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N Shaik-Peremanov

1 Introduction

The Kimberley Process Certification Scheme (KPCS) came into being pursuant to a United Nations resolution. The objectives of the KPCS are twofold. The first objective is to certify the origin of rough diamonds from sources or countries which are free of conflict. The second objective is to attempt to curb the trade in "conflict diamonds", which results in human rights abuse. The KPCS was established in 2003 in order to prevent states and rebel groups from making use of proceeds from rough diamonds.

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2 See the official Kimberley Process website (KP date unknown http://www.kimberleyprocess.com/). The Kimberley Process Certification Scheme (2000) (KPCS) was established on the basis that participants will comply with its "provisions". The term "participants" is defined as meaning "a state or a regional economic integration organisation for which the Certification Scheme is effective".

3 The KPCS comprises a preamble; six sections, and three annexes which form part of the sections. S I of the KPCS provides for definitions. S II deals with the actual "KPCS Certificate", which must accompany each shipment or export of rough diamonds. S III deals with the participants' undertakings in respect of the international trade in rough diamonds. S IV deals with the duty of Participants to the KPCS. MNCs must undertake particular internal control systems for the export of rough diamonds. S V deals with cooperation and transparency between MNCs participating in the KPCS. S VI deals with administrative matters pertinent to the KPCS. S VI also contains three annexes.

4 The KPCS defines "rough diamonds" to mean "diamonds that are unworked or simply sawn, cleaved or bruted and fall under the Relevant Harmonised Commodity Description and Coding System 7102.10, 7102.21 and 7102.31". A "diamond" is defined as a "natural mineral consisting essentially of pure crystallised carbon in the isometric system, with a hardness on the Mohs (scratch) scale of 10, a specific gravity of approximately 3.52 and a refractive index of 2.42".

5 See the Preamble of the KPCS.

6 See the Preamble of the KPCS.
diamond sales to fund wars in Africa.\textsuperscript{7} It is aimed at preventing "conflict diamonds", otherwise known as "blood diamonds", from entering the mainstream rough diamond market.\textsuperscript{8}

Human rights abuses and conflicts were the primary impetus for establishing the KPCS.\textsuperscript{9} United Nations (UN) General Assembly and Security Council resolutions evidence international concern over the illegal trade of rough diamonds, as it fuelled conflicts. Thus, the regulation of the trade in rough diamonds and the curbing of conflict diamonds entering the international trade arena was sought.\textsuperscript{10}

In its Preamble, the KPCS recognises that the trade in conflict diamonds is a matter of serious international concern.\textsuperscript{11} This trade 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.\textsuperscript{12}

Governments and armed groups vied for control of diamond mines.\textsuperscript{13} Very soon armed groups managed to obtain control over diamond mines.\textsuperscript{14} When this occurred, human rights were abrogated. Citizens were illegally conscripted for working the

\textsuperscript{7} In countries such as Sierra Leone, Angola, Liberia and the DRC; see also Newell and Frynas 2007 \textit{Third World Quarterly} 669-681.

\textsuperscript{8} "Conflict diamonds" are defined in the KPCS document as rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments, as described in relevant United Nations Security Council Resolutions insofar as they remain in effect, or in other similar UNCS Resolutions which may be adopted in the future, and as understood and recognised in UN Doc A/RES/55/56 (2001).

\textsuperscript{9} UN Doc A/RES/55/56 (2001).

\textsuperscript{10} The Taylor regime in Liberia has been proven to be involved in the formation of "joint criminal enterprises" which were aimed at controlling diamond mine production. \textit{Prosecutor v Brima, Kamara and Kanu} (Appeals Judgment) case number SCSL-2004-16-A of 22 February 2008 para 17 (RUF case); see also Shaik-Peremanov 2009 \textit{SAYIL} 243; see also Newell and Frynas 2007 \textit{Third World Quarterly} 669-681.

\textsuperscript{11} See the Preamble to the KPCS.

\textsuperscript{12} See the Preamble to the KPCS; see also UN Doc S/RES/1195 (2000); UN Doc S/Res/1343 (2001).

\textsuperscript{13} Shaik-Peremanov 2009 \textit{SAYIL} 247-250.

diamond mines. Most mines came within the control of armed movements and rebel groups.

The UN Charter obliges all contracting state parties to maintain international peace and security. Thus, international action was urgently needed. Intervention, in the view of the UN, would at least prevent the problem of conflict diamonds from negatively affecting the trade in legitimate diamonds. The legitimate diamond trade contributes critically to the global economy.

The UN recognised that the peace, safety and security of people in diamond producing and non-producing diamond countries in Africa were being severely affected. The illegal diamond trade resulted in systematic and gross violations of human rights, which were perpetrated through conflicts. Special recognition was given to developing states. The UN General Assembly recommended that the international community develop detailed proposals for a simple and workable international certification scheme for rough diamonds, based primarily on national certification schemes and on internationally agreed minimum standards.

Historically, poor governance and bad policies exacerbated armed conflicts in Africa. Recently, an increased international emphasis was placed on good

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15 Shaik-Peremanov 2009 SAYIL 247-250.
17 Preamble to the KPCS.
19 Some examples of “gross human rights violations” are genocide, murder, child enslavement, rape, and the keeping of bush wives. See for example the RUF case in general.
20 Preamble to the KPCS; the relevant resolutions of the United Nations Security Council under Chapter VII of the United Nations Charter, including the relevant provisions of UN Doc S/RES/1173 (1998), UN Doc S/RES/1295 (2000), UN Doc S/RES/1306 (2000), and UN Doc S/RES/1343 (2001). The UN is determined and committed to contribute to and support the implementation of the measures provided for in these resolutions. See UNGA Resolution 55/56 (2000) on the role of the trade in conflict diamonds in fuelling armed conflict, which called on the international community to give urgent and careful consideration to devising effective and pragmatic measures to address this problem.
22 Lake and Rothchilds International Spread of Ethnic Conflict; see also Keller and Rothchilds Africa in the New International Order; see also Saunders 2011 Review of African Political Economy 123-134.
governance and good public management. These notions were posited with the intention of states and multi-national co-operations maintaining and upholding human rights aimed at alleviating human rights violations.

