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Kimberley at the National Level: Fancy Footwork?

The people back home wouldn't buy a ring if they knew it cost someone else their hand.

From the movie *Blood Diamond*¹

Chapter Overview

National governments, particularly those of diamond-producing nations, are the front-line defences against conflict diamonds. At the heart of the KP is the initial certification by the country of first export that the diamonds are, in fact, free from association with international human rights crimes. For this certification to be meaningful, an effective system of internal controls from the diamond mining site to customs at the place of international export is required. This chapter focuses on those internal controls as well as, to some extent, the internal controls required by cutting and polishing nations, and those nations that are primarily involved in the retail of diamond jewellery. In doing so, the chapter makes an important contribution towards answering the first research question, namely, to what extent has the conflict diamonds governance system achieved its objectives? The chapter considers in detail the manner in which several African

1 *Blood Diamond*, 2006, motion picture, Warner Bros, www.imdb.com/title/tt0450259/quotes.

diamond-producing nations — Angola, the Democratic Republic of Congo (DRC), Côte d'Ivoire, and Sierra Leone — have incorporated internal controls into domestic legislation. By way of contrast with a developed country, the implementation of KP obligations by Australia is also discussed. Finally, legal developments in the Netherlands are considered, most notably the efforts of that government to hold accountable one of its nationals (Gus Kouwenhoven) before its national court system, in relation to resource-based crimes under international law. The chapter closes following concluding remarks.

Implementation at the National Level



Figure 4.1: Kimberley Process: The Domestic Regulatory Pyramid

Source: Author's research.

The Kimberley Process is premised on the idea of a chain of warranties that verifies the origin of rough diamonds from the point of mining to the point at which the diamonds are purchased by consumers at retail outlets. The primary obligations under the Kimberley Process

relate to the regulation of the import and export of conflict diamonds. Each country participant, on export, is required to ensure that each shipment of rough diamonds is accompanied by a duly validated certificate. On import, each participant must require a duly validated certificate be presented by the importer. The participant must also send confirmation of receipt to the exporting authority.² Governments must ensure that no shipment of rough diamonds is imported or exported without such certification, thereby excluding non-participating countries from the rough diamond trade. Transit countries, however, are not required to verify or issue certificates, providing that parcels are not tampered with in transit.

Even where countries have implemented these obligations into their domestic laws,³ such regulation will only apply to the process of exporting or importing diamonds. The Kimberley Process provides that regulation of the initial half of the trade in diamonds, from the point of mining to the point of export, must be guaranteed by states themselves, though little detail of how such internal controls are to be implemented is provided in the international instrument itself. Consequently, this matter has been left to individual states to devise, with varying degrees of success. Similarly, states are responsible for ensuring that rough diamonds that are imported are Kimberley-compliant.⁴

2 Kimberley Process, *The Kimberley Process Certification Scheme* (Core Document, 2002) s III.

3 The Australian Government made the point that the Kimberley Process border control measures must be implemented under the domestic laws or regulations of each participating country. Written Response from Australian Government to Author's Interview Questions (14 September 2007).

4 It is noted that work was initiated within the Kimberley Process regarding the effectiveness of internal controls and industry self-regulation. Kimberley Process, 'Final Communiqué: Kimberley Process Plenary Meeting' (Gatineau, Canada, 29 October 2004). This culminated with the Kimberley Process Plenary's endorsement of a document called the Brussels Declaration on internal controls of participants with rough diamond trading and manufacturing. The declaration gives guidance on requirements for record keeping, spot checks of trading companies, physical inspections of imports and exports, and maintenance of verifiable records of rough diamond inventories. Kimberley Process, '2007 Kimberley Process Communiqué' (Brussels, Belgium, 8 November 2007). A critique of the lack of internal controls in the Kimberley Process is set out in Fishman, J L, 'Is Diamond Smuggling Forever?: The Kimberley Process Certification Scheme: The First Step Down the Long Road to Solving the Blood Diamond Trade Problem' (2005) 13 *University of Miami Business Law Review* 217, 237–238. See also, Global Witness and Partnership Africa Canada, 'The Key to the Kimberley: Internal Diamond Controls: Seven Case Studies' (Report, 2004).

Spearheaded by NGOs, there has been significant pressure for the Kimberley Process Plenary to finalise an administrative decision that sets down particular requirements for internal controls in rough diamond-producing nations. For example, there are currently no specific requirements regarding the licensing of diamond mining and trading activities, or requirements that customs officials have the power to monitor the industry through spot-checks, or even requirements that fines and criminal penalties attach to trafficking black market diamonds. There should be minimum training standards for diamond valuers and customs officials, and requirements regarding how they report back about diamond exports. In the absence of such specifications, it is difficult to ensure that effective internal controls are in place. The task of review teams sent through the peer-review system is made more difficult as there are no established requirements to look for in assessing the internal controls of countries being investigated.⁵

For example, government monitoring officers are not able to monitor effectively on the ground at mining centres. The overall governance of the system is hindered by lack of implementation capacity, and corruption.

