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THE KIMBERLEY PROCESS' LEGACY: HOW THE 2000  
CERTIFICATION PROCESS FOR CONFLICT-FREE DIAMONDS  
CAN HELP SOLVE CONTEMPORARY HUMAN RIGHTS  
VIOLATIONS WITHIN THE COBALT & COLTAN  
MINING INDUSTRIES

Claire Henleben

**I. Introduction**

One might speculate that a country rich in natural resources – such as oil, timber, or minerals – would be well off and that its people would prosper given the country's wealth. However, this is not the reality in many countries where these riches abound; the “resource curse” has cast its shadow over regions which otherwise should have profited from their natural resources.<sup>1</sup> To blame for this unexpected misfortune is often the same set of circumstances: civil war and government overthrow coupled with the exploitation of a vulnerable population.<sup>2</sup> This problem resurges repeatedly in countries which meet these circumstances and where the population extracts a material of value from the earth.<sup>3</sup> This comment seeks to highlight past iterations of this phenomenon, analyze where and how prior solutions have gone wrong or made headway, and finally, to apply those solutions to current resource crises in need of an effective solution.

Although historical precedent details generations of the exploitation of natural resource mining by those waging war in developing nations, the issue did not gain international attention or outrage until the 1990s and the beginnings of civil war in Sierra Leone and Angola.<sup>4</sup> Sierra Leone, as a country affected by the so-named resource curse, is rich in natural diamond stores beneath its soil, and yet is not itself a wealthy nation.<sup>5</sup> Exploitation of these diamond reserves first materialized in 1991 when the Revolutionary United Front (“RUF”) launched its violent campaign to overthrow the Sierra Leonean government.<sup>6</sup> The RUF, in need of funding for its fast-growing regime, turned to the country's diamonds as a read-

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<sup>1</sup> Ingrid J. Tamm, *Dangerous Appetites: Human Rights Activism and Conflict Commodities*, 26 HUM. RTS. Q. 687-704 (2004); Maarten Voors, *Resource and Governance in Sierra Leone's Civil War*, 53 J. OF DEV. STUD. 278, 280 (016).

<sup>2</sup> Katharina Wick & Erwin Bulte, *The Curse of Natural Resources*, 1 ANN. REV. OF RESOURCE ECON. 139, 140-143 (009).

<sup>3</sup> Duncan Brack, *The Growth and Control of International Environmental Crime*, 112 ENV. HEALTH PERSP. No. 2 A80-81 (2004).

<sup>4</sup> Philippe Le Billon, *Diamond Wars? Conflict Diamonds and Geographies of Resource Wars*, 98 ANNALS OF THE ASS'N OF AM. GEOGRAPHERS 98:2, 345-72 (2008).

<sup>5</sup> Sigismund A. Wilson, *Sierra Leone's Illicit Diamonds: The Challenges and the Way Forward*, 76 GEOJOURNAL 191-212 (2011).

<sup>6</sup> *Id.*

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ily-available solution.<sup>7</sup> RUF recruiters forcibly compelled able-bodied Sierra Leoneans to excavate the country's rivers and hillsides for diamonds and recruited child soldiers to fight in the rebels' military forces.<sup>8</sup> Unearthed diamonds were then smuggled out of the country and sold for profit, which the RUF used to finance its campaign to overthrow Sierra Leonean president Joseph Saidu Momoh – the country's leader since 1985.<sup>9</sup>

In an attempt to corral Sierra Leone's ever-growing conflict diamond exports and mitigate the damage inflicted as a result of mass forced labor, the United Nations drafted Resolutions 55 and 56, along with the ratification of the Kimberley Process Certification Scheme ("Kimberley Process") in 2000. The Kimberley Process was instrumental in controlling the RUF's exploitation of human labor as well as the global diamond trade's problematic business practices which contributed to conflict diamonds' distribution.<sup>10</sup> Consequently, the global diamond industry currently employs standards which have their roots in the United Nations' Kimberley Process and have all but eliminated the practice of illegal conflict diamond mining in Africa.<sup>11</sup> However, the Kimberley Process is not without its faults.

