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## Introduction: Showdown at Kinshasa

The shallow tunnel where my colleagues were working collapsed and trapped them inside. There was nothing I could do to save them; I had to run for my own life. On that night, three people were shot by police and died on the field. The following morning, police ordered us to bury the three bodies in one of the pits on the field. When I asked to dig out my four colleagues, a police officer told me, 'Consider them already buried'.

Artisanal miner in Marange, Zimbabwe<sup>1</sup>

On 23 June 2011, at Kinshasa in the Democratic Republic of Congo (DRC), civil society delegates staged a dramatic walkout from a meeting of the Kimberley Process (KP). At the meeting, the KP chairperson had acted to endorse the sale of controversial Zimbabwean blood diamonds despite a lack of consensus by KP participants. In a statement issued after the walkout, the civil society coalition, representing a range of non-governmental organisations (NGOs), stated:

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<sup>1</sup> Human Rights Watch interview with Marange artisanal miner R M, Harare, 26 February 2009, referring to an attack in August 2008, cited in Human Rights Watch, 'Diamonds in the Rough: Human Rights Abuses in the Marange Diamond Fields of Zimbabwe' (Report, June 2009).

The agreement between the Kimberley Process and Zimbabwe being discussed this week falls far short of what is acceptable to maintain the credibility of the Kimberley Process, protect civilians and civil society members living and working in Marange or prevent substantive quantities of illicit diamonds from infecting the global diamond supply chain.<sup>2</sup>

To better understand why the NGOs walked out of the meeting on that day, it is necessary to understand the nature of the Kimberley Process, an organisation that was established to tackle the issue of conflict diamonds, also known as blood diamonds. Blood diamonds constitute a segment of the rough diamond trade that is linked to egregious human rights violations in a number of African diamond mining countries.<sup>3</sup> These diamonds are known as blood diamonds because of their connection with groups that have used enforced labour, recruited and deployed children as soldiers, murdered and raped civilians, amputated the limbs of their victims, and terrorised civilian populations, often as part of waging civil war. Although diamond-fuelled violence has diminished with the emergence of peace in Angola, Sierra Leone, and Côte d'Ivoire, there are ongoing concerns relating to the war-torn DRC and the Central African Republic.

What has garnered recent international attention more than any other blood diamond issue, however, is the violence associated with the discovery of diamonds in the Marange region of Zimbabwe. With civilian casualties in the hundreds, the brutality of the management of the Marange diamond fields by Zimbabwe's police and armed forces has become well known to the international community. What would appear to be a clear violation of the KP's mandate, which is to prevent such blood diamonds being traded on the international market, instead attracted a different response from the KP. Rather than excluding these diamonds from the international market and expelling Zimbabwe from the KP, the KP chair controversially acted to mandate the sale of several shipments of these diamonds, despite a lack of consensus within the

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2 Partnership Africa Canada, 'NGOs Walkout of Kinshasa KP Meeting, Consider Options', *Other Facets: News and Views on the International Effort to End Conflict Diamonds* (No. 35, August 2011), 1. Available at: [www.pacweb.org/images/PUBLICATIONS/Other\\_Facets/OF35-eng.pdf](http://www.pacweb.org/images/PUBLICATIONS/Other_Facets/OF35-eng.pdf); Gooch, C, 'Global Witness Founding Director's Statement on NGO Coalition Walk-Out from Kimberley Process Meeting', 27 June 2011. Available at: [www.globalwitness.org/en/archive/global-witness-founding-directors-statement-ngo-coalition-walk-out-kimberley-process/](http://www.globalwitness.org/en/archive/global-witness-founding-directors-statement-ngo-coalition-walk-out-kimberley-process/).

3 It should be noted that the definition of a 'conflict diamond' or 'blood diamond' was itself part of the dispute in the Zimbabwe Marange diamonds dispute. This is discussed in Chapter 2.

organisation. Concerned that the core mandate of the KP was being contravened, the NGOs stormed out of the Kinshasa meeting, although they have said that they will remain within the organisation, at least for the moment.<sup>4</sup> To put it metaphorically, NGOs were wondering whether the KP lion had lost its roar.

The so-called showdown at Kinshasa provides a useful point of reference in seeking to analyse and assess the relative strengths and weaknesses of the Kimberley Process at this moment of institutional crisis. The challenges facing the Kimberley Process are particularly relevant to an Australian audience, as Australia will take its turn as Chair of the KP in 2017. The Kimberley Process Certification Scheme (KP) was established in 2002 as the international community's primary response to the blood diamond problem. It has mobilised the energies of civil society, the major corporate players in the rough diamond trade, and national governments. The Kimberley Process is a chain of custody arrangement, which aims to provide a warranty as to the origin of each diamond from the point of mining, through to export and polishing, to incorporation in jewellery and final sale to a consumer in a retail context. The primary mechanism for this guarantee about the origin of the diamonds is the export certificate, which guarantees that a package of rough diamonds is conflict-free when it leaves the original producer country. Compliance with Kimberley requirements is monitored through review visits by delegations, involving representatives of civil society, industry, and government. In cases of serious non-compliance, the Kimberley Process has the ability to suspend or expel a government member, meaning that they are excluded from the legitimate rough diamond trade.