One dimension of the problem is that a lot of diamond miners are working in dangerous conditions for very little remuneration, which is an example of the many labour, social, and environmental issues underpinning the conflict diamonds problem. Many of these diggers are unregistered and unlicensed by the national government.⁶

Similar comments, but with a different emphasis, on the issue of internal controls were made by the representative from Rio Tinto in his interview response. The representative stated that regulation by national governments probably varies quite a lot and can be improved. However, he also stated that this was not a fundamental issue from an industry perspective. He suggested that less than 1 per cent of traded diamonds are linked to human rights violations. The representative also stated that further improvements were possible in relation to the Kimberley Process.⁷

5 Kimberley Process, *The Kimberley Process Certification Scheme* (Core Document, 2002) ss III, IV.

6 Interview with Global Witness Representative (telephone interview, 21 May 2007).

7 Interview with Rio Tinto Representative (telephone interview, 30 May 2007).

In order to improve the Kimberley Process, Global Witness and other organisations have urged that the process make explicit the internal controls that are required for different categories of countries. In particular, artisanal diamond producing and trading countries all need separate systems of controls, as do countries with cutting and polishing centres. The creation of the Artisanal Mining Working Group represents an important step in this direction.⁸

According to Global Witness, problems also exist at the point of retail in countries such as the United States. Global Witness argues that there is insufficient checking of shipments, because it is a low priority for business and government. In its interview response, Global Witness highlighted the issue of the ongoing sustainability of the Kimberley Process. With not as many diamonds fuelling conflict, the concern raised was that governments will give up on the Kimberley Process, thereby undermining its power as a preventative measure. As a result, there is the risk of renewed instability in artisanal diamond areas potentially leading to the outbreak of conflict.⁹

A further important mechanism of regulation is through the making and enforcement of contracts. Requirements regarding Kimberley Process obligations could be built into any potential contracts negotiated between government and business. For example, a government contract with a business enabling the mining of a concession could stipulate that the business guarantee that no revenue go to persons linked to human rights violations. Failure to ensure this stipulation could lead to the termination of the contract. Corporations entering into contracts with subsidiaries or other independent businesses could put guarantees of Kimberley Process compliance into their contracts. For example, a diamond retailer might put a guarantee that diamonds being purchased are conflict-free into their purchase contract from a diamond cutter/polisher. Failure to adhere to the

8 Global Witness, 'Kimberley Process Certification Scheme Questionnaire for the Review of the Scheme' (Review Submission, 5 April 2006). At its 6–9 November 2006 meeting, the Kimberley Process Plenary agreed to the creation of a Working Group on Artisanal-Alluvial Production. Kimberley Process, 'Kimberley Process Plenary: Final Communique' (Gaborone, Botswana, 6–9 November 2006).

9 Interview with Global Witness Representative (telephone interview, 21 May 2007).

obligation would constitute breach of the contract. It would be open to national governments to require that retailers or other businesses in the diamond supply chain include such provisions in their contracts.¹⁰

Regulatory Options Under National Legislation

Of importance and interest to any system of regulation is the ability of regulators to enforce their rules. The Kimberley Process core document is not silent simply on the issue of internal controls for governments, but also on the matter of how the import/export certification regime is to be enforced. National governments have an array of enforcement mechanisms available to them to ensure that national industry is compliant with the Kimberley Process. They are able to engage in negotiation and discussion with industry in order to promote compliance with the Kimberley Process. Their ability to engage in negotiation is backed up by the ability to impose sanctions for various types for non-compliance. Naturally, the first of such sanctions is the refusal to grant an export certificate under Kimberley Process procedures. Beyond this, national governments might impose financial penalties or even undertake criminal prosecutions for serious offences.

It would seem logical, in the implementation of the Kimberley Process on the national level, to provide for criminal sanctions for individuals who trade in diamonds in the absence of appropriate certification. This is the simplest method of providing a criminal sanction for violation of the Kimberley Process provisions, as all that must be proven is an absence of a valid Kimberley Process certificate. The sanction should have confiscation of the diamonds and some type of fine as a minimum penalty, with the option of terms of imprisonment where appropriate *mens rea* is present, including situations of repeat offenders. Where there is evidence that a person has been engaged in the conflict diamonds trade, as opposed to simply trading without a certificate, there are further options for national criminal prosecution. This might be considered a more serious offence, as it shows that the

10 Collins, H, 'Regulating Contract Law' in Christine Parker, et al. (eds), *Regulating Law* (Oxford University Press, 2004) 13–32.