Following the onset of civil war in 1998, the Democratic Republic of Congo ("DRC") suffered many of the same resource curse symptoms as Sierra Leone in the early 1990s.<sup>12</sup> Although its second civil war officially ended in 2003, the associated abuse of the country's natural resources still continues to plague the central African state.<sup>13</sup> However, in DRC's case, the substance in question is not diamonds, but coltan and cobalt: two minerals essential to the manufacturing of nearly every electronic and mechanical device worldwide, including televisions, telephones, laptops, cars, and planes.<sup>14</sup> DRC sits upon soil containing 60% of the world's coltan stores, which rebel groups continuously exploit in order to finance their fight against the DRC government.<sup>15</sup> Currently, there are no long-term solutions to this ongoing domestic conflict, and the coltan and cobalt industries re-

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<sup>7</sup> *Id.*; see also Maarten Voors, *Resource and Governance in Sierra Leone's Civil War*, 53 J. OF DEV. STUD. 278, 280 (2016).

<sup>8</sup> Alfred B. Zack-Williams, *Sierra Leone: The Political Economy of Civil War*, 20 THIRD WORLD Q. 143, 145-150 (1999); see also Sigismund A. Wilson, *Sierra Leone's Illicit Diamonds: The Challenges and the Way Forward*, 76 GEOJOURNAL 191-212 (2011).

<sup>9</sup> Sigismund A. Wilson, *Sierra Leone's Illicit Diamonds: The Challenges and the Way Forward*, 76 GEOJOURNAL 191-212 (2011).

<sup>10</sup> John Michael Durnovich, *This Land is My Land: Mending the Kimberley Process and Promoting Stability in Sub-Saharan Africa by Reinforcing Individual Property Rights*, 39 N.C. J. INT'L L. & COM. REG. 885 (2014) [hereinafter Durnovich].

<sup>11</sup> *Id.*

<sup>12</sup> AMNESTY IN'L, *THIS IS WHAT WE DIE FOR: HUMAN RIGHTS ABUSES IN THE DEMOCRATIC REPUBLIC OF THE CONGO POWER THE GLOBAL TRADE IN COBALT*, 14-54 (2016).

<sup>13</sup> Zandi Shabalala, *Cobalt to be Declared a Strategic Mineral in Congo*, REUTERS, (Mar. 14, 2018), <https://www.reuters.com/article/us-congo-mining-cobalt/cobalt-to-be-declared-a-strategic-mineral-in-congo-idUSKCN1GQ2RX>.

<sup>14</sup> *Id.*

<sup>15</sup> THE HAGUE CENTRE FOR STRATEGIC STUDIES, *COLTAN, CONGO & CONFLICT: POLINARES CASE STUDY*, 43-44 (2013).

main largely unregulated.<sup>16</sup> This comment proposes that the application of the Kimberley Process – with amendments to fill in gaps where the Process has failed to meet expectations – will help alleviate the DRC's burgeoning conflict coltan and cobalt crises.

## II. Background: The Kimberley Process

The Kimberley Process Certification Scheme entered into force in 2003 as a method for remedying the conflict-ridden diamond industry in Western Africa, and to further regulate an industry which had been allowed to flourish for decades without significant supervision.<sup>17</sup> But in order to fully comprehend why the Kimberley Process was a necessary means to ending uncontrolled and egregious human rights abuses, one must first understand why the diamond trade was first able to grow into such a lucrative industry at all.

With the resurgence of civil wars in Angola, Sierra Leone, Rwanda, and Liberia, rebel groups hoping to overthrow their respective domestic governments needed capital with which to fund their revolutions.<sup>18</sup> One of the first solutions to this problem proposed – and subsequently adopted by the United Nations General Assembly – was to impose sanctions upon those countries which were the most notorious abusers of human rights so as to set an example for other violators worldwide.<sup>19</sup> However, this solution proved not to be as successful at remedying the problem as the United Nations had hoped.<sup>20</sup> Instead of thwarting bad business practices and unethical mining conditions, the sanctions instead placed the heaviest of burdens on ordinary people which the sanctions were intended to protect, thus leaving the responsible government bodies and rebel regimes largely unaffected.<sup>21</sup> Furthermore, even aptly-named “smart sanctions” imposed by the United Nations in response to initial sanctions' failure to corral the diamond industries in Angola and Sierra Leone were unsuccessful – largely due to lack of full implementation.<sup>22</sup> Therefore, because traditional measures which ordinarily would have been effective in regulating a runaway human rights-violating industry proved fruitless, the United Nations crafted a new program aimed at the dismantling of the intensely problematic gemstone market: the Kimberley Process.<sup>23</sup>