At the heart of the KPCS is ensuring that the legitimate trade of diamonds is free from conflict; thus protecting human rights. The protection of human rights is crucial, as it is contingent on national, regional and international peace and security. The conditions prevalent within a given state feed directly into regional peace and security. The KPCS identifies peace and security as fundamental to a legitimate rough diamond trade. This is its first objective. The second objective is to eliminate or curb the flow of illegal rough diamonds, which results in conflicts and human rights abuses.

The KPCS is a voluntary, formalised international process which seeks to promote responsible rough diamond trading through the activities of participating members. The ethical basis for human rights derives from the inviolability of human dignity. Just as politics is not an end in itself, but a means of promoting social change for the benefit of the people and the environment, a state’s profits or activities are not goals that can be viewed in isolation from other considerations.

Given the fact that the KPCS has reached a decade since its coming into operation, it is fitting to assess its application. Therefore, this paper addresses the KCPS and its applicability to the Zimbabwean Marange diamond mining region, as Zimbabwe has

23 Nelson and Eglinton Encouraging Democracy; see also Newell and Frynas 2007 Third World Quarterly 669-681.
24 See Harbeson, Rothchild and Chazan Civil Society and the State, where they discuss economic reform and external pressure on authoritarian regimes to democratise. See further Kramarenko et al Zimbabwe.
25 See Jaycox Challenges of African Development.
26 See the Preamble to the KPCS.
27 See the Preamble to the KPCS.
28 See the Preamble to the KPCS.
29 See the Preamble to the KPCS.
demonstrated challenges in adhering to the KPCS's objectives. In this first part, the paper provides an overview of the KPCS's primary objective, namely the alleviation of human rights violations which arise from illegal diamond production and trade. In the second part, the paper addresses human rights abuses in the Marange diamond mines. Finally, the paper concludes with the applicability of the KPCS in the Marange region.

The case of Zimbabwe's Marange diamond mines is examined as a particularly important test case for the efficacy of the KPCS in a situation of systematic human rights abuses. The Marange diamond rush is said to be the largest in twenty years.32 Thus a brief situational analysis of the Marange mine region is also explored. Civil society organisations (CSOs) have published detailed reports which identify human rights violations arising from the illegal rough diamond production and trade in the Marange diamond mining region.33 The reports and subsequent developments will be used as a basis for the latter part of the paper. The reputation and credibility of the KPCS should be assessed, as these factors are indicators of its long term sustainability.

2 International human rights background to the KPCS

The KPCS posits that the legitimate trade of conflict free diamonds underpins the realisation of human rights. When human rights abuses reach a particular scale in a given territory, the state in question becomes compromised through its citizenry and armed groups.34 The maintenance of international peace and security is dependent upon intra state peace and security. However, the maintenance of peace and

33 Moyo Mail & Guardian.
34 See Prosecutor v Sesay, Kallon and Gbao case number SCSL-04-14T of 25 February 2009 paras 345-372, where the matter of illegal diamond mining which impacts upon human rights is exhaustively discussed. Illegal mining leads to human rights abuses which escalate to a humanitarian situation.
security and its subsequent monitoring through incorporation by Participants to the KPCS is not easy.\textsuperscript{35}

Within international law, a state party to a human rights instrument is accountable to three different legal entities. Firstly, a state party is accountable to its citizens, and secondly to fellow member states. Thirdly, a state party is accountable to the UN, in particular to the bodies created by its human rights treaty mechanisms.\textsuperscript{36} Thus the relationship between a state party and its citizens in international human rights law is crucial, as the state is the primary role player.

Within the human rights paradigm, international concern arises when there is a threat to the internal peace and security of a nation. This concern escalates when conflicts within a state have the potential of crossing borders.\textsuperscript{37} Trade in blood diamonds has been directly linked to funding wars and cross-border conflicts. Blood diamonds were traded with the intent of securing funds which would form the financial basis for funding wars in Africa.\textsuperscript{38}

Conflict over diamond trading was exacerbated as citizens began to assert their basic human rights.\textsuperscript{39} The situation became fraught with political vengeance. Good governance and the full delivery of human rights were desperately needed. Initially

\begin{enumerate}
\item Bieri and Boli 2011 *Sociological Forum* 503-504.
\item Namely the bodies established by the United Nations Human Rights Committee emanating from the ICCPR and the United Nations ESCR Committee arising from the ICESCR.
\item Aa 55 and 56 of the *United Nations Charter* (1948). A 55 states: "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
\begin{enumerate}
\item higher standards of living, full employment, and conditions of economic and social progress and development;
\item solutions of international and economic, social, health, and related problems; and international cultural and educational cooperation; and
\item universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."
\end{enumerate}
A 56 states: "All members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."
\item Wilson 2010 *GeoJournal* 4.
\end{enumerate}
citizens formed groups which governments did not recognise. These groups fought for the protection of the extractive natural resources.\textsuperscript{40} When governments refused to provide an audience, groups such as the Revolutionary United Front (RUF) took up arms. Funded by the conflict diamond trade, the RUF led by Foday Sankoh was a rebel group. It was formed in Sierra Leone under the auspices of the former Liberian President Charles Taylor, and undertook an eleven-year war that began in 1991 and ended in 2002.\textsuperscript{41} Some key members of the RUF were prosecuted for war crimes and crimes against humanity before the UN-established Special Court for Sierra Leone.\textsuperscript{42} 

The KPCS acknowledges respect for state sovereignty and the principles of equality, mutual benefits and consensus, and requires that these principles should be adhered to.\textsuperscript{43} The Preamble to the KPCS recognises that an international certification scheme for rough diamonds must be consistent with the law governing international trade.\textsuperscript{44} The level of political pragmatism endemic to all UN treaty- and convention-based initiatives was also evident in the KPCS. The Preamble highlights the international economic, social and human rights political issues to be dealt with.