attempt to export the diamonds was made in the knowledge that, at some point, the trade benefits militia groups involved in human rights abuses. Of arguably greater seriousness is the crime of contravening United Nations sanctions, where such sanctions have been imposed.¹¹

One of the strengths of prosecutions for trafficking in conflict diamonds, or contravening United Nations sanctions, is the comparative simplicity of making out a case. Rather than requiring the judicial process to consider the intricacies of international crimes prosecutions, it is simpler for a court to consider evidence that an individual has been trading in conflict diamonds that are not correctly certified, and that the person possesses the requisite *mens rea*. Sanctions under national laws could also be applied to corporations themselves, an option not currently available under international criminal law.

Moving squarely into the province of serious international crimes is the prospect of prosecution domestically for conduct amounting to the war crime of pillage, as incorporated into domestic legislation by parties to the *Rome Statute of the International Criminal Court 1998*. Essentially, this crime involves the removal of resources and property without the consent of the legitimate government.¹²

A final option is prosecution for trading in conflict diamonds, by relying on indirect liability for the perpetration of war crimes and crimes against humanity such as murder and torture. Such an approach focuses on human rights violations committed by direct perpetrators, but attributes individual criminal responsibility to those whose role was financing the perpetrators through illegal diamond trading. Any country that is a party to the *Rome Statute* is obliged to legislate domestically for international crimes such as torture and

11 For example, see discussion of the Kouwenhoven case below, which involved a prosecution under Dutch laws that criminalised the infringement of United Nations sanctions.

12 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 8(2)(b)(xvi) (prohibition of pillage in international conflicts), art 8(2)(e)(v) (for non-international conflicts). A further possibility is taking proceedings, based on state responsibility rather than individual criminal responsibility, before the International Court of Justice. Uganda was found to be in breach of its international obligation to prevent plunder by the International Court in the *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda) (Judgement)* (1995) ICJ Rep 90 [213]–[214], [242]–[251]. The relevant obligation that had been breached was the rule concerning pillage in *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, opened for signature 18 October 1907, (entered into force 26 January 1910) art 43.

murder. This possibility is the national analogue of an international prosecution before the court itself, and is discussed in the context of the Kouwenhoven case further below.

Beyond an in-principle consideration of domestic legislative approaches, the actual legislative framework from a number of diamond-producing countries in managing diamond mining and export, including provisions specifically directed against conflict diamonds, are discussed below. Most of the legislation considered relates to African diamond-producing nations. However, the legislative approach of a developed diamond-producing country, Australia, is also considered, by way of comparison. Finally, a domestic prosecution initiated by Dutch authorities in an analogous field to conflict diamonds, the Kouwenhoven case concerning so-called 'conflict timber', is discussed.

Angolan National Legislation

Angola has created a legal regime under its domestic legislation to manage diamond mining activities. The legislation employs two main approaches to the regulation of the mining industry, namely zoning and licensing.¹³ Zoning involves the designation of certain areas as diamond production zones.¹⁴ Public access to such areas is prohibited or restricted, and taking up residence in the area is regulated, as is the carrying on of certain economic activities there, and bringing particular goods into and out of the zone.¹⁵ Criminal offences for contravention of these requirements are created.¹⁶

Under licensing laws, persons are authorised to carry out particular activities in relation to diamond mining activity, such as prospecting, exploration, extraction, trading, and, importantly, export

13 However, other regulatory approaches are also provided for. For example, an income tax regime for diamond mining is established under the *Regulamento do Regime Fiscal para a Indústria Mineira 1996* [Regulation of the Fiscal Regime for the Mining Industry] (Angola) Decree-Law No 4-B/96, 31 May 1996.

14 *Da Lei dos Diamantes 1994* [The Diamond Law] (Angola) Law No 1/92, 7 October 1994 arts 14–23; *Lei sobre o Regime Especial das Zonas de Reserva Diamantífera 1994* [Law on the Special Regime of Zones of Diamondiferous Deposits] (Angola) Law No 17/94, 7 October 1994.

15 *Da Lei dos Diamantes 1994* [The Diamond Law] (Angola) Law No 1/92, 7 October 1994 arts 14–23; *Lei sobre o Regime Especial das Zonas de Reserva Diamantífera 1994* [Law on the Special Regime of Zones of Diamondiferous Deposits] (Angola) Law No 17/94, 7 October 1994.

