing a country from the KPCS was developed: it would simply be 'dropped from the list'.

Following the examination of credentials, several countries were dropped from the list: Brazil, Burkina Faso, Cyprus, Gabon, Malta, Mexico, Norway, Philippines and Poland.

Three of these countries, Brazil, Mexico and Norway, subsequently applied and re-joined the KPCS.

### **The Case of Central African Republic**

The Central African Republic (CAR) was suspended from the KPCS following a May 2003 coup during which Francois Bozize overthrew the government of President Ange-Félix Patassé and suspended the constitution. The CAR was reinstated as a participant after authorities provided assurances they could implement the KP and agreed to let a review mission evaluate the country's diamond control system. The review found that CAR was managing its internal diamond controls and KPCS standards responsibly.

### **The Case of Lebanon**

Lebanon did not participate in the 2000-2002 Kimberley Process negotiations and was not present at Interlaken, but it expressed its eagerness to join early in 2003. It submitted all of the required documentation, including legislation that at the end of the tolerance period was simply awaiting Presidential signature. Lebanon was therefore included in the list of 39 Countries plus the EC that was approved with effect from Aug. 31, 2003.

Nine months later, Presidential approval for the country's KP legislation had still not been given, and Lebanon was dropped from the list on April 1, 2004. In 2005, following enactment of the legislation and two KP Review Missions to Lebanon, Lebanon was readmitted to the Kimberley Process.

### **The Case of the Republic of Congo**

In 2004 questions were raised about the volume and value of diamond exports from the Republic of Congo. It was widely asserted that these far exceeded the country's known production capacity and its official imports.

The Canadian Chair of the Kimberley process visited Brazzaville and persuaded President Sassou-Nguesso that a KP Review was required to validate the country's continued participation in the KPCS. The review took place in May 2004, and included an aerial survey of the country's diamond mining areas. The Review concluded that the ROC's exports could not be explained by local production or official imports.

In July, through a Chair's Notice, the Republic of Congo was dropped from the list. Conditions for readmission included the requirement for an independent third-party survey of the country's geological diamond potential.



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A July 9, 2004 KP Press Release stated: 'The findings of the review mission are clear. The Republic of Congo cannot account for the origin of large quantities of rough diamonds that it is officially exporting... Kimberley Process Participants need to have complete confidence that conflict diamonds are not entering the legitimate trade. The removal of the Republic of Congo from the list of participants is necessary to safeguard the credibility and integrity of the KPCS.'

In November 2007, after hosting another KP Review and meeting all of the Kimberley process stipulations, the ROC was readmitted into the Kimberley Process Certification Scheme.

## **Anomalies**

### **The Case of Venezuela**

In mid-2005, Venezuela, a KP participant since 2003, ceased issuing Kimberley Certificates, and communications with the KP ceased. Nevertheless, diamonds were being mined and openly – if not legally – exported.

The problems were documented in a 2006 PAC report. The KP procrastinated, and it was not until October 2008, following bitter internal debate and widespread calls for Venezuela's expulsion from the KPCS, that a KP team visited Venezuela, corroborating many of PAC's findings. In November 2008, Venezuela announced that it would 'self-suspend' from the KPCS, saying it would halt all diamond production and trade for at least two years while reorganizing its diamond sector. The KP concurred with this face-saving measure.

But in Venezuela, little changed. Early in 2009, the mineral leases of five diamond mining cooperatives held by the state-owned mining concern Corporacion Venezolana de Guyana (CVG) were renewed. Diamond mining and exporting, whether legal or illegal, simply continued as before.

In a March 2009 letter, the KP Chair, Namibia, hailed the arrangement with Venezuela saying that the KP would 'assist and support the country in developing appropriate internal controls over its alluvial diamond mining.' The Chair said that this was 'yet another example of mutual inclusiveness inherent in the Scheme and is testimony to the willingness of the KP family to stand together, learn from global best practices and proactively provide assistance when required.'

In fact, however, there has been little substantive communication with Venezuela since 2008, and the KP has provided no assistance or support except for its willingness to ignore the fact that 100% of Venezuela's diamond production is entering world markets illegally.