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<sup>16</sup> Nakirfai Tobor, *The Democratic Republic of Congo Declared Cobalt and Coltan Strategic Mineral*, IAFRIKAN, (Mar. 31, 2018), <https://www.iafrikan.com/2018/03/31/the-democratic-republic-of-congo-will-declare-cobalt-a-strategic-mineral/>.

<sup>17</sup> Holly Burkhalter, *Between the Lines: A Diamond Agreement in the Rough*, 135 FOR. POL. 72-73 (2003) [hereinafter Burkhalter].

<sup>18</sup> *Id.*; see also THE HAGUE CENTRE FOR STRATEGIC STUDIES, COLTAN, CONGO & CONFLICT: POLINARES CASE STUDY, 76-79 (2013).

<sup>19</sup> Burkhalter, *supra* note 17.

<sup>20</sup> Alben P. Petrova, *The Implementation and Effectiveness of the Kimberley Process Certification Scheme in the United States*, 40 INT'L LAW. 945-60 (2006) [hereinafter Petrova].

<sup>21</sup> Virginia Haufler, *The Kimberley Process Certification Scheme: An Innovation in Global Governance and Conflict Prevention*, 89 J. OF BUS. ETHICS 403-16 (2010).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*; KIMBERLEY PROCESS: ABOUT, <https://www.kimberleyprocess.com/en/about> (last visited Jan. 3, 2019).

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Motivated by international outrage in response to global diamond mining practices, as well as war crimes committed by rebel regimes hoping to earn a profit from their country's natural resources, the United Nations began negotiations and international discussions on the creation of the Kimberley Process in 2000.<sup>24</sup> After three long years of deliberation, the Kimberley Process entered into force and became a legally binding certification scheme for all member states of the United Nations in 2003.<sup>25</sup>

In order to remedy ongoing human rights violations in connection with unethical diamond mining procedures in affected countries, the Kimberley Process implemented measures aimed at decreasing the likelihood of conflict diamonds making their way into global diamond distribution channels.<sup>26</sup> The first and most significant of these measures was the introduction of Kimberley "certifications". Under the Kimberley Process' certifications, rough diamonds (diamonds which are unpolished and cut raw from the earth by excavators) were to be gathered into bundles and packaged together into groups of other uncut diamonds and given a certification that those enclosed diamonds were not borne of humanitarian violations, unethical diamond mining conditions, or slave labor.<sup>27</sup> Enclosed with the certification was tamper-resistant and forgery-proof documentation that the stones in that particular parcel were all eligible for distribution and in compliance with United Nations' standards for human rights and best business practices.<sup>28</sup>

In addition to its certifications, the Kimberley Process launched additional measures at the state and local levels of government in 40 participating nations.<sup>29</sup> In those participating states, including Angola and Sierra Leone, the governments of each were required to ensure that the diamonds bound for global distribution were packaged in sealed containers, that they were properly certified, and that the diamonds inside did not originate from countries not in compliance with the Kimberley Process.<sup>30</sup> Furthermore, member states would be required to disclose information concerning their individual diamond output, including diamond production levels and specific hurdles or problems the state faced in implementing Kimberley Process programs.<sup>31</sup> Finally, in addition to the Kimberley Process certificates and specific disclosure requirements, member states were required to implement domestic legislation aimed at eliminating conflict diamond exports

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<sup>24</sup> Durnovich, *supra* note 10.

<sup>25</sup> Burkhalter, *supra* note 17.; *see also* THE HAGUE CENTRE FOR STRATEGIC STUDIES, COLTAN, CONGO & CONFLICT: POLINARES CASE STUDY, 76-79 (2013).

<sup>26</sup> Durnovich, *supra* note 10.