16 *Da Lei dos Diamantes 1994* [The Diamond Law] (Angola) Law No 1/92, 7 October 1994 arts 28–31.

of diamonds.¹⁷ The government has the ability to inspect and audit all mining activities¹⁸ and suspend or revoke mining licences if required.¹⁹ Criminal offences exist for persons carrying out such activities in the absence of a licence.²⁰ Artisanal mining is specifically regulated through the use of particular zoning and licensing requirements.²¹

Angolan legislation provides, in particular, that diamond exporters must have an export licence, and sets out relevant customs procedures for exporters.²² Classification and valuation of diamonds prior to export is regulated by the national diamond mining agency, *Emprese Nacional de Diamantes*.²³ Unauthorised importation of diamonds into the country is criminalised, as is unauthorised trading in diamonds.²⁴

Congolese National Legislation

The DRC employs the tools of zoning and licensing to regulate its mining industry under its national legislative regime.²⁵ By the use of a zoning mechanism, the government may prohibit mining activity in particular areas.²⁶ When properly licensed, a natural person, public entity or corporation, whether foreign or Congolese, may carry out diamond mining on a large-scale basis.²⁷ Such activities include prospecting, exploration, extraction, trading and export of

17 *Lei das Actividades Geológicas e Mineiras 1992* [Law on Geological and Mining Activities] (Angola) Law No 1/92, 17 January 1992 arts 6–7. Articles 10–13 allow for the granting of exploration rights, a process of determining whether traces of a material are commercially exploitable. The legislation also provides for the licensing of extraction activities.

18 *Ibid* art 24.

19 *Ibid* arts 17, 22.

20 *Da Lei dos Diamantes 1994* [The Diamond Law] (Angola) Law No 1/92, 7 October 1994 ch 6, especially art 24.

21 *Ibid* arts 31–36 creates specific licensing and zone regulations for artisanal miners.

22 *Regime Aduaneiro Aplicável ao Sector Mineiro 1996* [Customs Regime Applicable to the Mining Sector] (Angola) Decree-Law No 12-B/96, 31 May 1996 arts 9, 10.

23 *Da Lei dos Diamantes 1994* [The Diamond Law] (Angola) Law No 1/92, 7 October 1994 art 10.

24 *Ibid* arts 36, 38; *Regime Aduaneiro Aplicável ao Sector Mineiro 1996* [Customs Regime Applicable to the Mining Sector] (Angola) Decree-Law No 12-B/96, 31 May 1996 arts 9, 10.

25 *Loi Portant Code Minier 2002* [Law Relating to the Mining Code] (The Democratic Republic of Congo) Law No 007/2002, 11 July 2002.

26 *Ibid* arts 6, 8.

27 *Ibid* art 5. Under this article, the applicant must specify the type of mineral that will be mined (e.g. diamonds).

diamonds.²⁸ Mining licence applications can be refused or revoked by the government.²⁹ Fines apply to persons undertaking unauthorised mining activities, with minerals being subject to confiscation.³⁰ Also criminalised are theft, possession of stolen minerals, unauthorised trading in minerals, and unauthorised transportation of minerals.³¹ Fraudulent exports are also subject to criminal sanctions.³²

A separate regime applies to artisanal miners. Such activities may be restricted to particular artisanal mining zones and may only be carried out by Congolese natural persons who are licensed for artisanal diamond mining.³³ Only authorised artisanal diamond traders may purchase diamonds from miners and sell them on the domestic market.³⁴ Only diamond trading houses, and their agents, may export artisanally mined diamonds.³⁵

Côte d'Ivoire National Legislation

The Côte d'Ivoire legislative framework provides for protected zones where mining is not permitted, as well as zones where entry is not permitted without authorisation and zones for artisanal mining.³⁶ The legislation sets up licensing systems for mineral prospecting,

28 Ibid arts 18–21 (prospecting), chapter 1 (exploration), arts 63–66, 69, 73, 80 (exploitation, which includes extraction and sale of extracted minerals), art 85 (separate authorisation is required to export 'untreated ores', although it is unclear whether this applies to rough diamonds. Article 266 states that a licence holder can export and sell its production to international markets.). Articles 23 and 25 require that, apart from prospecting, foreign corporations must act through a mining agent in the county. The government requires 5 per cent of the shares of the registered capital of mining corporations who have an exploitation licence. Chapter III of the Mining Code provides that an exploitation licence may apply to artificial mineral deposits known as 'tailings'.

29 Ibid arts 27, 73, 80. Government officials are not permitted to be artisanal or large-scale miners or traders.

30 Ibid art 299.

31 Ibid arts 300–302.

32 Ibid art 234, which refers to sanctions located in customs legislation.

33 Ibid arts 5, 26–27, 109–118. A further category called 'small-scale mining' also exists under Chapter 5 of the Mining Code, which is larger than artisanal mining, but smaller than large-scale mining.

