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Did You Hear Something?: Concluding Remarks

High on the Jungfrau overlooking the town, it had snowed during the night, and for a few moments the clouds broke to reveal the mountain, looming over the town in its brilliant cloak of new white snow. Unresolved issues notwithstanding, it seemed like a metaphor for the event: a brief opening and a small step towards solving a problem that a group of NGOs had been battling for more than four years.

Ian Smillie, on the establishment of the KP in Interlaken, 2002¹

Chapter Overview

This chapter summarises the main findings of the book in response to the original two research questions, and sets out recommendations for improving the conflict diamonds governance system based on these findings, directed towards national governments, non-governmental organisations (NGOs), the diamond industry, the Kimberley Process (KP), the United Nations Security Council (UNSC) and the International Criminal Court (ICC). The chapter then suggests areas for further research before giving concluding remarks.

¹ Smillie, I, *Blood on the Stone: Greed, Corruption and War in the Global Diamond Trade* (Anthem Press, 2010) 191.

Findings

In the first chapter of this book I posited two research questions:

1. Has the conflict diamonds governance system achieved its objectives?
2. Does the networked pyramid regulatory model provide descriptive and normative insights into that system?

Chapter 2 of the book outlined the conflict diamonds problem, showing the connection between the rough diamond trade, conflict, and serious human rights violations in five African producer nations. Chapter 3 introduced the Kimberley Process as the centrepiece of the conflict diamonds governance system, with its import/export certification process established and monitored by industry, government, and civil society representatives. Chapter 4 discussed the operation of the Kimberley Process at the national level. Internationally, the UNSC and the criminal tribunals, the conflict diamonds governance system institutions discussed in Chapter 5, have also played key roles through imposing economic sanctions and carrying out international criminal prosecutions. Chapter 6 reviewed the key models and theories from the field of regulation that would be later be deployed in the form of the dual networked pyramid regulatory model. The salient features of the dual networked pyramid regulatory model were set out in Chapter 7, with networks theory explained by processes of persuasion and socialisation, while pyramid elements established a coherent rationale for deploying more coercive interventions in appropriate cases. Chapter 8 involved responding to the two original research questions by applying the dual networked pyramid model in descriptive and normative terms to the conflict diamonds governance system.

In response to the question of whether the conflict diamonds governance system has achieved its objectives, I have argued that, with the reduction of conflict diamonds traffic to less than 1 per cent of the world's diamond trade, there has been a marked improvement since the pre-Kimberley era. It is also arguable that the success of peace initiatives in Sierra Leone, Angola, Liberia, and Côte d'Ivoire have been in part attributable to the conflict diamonds governance system. Despite ongoing conflict in the Democratic Republic of Congo (DRC) and Central African Republic, the Kimberley Process has

arguably contributed to the emergence of peace and stability in these countries through its handling of blood diamond issues. However, it would appear that it has fallen short of the mark in its response to the emergence of conflict diamonds in Zimbabwe. The seeming inability of the system to grapple with persistent non-compliance by Venezuela has posed a further challenge.

Analysis of the reasons for the conflict diamonds governance system's level of success to date must start with its proven ability to bring together the vast majority of the rough diamond industry, national governments, and concerned NGOs to combat the issue. In an industry that was once considered opaque, the publication of global diamond statistics is a huge breakthrough in transparency. Other monitoring, through annual reports and peer reviews, has a proven ability to highlight relevant issues of non-compliance. The Kimberley Process has even had some level of success with situations of serious non-compliance. On the lower end of the scale, efficacy of the peer-review system to promote normative compliance was demonstrated in the case of Brazil. Once its problems had been highlighted by an NGO report, and confirmed by a Kimberley review visit, Brazil acted conscientiously in taking legal action against illicit trafficking. Another example of success was the initiative taken by the Kimberley Chair, occupied at that time by the Canadian Government, in expelling the Republic of Congo from membership when it became clear that that country was a conduit for smuggled DRC diamonds. The international spotlight in 2017 will be on Australia, as it takes its turn in the difficult position of Chair of the Kimberley Process.