The United Nations Security Council (UNSC) and the international criminal tribunals are the other major players in the conflict diamonds governance system. The UNSC has played an important monitoring role through its expert committee reports, and has imposed legally binding sanctions on diamonds from problem countries in a number of instances. It is arguable that the UNSC was the midwife of the Kimberley

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4 Partnership Africa Canada, 'NGOs Walkout of Kinshasa KP Meeting, Consider Options', *Other Facets: News and Views on the International Effort to End Conflict Diamonds* (No. 35, August 2011), 1. Available at: [www.pacweb.org/images/PUBLICATIONS/Other\\_Facets/OF35-eng.pdf](http://www.pacweb.org/images/PUBLICATIONS/Other_Facets/OF35-eng.pdf); Gooch, C, 'Global Witness Founding Director's Statement on NGO Coalition Walk-Out from Kimberley Process Meeting', 27 June 2011. Available at: [www.globalwitness.org/en/archive/global-witness-founding-directors-statement-ngo-coalition-walk-out-kimberley-process/](http://www.globalwitness.org/en/archive/global-witness-founding-directors-statement-ngo-coalition-walk-out-kimberley-process/).

Process, facilitating its birth. The international criminal tribunals, namely the Special Court for Sierra Leone and the International Criminal Court (ICC), provide a further level of conflict diamonds governance. A growing number of international prosecutions by these bodies, most notably the Charles Taylor case, have shone a spotlight on the role played by conflict diamonds in the perpetration of crimes against humanity and war crimes.

## Research Questions and Main Argument

The walkout at Kinshasa highlights the recent state of crisis that the KP finds itself in, almost 13 years after its creation in November 2002. Since the creation of the KP, a significant body of articles and reports has been written by academics and NGO activists. This has largely focused on the blood diamonds problem, the wider context of the resources and conflict linkage, and practical evaluations of the KP. Only two monographs have been published about the KP to date, the insider/practitioner perspective of Ian Smillie in his work *Blood on the Stone*, and the doctoral dissertation in book format of Franziska Bieri, entitled *From Blood Diamonds to the Kimberley Process: How NGOs Cleaned up the Global Diamond Industry*. Bieri's work involved the collation of interview material, and focuses on the role of NGOs in identifying the issue of blood diamonds, campaigning on the issue and ultimately providing a guiding role in the creation of the tripartite KP.

My book represents an original contribution to the field, as distinct from the works of Smillie and Bieri. Smillie presented a practitioner/insider perspective on the Kimberley Process, while Bieri's academic work focused on the role of NGOs in relation to the Kimberley Process. By contrast, my work analyses the KP in the context of other international regulatory mechanisms, using an original theoretical model (the dual networked pyramid model (DNPM)), which assists in understanding its successes thus far, as well as suggesting ways in which the system might be improved upon. Other works discuss the blood diamonds problem in general, without throwing specialist light on the Kimberley Process. In this category is Greg Campbell's work *Blood Diamonds: Tracing the Deadly Path of the World's Most*

*Precious Stones*.<sup>5</sup> By contrast with Smillie and Bieri's specialist work on the Kimberley Process, and the generalist blood diamonds literature, my book gives a rigorous overview of both the conflict diamonds and regulatory theory literature, provides systematic analysis of that literature, and provides theoretical modelling.

The first research question that this book posits is: to what extent has the conflict diamonds governance system achieved its objectives? In considering this question, the work discusses not only the Kimberley Process but also other international institutions that have played a central role in conflict diamonds governance — in particular the UNSC and the ICC (including its sister tribunals). It seeks to be, arguably, the first large-scale work to not only describe the role that each of these bodies has played in relation to conflict diamonds governance, but the way in which they have interacted, and how these interactions could be improved.

In considering the interactions between the major institutional players in the conflict diamonds governance system, the book seeks to be the first work to apply a theoretical, regulatory model to that system, with a view to understanding it better. As such, the book involves consideration of a further research question: does an application of the networked pyramid regulatory model to the conflict diamonds governance system provide descriptive or normative insights into its effectiveness? The networked pyramid model suggests that the most successful regulatory approaches extend beyond governmental action alone, to embrace non-governmental actors such as civil society organisations and business entities. It argues that the most significant regulatory gains are made through the horizontal techniques of dialogue, persuasion, and socialisation. Nevertheless, the model recognises that the deployment of vertical coercive interventions may be necessary in appropriate circumstances.

Despite the intuitive applicability of the networked pyramid model, it is arguable that modifications to the model may be desirable before it can usefully be applied to the conflict diamonds governance system. The book suggests two significant modifications to the model that result in a so-called dual networked pyramid model. It is dual in two senses: firstly, it incorporates regulatory systems at both the national

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5 Campbell, G, *Blood Diamonds: Tracing the Deadly Path of the World's Most Precious Stones* (Basic Books, 2013).

and international levels, creating a pyramid inside the pyramid that models national governments as both regulators and the subjects of regulation. Secondly, by incorporating insights from the pyramid of rewards, it models both rewards and sanctions in a single model. For these reasons, it can be argued that the dual model is well placed to generate theoretical insights into a range of complex international systems, such as the global intellectual property standards system, beyond the application that is the subject of this book.