34 Ibid arts 27, 118–119.

35 Ibid arts 120–123. They are required to purchase all artisanally mined substances presented for sale, regardless of quantity or quality, under Article 123. Partnership Africa Canada, an NGO involved in the Kimberley Process, reported that there was evidence of bribes being taken by diamond valuers in the period since 2005, which was the year that the employment of an independent diamond valuer was discontinued. Partnership Africa Canada, 'Diamonds and Human Security: Annual Review 2008' (Annual Report, October 2008) 4–5.

36 *Code Minier 1995* [Mining Code] (Côte d'Ivoire) Law No 95-553, 17 July 1995 title VI (large-scale mining), art 42 (artisanal mining).

exploration and exploitation, as well as artisanal mining.³⁷ Furthermore, the legislation establishes criminal offences to enforce the licensing system, which are punishable by fines, imprisonment or both. Such offences include exploitation, possession, trade and transportation of minerals without authorisation, as well as fraud in relation to these activities.³⁸

Sierra Leone National Legislation

The Sierra Leone legislative framework also provides for zoning in relation to artisanal mining activities.³⁹ Artisanal miners, traders and exporters must also be licensed, and artisanal diamonds are only allowed to be traded between such persons, unless exported under a valid export licence.⁴⁰ Large-scale mining activities, including prospecting, exploration, exploitation and export are also subject to a licensing regime.⁴¹ Fines and terms of imprisonment may be imposed if a criminal offence is successfully prosecuted. Offences include mining, possession, sale or export of minerals without authorisation.⁴²

Australian National Legislation

The Kimberley requirements for the export of rough diamonds were implemented under Australian domestic law under Regulation 9AA of the Customs (Prohibited Exports) Regulations 1958. Under this regulation, the responsible minister may, on application, grant permission for the exportation of rough diamonds to a country by issuing a certificate. The regulation prohibits the export of rough diamonds unless the exporter holds a Kimberley Process certificate, the original is produced to customs at or before the time of exportation and the rough diamonds are exported in a tamper-resistant container.⁴³

37 Ibid titles II, III (large-scale mining), arts 43–45 (artisanal mining).

38 Ibid arts 101–108.

39 *Mines and Minerals Act 1994* (Sierra, Leone) s 20.

40 Ibid ss 76, 79–81, 118.

41 Ibid ss 1, 49, 54–55, 61, 67, 118.

42 Ibid ss 117–118. The legislation also provides for a number of revenue-raising mechanisms for the government (Part XIII).

43 Written Response from Australian Government to Author's Interview Questions (14 September 2007).

Australia has a two-tier system of managing export certification. Occasional exporters are required to apply to the relevant federal department in writing for each shipment and provide documentary evidence of the origin of rough diamonds they wish to export. Applicants are required to complete a criminal history check through the Australian Federal Police. Packages of rough diamonds to be exported must be declared to customs on departure and the certificate presented.⁴⁴

Businesses wishing to regularly export shipments of rough diamonds may apply for a frequent exporter licence. Successful applicants are pre-issued with sequentially numbered stocks of partially completed Kimberley Process certificates. Using database applications supplied by the relevant federal department, the companies are able to complete the details of the goods for shipment and the importing business and then finalise the validation of the Kimberley Process certificate. Details of each Kimberley Process certificate are transmitted to the relevant federal department and incorporated into the Export Authority's database records. Under this decentralised system, frequent exporters work closely with Australian Kimberley Process authorities to manage certification procedures. Customs verifies the shipment satisfies the requirements of regulations at export.⁴⁵

Under import regulation, Regulation 4MA of the Customs (Prohibited Imports) Regulations 1956, the import of rough diamonds is prohibited unless the diamonds are accompanied by a Kimberley Process certificate, they are imported in a tamper-resistant container and the diamonds are imported from a country that is a participant in the Kimberley Process.⁴⁶

The *Customs Act 1901 (C'th)* provides customs with the appropriate powers to enforce compliance with the regulations and take appropriate action. Shipments not meeting the requirements of import or export controls may be detained or seized by customs. Customs undertakes checks to verify compliance in an environment that is largely self-regulated. Customs intervenes in transactions proportionate to the perceived level of risk.⁴⁷

44 Ibid.

45 Ibid.

46 Ibid.

47 Ibid.

The intervention of customs is generally aimed at encouraging compliance and is appropriate to the assessed level of risk. Customs compliance programs focus on assisting clients who are willing and capable of complying with the legislation but there is scope to impose sanctions on entities where appropriate.⁴⁸ Cooperation with industry, facilitated by the relatively concentrated nature of diamond mining industry in Australia has been one of the major strengths of Australia's implementation of the Kimberley Process.⁴⁹

For exports of diamonds from Australia, the relevant federal department may decline to grant a Kimberley Process certificate where the circumstances warrant such action. Import or export of prohibited diamonds is an offence under the *Customs Act 1901*. Regulation 9AA of the Export Regulations makes it an offence to export rough diamonds from Australia without a Kimberley Process certificate. Regulation 4MA of the Customs Import Regulations makes it an offence to import rough diamonds into Australia without a Kimberley Process certificate.