### **The Case of Zimbabwe**

In 2008, a number of events occurred suggesting that Zimbabwe was losing its ability to meet KPCS minimum standards. Large volumes of easily identified smuggled Zimbabwean diamonds were the

So what can be concluded from the Zimbabwe case? The credibility of the KPCS has evidently been seriously harmed, but with Zimbabwe just the tip of the iceberg... It is particularly disheartening as there is so much at stake.

– Lucy Koechlin, *Blog of the International Journal of European Law*

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subject of arrests in Dubai and India. Internal controls are ineffective and highly controversial. A diamond rush by illicit diamond diggers in the Marange area was suppressed by well documented extrajudicial killings and widespread human rights abuse by the Zimbabwe armed forces. Many international diamond dealers have well-established buying offices in Manica, just across the Zimbabwe border in Mozambique where a flourishing trade in smuggled goods continues today.

Zimbabwe became the subject of bitter debate within the KP. It took months before a review mission could be undertaken, and the mission itself became the subject of debate and political manipulation. Its findings were clear but its recommendations were vague, and in the end a bitter debate resulted in little more than the appointment of a KP monitor whose terms of reference omitted almost all the topics of controversy. Zimbabwe's continued presence without censure in the KP has been ensured by strong support from South Africa and other neighbouring countries, although its behavior continues to be both erratic and controversial, and its ability to meet minimum KP standards cannot be demonstrated.

### 3 • MONITORING AND FOLLOW-UP

In any system dealing with standards and supply chains, monitoring is essential. A number of global commodity governance systems have evolved over time to include rigorous and credible third party verification systems (e.g. the Forest Stewardship Council, Fair Labour Association, the Responsible Jewellery Council).

From the beginning, monitoring was a highly contentious subject in Kimberley Process negotiations. Diamonds were regarded as a 'strategic mineral' in Russia, for example, and data regarding production and trade was classified. In many countries there were commercial sensitivities and security issues. There were also worries about change in an industry that had operated for generations in a certain way: one large cartel; hundreds of small family-owned businesses; bourses that operated like clubs; transactions based on handshakes and cash, and not very much documentation.

In the initial KPCS agreement, there was provision only for monitoring in cases of 'significant non compliance', a term that was never defined.

#### Adaptation and Change

A year after the KPCS came on stream in 2003, a stronger monitoring arrangement was agreed (the peer review mechanism) and a Monitoring Working Group was created. The current KPCS 'peer review mechanism' takes a systems approach to monitoring. A team, usually comprising three representatives from other governments and one each from industry and civil society, reviews a participating country's KP-related systems and controls for compliance. It does not audit companies. Reviews usually take about three days and occur approximately once every three years for each participant. A written report with recommendations is discussed with the government of the country under review and then it is made available to all KP participants. This entire process was developed after the core document had been finalized, providing a text-book

case of how the KPCS can and has evolved in order to achieve the goals that are expected of it.

## Discussion

While the peer review mechanism was a creative innovation for its time, there are two problems associated with it. The first is the system itself, the second is follow-up.

When it works well, the system is adequate, although three-day reviews are not enough in some cases to develop a comprehensive understanding of a country's diamond industry. In many cases, however, it is far from adequate. Worst case examples include a review of Ghana where the report, a year in production, was superseded by a much tougher UN report revealing the transit through Ghana of conflict diamonds from Côte d'Ivoire (missed entirely by the KP team). An enormous nine-member Guinea review team spent less than two hours outside the capital city and did not complete its report for more than a year. A review of Venezuela was orchestrated entirely by the non-compliant host government. Civil society was prevented from participating in the exercise, and the team was never allowed near diamond mining or trading areas.

The makeup of review teams is inconsistent. Some KP participants have never taken part in a review, and in recent years several teams have included no industry representatives. Burden sharing has been uneven, with some NGOs footing a larger share of review costs than most governments. This has been alleviated in recent years by contributions from Rio Tinto Diamonds, Norway, Switzerland and the United States to a fund for NGO participation.

## Follow-up Action

While some reviews have been thorough and have made important recommendations, there has been a chronic lack of follow-up. Review teams have repeatedly stated that some of the countries worst affected by conflict diamonds – notably Angola, DRC and Sierra Leone – have extremely weak internal controls. In seven years of KPCS operation, little progress has been made on the issue. Getting a grip on internal controls was, and remains, the single most important issue for the diamond industry and the Kimberley Process.