The conflict diamonds governance system has not been an unqualified success. It faces three major problems: the continued role of conflict diamonds in ongoing conflicts in Côte d'Ivoire, the DRC and Zimbabwe; the serious non-compliance and active resistance of two of its members, Zimbabwe and Venezuela; and the threat that, ironically, the Kimberley Process may become a victim of its own success, with some governments calling for it to be dissolved. Of these threats, the inability of the Kimberley Process to deal with the active resistance of its own membership is the most serious. This threat represents not uncertainty in the potential result of Kimberley Process action, but actual failure to take action. While the continued flow of Venezuela's diamonds represents an open breach by which conflict diamonds might contaminate the Kimberley chain of custody, the Zimbabwean

case is worse in that it enables the continued flow of conflict diamonds into the Kimberley system. The Zimbabwe case reflects a number of systemic challenges within the KP itself. Most significant is the inability of the KP to take a purposive approach to understanding the definition of conflict diamonds so that it might confront human rights abuses committed by governments and the perpetuation of conflict through fuelling the financial coffers of militia groups. Alternatively, or in parallel, the KP might have sought an amendment of its definition to cover these circumstances. A related issue concerns the definition of consensus under which the organisation operated. With consensus understood as unanimity, the ability of the organisation to move forward decisively has been hampered. No doubt the lack of a permanent secretariat and budget constraints have also hindered decisive intervention in the face of non-compliance.

It appears a little ironic that the Kimberley Process was able to deal with serious non-compliance by the Republic of Congo early in its mandate, with the chair expelling it from membership following a rapidly deployed review visit, but similar action has not been forthcoming in the cases of Zimbabwe and Venezuela. Certainly, this type of discrepancy leaves the Kimberley Process open to the criticism, as suggested by Global Witness in its research interview response, that the effectiveness of the response is largely dictated by which person is the occupant of the Kimberley Process rotating chair. Perhaps the same argument, put differently, is that there is no clear procedure for dealing with situations of serious non-compliance, including which body (whether the chair or the plenary) is empowered to act. If it is the plenary which is so empowered, there is a further problem in relation to the choosing of consensus as the mode of decision making. Consensus by the plenary voting membership in a decision to expel a national government from the Kimberley Process for serious non-compliance is well-nigh impossible to achieve. If expulsion is to be a regulatory ratchet available to the Kimberley Process, then a majority vote by the plenary is the only viable option.

The Kimberley Process has proven itself able to evolve since the decision to finalise its founding agreement in 2002. Two important examples of this are the peer-review mechanism and the Artisanal Diamond Working Group. When the Kimberley Process Agreement was finalised, there was no monitoring mechanism included in its provisions. Led by NGOs, the Kimberley Process agreed within

its own plenary membership to the creation of the Working Group on Monitoring, the Participation Committee, and the central mechanism of peer review, which has been central to the amount of success that the Kimberley Process has enjoyed to date. Another example, also on the initiative of NGOs, was the Artisanal Mining Working Group. Aware of the centrality of artisanal diamond mining to the problem of conflict diamonds, the plenary was able to approve the creation of a committee mandated to assist with the working conditions of artisanal miners globally. It is this ability to evolve that is now being challenged in relation to its ability to deal with issues of serious non-compliance. Also needing to be addressed is formalisation within the Kimberley Process Agreement, backed up by UNSC resolution, that the definition of conflict diamonds includes diamonds that are connected to human rights violations even in situations where there is no ongoing conflict.

Armed with a clear picture of the success and failure of the conflict diamonds governance system, it is possible to consider insights gained by analysing it in the light of the networked pyramid regulatory model. The coming together of NGOs, industry, and governments to create the Kimberley Process is almost by definition a network approach. It has almost exclusively relied upon methods of persuasion and socialisation, rather than coercion and punitive action. The discussion that occurs in the Kimberley Process Plenary, the information shared by industry about technical issues, or NGOs about compliance issues, and the informal naming and shaming as a result of peer-review visits all represent the standard tool-kit of networked governance. Such approaches confirm what has already been suggested in the literature, that networked governance can achieve a great deal. However, the Kimberley Process has a contribution to make towards networks theory beyond this statement. One of the features of the Kimberley Process that is not accounted for in networks theory is that fact that, as a network, it embodies a separation of interests. This constitutionalist model operates to create checks and balances in the regulatory operation of the Kimberley Process. As such, it represents a very different type of network to the networked regulation of the intellectual property regime. While the initial driver for the intellectual property regime was the profit motive of corporations, supported by the US national government, the Kimberley Process set itself up, at least in the short term, as a break on free-for-all profit maximisation by the