Regulation 4N of the Import Regulations and Regulation 8A of the Charter of the United Nations (Sanctions – Côte d'Ivoire) make it an offence to import rough diamonds into Australia from Côte d'Ivoire (whether or not the rough diamonds originated in Côte d'Ivoire) or of Côte d'Ivoire origin from a third country.

In all cases, offences only apply where rough diamonds are exported from or imported into Australia. There is no specific offence under Australian law of trading in rough diamonds where the trade does not involve Australian territory. The penalty on conviction is not greater than three times the value of the goods or AUD\$110,000 whichever is greater.

According to the Global Witness interview comments, Australia has not had a review visit and there has been no independent verification of its Kimberley Process controls. However, Australia has submitted annual reports every year, and appears to comply with minimum requirements. Global Witness noted that there is generally not much of an issue with conflict diamonds in the large-scale industrial mining sector that is present in Australia. However, the respondent stated

48 Ibid.

49 Ibid.

that Australia appeared to have hands-off regulation much like the US system, and there was a question as to what checks are going on and whether there is sufficient government oversight.⁵⁰

Dutch National Legislation and the Kouwenhoven Case

As discussed above, the utilisation of national war crimes legislation represents a possible avenue for national governments to bring to account those engaged in the conflict diamonds trade. The Netherlands utilised its national war crimes legislation to initiate a prosecution about the related issue of so-called 'conflict timber'. Although not a conflict diamonds prosecution as such, the war crimes legislation was used to prosecute timber trader and Dutch national, Gus Kouwenhoven. Reminiscent of the conflict diamonds problem, Kouwenhoven allegedly provided financial assistance through his logging activities to human rights violators.⁵¹ Kouwenhoven was charged with war crimes for his role in the conflict in Liberia, as well as breaching United Nations sanctions.

The indictment alleged that in at least four locations, Kouwenhoven committed, directly or indirectly, the war crimes of killing, inhuman treatment, looting, rape, severe bodily harm, and offences against dead, sick or wounded persons.⁵² Machine guns and rocket-propelled grenades were used in an attack that made no distinction between

50 Interview with Global Witness Representative (telephone interview, 21 May 2007).

51 Global Witness, *Natural Resources and Conflict under the Legal Spotlight, War Crimes Trial of Gus Kouwenhoven to Commence in The Hague* (21 April 2006). Available at: www.globalwitness.org/library/natural-resources-and-conflict-under-legal-spotlight-war-crimes-trial-gus-kouwenhoven. An interesting discussion of the illegal timber trade and its parallels with the conflict diamonds trade and the Kimberley Process can be found in Salo, Rudy S, 'When the Logs Roll Over: The Need for an International Convention Criminalizing Involvement in the Global Illegal Timber Trade' (2003) 16 *Georgetown International Environmental Law Review* 127, 127–146.

52 *Guus Kouwenhoven, Rechtbank 's-Gravenhage* [District Court of The Hague], Case No AY5160, 7 June 2006, 3. The international criminal law provisions allegedly contravened were the international customary law prohibition on indiscriminate attacks, as well as contraventions of *Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention III)*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) art 130 and common article 3 of the Geneva Conventions. The latter two provisions prohibit torture, inhuman treatment, rape, looting and acts of violence against inactive soldiers and civilians. The modes of individual criminal responsibility with which Kouwenhoven was charged were direct commission, aiding and abetting and superior responsibility.

active combatants and civilians.⁵³ In addition, a house was set on fire, resulting in the deaths of civilians and inactive soldiers.⁵⁴ Such persons were also killed in buildings through the use of grenades.⁵⁵ Civilians and inactive soldiers had their hands amputated, and babies were injured.⁵⁶ Women and children were raped, and the possessions of civilians and inactive soldiers were plundered.⁵⁷

Kouwenhoven's alleged role in these crimes was through selling or supplying weapons, vehicles and equipment, such as machine guns, rocket-propelled grenades, helicopters and trucks to Charles Taylor and his armed forces, and placing staff members with timber companies under threat of dismissal from employment at the disposal of the armed conflict. He was also charged with supplying or giving money, cigarettes, and marijuana to members of the armed forces of Charles Taylor, the Liberian Government, and timber company employees assisting the conflict. He allegedly gave instructions regarding the use of weapons, including heavy weapons and battle methods to the armed forces of Charles Taylor, the government of Liberia and staff members assisting the conflict, telling them that all should be killed without distinction and that looting was accepted.