In relating this model to the conflict diamonds system, the second research question considers whether the DNPM provides descriptive or normative insights into the operation of the conflict diamonds governance system. In particular, it explores whether the reasons for the successes or failures of the system can be linked to the way in which it incorporates and implements features of the DNPM.

Returning to the first research question, the book, which considers developments up to the end of December 2015, argues that a significant degree of achievement can be attributed to the conflict diamonds governance system. It is argued that the governance system has contributed to the diminution of the conflict diamonds trade from estimates as high as 15 per cent in the 1990s, when the Sierra Leone and Angolan conflicts were active, to less than 1 per cent of the world's rough diamond trade in recent years. When considering the role of the Kimberley Process, this relative achievement is due in large measure to its ability to enlist the support of the major diamond mining players, the vast majority of national governments involved in rough diamond production, trading and polishing, as well as committed international NGOs. KP has not been an unqualified success, however. The fact that Angolan and Zimbabwean conflict diamonds have not been effectively filtered out of the legitimate trading system, as well as the opening of a smuggling gateway created by Venezuela's active opposition, show that serious challenges remain for the conflict diamonds governance system. These problems have arisen through the inability of the KP to expel member governments in situations of serious non-compliance. It is arguable that they can only be effectively addressed through appropriate application of vertical coercive interventions, as suggested by the pyramid features of the networked pyramid regulatory model. As such, the book recommends that Kimberley Process procedures be reformed so as to enable timely and definitive expulsion of recalcitrant governments. The work recommends that a new, specific crime of trafficking in conflict diamonds be created in the provisions of the

Rome Statute of the ICC. Such a crime should be defined in terms of contravening a UNSC ban on diamond trading and would, it is argued, strengthen the conflict diamonds governance system at all levels.

Beyond resolving the initial crisis that the KP finds itself in, it would arguably benefit from a renewed mandate, focusing on the concept of development diamonds. The book explores these possibilities, with reference to not only regulatory pyramid insights, but also insights from the incentive-based pyramid of rewards.

## Methodology

The methodology deployed by this research projects involves a number of stages. The first stage was rigorous review of the existing literature concerning the conflict diamonds problem and international legal responses to it, as well as applicable literature on regulatory theory. The second stage of the methodology was to draw on the existing regulatory theory literature in order to develop a new theoretical model that might explain how the conflict diamonds governance system might, in a descriptive sense, be analysed and understood, as well as offering insights, in a normative sense, as to how the system might be improved upon.

As part of the first stage of the methodology — collecting information about the conflict diamonds problem and international legal responses to it — a limited exercise in collecting interview data was undertaken. In order to obtain information on the operation of the Kimberley Process, a number of standardised questions were presented to government, NGO, and industry participants in the Kimberley Process. The government participant, the Australian Federal Government, provided a written response while the NGO participant, Global Witness, and the industry participant, Rio Tinto, responded to the questions by means of a verbal interview process. The interviews were recorded and a written transcript produced. In relation to all three participants, the ethical requirements set out by The Australian National University concerning such research were complied with and approved by the ANU Research Ethics Committee.

## Road Map

This introduction has set out the two research questions to be explored by the book, namely:

1. To what extent has the conflict diamonds governance system achieved its objectives?
2. Does an application of the networked pyramid regulatory model to the system provide descriptive or normative insights into its effectiveness?

This chapter advances the argument that the conflict diamonds governance system has made modest gains, but has failed in its efforts to address situations of serious non-compliance by member governments. In accordance with insights from the networked pyramid model, the book argues that procedures for expulsion in such cases must be clearly defined and implemented, and that pathways of escalation to the UNSC and the international criminal tribunals should be strengthened through the creation of a new international crime of trafficking in conflict diamonds. It also sets out a road map by summarising in brief the contribution of each chapter towards responding to the research questions, and advancing the main argument of the work. It also provides a more detailed introduction into the substantive chapters of the book.

The second chapter briefly outlines the history and features of the legitimate diamond trade, before turning to the problem of conflict diamonds. It discusses the definition of conflict diamonds, also known as blood diamonds, before detailing the connection of this trade to human rights violations and armed conflict in Angola, Sierra Leone, the DRC, and Côte d'Ivoire.

The third chapter, which discusses the Kimberley Process, is the first of three chapters dealing with the conflict diamonds governance system. It discusses the operation of the Kimberley Process at the international level, including its procedures for accepting new members, monitoring through peer review, and dealing with situations of serious non-compliance. It also considers the particular roles played by NGOs and industry. The fourth chapter is concerned with the domestic implementation of Kimberley responsibilities by national governments.

The UNSC and international criminal tribunals, the other components of the conflict diamonds governance system, are discussed in the fifth chapter. The monitoring role of the UNSC expert committees is discussed, as is its ability to take enforcement action through the imposition of diamond trading sanctions. The track record of the Sierra Leone Special Court and the ICC in prosecuting conflict diamonds cases is then discussed. The book notes that conflict diamonds were discussed in three ways in the emerging jurisprudence: as context for the commission of crimes, as being connected to crimes in the process of mining, and as providing a mechanism of indirect liability between high leadership and direct perpetrators on the ground.