international diamond industry. The role of NGOs and enlightened national governments has been to help socialise big business into choosing long-term, enlightened self-interest over short-term profit maximisation. It has been remarkably successful in this effort, with the diamond industry major players coming on board. This task has naturally been a lot more difficult than promoting immediate self-interest. The separation of interests model establishes a more robust organisational model whereby such a socialisation process can occur. It now faces significant challenges in confronting the immediate self-interest of a number of key national government participants.

The networks theory concept of a node is a valuable tool in recognising the potential of the Kimberley Process to ratchet up interventions by engaging with higher level regulators, such as the UNSC and the international criminal tribunals. The further insights into enhancing the conflict diamonds governance system, however, relate more to the domain of pyramid than networks theory. Part of the success of the Kimberley Process has to be credited to the ongoing efforts of the UNSC and the international tribunals. However, there are a number of ways in which the regulatory ratchet from expulsion to UN sanctions to international prosecutions can be strengthened. Chief amongst these is the creation of an international crime of trafficking in conflict diamonds, which is defined in the ICC statute in terms of a contravention of UNSC diamond-trading sanctions. With the benefit of such an amendment, the threat of escalation to the UNSC and then the ICC becomes more meaningful, thereby enhancing the ability of the Kimberley Process to carry a big stick at the same time as it speaks softly. The enactment of a crime of trafficking in conflict diamonds at the domestic level would be a logical progression of this connection. It would create a fitting apex to the regulatory pyramid at the domestic level: the pyramid within the pyramid. The base of the national pyramid also needs attention, as national government backing to initiatives such as the Diamond Development Initiative International would assist working conditions for artisanal diamond miners, thereby reducing the incentive to sell to illegal operatives engaged in human rights abuses.

Further Research

Further research projects might relate to the theoretical and empirical investigations of this book. On the theoretical side, the dual networked pyramid model might usefully be applied to other complex international systems, such as the intellectual property system, so as to determine its strengths and weaknesses in other contexts. In relation to the conflict diamonds governance system, further studies might investigate the extent to which the KP is responsive to undertaking a wider mandate based around the concept of development diamonds.

Concluding Remarks

This chapter has summarised the findings of the book in response to the two research questions. The first question sought to assess how effective the conflict diamonds governance system has been in meeting its goals. In response, the book argues that it has achieved a measure of success, notably reducing the quantity of conflict diamonds in the international system from estimates as high as 15 per cent in the 1990s to less than 1 per cent in recent years,² and establishing an innovative tripartite partnership that has socialised the major diamond industry players into becoming active proponents of the Kimberley Process. The system as a whole is able to draw on a range of enforcement mechanisms, from horizontal peer review and informal naming and shaming, to expulsion for serious non-compliance, and, through its networked relationship with the UNSC and international tribunals, UNSC diamond embargoes and international criminal prosecutions.

Despite the measure of success it has achieved, the Kimberley Process and its collaborators have fallen into a state of deepening crisis, beginning with its inability to manage serious non-compliance by Venezuela in 2006. Even worse, the KP did not act decisively following the commission of international human rights crimes by Zimbabwe and Angola in artisanal diamond fields in those countries. This inability to quarantine conflict diamonds from Zimbabwe and Angola from the KP regime continues to undermine the legitimacy of the conflict diamonds system and may lead to complete system failure.