<sup>27</sup> U.S. DEPT. OF STATE, CONFLICT DIAMONDS AND THE KIMBERLEY PROCESS, <https://www.state.gov/conflict-diamonds-and-the-kimberley-process/> (2017); Burkhalter, *supra* note 17.

<sup>28</sup> Burkhalter, *supra* note 17.

<sup>29</sup> *Id.*

<sup>30</sup> Joseph Hummel, *Diamonds Are a Smiggler's Best Friend: Regulation, Economics, and Enforcement in the Global Effort to Curb the Trade in Conflict Diamonds*, 41 THE INT'L. LAW. 1145, 1145-1151 (2007).

<sup>31</sup> Durnovich, *supra* note 10.

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with accompanying procedures for adjudication and prosecution of humanitarian rights violators.<sup>32</sup>

### III. Effectiveness Of The Kimberley Process

The Kimberley Process has maintained a legacy – both positive and negative – in the international community for its progress in eliminating conflict diamonds from global distribution.<sup>33</sup> As a secondary mechanism for ensuring the program's success, third party NGO's and non-diamond-distributing United Nations member states were invited to submit their own independent findings concerning the Process' progress.<sup>34</sup> These organizations and states, including Global Witness and Partnership Africa Canada (PAC), serve as official observers to the Kimberley Process.<sup>35</sup> This third party encouragement strengthened the Kimberley Process' peer review procedures and allowed for foreign, neutral observer states and organizations to lend their expertise to Kimberley Process member states.<sup>36</sup>

The Kimberley Process has in fact satisfied one of its main goals in that it has succeeded at significantly decreasing conflict diamonds' role in funding rebel regimes in West African particularly vulnerable countries.<sup>37</sup> Angola and Sierra Leone in particular found their success through adherence to four central mandates imposed upon member states to the Kimberley Process.<sup>38</sup> First, states must enact domestic legislation which satisfies the import and export requirements and working conditions standards specified in the Kimberley Process.<sup>39</sup> Second, states must collaborate and share statistical data concerning the nations' diamond exports, including data concerning the region of diamond excavation, accompanied by a documented warranty that the stones are ethically sourced.<sup>40</sup> Third, states are bound only to engage in trade and diamond-related commerce with other Kimberley Process-complying nations.<sup>41</sup> Finally, all stones bound for exportation and international sale must have an accompanying Kimberley Process

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<sup>32</sup> Burkhalter, *supra* note 17; NIGEL DAVIDSON, *THE LION THAT DIDN'T ROAR: CAN THE KIMBERLEY PROCESS STOP THE BLOOD DIAMONDS TRADE?* 73-126 (2016).

<sup>33</sup> Andrew H. Winetroub, *A Diamond Scheme is Forever Lost: The Kimberley Process's Deteriorating Tripartite Structure and its Consequences for the Scheme's Survival*, 20 *IND. J. OF GLOBAL LEGAL STUD.* 1425, 1425-44 (2013) [hereinafter Winetroub].

<sup>34</sup> Burkhalter, *supra* note 17.

<sup>35</sup> Winetroub, *supra* note 33.

<sup>36</sup> *Id.*

<sup>37</sup> Winetroub, *supra* note 33.

<sup>38</sup> Petrova, *supra* note 20.

<sup>39</sup> Khaled Fayyad, *The Kimberley Process and The Unfulfilled Promise of a Conflict-Free Diamond Industry*, *SEMINAR ON CORP. AND INT'L LAW* (May 7, 2018), <https://sites.duke.edu/corporations/2018/05/07/the-kimberley-process-and-the-unfulfilled-promise-of-a-conflict-free-diamond-industry/> [hereinafter Fayyad].

<sup>40</sup> *Id.*; see also Kimberley Process Certification Scheme, *KIMBERLEY PROCESS*, at Section II, [hereinafter KPCS].