The networked pyramid regulatory model is the subject of the sixth chapter, which discusses the utility of using a regulatory approach, before discussing the features of network models and pyramid models. The networked pyramid hybrid model is then discussed, combining as it does the dialogic and socialisation elements of network models with the ability to ratchet up to more coercive interventions in appropriate circumstances.

Before applying the networked pyramid model, the seventh chapter suggests two major modifications so as to optimise its utility in relation to the conflict diamonds governance system. The first modification, depicting regulation at the national level as a pyramid within the greater international pyramid, attempts to capture the complexity of a regulatory system that operates simultaneously at national and international levels, and in which national governments are both regulators as well as the subjects of regulation. A further modification, showing incentives and sanctions as part of a single model, allows interactions between the two regulatory ratchets to be more clearly observed.

The DNPM is applied to the conflict diamonds governance system in Chapter 8. In this chapter, the two central research questions are discussed in depth and responded to. It is argued that the conflict diamonds governance system has made progress towards its goals, noting that the conflict diamonds trade has reduced to less than 1 per cent of the international diamond trade, and that peace has emerged in Angola and Sierra Leone, both countries that were previously affected by the problem. The contribution of the UNSC and the international criminal tribunals is also noted. The chapter notes, however, the failure of the Kimberley Process to respond to serious

non-compliance by three of its government members — Zimbabwe, Angola, and Venezuela — and pyramid theory is recommended as a way forward in these cases. If the KP can extricate itself from its current crises, a further horizon beckons, in which a potential extended mandate might focus on the concept of development diamonds, which are free not only of the taint of conflict and international crime, but a further range of human rights ills. Diamonds mined and polished without the use of child labour, for example, might qualify for voluntary certification, thereby opening a door to fair trade markets in the developed world. Chapter 9, the final chapter, gives a recapitulation of the book, lays out a range of recommendations for possible adoption by parties involved in the conflict diamonds governance system, and suggests areas for further research.

## The Conflict Diamonds Problem

In the period following the end of the Cold War, it has become commonplace to observe that the nature of warfare has changed from being predominantly international in character to intranational. The two world wars, paradigms of clashes between nation states, have given way to conflicts between component populations of nations, such as occurred in the early 1990s with the collapse of the former Yugoslavia and the resurgence of ethnically based conflict in Rwanda.<sup>6</sup> Concomitant with these conflicts has been the perpetration of human rights violations of sufficient scale and severity to merit the use of the terminology of international criminal law — namely war crimes, crimes against humanity, and genocide. Another feature of modern conflict has more recently come to the attention of academics and the international community more broadly. This feature is the connection between natural resources and conflict, which has been dubbed the ‘resource curse’.<sup>7</sup>

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6 Dallaire, R, *Shake Hands with the Devil: The Failure of Humanity in Rwanda* (Random House Canada, 2003) 40–41, 516–517; Kofele-Kale, N, ‘The Global Community’s Role in Promoting the Right to Democratic Governance and Free Choice in the Third World’ (2005) 11 *Law and Business Review of the Americas* 205, 215.

7 Le Billon, P, ‘The Geopolitical Economy of “Resource Wars”’ in P Le Billon (ed.), *The Geopolitics of Resource Wars: Resource Dependence, Governance and Violence* (Frank Cass, 2005) 1–28.

Whether one considers the connection between the oil trade and conflict in Sudan and Iraq, or the association between illegal drugs and warfare in Colombia and Afghanistan, the resource curse has been blamed for the instigation and perpetuation of conflict and gross human rights abuses. Of primary concern has been the fact that belligerent parties, often insurgent groups, have had their armaments funded through proceeds from these commodities.<sup>8</sup> In the context of the African continent, the resource curse has manifested itself through the trade in rough diamonds. Diamonds used to fund the perpetration of warfare and human rights violations by insurgents are now known as conflict diamonds or blood diamonds.<sup>9</sup>

African conflict diamonds were brought to the attention of the international community as a result of the war in Angola, which commenced with independence from Portugal in 1975 and continued until 2002.<sup>10</sup> During the course of the conflict, the rebel group National Union for the Total Independence of Angola (UNITA) took control over all of the major diamond-producing areas of the country. The ceasefire of 1991–92 provided UNITA with the opportunity to sell much of its large harvest of rough diamonds on international markets, using the proceeds to purchase armaments in anticipation of a resumption of the conflict.<sup>11</sup> The non-governmental organisation (NGO) Global Witness at this time was monitoring the situation and, in particular, the annual reports of the South Africa-based diamond mining giant De Beers Corporation. It was well known that De Beers had a standing policy of buying out as much of the global diamond production as it could manage, and the period 1991–92 was no exception. The logical

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8 Ross, M, 'How Do Natural Resources Influence Civil War?: Evidence from Thirteen Cases' (2004) 58 *Winter International Organization* 35, 35–67; Banat, A B, 'Solving the Problem of Conflict Diamonds in Sierra Leone: Proposed Theories and International Legal Requirements for Certification of Origin' (2002) 19 *Arizona Journal of International and Comparative Law* 939, 939–973.