In two further counts, Kouwenhoven was charged with contravening United Nations sanctions on Liberia, criminalised under domestic Dutch legislation. In particular, Kouwenhoven was charged with supplying Taylor's forces with machine guns, grenade launchers, and mortars.⁵⁸

The decision of the District Court of The Hague in the Kouwenhoven case was delivered on 7 June 2006.⁵⁹ The court found that these basic crimes were committed. However, concerning the role of the accused, the court did not find that Kouwenhoven was individually criminally responsible. In particular, the court found there was insufficient evidence to prove that the defendant had knowledge of the alleged criminal activities of his subordinates. In most instances the security

53 *Guus Kouwenhoven, Rechtbank 's-Gravenhage* [District Court of The Hague], Case No AY5160, 7 June 2006, 4.

54 *Ibid.*

55 *Ibid.*

56 *Ibid.*

57 *Ibid.*

58 *Ibid.*

59 *Ibid.*

employees were former fighters of Charles Taylor's armed forces, and so it could not be concluded that the security employees participated in these acts by order of or with the consent or knowledge of the defendant. The court found it proven that the defendant, together and in conjunction with another, supplied weapons to Charles Taylor, but found that this was not itself sufficient evidence that he directly participated in committing the offences charged under the three counts. The court noted that weapons could have been used for legal acts.

The court, however, found Kouwenhoven guilty of charges four and five, relating to the contravention of United Nations sanctions. Based on evidence adduced in court, the court found that there was a close financial relationship between the defendant and Taylor. There were also personal ties between Kouwenhoven's timber company staff and Liberian Government members. The court found it established that Kouwenhoven played an important role in supplying weapons to Taylor and Liberia. In reaching this conclusion, the court relied in particular on the fact that Kouwenhoven was the owner of a ship called the *Antarctic Mariner*, which had been used to import weapons for the benefit of Taylor and his regime. From this, the court concluded that in 2000, Kouwenhoven was involved in the contravention of UN sanctions. The court rejected a defence to weapons importation on the grounds that the weapons were needed as legitimate self-defence by Liberia. Instead, the court found that the United Nations Security Council had already pronounced that Liberia was acting illegally through supporting the Revolutionary United Front rebels based in Sierra Leone.⁶⁰

The conviction of Kouwenhoven at first instance was overturned on appeal on 10 March 2008.⁶¹ According to the Court of Appeal, the written testimony of a number of witnesses was not considered sufficiently reliable to ground a finding connecting Kouwenhoven with the transport of weapons.

60 Ibid.

61 British Broadcasting Corporation, 'Profile: Guus van Kouwenhoven' (2008). Available at: news.bbc.co.uk/2/hi/africa/5055442.stm.

Although there was no conviction recorded against Kouwenhoven as a result of insufficient evidence, the case is an important precedent for war crimes prosecutions where an individual has allegedly assisted the crime financially rather than being a direct perpetrator. The court was clearly quite prepared to consider the allegations that Kouwenhoven contributed to the commission of the crimes through such indirect means as providing financial assistance, weapons, training, and enforced enlistment of employees to fight in the conflict. If these modes of involvement are recognised as being sufficient in principle to bring about a war crimes conviction, then it would appear that trading in conflict diamonds, to the benefit of human rights violators, and with the appropriate *mens rea*, may also be sufficient to lead to a guilty verdict in a domestic war crimes case.

A further development occurred in 2010, when the Dutch Supreme Court overturned the acquittal by the Appeal Court. The trial re-opened in December 2010, and Kouwenhoven still faces charges of war crimes and illegal arms trading. In November 2014, the court in Den Bosch was to hear arguments for dismissal as there were no witnesses available to testify. The Prosecutor Cara Pronk-Jordan wishes to have the earlier anonymous interviews used as evidence.⁶²

Concluding Remarks

The chapter discussed the implementation of the Kimberley Process at the national level, including regulatory options under national legislation in Angola, the DRC, Côte d'Ivoire, Sierra Leone, Australia, and the Netherlands. A review of legislation and regulatory action at the national level is necessary in terms of responding to the first research question: to what extent has the conflict diamonds governance system achieved its objectives? Legislation in African diamond-producing states focuses on zoning and licensing systems. Zoning is a method of distinguishing kimberlite, industrial areas of mining from artisanal-alluvial mining areas, and is used to designate areas for diamond mining exploration. Licensing denotes systems of authorising persons to carry out particular diamond mining-related

62 Global Witness, *Global Witness Welcomes Dutch Court's Decision to Hear New Prosecution Witnesses in Kouwenhoven Case*. Available at: www.globalwitness.org/en/archive/global-witness-welcomes-dutch-courts-decision-hear-new-prosecution-witnesses-kouwenhoven/.