\section{2.1 Applicable international human rights law}

International human rights instruments have sought the same guarantees in recent decades: guarantees that human rights must triumph over tyranny. Instruments such as the \textit{Universal Declaration of Human Rights} (UDHR)\textsuperscript{45} were adopted with the vision of realising the protection of the dignity and integrity of each person by national governments and the broader community of nations. It was this powerful commitment by states to take responsibility for the protection of the rights of

\begin{footnotesize}
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\item \textsuperscript{40} See Kabemba 2010 http://www.za.boell.org/web/resource-governance-572.html.
\item \textsuperscript{42} RUF para 17.
\item \textsuperscript{43} See Preamble of the KPCS.
\item \textsuperscript{44} See Preamble of the KPCS.
\item \textsuperscript{45} \textit{Universal Declaration of Human Rights} (1948).
\end{itemize}
\end{footnotesize}
individuals everywhere that led the establishment of an International Criminal Court (ICC).\textsuperscript{46}

The acceptance of universally binding standards of human rights as laid down in the UDHR and the International Covenant of Human Rights (ICCPR and ICESCR)\textsuperscript{47} is essential in today's shrinking world. Respect for fundamental human rights should not remain an ideal to be achieved but a requisite foundation for every society. Article 8 of the UDHR provides that every individual shall have a right to an effective remedy by competent national tribunals for violations of fundamental rights accorded by law.\textsuperscript{48} The Preamble to the UDHR states that every individual and every organ of society:

... shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among peoples of the Member states themselves and among the peoples of territories under their jurisdiction.\textsuperscript{49}

Article 8 provides for effective remedies for peoples.

Apart from the UN GA resolutions, especially Resolution 55/56 (2000),\textsuperscript{50} international human rights instruments such as the ICCPR and the ICESCR, Zimbabwe ratified the

\textsuperscript{46} At the World Economic Forum in Davos on 31 January 1999, United Nations Secretary-General Kofi A. Annan challenged world business leaders to "embrace and enact" a set of universal principles within their sphere of influence in the areas of human rights, labour standards and the environment. The set of universal principles was named the Global Compact Nine Principles. There are two principles relevant to the scope of this paper. The first two principles are as follows: Principle 1: Support and respect the protection of internationally proclaimed human rights; and Principle 2: Business should make sure not to be complicit in human rights abuses. This paper will not address these issues as it is concerned with state responsibility. UN 2000 http://www.un.org/partners/business/otherpages/guide.htm I.IV. General Principles in Part 14 provides for advancement of United Nations Charter goals; clear delineation of responsibilities and roles including expectations and accountability; maintenance of integrity and independence; ensuring no unfair advantage and transparency.

\textsuperscript{47} Such as the International Covenant on Civil and Political Rights (1966) (ICCPR).

\textsuperscript{48} A 2 of the ICCPR mandates that states must ensure the presence of an effective remedy. The American Convention of Human Rights (1969) makes a similar provision. A 13 of the European Convention of Human Rights (1950) provides for the right to an effective remedy.

\textsuperscript{49} The Declaration was adopted by the UN General Assembly on December 10, 1948. Forty-eight states voted in favour, none against.

\textsuperscript{50} UN Doc A/RES/55/56 (2001).
African Charter on Human and Peoples’ Rights in 1986,\(^{51}\) which, among its many provisions, requires states to protect the right to life\(^{52}\) and property.\(^{53}\) Article 5 of the African Charter on Human and Peoples’ Rights states:

> Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.\(^{54}\)

Zimbabwe ratified the ICESCR.\(^{55}\) The ICESCR states that state parties to it accept the right of everyone to an adequate standard of living for himself and his family, including the continuous improvement of living conditions and a prohibition of forced eviction.\(^{56}\) In 1998 Zimbabwe ratified the International Labour Organisation (ILO) Convention, prohibiting forced or compulsory labour. Furthermore, in 2000 Zimbabwe ratified the ILO’s Worst Forms of Child Labour Convention.\(^{57}\)

### 3 Ten years into the KPCS: Zimbabwe’s Marange

In March/April 2006 De Beers’ exploration licence for Marange diamond mining expired and the British-registered Africa Consolidated Resources Ltd (ACR) obtained control of diamond exploration rights in the region.\(^{58}\) In September the Marange mines experienced a diamond rush when an estimated ten thousand miners flocked to the Marange diamond field. In December of the same year, shortly after ACR operations began, ACR’s licence was revoked by the state-owned Zimbabwe Mining Development Corporation (ZMDC).\(^{59}\) Despite a court ruling in ACR’s favour, the Zimbabwean police prevented ACR from resuming operations and seized control of


\(^{52}\) See a 4 of the Banjul Charter.

\(^{53}\) See a 14 of the Banjul Charter.

\(^{54}\) See a 5 of the Banjul Charter.


\(^{56}\) See a 11 of the ICESCR.

\(^{57}\) ILO Convention No 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999) (Worst Forms of Child Labour Convention); ILO Convention No 29 Concerning Forced or Compulsory Labour (1930).

\(^{58}\) African Consolidated Resources v Minister of Mines And Mining Development 2010 ZWHHC 205.

the Marange diamond fields.\textsuperscript{60} By mid-2007 suspicions of illegal mining gave way to a KPSC review mission, which concluded that Zimbabwe as a Participant to the KPCS met the minimum standards required by the KPCS.\textsuperscript{61}

According to CSOs corruption was rife and the smuggling of diamonds by soldiers in the fields was plentiful.\textsuperscript{62} The diamond revenues continue to benefit a few senior people in the government and their associates, rather than the people of Zimbabwe.\textsuperscript{63} Soldiers continued to perpetrate abuses in Marange, including forced labour, beatings, and harassment, which Zimbabwe's government has failed to investigate or prosecute.\textsuperscript{64}