9 Dunn, K C, 'Identity, Space and the Political Economy of Conflict in Central Africa' in P Le Billon (ed.), *The Geopolitics of Resource Wars: Resource Dependence, Governance and Violence* (Frank Cass, 2005) 151–153, 242–279; Tailby, R, 'The Illicit Market in Diamonds' (2002) 218 *Australian Institute of Criminology: Trends and Issues in Crime and Criminal Justice* 1, 1–6; Saunders, L, 'Note: Rich and Rare are the Gems they War: Holding De Beers Accountable for Trading Conflict Diamonds' (2001) 24 *Fordham International Law Journal* 1402.

10 Price, T M, 'Article: The Kimberley Process: Conflict Diamonds, WTO Obligations, and the Universality Debate' (2003) 12 *Minnesota Journal of Global Trade* 1, 8–11; Kaplan, M, 'Junior Fellows' Note: Carats and Sticks: Pursuing War and Peace through the Diamond Trade' (2003) 35 *New York University Journal of International Law and Politics* 559, 573–578.

11 Price, T M, 'Article: The Kimberley Process: Conflict Diamonds, WTO Obligations, and the Universality Debate' (2003) 12 *Minnesota Journal of Global Trade* 1, 8–11.

conclusion, which was not denied by De Beers, was that diamond sales during the period were going directly or indirectly into the coffers of UNITA, providing funds for the purchase of armaments. By the close of the war in 2002, the conflict had resulted in the loss of up to one million lives.<sup>12</sup>

In 1992, when, for much of the time, the majority of the diamond areas were controlled by UNITA, De Beers stated:

That we should have been able to buy some two thirds of the increased supply from Angola is testimony not only to our financial strength but to the infrastructure and experienced personnel we have in place.<sup>13</sup>

Significantly, De Beers confirmed the nature of its Angolan business practices in written testimony to a hearing on conflict diamonds held before the United States Congress in May 2000:

De Beers believes that to regard as 'conflict diamonds' all diamonds emanating from areas of Angola which were from time to [time] under UNITA control during this period [the Angolan civil war] muddles history to make a dubious point. De Beers makes no secret of the fact that during this period it purchased Angolan diamonds on the outside market, although it never at any stage bought diamonds from UNITA itself these purchases were made in good faith and under normal and customary market terms.<sup>14</sup>

Diamonds became associated not only with conflict but also the perpetration of egregious human rights violations in the context of the Sierra Leonean civil war of 1991–2002.<sup>15</sup> The Revolutionary

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12 Global Witness, 'A Rough Trade: The Role of Companies and Governments in the Angolan Conflict' (Report, Global Witness Ltd, 1998) 6–8; Price, T M, 'Article: The Kimberley Process: Conflict Diamonds, WTO Obligations, and the Universality Debate' (2003) 12 *Minnesota Journal of Global Trade* 1, 8.

13 De Beers Diamond Jewellers Ltd, 'Annual Report' (1992) cited in Global Witness, 'A Rough Trade: The Role of Companies and Governments in the Angolan Conflict' (Report, Global Witness Ltd, 1998) 8.

14 De Beers Diamond Jewellers Ltd, 'Written Testimony before the United States Congress, House Committee on International Relations, Subcommittee on Africa', *Hearing into the Issue of 'Conflict Diamonds'* (25 May 2000). Available at: [www.diamonds.net/fairtrade/Article.aspx?ArticleID=4046](http://www.diamonds.net/fairtrade/Article.aspx?ArticleID=4046). The oral testimony of witnesses appearing before the committee is available at: [www.fas.org/asmp/resources/govern/hrgdiamonds.htm](http://www.fas.org/asmp/resources/govern/hrgdiamonds.htm). De Beers was not represented in person due to an ongoing legal dispute with the US Government over alleged monopolistic corporate practices. Bieri, F, *From Blood Diamonds to the Kimberley Process: How NGOs Cleaned Up the Diamond Industry* (Ashgate Publishing Ltd, 2010) 46.

15 Price, T M, 'Article: The Kimberley Process: Conflict Diamonds, WTO Obligations, and the Universality Debate' (2003) 12 *Minnesota Journal of Global Trade* 1, 13–16.