Well documented cases of 'serious non-compliance' have been brought to the attention of the Kimberley

### INTERNATIONAL ORGANIZATION FOR STANDARDIZATION: CONFORMITY ASSESSMENT

Conformity assessment is the name given to the processes that are used to demonstrate that a tangible product or a service or a management system or body meets specified requirements.

Certification/registration is when a third party gives written assurance that a product, process, personnel, organization or management system conforms to specific requirements.

The most well-known examples are the certification of quality management systems and environmental management systems as conforming, respectively, to ISO 9000 and ISO 14000 standards. **More than 800,000 organizations worldwide have been certified to ISO 9001 and/or ISO 14001.** ISO itself does not assess for conformity, nor does ISO issue certificates of conformity. Certification is carried out independently of ISO by the many certification or registration bodies active nationally or internationally.

Although ISO does not control the certification bodies, it contributes to best practice and consistency in their activities through the development of standards and guides which give general requirements for bodies providing audit and certification of management systems.

(ISO: [http://www.iso.org/iso/resources/conformity\\_assessment/mechanisms\\_for\\_performing\\_conformity\\_assessment.htm](http://www.iso.org/iso/resources/conformity_assessment/mechanisms_for_performing_conformity_assessment.htm))

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Process on several occasions, mainly by civil society representatives and the media, but the KP has been either slow to act, or has not acted at all. Smuggling of diamonds from Brazil, Venezuela, Guyana and Zimbabwe have been debated at length, but have elicited weak, slow or no response. The same has been true in cases where gross statistical anomalies suggest the need for urgent action: Guinea and Lebanon are two cases that were 'pending' throughout 2009, and which remain unresolved.

'Technical assistance' has been used as a catch-all, last-minute answer to many of these problems. Assistance, regardless of how it is described, is not always the solution to problems of compliance, but sometimes it is. The KP approach, however, has been ad hoc and patchy. Guyana and Ghana, among others, are still awaiting technical assistance promised by the Kimberley Process. The KP requires something better than this.

In OECD terminology, 'technical assistance' means the sending of experts, usually to design, train or manage something. KP terminology and thinking needs to expand beyond the idea of technical assistance to incorporate other ideas, including longer-term inputs and the provision of equipment.

In sum, the Kimberley Process needs a rigorous, clear and phased compliance enforcement strategy that starts with assistance and internal pressure, moves to public naming and shaming, and then moves to higher levels of sanctions, suspension and expulsion.

## Recommendations

- 1. The need for independent, third party monitoring can no longer be ignored.** The KP Chair should create a panel of experienced experts to design and propose a range of models for independent, third party monitoring complemented by rigorous follow-up, credible sanctions in cases of continued non-compliance, and a decision-making process on non-compliance that is not hostage to political interference. The panel should submit its findings to the KP Working Group on Monitoring by the end of October 2010 for discussion and decision at the 2010 KP plenary.
- 2. A small permanent KP secretariat should be established to manage monitoring and follow-up, providing service to the KP Chair and Working Groups as required.** This secretariat would not replace or supplant the WGM; it would handle the organizational and managerial functions that currently fall to a single KP Participant.
- 3. A multi-donor trust fund for timely and appropriate follow-up assistance in helping participants to meet KP minimum standards.**

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## 4 • CUTTING AND POLISHING CENTRES

**T**he Kimberley Process has repeatedly ignored calls for the inclusion of oversight on the cutting and polishing industry in KPCS minimum standards. This sector remains vulnerable to, and a convenient laundry for rough diamonds that have evaded KPCS scrutiny. The volume of illicit goods is growing: 100% of Venezuela's production; conflict diamonds from Côte d'Ivoire; a large volume of Zimbabwe diamonds moving through Mozambique, plus an unknown volume of smuggled and stolen goods from other countries. Major seizures of illicit diamonds in India, Dubai and elsewhere in recent months may be the tip of an iceberg.