State security agents have harassed local CSOs that were attempting to document smuggling and abuses in the fields.\textsuperscript{65} In June 2006 police arrested Farai Maguwu, the head of the Centre for Research and Development in Zimbabwe, after he provided sensitive information on the activities of soldiers in the fields to KPCS-appointed Monitor, Chikane.\textsuperscript{66} Police also beat, arrested, and detained members of Maguwu's family. Maguwu was charged with "communicating and publishing falsehoods against the state with the intention to cause prejudice to the security or economic interests of the country" under section 31 of the \textit{Criminal Law (Codification and Reform) Act}.\textsuperscript{67}

\begin{footnotesize}
\begin{enumerate}
\item Greve 2013 http://www.miningweekly.com/topic/african-consolidated-resources.
\item Wilson 2010 GeoJournal 2.
\item Wilson 2010 GeoJournal 2.
\end{enumerate}
\end{footnotesize}
Zimbabwean parliamentary and presidential elections were held in March 2008. Later in October 2008 the number of illegal miners had drastically tripled to an estimated thirty thousand.\(^6^8\) The reaction of the Zimbabwean government was a military operation termed "No Return", during which observers reported more than two hundred dead in the first three weeks of the operation.\(^6^9\)

Pursuant to the objectives of the KPCS, the KP review mission to Marange in 2009 reported "credible indications of significant non-compliance" and recommended temporarily suspending Zimbabwe from the rough diamond trade.\(^7^0\) Despite this recommendation, the Zimbabwean Ministry of Mines (ZMM) permitted and accepted expressions of interest from companies willing to enter into joint venture mining agreements in the Marange region. This resulted in the ZMM entering into joint venture agreements with two companies, namely Mbada Diamonds and Canadile Miners, the former retaining a fifty per cent shareholding under the auspices of the ZMDC.\(^7^1\)

At a KP plenary meeting in November 2009 Zimbabwe agreed on a joint work plan (JWP) which was to be implemented under KP monitoring, to address areas of non-compliance which had been previously reported.\(^7^2\) The KPCS team sent to review conditions in the field in August 2010 was routinely obstructed by government officials from conducting its activities and was, therefore, unable to gather crucial information about conditions in the majority of the diamond fields.\(^7^3\)

In 2010, following his first visit to the Marange diamond fields to assess the progress of the JWP, KP monitor Chikane reported that Zimbabwe had made strides in that it

\(^7^0\) United Nations General Assembly resolution UN Doc A/1093.
met the minimum KP requirements. His second visit concluded that Zimbabwe should be granted permission to resume diamond exports from the Marange diamond fields.\footnote{KPCS 2010 http://www.diamonds.net/news/Files/Docs/2010/ReviewMissionReportFinal_110110.doc} Chikane's conclusion was debated at the KP intersessional meeting in June 2010, which debate gave rise to a deadlock.\footnote{KPCS 2010 http://www.diamonds.net/news/Files/Docs/2010/ReviewMissionReportFinal_110110.doc, wherein the St Petersburg decision is also discussed, informing of the concern over civil society representation in Zimbabwe.} In its investigation in 2010, Human Rights Watch researchers were able to interview 23 people directly linked to the Marange diamond fields and to confirm the following abuses, which put Zimbabwe in violation of the minimum standards required for membership in the KPCS:\footnote{Human Rights Watch 2009 http://www.hrw.org/news/2009/10/29/india-suspend-zimbabwe-diamond-trade-0; Human Rights Watch 2010 http://www.hrw.org/news/2010/06/20/kimberley-processhalt-zimbabwe-diamond-trade. See further Mobbs 2004 Commodity Review 42.1-4. See also Moyo Mail & Guardian.}

- The Zimbabwean army used syndicates of local miners to extract diamonds, often using forced labour, including children.
- On September 17 a soldier shot and killed a 19 year-old member of one syndicate. The soldier stated, in the presence of witnesses, that he had shot the man for hiding a raw diamond instead of handing it over to the soldier.
- Local miners provided information that soldiers had begun to recruit people from outside Marange to join army-run diamond mining syndicates.
- The smuggling of Marange diamonds had intensified. Many buyers and middlemen openly traded in Marange diamonds in the small Mozambique town of Vila de Manica, 20 miles from Mutare.\footnote{Wilson 2010 GeoJournal 2.}

CSOs were not able to fully pursue the global chain of the purchase of diamonds from Marange, but research suggests that the majority of Marange diamonds have been smuggled out of the country via Mozambique, South Africa, and Harare.
international airport, and then shipped to Lebanon, the United Arab Emirates, India, Pakistan, and Europe, among other destinations.  

A significant number of homes in the district were rented to foreign nationals with links to diamond mining. As early as September 2006 Zimbabwean authorities acknowledged that the smuggling of Marange diamonds had become a serious problem. Soon after, the ZMM directed the the Minerals Marketing Corporation of Zimbabwe (MMCZ) to "mop up all diamonds in Marange and reduce the quantity of diamonds that were illegally leaving the country." In October 2009 the MMCZ moved into Marange and began trying to purchase diamonds from illegal, unlicensed local miners.  

MMCZ officials added to the number of operating middlemen. They paid out token cash sums as incentives to get miners to hand in stones that they had extracted and to stop them from trading with foreigners or smuggling the gems. MMCZ offered prices that were far below market value and much lower than those offered by foreign smugglers, so their intervention failed to halt smuggling and illicit trading.  

Zimbabwe's army was under the control of Zimbabwe's dominant political party, ZANU-PF, and committed horrific abuses against miners and local residents, including killings, beatings, and torture. Reports also revealed the army's policy of rotating military units into the diamond fields for approximately two months. This

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85 Moyo Mail & Guardian.
policy was designed to maintain the loyalty of senior military and other officials to ZANU-PF by giving them illicit access to Zimbabwe’s mineral wealth at a time of national economic and political crisis.\(^{85}\) CSOs found new evidence of the rotation of army units into Marange.\(^{87}\) At the beginning of October the Harare-based special mechanised brigade was deployed, replacing the Kwekwe-based fifth brigade.\(^{88}\)

The KPCS sent a KP review mission to Marange in late June 2010 to assess Zimbabwe’s compliance with the KPCS’s standards, which require diamonds to be lawfully mined, documented, and exported by Participant countries.\(^{89}\) In early July 2010 the review mission found Zimbabwe to be in violation of these standards.\(^{90}\) The review mission urged the government to take corrective action by July 20 or face suspension.\(^{91}\) The KPCS did not suspend Zimbabwe. Decision making within the KPCS is based on the consensus mechanism.\(^{92}\) In the taking of a decision to suspend a Participant, if only one Participant dissents this will render a decision to suspend inoperable.