United Front (RUF), based away from the coast in the Kono district, was notorious for the practice of amputating the hands and feet of civilians as a technique of intimidating the local population. The RUF was allegedly supported by the government of neighbouring Liberia, and had its activities funded through the exploitation of Sierra Leone's alluvial diamond fields.<sup>16</sup> Large-scale media campaigns organised by groups such as Global Witness highlighted the connection between diamonds sold to consumers in New York and London and the arming of militia in Sierra Leone, leading to consumer boycotts and ultimately to legal action at national and international levels.<sup>17</sup> Particularly noteworthy have been the passage of a series of UNSC resolutions imposing diamond trading prohibitions on Angola, Sierra Leone, and Liberia. A related development was the creation of the Kimberley Process, an effort by government, business, and NGOs to provide a system of import/export licences so as to distinguish the legitimate trade in diamonds from the illegal trade.<sup>18</sup>

The conflict diamonds problem is not only of historical interest, but presents an ongoing and pressing contemporary challenge. As well as the Zimbabwe Marange diamonds issue, ongoing fighting in the DRC, and the recent civil war in Côte d'Ivoire have both been exacerbated by the trade in conflict diamonds. These challenges have proven to be something of a litmus test as to the effectiveness of the new legal mechanisms for the control of conflict diamonds. Côte d'Ivoire has been the site of a conflict bearing a striking resemblance to the Sierra Leone/Angolan precedents, in that insurgent groups largely captured the northern diamond-rich sector of the country. Diamonds in the DRC have proven to be one of a number of resources that have extended conflict by rebels and national governments in that country, particularly in its north-eastern provinces. Unfortunately, human rights abuses have characterised both conflicts to date.

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16 Ibid 13; Kaplan, M, 'Junior Fellows' Note: Carats and Sticks: Pursuing War and Peace through the Diamond Trade' (2003) 35 *New York University Journal of International Law and Politics* 559, 568–570.

17 Price, T M, 'Article: The Kimberley Process: Conflict Diamonds, WTO Obligations, and the Universality Debate' (2003) 12 *Minnesota Journal of Global Trade* 1, 30–36.

18 SC Res 1173, UN SCOR, 3891st mtg, UN Doc S/RES/1173 (12 June 1998) (Angola); SC Res 1306, UN SCOR, 4168th mtg, UN Doc S/RES/1306 (5 July 2000) (Sierra Leone); SC Res 1343, UN SCOR, 4287th mtg, UN Doc S/RES/1343 (7 March, 2001) (Liberia); Kimberley Process, *The Kimberley Process Certification Scheme* (Core Document, 2002).

Nevertheless, it has been possible to see that the international system in both cases has assisted in denying access to international markets for diamonds originating from these rebel-held regions.<sup>19</sup>

## The Conflict Diamonds Governance System

An understanding of the nature of governance responses to the conflict diamonds problem also requires an understanding of the nature of the international diamond trade itself. At the exploration stage, diamond deposits themselves are normally described as being either alluvial or kimberlite in nature. Alluvial diamond deposits are those that, by virtue of an existing or historical river system, have become scattered through the topsoil over a given area and are accessible without the need for expensive or sophisticated diamond mining equipment. By contrast, kimberlite deposits are buried deep below the surface of the earth, are concentrated deposits, and require the use of expensive, sophisticated mining equipment, making it a capital-intensive industry that is less intrinsically vulnerable to the efforts of technologically unsophisticated insurgents. There are four main types of countries that are component parts of the international diamond trade: producer countries involved in mining rough diamonds; rough diamond wholesale trading centres such as the UK and Belgium; polishing/cutting countries that prepare rough diamonds for sale; and market countries where diamond products, such as jewellery, are sold to consumers. It is clear that the diamond industry is highly internationalised and reliant on numerous international trade connections to be effective.<sup>20</sup>

The principal response to the problem of conflict diamonds has been the Kimberley Process. This system emerged through tripartite cooperation between business, government, and NGOs with a view to distinguishing the legitimate diamonds trade from the conflict

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19 Final Report Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, UN Doc S/2002/1146 (16 October 2002); Report of the Group of Experts Submitted Pursuant to Paragraph 7 of Security Council Resolution 1584 (2005) Concerning Côte d'Ivoire, UN Doc S/2005/699 (7 November 2005).

20 Global Witness, 'Conflict Diamonds: Possibilities for the Identification, Certification and Control of Diamonds' (Report, June 2000), Section 1 'The Structure of the Diamond Industry'; Price, T M, 'Article: The Kimberley Process: Conflict Diamonds, WTO Obligations, and the Universality Debate' (2003) 12 *Minnesota Journal of Global Trade* 1, 30–36.

diamonds trade. Naturally, when divorced from conflict situations, the diamond industry has the potential to be a powerful driver of economic and social development on the African continent. The Kimberley Process focuses on a system of export certificates, through which participant governments certify the legitimacy of the diamonds at the point of export. Importing governments are mandated to seize unlawful imports and take other action, including domestic prosecution, against non-compliant traders. Certification also allows for statistics to be kept regarding the quantity of rough diamonds traded between countries, allowing estimates of the annual diamond trade.<sup>21</sup>

The Kimberley Process also establishes a system for ensuring that governments take their obligations under the process seriously. In particular, the Kimberley Process includes a Participation Committee and a Monitoring Committee. The Monitoring Committee is mandated to consider annual reports by member nations, as well as organising review visits to nations to assess their compliance with the international system. The Participation Committee is charged with considering applications by countries wishing to join the Kimberley Process, as well as taking punitive action against states in the event of serious non-compliance, where this is evident pursuant to the investigations made by the Monitoring Committee.<sup>22</sup>

Beyond the sphere of the Kimberley Process, and predating its formation, the UNSC has played a pivotal role in combating the trade in conflict diamonds. In response to the role of conflict diamonds in the Angolan conflict, the UNSC passed Resolution 1173 of 1998, which was the first international trade ban on the diamond trade, in response to the link of that trade with conflict. The UNSC further intervened to impose trade bans on both Sierra Leone and Liberia, the latter when it came to light that it was being used as a conduit country for smuggling diamonds of Sierra Leonean provenance. The UNSC has also passed resolutions concerning conflict diamonds in response to the situation in the DRC, and, significantly, demonstrated its capacity

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21 Kimberley Process, *The Kimberley Process Certification Scheme* (Core Document, 2002).