### Recommendations

1. Once a drop has fallen into a bucket of water, it is indistinguishable from the rest. **It is essential, therefore, that companies that cut and polish diamonds document their sources, and that their records be made subjected to independent audit as an integral part of KPCS minimum standards.**
2. **The WDC should commission an independent evaluation of its system of warranties, to determine how it could improve the performance of industry actors in meeting KPCS challenges.**

## 5 • TRANSPARENCY

**O**riginally, public transparency was a key focus of the Kimberley Process. An early draft of the core document stated in its preamble,

*Acknowledging that an international certification scheme for rough diamonds will only be credible if supported by appropriate arrangements to ensure transparency and accountability with respect to its implementation...<sup>2</sup>*

Under the heading 'cooperation and transparency', however, the final KP core document lists seven provisions, dealing only with the exchange of information among participants. There is no discussion of public transparency. The KP's most notable failing in this area is the fact that reports of review visits are kept confidential.<sup>3</sup>

The explanation is that governments would not open themselves to full peer scrutiny if blemishes were to be made public. Most 'blemishes' are, however, self-evident to inside observers, and are hardly a public secret. By hiding the reviews and their recommendations, and by failing to follow up on the recommendations, the KP effectively removes a tool that might improve matters without any effort on its part: publicity. Confidentiality, of course, also obscures the KP's lack of follow-up on its own recommendations, and it prevents concerned citizens from knowing about, and calling for change in their government's implementation of its KP obligations.

<sup>2</sup> Kimberley Process Working Document nr 3/2001, 21 August 2001

<sup>3</sup> In some cases a summary is placed on the KP's public website.

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## Adaptation and Change

In early KP negotiations, statistical data was regarded by some governments as information that could not be shared, either internally among KP participants, or externally. Some countries cited commercial sensitivity as a reason. Russia treated diamond production data as a state secret, and said that it would not go along with a certification system that would open this secret to others.<sup>4</sup>

By 2003, however, much of the sensitivity on statistics had diminished, and in 2004 even Russia had agreed to submit quarterly trade data and semi-annual production data. The KP Statistics website is today the best source of data on rough diamond production and trade, and is an essential tool in tracking anomalies in the system.

For several of its early years, however, the KPCS statistics website was accessible to participants only. There was very strong resistance to making any of the data public.<sup>5</sup> Nevertheless, in the past two years greater – although not complete – statistical openness has been achieved, without any apparent ill effect. The major advantage appears to be an end to charges that the Kimberley Process was hiding something by refusing to make its statistics public.

A move towards greater transparency can be seen in other global governance initiatives as well. For years, Nike was so secretive that it refused to publish even the location of its source factories on the grounds of commercial confidentiality and competitiveness. That changed, along with many other practises the company had explained on the basis of commercial confidentiality. As a result, Nike's reputation, its public credibility – and presumably its commercial position -- improved.

## Problems

Virtually everything about the Kimberley Process aside from statistics remains secretive. The communiqués at the end of its semi-annual meetings are uninformative; the annual reports of participating governments are not published, and the reports of review visits are posted on the members-only website.

In 2007, the European Commission Chaired the Kimberley Process. It stated as its primary objectives, 'better monitoring of KP rules, stronger internal controls in participating countries and increased transparency.'<sup>6</sup> Little, however, changed.

Arguably the lack of KP transparency on some issues, notably Venezuela and Zimbabwe, has been disastrous for its public relations, and for the image of an industry that the KP was designed, in part, to protect.

A credible, transparent and accountable Kimberley Process is essential to the future of our industry and those economies and people who depend upon it.

– Eli Izhakoff, WDC Chairman, 2006 KP Plenary Meeting, Botswana

4 <http://dlib.eastview.com/browse/doc/1906228?enc=zhc>

5 'Commercial sensitivity' was the common refrain, but there is nothing in the KP statistics that is commercially sensitive. Another issue was the possibility that KP statistics might differ from those of a country's customs agency or trade ministry where different customs codes or time periods might be used. This, it was said, might lead to public confusion.

6 [http://www.europa-eu-un.org/documents/en/070125\\_EU.pdf](http://www.europa-eu-un.org/documents/en/070125_EU.pdf)

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The problem of Kimberley Process confidentiality was raised in December 2009 by Martin Rapaport, a major player in the diamond industry and one of the architects of the Kimberley Process. Angered by the confidentiality of the KP Review Report on Zimbabwe and the KP's subsequent inaction, he took issue with the World Diamond Council:

'It is entirely unacceptable for the WDC to cover up human rights violations in the diamond sector by withholding detailed information about severe human rights violations in Marange. The WDC has not communicated to the diamond trade the fact that Marange blood diamonds have been issued KP certificates and legally exported to the cutting centers... The WDC has not only failed to stop the flow of these blood diamonds, it has also failed to communicate the existence of 'KP approved legal' blood diamonds. I am shocked and sickened by the fact that the WDC has not made public or notified the diamond trade about the contents of the 'Review Mission to Zimbabwe – 30 June to 4 July, 2009' even though the WDC participated in the mission...