The government of Zimbabwe ignored calls by the review mission to remove military units from Marange, to end human rights violations and smuggling, and to hold accountable those responsible for abuses.\(^{93}\) In this context, Human Rights Watch again called on the KPCS to set up a local monitoring mechanism comprising independent local civil society organisations and Marange community leaders, who

\(^{85}\) Moyo Mail & Guardian.
\(^{87}\) Moyo Mail & Guardian.
\(^{88}\) Moyo Mail & Guardian.
\(^{92}\) S VI of the KPCS.
\(^{93}\) Ploch 2009 Congressional Research Service 15.
could freely monitor and verify the Zimbabwe government's compliance with the KPCS's review mission's recommendations.94

Since 2009 the Zimbabwean Environmental Law Association (ZELA) in partnership with other CSOs has been critical in gathering, providing and assessing information on the human rights situation in the Marange diamond mines in order to assist the KPCS in assessing Zimbabwe's compliance with the KPCS minimum requirements.95 Thus, ZELA participated in the 2009 and 2010 KPCS review missions to Zimbabwe. Within the framework of the KPCS, ZELA is coordinating the activities of the KP Local Focal Point (LFP) mechanism96 on Marange diamonds, which was established by the St Petersburg Agreement of 2010, calling for the appointment of an LFP by the KP Civil Society Coalition to assist KP Monitor Chikane in assessing compliance with the KP requirements.97

The function of the LFP is to support the KP Monitor in assessing the implementation of the JWP, which was agreed to by Zimbabwe and the KP in 2009.98 The JWP was meant to ensure that Zimbabwe controls and stops the smuggling of diamonds, engages investors, engages small scale miners, educates communities about the dangers of illegal diamond mining, and embarks on a phased withdrawal of the military from the Marange diamond fields.99 The LFP technical committee members gather information from the wider network of CSOs and the community and pass this information on to the KP Monitor or to the KP Working Group on Monitoring

94 Parlevliet "Rethinking Conflict Transformation" 14-15.
96 The organisations that make up the LFP formed a technical committee that functions as the LFP and these include the Zimbabwe Environmental Law Association (ZELA), the Centre for Research and Development (CRD), the Zimbabwe Lawyers for Human Rights (ZLHR), the National Association of Non-Governmental Organisations (NANGO), the Counselling Services Unit (CSU), the Crisis Coalition and the Women's Coalition.
The role of the Coordinator is to act as a conduit of information between the LFP and the KP Monitor or the Working Group on Monitoring. In July 2010 KP Participants reached a compromise at the Annual World Diamond Council meeting, in terms of which Zimbabwe was permitted to hold two KP-supervised sales auctions, but a civil society local focal point was to be established to assist the KP monitor in assessing JWP progress. The sales auctions were held in August and September 2010. A KP review mission in August found that the Zimbabwean government and the mining companies Mbada and Canadile had made progress in implementing some elements of the JWP. However, the review report also pointed to a number of problems, such as ongoing smuggling activities involving the military, and the existence of illegal miners' syndicates.

On October 6 2010, to comply with a demand by members of the Kimberley Process, President Mugabe announced that the government had selected two new private sector investors to take over mining in Marange. However, the process of selection was shrouded in secrecy and the investors' identities remain unknown. Subsequent reports compiled by CSOs in 2012 demonstrated the shareholding structures of the companies involved in diamond mining. These included reports on Mbada, Anjin, Marange Resources, Diamond Mining and others. The KPSC's rules require Participants to ensure that all diamond mines are licenced and that only licenced mines extract diamonds. A KP plenary meeting in November failed to produce any agreement. Zimbabwe rejected a draft text that proposed provisions for

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108 Financial Times The Standard.
supervised exports from Mbada and Marange Resources (formerly Canadile) coupled with an export cessation mechanism, arguing that it had satisfied the minimum requirements of the KP and should be allowed to trade without any conditions or supervision.\textsuperscript{109} The Brussels meeting of the WGM was unable to break the deadlock. The Minister of Finance in his November 2011 budget speech referred to a third unauthorised sale of diamonds, whose revenues the government did not receive.\textsuperscript{110} Be that as it may, the KP WGM approved the structure of the Zimbabwean KP civil society coalition, which comprised six organisations to be coordinated by ZELA, which was rejected by Zimbabwe.\textsuperscript{111}

In 2011, the DRC was appointed as KP Chair. In March the KP Chair issued a notice seeking to permit Zimbabwe to export diamonds from compliant mining companies in Marange, namely, Mbada and Marange Resources.\textsuperscript{112} However, other KP Participants rejected this decision on the grounds that it was reached without consensus, stating that further monitoring and supervision was necessary as well as measures to cease exports if there were eruptions of violence in Marange.\textsuperscript{113} Zimbabwe rejected the proposed agreement.\textsuperscript{114}

At a KP intersessional meeting the KP Chair issued a second notice reiterating its previous request.\textsuperscript{115} This notice was rejected by other Participants, including the United States, the European Union, Australia, Israel and Canada, stating that this request was based on a lack of consensus on a unilateral decision arising from the notice. In its Final Communique after the Plenary held in the DRC on 3 November

2011, the KPCS members endorsed the KP Chair's proposal for a decision on Marange. The Communique commended the DRC, the EU and Zimbabwe for their relentless efforts at promoting an agreement that allows for the trade of compliant Marange diamonds under the KPCS and maintains the integrity and credibility of the KP.\(^{116}\) The Plenary called on Zimbabwe and the WGM to jointly implement the decision with a view to bringing Zimbabwe's KPCS's implementation in the Marange mining area into full compliance with minimum requirements.\(^{117}\) The KPCS reacted to the international community's desire for a coalition CSO initiative. CSOs such as ZELA were officially organised to give credence to on-the-ground information gathering and analysis. ZELA put into place measures to address the concerns of the international community.\(^{118}\)

No reports have been made of KPCS Certificates issued from Zimbabwe, yet it has been reported that the quantity of rough diamonds exported from the Marange region continues to increase. The Plenary also called upon representatives of the KPCS civil society coalition, namely Partnership Africa Canada and Global Witness to engage actively in the implementation of the decision. No moratorium was placed on the trade of rough diamonds from the Marange region. Trading in rough diamonds trading in the Marange region therefore continues.