22 Ibid.

to respond in a collaborative fashion by imposing sanctions in 2005 after the Kimberley Process had imposed a trade ban on Côte d'Ivoire diamonds.<sup>23</sup>

A final response to the problem of conflict diamonds has come from the emergent institutions of international criminal justice. The earliest precedents of financial contribution to the perpetration of international crimes goes back to the Nazi war crimes cases of *Flick, Farben and Krupp* at Nuremberg in the aftermath of World War Two.<sup>24</sup> The jurisprudence of 'joint criminal enterprise' developed by the Yugoslavia and Rwanda Tribunals since the mid-1990s now provides a coherent legal framework for bringing such individuals to account.<sup>25</sup> While the ICC, established under the 1998 *Rome Statute*, has alluded to the possibility of persons complicit in the conflict diamonds trade being brought to account, the most important breakthrough has been made by the Special Court for Sierra Leone, which has put on trial the former president of Liberia, Charles Taylor, for his role in the conflict diamonds trade as it related to the Revolutionary United Front (RUF).<sup>26</sup>

## The Networked Pyramid Regulatory Model

Concurrent with the recognition of the challenge posed by the conflict diamonds trade, there have been trends within academia to develop models for evaluating the effectiveness of legal systems for

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23 SC Res 1173, UN SCOR, 3891st mtg, S/RES/1173 (12 June 1998) (Angola); SC Res 1306, UN SCOR, 4168th mtg, S/RES/1306 (5 July 2000) (Sierra Leone); SC Res 1343, UN SCOR, 4287th mtg, S/RES/1343 (7 March, 2001) (Liberia); SC Res 1457, UN SCOR, 4691st mtg, UN Doc S/RES/1457 (24 January 2003) (Democratic Republic of Congo); SC Res 1643, UN SCOR, 5327th mtg, UN Doc S/RES/1643 (15 December 2005) (Côte d'Ivoire).

24 *Trials of Nazi War Criminals before the Neurnberg Tribunals under Control Council Law No 10: Neurnberg October 1946–April 1949, Volumes V, VI, VII, VIII, IX* (United States Government Printing Office, 1952). Reproduced at: [www.phdn.org/archives/www.mazal.org/NMT-HOME.htm](http://www.phdn.org/archives/www.mazal.org/NMT-HOME.htm).

25 *The Prosecutor v Dusko Tadic (Appeal Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-A, 15 July 1999) 227–228; *The Prosecutor v Brdjanin (Appeal Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-99-36-A, 3 April 2007) 110–141.

26 International Criminal Court, Office of the Prosecutor, *The Prosecutor on the Co-operation with Congo and other States Regarding the Situation in Ituri, DRC* (26 September 2003); 'Prosecution's Second Amended Indictment', *The Prosecutor v Charles Taylor* (Special Court for Sierra Leone, Case No SCSL-03-01-PT, 29 May 2007); Transcript of Proceedings, 'Evidence of Expert Witness Ian Smillie', *The Prosecutor v Charles Taylor (Trial)*, (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-03-01-PT, 7 January 2008).

responding to such challenges. Such approaches often go beyond a purely legal analysis into the area of regulatory theory. Regulatory theory is distinguished from legal analysis by assessing whether legal systems actually achieve desired social outcomes, and involves the development of models that, when applied, can increase the ability of systems to achieve their desired outcomes.<sup>27</sup>

Two models from the field of regulatory theory, the network model and the pyramid model, stand out for their potential application in relation to the conflict diamonds governance system. Network models, such as the regulatory web or the horizontal government network, emphasise regulatory techniques based on persuasion, dialogue, and socialisation. These models provide for dynamic interaction with non-governmental participants such as business organisations and civil society organisations, and encompass organisations such as the International Labour Organization, which has formalised but largely private processes of naming and shaming, which create a socialisation pressure tending towards normative compliance.<sup>28</sup>

Another model, the regulatory pyramid, was first developed by Ayres and Braithwaite to explain the ways in which regulatory standards for a particular industry may best be enforced when considered within a particular national jurisdiction. The model is useful in that it does not take an either/or approach to the two conflicting schools of regulatory thought: industry self-regulation, and command-and-control regulation. The industry self-regulation school seeks to use soft compliance options involving the engagement of industry to promote best practice outcomes. Rather than imposing a regime from an external source on a particular industry, such approaches seek to empower the industry itself to recognise its own interest in complying with particular regulatory goals. By contrast, so-called command-and-control systems are imposed from government entities beyond the industry itself, using instruments such as criminal prosecution to forcefully bring industry players to account against government legal standards. The regulatory pyramid model seeks to marry these two seemingly disparate systems by suggesting that

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27 Black, J, 'Critical Reflections on Regulation', *Australian Journal of Legal Philosophy*, vol. 27, 2002, 20.