Clearly, a red line has been crossed and I believe the WDC has lost its moral compass... The WDC must decide if its primary loyalty is to the KP, the diamond industry, or the principles of human decency. The WDC cannot continue to use KP confidentiality as an excuse to cover up severe human rights violations. Failure to disclose such human rights violations does not protect the trade. It results in higher diamond sales at the unbearable cost of human lives, murder, rape and slavery.'<sup>7</sup>

The issue of confidentiality does not stop there. Each year the Chair of the Kimberley Process circulates a draft resolution about the KPCS to be presented at the UN General Assembly for adoption. In 2009, Venezuela insisted that all reference to Venezuela be dropped. China insisted that all reference to human rights be dropped. And Zimbabwe insisted that all reference to Zimbabwe be dropped. An anodyne UNGA resolution was passed, therefore, without a single reference to the issues that had most consumed the Kimberley Process over the previous two years.<sup>8</sup>

Greater openness in the Kimberley Process might be uncomfortable because it would be easier for the media, civil society and others to hold it more accountable for timely follow-up on reviews, and for action on issues of serious non-compliance. But all of these stories find their way into the media anyway. Greater transparency would help to make the KPCS the regulatory body it aims to be, and the one the industry and African producer countries so badly require.

## Recommendation

**All KP Annual Reports and all reports of KP Reviews should, as a matter of course, be placed on the open KP website, along with details of follow-up action. A transparency working group should be established to develop criteria on exceptions to the rule, and to deal with special requests for confidentiality.**

7 Letter, Martin Rapaport to Eli Izhakoff, President of the World Diamond Council, Dec. 2, 2009

8 Echoing the growing dissidence from civil society and some industry players, several governments, including Switzerland, Sweden, Canada and the United States challenged the official KP version of events in the UNGA debate; see <http://ca.reuters.com/article/topNews/idCATRE5BA3OI20091211>

## 6 • HUMAN RIGHTS

**H**uman rights abuses committed by the Zimbabwe authorities in the course of establishing control over the Marange diamond fields have brought the issue of human rights to the forefront once again. This is not a new topic for the KPCS; the core document specifically mentions human rights in the second item of its preamble:

*'RECOGNISING the devastating impact of conflicts fuelled by the trade in conflict diamonds on the peace, safety and security of people in affected countries and the systematic and gross human rights violations that have been perpetrated in such conflicts...'*

There were at least four important drivers motivating stakeholders in support of the Kimberley Process in its early days:

- Concern about state sovereignty being undermined by rebel movements using diamonds to finance their rebellions;
- Concern about the negative impact on regional peace and security caused by diamond-financed conflict;
- Concern about the appalling human rights abuses committed in the course of these conflicts;
- Concern about the reputational and profitability threat posed by these conflicts to non-conflict diamonds.

While some stakeholders may have thrown their support behind the KP for only one of these reasons, all have been present from the beginning, and all are an inextricable part of the KP's *raison d'être*.

The KPCS core document is a contract that embodies the will and aspirations of three sets of stakeholders: governments, industry and civil society. A contract must be interpreted in light of its purpose. If human rights were not part of the KP's implicit mandate, they would not have been discussed in the 2009 Review Mission to Zimbabwe in 2009, nor would the Joint Work Plan have included calls for the demilitarization of the diamond fields.

To argue for a minimalist interpretation of what a conflict diamond is and to argue that the KP has nothing to do with human rights, ignores the Kimberley Process brand. A brand is an organization's promise. Semantics aside, the Kimberley Process make a promise to consumers that the diamonds it certifies are not linked to human harm.