In 2012 ZMM submitted a "clean" annual report to KPCS, wherein it reported that there was compliance with the KPCS.\(^{119}\) The KP Marange Monitoring team visited the Anjin facilities and returned with a finding that Anjin's policies and procedures on security, anti-smuggling and the traceability of rough diamonds were fully "KP compliant".\(^{120}\)

\(^{118}\) ZELA on the Kimberley Process Certification Scheme http://www.zela.org/index.php?option=com_content&view=article&id=7&Itemid=82.
\(^{120}\) Global Witness 2012 http://www.globalwitness.org/sites/default/files/library/A%20GOOD%20DEAL%20FOR%20ZIMBABWE_0.pdf.
On 7 June 2013 a KP Inter-sessional meeting in Kimberley commemorated the KPCS's ten years in operation. At this meeting the diamond industry and civil society discussed ways of strengthening the effectiveness of the rough diamond certification scheme to ensure that the diamond trade does not finance violence by rebel movements and their allies seeking to undermine legitimate governments. Discussions also focused on an update to redefine the concept of "conflict diamonds".

In June 2013 the European Community issued Council Regulation (EC) No 2368/2002, which extends the territory of the Union to cover the territory of Greenland for the purposes of the KPCS. Accordingly, Greenland will also be prohibited from accepting imports or exports of rough diamonds to or from outside the territory of the Union without a valid KP Certificate.

### 3.1 The role of the Reserve Bank of Zimbabwe (RBZ)

The RBZ, which did not have the legal status to buy diamonds until the end of January 2009, has been a major buyer of illegal diamonds from Marange since as early as 2006. Buying diamonds from illegal and undocumented sources violates the KPCS's requirements, which stipulate that Participants must record all sources of diamonds and export them with the necessary documentation indicating their origin.

In its Preamble the KPCS provides for the curbing of human rights abuses resulting from the illicit trade in rough diamonds. The state of Zimbabwe, as has been explained above, has a duty to respect and ensure human rights. The human rights abuses in the Marange region must therefore be curbed. It should not be acceptable

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122 2013/0198(COD) European Community's Legislative Proposal as at 18 as at June 2013 by the European Parliament later adopted formally on 4 February 2014 at P7.
123 Rudolph Governance without Government in general.
124 KPCS.
for a Participant to the KPCS to embark upon rough diamond mining and production whilst perpetrating human rights abuses.

4 The certification scheme and its applicability in Marange

The KPCS obliges Participants to exercise effective internal control over their diamond industries to prevent trade in conflict diamonds in the global market. Each Participant is required to ensure that all rough diamonds that it exports from its domestic industry are accompanied by a valid, forgery-resistant KPCS Certificate attesting to their origin. The KPCS's investigative arm, namely the WGM, monitors compliance with its requirements in all Participant countries.

The KPCS has, to date, taken a number of key steps to address the Marange diamonds issue. In June 2007 a KPCS review team led by the Russian Federation visited Zimbabwe and came up with recommendations to strengthen Zimbabwe's certification system. In 2008 the KPCS plenary meeting noted with great concern "the continuing challenges faced by Zimbabwe in meeting its obligations and recommended further monitoring of developments and concerted actions in that respect".

In the same month a delegation, led by the then KPCS's Chairperson Esau Bernhard of Namibia, visited Zimbabwe and expressed concern to the government of Zimbabwe about reports of smuggling and abuses in Marange. The Chairperson urged the Zimbabwean authorities to "put an end to the violence in Marange and

125 See s VI(4) of the KPCS.
126 See s VI(4) of the KPCS.
bring the area under control." A review mission also ensued in June 2009, which evaluated, among other things, the situation in the Marange diamond fields.

Following the March 2009 visit, the Chairperson publicly questioned whether suspending Zimbabwe from the KPCS would bring the smuggling of Marange diamonds to a halt or end illegal activities in the district. He said that suspending Zimbabwe "will only help exacerbate the problems in Zimbabwe" without stopping Marange diamonds from penetrating the legitimate trade.

The KPCS expressed concern at the illicit trade of diamonds from the Marange area in Zimbabwe and decided to step up international efforts to prevent the illicit trafficking of those diamonds, notably by calling on KPCS Participants to take appropriate "enhanced vigilance measures" as per the KPCS Chair notice of 10 February 2009. Pursuant to the KPCS Chair notice of 06/05/2010, the KPCS decided to upgrade the vigilance measures. This guidance was aimed at assisting KPCS Participants to implement the "enhanced vigilance measures" and handle suspicious shipments from the Marange area.

- Participants should make use of the footprint on Marange diamonds and, when confronted with a suspicious Marange shipment, Participants should take the following precautionary measures:
  - provisionally detain the shipment;
  - exercise due diligence, i.e. request the necessary information in view of an examination to determine, where possible, the origin of the goods;

- Participants confronted with a suspicious shipment should ensure transparency and duly inform the KP Chair and the WGM and issue a suspicious shipment report for

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130 Kats aura 2010 JS DA 345.
131 Kats aura 2010 JS DA 345.
132 Kats aura 2010 JS DA 345.
133 Kats aura 2010 JS DA 345.
their consideration, subject to national applicable provisions. The suspicious shipment report should contain information pertaining to the determination of the origin of the goods, without prejudice to the confidentiality of commercial information. Where necessary, the WGM will ensure coordination with other KP working bodies such as WGS or WGDE;

- Upon receipt of such a report, the WGM will consider making a recommendation to the KP Chair to place the suspicious shipment report on the Participants section of KP website. Participants are encouraged to keep their own records of suspicious shipments;