28 Slaughter, A-M, *A New World Order* (Princeton University Press, 2004) 11, 14, 19, 21, 24, 56, 147, 156, 261, 262.

industry self-regulation approaches should be implemented as far as practicable in the absence of command-and-control. As long as this approach based on soft regulation is successful, there is no imperative to change the regulatory dynamic. However, the sensible external regulator will be engaged in careful monitoring of the system for signs of disrepair, at which point sanctions can be ratcheted up and command-and-control can take over as the central regulatory approach. Assuming heavier sanctions such as civil sanctions or fines are successful, and new signs of responsiveness are observed within the industry, sanctions might be ratcheted back down to the status of self-regulation. In the event that compliance is still not forthcoming, more severe strategies might be resorted to, such as criminal sanctions or the dissolution of the corporation. The keystone of the pyramid is that its strategy is to be contingently punitive or forgiving.<sup>29</sup>

More recent thinking in regulatory theory has sought to bring together the salient features of both network and pyramid models to create so-called networked pyramid hybrid models. The networked pyramid hybrid combines network features, such as expanding beyond government players and the focus on techniques of dialogue, persuasion, and socialisation, with pyramid features, which allow for escalation to more coercive interventions where dialogue has proven ineffective. Such modelling has been applied to international regulatory systems, such as the regulatory export of intellectual property standards from the US to other national governments, the field of traditional knowledge as well as the development of the threat of collective debt default by developing countries as a regulatory weapon of the weak.

## Adaptation and Application of the Networked Pyramid

Before applying the networked pyramid model to the conflict diamonds governance system, the book suggests that it might be modified in a number of ways for optimal effect. Firstly, a complex system such as this would benefit from a model that could describe regulatory action

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29 Ayres, I and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992) 20–51.

at international and national levels, where national governments are regulators as well as being regulated. As such, a diagram involving a smaller series of national pyramids at the base of a larger international pyramid is suggested. Furthermore, it is suggested that a regulatory model could benefit from the combination of incentives and sanctions in a single diagram, particularly with reference to the interaction between both sets of interventions. In summary, the revised model is a dual networked pyramid, with the duality being found both in the fact that there is a pyramid within the pyramid, and the combination of sanctions and incentives.

Applying the networked pyramid model to the conflict diamonds governance system provides insights into the analytical power of the model and the areas of potential improvement that might be made to the conflict diamonds system. It is useful, in the first instance, to consider whether the conflict diamonds governance system corresponds descriptively with either or both of the two component models — that is, the degree to which it already embodies the features of a regulatory pyramid or a network. In the event that the legal system is not a perfect fit on the descriptive level, the question to be considered is what changes would need to be made to the system to make a better correspondence with the theoretical model. In the event that these changes would appear to make the conflict diamonds system a more effective system, the models might be considered to be normatively powerful.

The models may be of particular utility in refining the relationship between regulatory actors in the conflict diamonds system, where there is little or no formal institutional linkage, for example between the KP, the UNSC, and the ICC. However, one of the particular challenges in considering the conflict diamonds legal system is that it operates both at the national or domestic level, where the apex of the system is the national government, and at the international level, where the principal regulators are other national governments and international agencies. As such, it may be that a particular model being considered may be a good fit at the domestic level but not at the international level.

While being based primarily on an analysis of existing literature in the fields of conflict diamonds and regulatory theory, the book has also involved a limited exercise in the gathering of primary

data. A representative from the business community, a government representative and an NGO representative were all interviewed in relation to their own views on the effectiveness of the conflict diamonds legal system at tackling the illicit diamonds trade. The interviews were carried out according to standard university ethical procedures, and the qualitative results from the interviews have been incorporated into the body of the book.

## Concluding Remarks

This chapter has sought to introduce the book and provide an overview. After some preliminary remarks, the two research questions were set out:

1. To what extent has the conflict diamonds governance system achieved its objectives?
2. Does an application of the networked pyramid regulatory model to the system provide descriptive or normative insights into its effectiveness?

The chapter also set out the central argument of the book, that the conflict diamonds governance system has been largely successful, but has failed in its efforts to address situations of serious non-compliance by member governments. In accordance with insights from the networked pyramid model, the book argues that procedures for expulsion in such cases must be clearly defined and implemented, and that pathways of escalation to the UNSC and the international criminal tribunals should be strengthened through the creation of a new international crime of trafficking in conflict diamonds. The chapter also delineated a road map for the book, summarising in brief the contribution of each chapter towards responding to the research questions, and advancing the main argument of the book. It also provided a more detailed introduction into the substantive chapters of the work.

This text is taken from *The Lion that Didn't Roar: Can the Kimberley Process Stop the Blood Diamonds Trade?*, by Nigel Davidson, published 2016 by ANU Press, The Australian National University, Canberra, Australia.