As evidence grows of how diamonds are in fact linked to state-sponsored human rights abuse, the Kimberley Process brand is being dragged through the mud, once again endangering those communities, countries and companies that depend on diamonds for their wellbeing. Some companies are now overtly attacking and undermining the KPCS brand in order to distinguish their own ethical products, products that are backed by more credible oversight systems than the KPCS.

We believe in and will respect the fundamental human rights and the dignity of the individual, according to the United Nations Universal Declaration of Human Rights.

– *Council for Responsible Jewellery*



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## Recommendation

The Kimberley Process needs a clear, unequivocal and forward-looking approach to human rights, one that gives full and clear meaning to its core mandate, building confidence among stakeholders and consumers that the Kimberley Process stands unambiguously for clean diamonds.

Proposed wording to be added to the Kimberley Process core document:

**The Kimberley Process promotes respect for human rights as described in the Universal Declaration of Human Rights, and it requires their effective recognition and observance, as part of KPCS minimum standards, in the diamond industries of participating countries, and among the peoples, institutions and territories under their jurisdiction.**

## 7 • COST IMPLICATIONS

A major concern at the outset of KP negotiations was the potential cost implications of a global regulatory system. It was assumed that the industry would have to bear most of the cost, although as it turned out, most of the financial burden has fallen on governments. In almost all countries, government has taken on most if not all of the cost of implementing the KPCS. The industry created the World Diamond Council to represent its interests in the Kimberley Process, and in some countries a low-cost chain of warranty system has been developed. Industry has participated in review visits and has contributed to the costs of special undertakings such as the 2006 review of Ghanaian diamond exports. All things considered, however, the cost of the KPCS to industry has been small.

Civil Society organizations have participated in all working groups, plenaries and intersessional meetings, and have participated in most review visits and missions. Civil society organizations have also undertaken a large number of independent reviews, studies and publications and have, arguably, borne a disproportionate cost of participation – and in holding the Kimberley Process accountable to its mandate.

This is not to suggest that the cost implications of any change be borne by industry alone. Some governments have expressed a willingness to make contributions to a more effective KPCS, and civil society will undoubtedly do its share.

Most of the reforms suggested in this paper actually have no cost implications. Greater transparency, changes in the decision-making process, clearer rules on participation, human rights and the inclusion of cutting and polishing centres in KP minimum standards involve virtually no cost at all.

The major cost implications lie in the adoption of an independent, third party monitoring system, and the establishment of a small secretariat to

The cost of UN Peacekeeping operations between 2009 and 2010 in three countries afflicted by conflict diamonds – DRC, Côte d'Ivoire and Liberia – is over \$2 billion.

manage that function, and the required follow-up as an ongoing service to the Chair of the day. The Monitoring Working Group would continue to set the agenda and the policy framework, and other working groups would remain unchanged.

The cost of running such a system might look something like this:

Item	Cost*
20 Reviews & Follow-Up Missions Per Annum (Cost Per Review: Travel & Accom. for 3 members per visit @ \$10,000 = <b>\$30,000</b> + Professional Fees @\$15,000 = <b>\$45,000</b> <b>\$30,000 + \$45,000 = \$75,000</b> )	\$1,500,000
Secretariat Costs (salaries, rent, utilities etc) @ 50%	750,000
Total Cost per Annum	\$2,250,000

\* Note: These are nominal figures. Actuals could be lower, depending on the location and time required for each review.

Costs of this magnitude would be small in comparison, for example, to running the EITI secretariat. Given the scourge that the Kimberley Process aims to end – decisively and conclusively – costs of this nature would be tiny in comparison with, say, the amount of money being contributed to the anti-Land Mine effort, which totaled \$628 million in 2008 and an estimated \$4.2 billion since 1992.

The cost of UN Peacekeeping operations between 2009 and 2010 in three countries afflicted by conflict diamonds – DRC, Côte d’Ivoire and Liberia – is over \$2 billion.

For anyone in or connected to the diamond industry to decry the possibility of having to spend a small amount of money on a formal mechanism that could make the KPCS more effective makes no sense whatsoever. If a secretariat were to cost double the numbers here, and if the cost were to be borne by the industry alone, it would represent less than 0.007% of global annual diamond sales, less than \$7.00 on every thousand-dollar diamond ring.

This is a small amount and one that no consumer would object to if it led to a certification system that governments, the industry and civil society could point to with pride and say, *‘It works.’*