- When a Participant is confronted with a suspicious shipment and requires assistance of a technical nature for the examination of the suspicious shipment and/or evaluation of the origin of the goods, the Participant may present a request to the KP Chair or the TA coordination mechanism for specific technical assistance in the matter.135

Considering that the appropriate use of KPCS certificates is crucial for the credibility of the KPCS, Participants were also encouraged to exercise caution as regards possible fraudulent KPCS Certificates.136

In July 2009, a KPCS investigative mission again found serious human rights abuses and rampant smuggling at the Marange diamond fields.137 Despite these findings, Participants to the KPCS decided not to suspend Zimbabwe from participation, nor to ban the export of its diamonds.138 The reason advanced was that the mandate of the KPCS addresses only "conflict diamonds," meaning those mined by rebel groups, but not those mined by abusive governments.139 In 2012 Zimbabwe was allowed to

enter the rough diamond trade. Key CSO Global Witness withdrew its involvement from the KPCS. Israel's 2013 Chair of the World Diamond Council, Izhakoff, in his address at the Annual General Meeting to the World Diamond Council on 6 May 2013, agreed that the definition of "conflict diamonds" should be reviewed.\footnote{Izhakoff "World Diamond Council Opening Address"; see also Zimbabwe's mining minister, Moses Mpofu, calls for an end to sanctions against diamonds in Dow Jones Newswires on 6 May 2013 from the World Diamond Council's Annual General Meeting stating that it the sanctions are unfair because the KPCS, whose members represent 80 countries, approved diamonds from Zimbabwe's Marange field for export in 2011, saying they were not "conflict diamonds" which are defined as stones used to finance the violence of rebels against legitimate governments. See Mpofu 2013 http://online.wsj.com/article/SB10001424127887323372504578466861900742602.html.} In this case, the abuses at Marange were committed by Zimbabwe's police and army, rather than by rebel groups.

These abuses are as serious as those that the KPCS was designed to address. The KPCS's reliance on a technicality provides no comfort to the victims of the abuses. Instead of ignoring human rights abuses, KPCS Participants, as well as retailers, should expand the definition of "conflict diamonds" to include the Marange diamonds.

Zimbabwe is a Participant to the KPCS, which was established in 2003 to combat the trade in conflict diamonds. The Marange situation does not epitomise the realistic and true nature of the KPCS's objectives, the achievement of which is prevented by the definition of conflict diamonds. The KPCS defines conflict diamonds as rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments.\footnote{S I of the KPCS.} In the strictest sense, due to the absence of armed conflict and the involvement of a rebel army or movement in Zimbabwe, the Marange diamonds would not fall within the KPCS's definition of conflict diamonds.

However, such serious human rights abuses by security forces connected with diamond mining justify a more expansive interpretation of the KPCS's mandate, in order that they should include human rights issues. To formalise this extension of its mandate, the KPCS's rules should be amended to assert that human rights are a key
concern for the KPCS. The Preamble of the KPCS's core document recognises "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". Marange does not have a rebel movement. The situation in Marange, as has been reported in detail and with a great deal of accuracy, is one in which the state appears to be the source of the abuse and the continued illegal sale of rough diamonds. In order to ensure its workability and long-term sustainability, the KPCS must inevitably be responsive to dynamic contexts.

The KPCS's core document can be modified by consensus of the Participants following a proposal by any of its Participants. CSOs participating in the KPCS have already initiated a dialogue among participants with respect to the definition of conflict diamonds, calling on the KPCS to ensure that its minimum standards are consistent with international human rights law.

The KPCS ultimately delineated the scope of the diamond problem it was to address as regulating "rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments". The Preamble to the founding document reflects a similarly narrow interpretation:

> Recognizing that the trade in conflict diamonds is a matter of serious international concern, which can directly be linked to the fuelling of armed conflict, the activities of rebel movements aimed at undermining or overthrowing legitimate governments, and the illicit traffic in, and proliferation of, armaments...  

Yet the KPCS has ignored the larger illicit diamond trade as well as the government of Zimbabwe's use of diamonds to increase and consolidate its control of the

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142 See Grant "Kimberley Process at Ten".
143 S 1 of the KPCS.
144 S 1 of the KPCS.
country, and the diamond industry's role in other human rights abuses.\textsuperscript{145} According to Wexler, the nature of the KPCS is very state-centred.\textsuperscript{146}

The KPCS embodies this interest in its unwillingness to distinguish between rebels and state activities. Wexler further states that the KPCS presumes preventing or ending conflict is a sufficient end in itself.\textsuperscript{147} It seems that the KPCS attempts to cut off rebel access to illegal diamond mining, but does nothing to regulate what undemocratic or repressive governments do with such resources. Doing so would be in keeping with its initial mandate, yet it defies the contextual purpose within which it operates. In so doing, it reinforces the state's primacy and emphasises the legitimacy of the existing political order.

Such an approach is unsurprisingly consistent with much of existing international law.\textsuperscript{148} For instance, the KPCS's failure to acknowledge the potential legitimacy of non-state struggles accords well with much of international humanitarian law, which usually only applies to state actors engaged in armed conflict. Even Common Article 3 of the \textit{Geneva Convention} and \textit{Protocol II to the Geneva Convention}, which include some limited protections for non-state actors engaged in internal armed conflicts, leave purely internal disputes to be regulated domestically.\textsuperscript{149}

Thus, the failure to be all inclusive and recognise that a state may be a perpetrator in the violation of human rights arising from an illegal trade in rough diamonds is something which the KPCS seemingly wishes to overlook. This was evidenced in its decision to permit Zimbabwe to trade in rough diamonds emanating from an obviously violence-ridden Marange environment where the state itself was clearly engaged in rampant and systemic human rights abuses. The KPCS's initial focus on rebel groups reflects a common, statist strategy that might compromise larger

\textsuperscript{145} For a criticism of this exclusion, see Gooch 2008 \textit{Natural Resources Journal} 189. See also Wilson 2010 \textit{Geo Journal} 8-9.
\textsuperscript{146} Wexler 2009 \textit{Cardozo L Rev} 12.
\textsuperscript{147} Wexler 2009 \textit{Cardozo L Rev} 12.
\textsuperscript{148} Wexler 2009 \textit{Cardozo L Rev} 6-10.
\textsuperscript{149} Wexler 2009 \textit{Cardozo L Rev} 6-10.
human rights goals. The initial scope of the KPCS as a whole focuses on non-state actor abuses while ignoring state and corporate abuses. It suggests that the international community acts to deny resources to rebel groups regardless of the nature of the underlying conflict.