activities, such as prospecting, exploration, kimberlite mining or artisanal mining. Both zoning and licensing are potentially useful regulatory techniques, with the caveat that implementation of the law is carried out within the bounds of international human rights law. Zoning areas for artisanal mining potentially allows for these miners to carry on a livelihood, while protecting the interests of large-scale industry that are focused more on kimberlite deposits. However, enforcement of zoning, namely moving artisanal miners from kimberlite areas, or unauthorised artisanal miners, has become a justification for government security forces to carry out serious human rights abuses such as rape and murder in countries such as the DRC, Zimbabwe, and Angola. Similarly, the use of licensing, particularly for artisanal miners, as well as diamond traders and exporters, if effectively monitored and enforced, would represent an effective internal control set to ensure that all diamonds being mined and exported are legitimate rather than funding rebel militias or the commission of international crime. The challenge with licensing thus relates to both excessive and inadequate enforcement. Angola and Zimbabwe have seen the excessive use of force, resulting in murder, beatings and rape, in the name of enforcement of rights to mine in artisanal mining areas. At the other end of the spectrum are artisanal areas where there are inadequate bureaucratic resources to manage licensing systems correctly, or in which corruption means that the licensing system will not work properly.

The Australian example shows that Kimberley Process certification requirements, for both import and export, have been implemented into domestic legislation. The challenge of applying the Australian legislative provisions to those of the African producer states lies in the fact that diamond mining in these African countries is largely artisanal, whereas diamond mining in Australia is solely of industrial, kimberlite deposits. A further difference is that Australian diamonds are predominantly industrial grade, and are used as drill bits, rather than jewellery pieces. The Australian approach could therefore be used in relation to large-scale kimberlite mining, for example, in Angola, which has both kimberlite and artisanal sites, but is of little value to the informal artisanal sector. For example, Australia gives blanket approval and Kimberley Process certification in advance to the Rio Tinto operation, although it provides for inspections of the Rio Tinto operation to ensure that domestic regulatory requirements are being

adhered to. It is possible to argue that this approach is appropriate to a large-scale operation in a country not experiencing civil war, and where there are no known international crimes being committed in connection with the mine. Australia takes a different approach for small packets of diamonds that are being exported: the Kimberley Process certificate would only be available by application to the department. Naturally, rough diamond imports require Kimberley Process certificates before importation is accepted.

The Australian experience, on reflection, may not be a good model even in relation to kimberlite diamond mining in African producer countries, because countries such as Angola are only just emerging from situations of civil war, and so a more careful approach to issuing Kimberley Process certificates is warranted. This is particularly the case in Angola, where military and police forces have been implicated in gross human rights abuses since the end of the civil war period. As such, allowing corporations to self-administer KP certificates, even in the presence of regular inspections, would not be a sensible way forward. The Australian experience does not throw light onto the administration of KP internal controls in the artisanal industry. As previously discussed, a system of licensing in principle would be effective, but would require efficient implementation by a bureaucracy that is free from corruption.

The chapter has also considered the landmark Kouwenhoven case, prosecuted in the Netherlands court system. Although it was not a conflict diamonds case, it was a case concerning the interaction between resources, in this case the timber industry, and international human rights crimes committed during the course of the Liberian civil war. An interesting side issue is that this case concerns the relationship of Kouwenhoven to the Liberian regime of Charles Taylor, who was a key player in conflict diamonds trafficking. However, the central value of the case lies in the fact that it largely parallels the type of prosecution that could be initiated in relation to conflict diamonds trading. Instead of trading in diamonds, thereby funding the purchase of weapons and the commission of human rights abuses, Kouwenhoven was accused of misusing his management of the timber industry to assist Charles Taylor's army to carry out gross human rights violations. His timber corporation was allegedly used as a means of purchasing armaments that were later deployed by Taylor's forces. Kouwenhoven allegedly directed his timber corporation employees to join Taylor's

forces, which then carried out human rights violations, including the murder of civilians. The case is yet to be finally resolved by the Dutch court system as the acquittal was overturned in 2010, and the case reopened to hear new prosecution evidence from December of that year.

What is perhaps most interesting about the Kouwenhoven case is that there was no debate, as a matter of law, as to Kouwenhoven's criminal liability, with the multiple appeals turning on whether the evidence was credible and able to sustain the conviction. This means that, regardless of the final outcome of the case, the Dutch court system has accepted that, should it be proved that a person, for example, forced their employees to join an armed force that went on to commit international crimes, that person could be found to be legally responsible for the crimes committed. In this way, the case shows that business leaders can be convicted for their role in the commission of international crimes. It is furthermore possible to imagine that some of the ways that Kouwenhoven was involved in the commission of crimes, through his connection with a timber corporation, might be applied to a different business leader who is involved in the traffic of rough diamonds rather than timber.

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