2 For discussion about estimates of the quantity of the conflict diamonds trade, see Chapter 2.

The second question asks whether the dual networked pyramid model offers a description of how conflict diamonds governance currently operates or if it may be deployed normatively so as to suggest ways in which the system might be improved. The networked pyramid model is a hybrid, combining insights from networks theory, the regulatory pyramid model, and the pyramid of rewards. Networks theory suggests that regulation occurs through the combined operation of different individuals and organisations, which are considered roughly on equal terms. Its main regulatory techniques are dialogue and persuasion, and informal naming and shaming, which together create a process of socialisation towards compliance with a particular set of standards. Networks theory is an intuitive fit for the Kimberley Process, which combines networks of national governments, NGOs and diamond industry corporations. Acting as a command centre or node for these networks, the Kimberley Process is able to collect information and deploy a range of regulatory interventions, including peer-review reporting, which largely resembles the informal naming and shaming of networks theory. Indeed, one of the most dramatic examples of socialisation in the KP is the manner in which major diamond corporation, and alleged conflict diamonds trader, De Beers, became a stalwart proponent of the new system.

It is, however, the regulatory pyramid model that is best able to give insight into the deployment of more coercive interventions, where these are appropriate. The conflict diamonds governance system intuitively fits this model, with regulation at the national level regulated by the informal naming and shaming through the KP peer-review process. The system appears to be floundering, however, in being capable of ratchetting up from here to expulsion from the KP in the event of serious non-compliance. To achieve this, the KP needs to clearly define what constitutes serious non-compliance, clarify that the definition of conflict diamonds includes diamonds connected to grave human rights abuses, abandon the consensus approach to these issues when considered by the plenary, and empower the rotating Kimberley Process Chair to take expeditious expulsion decisions where time is of the essence.

Further improvements to current KP governance involve strengthening links to regulators at higher levels of the regulatory pyramid, namely the UNSC and the ICC. The UNSC has at its disposal a more powerful diamond embargo than the KP, which is binding under international

law. It would serve to strengthen the effectiveness of the system if the UNSC saw itself as a type of appeals body in relation to the KP. That way, a serious non-compliance issue might be forwarded to it for consideration, or it might consider the issue on its own motion, and impose a diamond embargo in situations where the KP has failed to act for political or other reasons. Such action would strengthen the hand of the KP, making it clear to member states in serious non-compliance that the UNSC will take action if the KP doesn't. Contemplation of conflict diamonds governance in terms of the regulatory pyramid gives further insights into how the ratchetting-up pathway might be strengthened. Legislating for a specific crime of trading in conflict diamonds under the statute of the ICC would be a strengthening measure, particularly if the new crime was defined in terms of breaching UNSC diamond-trading embargoes. If such a crime were created, then the UNSC diamond-trading embargo would be strengthened as an intervention, because sanctions busting would carry with it the possibility of international criminal prosecution. All of these developments at the UNSC and international tribunal levels would strengthen the hand of the KP in carrying out its activities. This is because responsiveness to the KP speaking softly would be increased so as to avoid the possibility of the big stick.

The KP is in a state of crisis and needs to consider seriously the measures suggested above so as to protect the integrity of its activities from the taint of conflict diamonds originating from Zimbabwe and Angola. Without diminishing the importance of this primary activity, an organisation is sometimes bolstered by envisioning a future for itself above and beyond the crisis in which it finds itself. If the KP is to move beyond simply fixing its current problems, and look at a longer-term preventative mandate, it would do well to reflect on insights available from the pyramid of rewards. This model is the carrot to the regulatory pyramid's stick. It promotes the concept of development diamonds voluntarily certified against aspirational standards as a counterpoint to diamonds that must be certified as conflict-free prior to export. If artisanal diamonds are, for example, mined without the use of child labour, they would qualify for the development diamonds label, which would enable them to access greater profits through being sold as a fair trade commodity. Should the KP become the central administrator of this system, it could generate a standards-raising regulatory ratchet, whereby today's aspirational standard becomes

tomorrow's mandatory standard, without which rough diamond export would be prohibited. Beyond the certification of development diamonds, a system of escalating rewards might include the practice of naming and faming NGOs, industry groups, and national governments who have made the greatest progress towards aspirational standards. A notch up, grants might be made available for projects supporting the achievement of aspirational standards. At the apex of the pyramid, if it had been merited, might be nomination for a Nobel Peace Prize.

This chapter has also included a number of recommendations to national governments, the Kimberley Process, the UNSC, and international criminal tribunals for action to strengthen the conflict diamonds governance system. Finally, the chapter has suggested new areas for further research, in relation to both theoretical areas of interest and the conflict diamonds governance system.

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.