5 Conclusion

Key countries could play a crucial role in suspending Zimbabwe from the KPCS. The final decision on a possible suspension of Zimbabwe rests with the Participants to the KPCS, who work on the basis of consensus.\textsuperscript{150} When consensus is impossible to reach, the Chair is mandated to carry out consultations.\textsuperscript{151} To reach consensus it is essential for key Participants to reconsider Zimbabwe's suspension from the KPCS.

Namibia, as the previous Chair of the KPCS, presided over all plenary proceedings and, in the event that consensus cannot be reached, may be mandated to assist in conducting consultations on the way forward. Namibia is also a major regional diamond producer, and its ruling party, SWAPO, has long had close links with Zimbabwe's ZANU-PF.\textsuperscript{152}

Though this is exceedingly difficult to calculate with precision, one estimate places the value of smuggled Zimbabwean rough diamonds to have totalled approximately US$2 billion from 2008 to 2012.\textsuperscript{153} Some of the world's largest rough diamond cutting and polishing centres are found in India. India chairs the KPCS's Committee on Participation, which is responsible for making recommendations regarding Zimbabwe's future participation. Human Rights Watch investigations found that raw

\textsuperscript{150} S IV (5) of the KPCS.
\textsuperscript{151} S IV (5) of the KPCS.
Marange diamonds are being channelled to India for polishing. This raises the risk that Marange diamonds could taint the reputation of India's domestic industry if no action is taken.

CSOs found that South Africa is one of the main destinations of Marange diamonds, and that they are also smuggled there via Mozambique. Along with the region's other main diamond producers, Botswana and Namibia, South Africa will find its market reputation undermined if it blocks KPCS action on Zimbabwe and permits the continued entry of Marange diamonds.

Home to a huge diamond sorting and polishing industry, Belgium is another notable destination for raw Marange diamonds. Belgium's position within the organisation is likely to have great influence on the rest of the European Union. Its reputation could suffer if it continues to handle tainted Zimbabwe stones.

As the 2010 Chair of the KPCS, Israel was the subject of scrutiny for its position on Zimbabwe's suspension at the meeting. Namibia, India, Belgium, South Africa and Israel have important roles to play in supporting the suspension of Zimbabwe from the KPCS. The 2012 KP Chair made concerted efforts to permit Zimbabwe to trade in rough diamonds. Participants finally acquiesced despite damning CSO reports.

As the nature of African conflicts, repression and human rights abuses has changed over the past decade, with the virtually total disappearance of post-independence rebel groups in the continent, the KPCS risks becoming irrelevant and ineffective if it adheres to a narrow interpretation of its original core mandate and limits its human rights focus to human rights abuses committed by non-state actors. It can thus be

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156 Grant 2013 Commonwealth & Comparative Politics 210-233.
157 Grant 2013 Commonwealth & Comparative Politics 210-233.
158 Grant 2013 Commonwealth & Comparative Politics 210-233.
159 Grant 2013 Commonwealth & Comparative Politics 210-233.
submitted that the Zimbabwean case highlights a further serious shortcoming of the KPCS, which makes the need to revisit its mandate and nature compelling.

The KPCS or an international treaty instrument that may replace it must expand its objectives to specifically cover broader human rights concerns and unambiguously include them as part of the KPCS. Diamonds originating from areas like Marange, where serious human rights abuses have taken place, should be shunned in the same manner as traditional "conflict diamonds" acquired by rebel groups. The term itself should be amended to reflect a broader array of actors connected to human rights abuses in diamond mines. Ten years on, the KPCS definitely has lessons to be learnt.
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ZELA on the Kimberley Process Certification Scheme

LIST OF ABBREVIATIONS

ACR African Consolidated Resources
Cardozo L Rev Cardozo Law Review
CSOs Civil Society Organisations
Eur J Crim Pol Res European Journal on Criminal Policy and Research
HRW Human Rights Watch
ICC International Criminal Court
ICCPR International Covenant on Civil and Political Rights
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<th>Acronym</th>
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<tr>
<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
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<td>International Labour Organisation</td>
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<td>Journal of Sustainable Development in Africa</td>
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<td>Joint Working Plan</td>
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<td>LFP</td>
<td>Local Focal Point</td>
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<td>Multinational Corporations</td>
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TEN YEARS ON, THE KIMBERLEY PROCESS CERTIFICATION SCHEME AND ZIMBABWE’S MARANGE AND "CONFLICT DIAMONDS": LESSONS TO BE LEARNT

N Shaik-Peremanov*

SUMMARY

The Kimberley Process Certification Scheme (KPCS) came into operation in 2003. Although, the KPCS is not an international treaty, major African diamond producing nations as well as other countries and multinational corporations have taken the contents of the KPCS to have the force of law. Zimbabwe is one such country. However, since the diamond rush in Zimbabwe’s Marange region, Zimbabwe has come under international interrogation for the manner and means of its diamond mining, production and trade in the international market. Human rights violations and abuses have been widely documented. Even the Chair of the KPCS and the United Nations have condemned the manner of the mining of Zimbabwe’s Marange diamonds. However, the subsequent suspension was short-lived. This paper examines Zimbabwe’s Marange conflict diamond situation and its attendant human rights issues, especially in light of ten years having passed since the coming into operation of the KPCS.

KEYWORDS: Kimberley Process Certification Scheme; conflict diamonds; Marange; diamond rush; human rights; conflict; international diamond trade; United Nations; rough diamonds; Joint Working Plan

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