<sup>41</sup> *Id.*

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certificate guaranteeing the stones' collective compliance with the Kimberley Process regulations for ethically-sourced stones.<sup>42</sup>

Sierra Leone and Angola responded well to these four goals and in turn, forever changed the diamond industry.<sup>43</sup> According to the World Diamond Council, since the inception of the Kimberley Process, merely a fraction of one percent of all diamonds exported from Kimberley Process member states are "conflict diamonds."<sup>44</sup> This number has dramatically decreased since the 1990s in Angola and Sierra Leone, in which an estimated 15% - 20% of diamonds originated from mines employing slave and child labor.<sup>45</sup> Sierra Leone in particular has managed to maintain a steady stream of ethical diamond exports – the country imported \$126,652,633 in diamonds in 2004 and \$122,101,392 in 2017.<sup>46</sup> Moreover, the percentage of diamonds sourced unethically has dropped to less than 1%, compared to 14% in 1991.<sup>47</sup> As such, Sierra Leone has been able to continue the distribution of its most valuable export without sacrificing its attention to human rights.<sup>48</sup>

However, the Kimberley Process still left plenty room for improvement. The first of the Process' flaws concerns the original document's definition of "conflict diamonds."<sup>49</sup> The Kimberley Process refers to conflict diamonds as, "rough diamonds used by rebel movements. . .to finance conflict aimed at undermining legitimate governments."<sup>50</sup> Unfortunately, this definition falls short of encompassing all possible unethically-sourced stones because (a) it is contingent upon the existence of a government being actively overthrown or having attempts of the same and (b) it refers only to stones sourced for the purpose of funding anti-governmental regimes.<sup>51</sup>

The consequences of this narrow definition are evident in the continued – albeit much less significant – abuse of human rights in the diamond mining industry. All that a diamond distributor, wholesaler, or miner must do in order for his or her diamonds to fall outside the definition of "conflict diamonds" – and to thus not be bound by the Kimberley Process – is to refrain from using funds from the diamonds' profit to finance rebel regimes.<sup>52</sup> Of course, the assurance that funds from diamond sales will not reach rebel hands is nearly impossible to guar-

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<sup>42</sup> *Id.*; see also KPCS, *supra* note 40, at Section II, Appendix I.

<sup>43</sup> Nazreen Shaik-Peremanov, *Ten Years On, The Kimberley Process Certification Scheme and Zimbabwe's Marange and "Conflict Diamonds": Lessons to be Learnt*, POTCHEFSTROOM E.L.C. L.J. 326, 326-66 (2014).

<sup>44</sup> Fayyad, *supra* note 39.

<sup>45</sup> *Id.*

<sup>46</sup> Sierra Leone, KIMBERLEY PROCESS PARTICIPANTS AND OBSERVERS, (Apr. 18, 2019), <https://www.kimberleyprocess.com/ee/sierra-leone-0>.

<sup>47</sup> Winetroub, *supra* note 33.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> KPCS, *supra* note 40, at Section I.

<sup>51</sup> Barbara Harlow, *The "Kimberley Process": Literary Gems, Civil Wars, and Historical Resources*, 3 THE NEW CENTENNIAL REV. 219, 220-24 (2003).

<sup>52</sup> Winetroub, *supra* note 33, at 1432-34.

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antee, especially in countries where armed conflict (or even the potential of armed conflict) currently threaten the state's sovereign government.<sup>53</sup>

Additionally problematic is the fact that the Process's terms are limited only to diamonds.<sup>54</sup> At the exclusion of all other gemstones, minerals, and resources that might be – and *have* historically been – exploited by those wishing to profit from the unethical sale of these materials, the Kimberley Process has defined its scope far too narrowly.<sup>55</sup> And although the Kimberley Process undoubtedly has an impressive history of almost entirely eliminating unethical diamond mining practices, other conflict minerals have gone largely ignored by would-be watchdog programs.<sup>56</sup>

However, the Kimberley Process has perhaps an even larger problem specifically regarding the complicated network of hoops that collaborating states must jump through in order to reach a consensus, which is especially problematic when immediate action is critical.<sup>57</sup> For example, if a country in the Kimberley Process network asserts that the most prudent course of action is to enact stricter regulations concerning the certificates given to batches of stones, then that country would have to propose a vote of all Kimberley Process nations.<sup>58</sup> The parties must then reach a consensus before enacting any changes to the Kimberley Process' existing framework, including proposals for changes to the certificates or requests for enforcement against non-compliant parties.<sup>59</sup> In practice, a consensus is often difficult to reach, considering the large number of states involved with the Process, and so countries' proposed improvements often fall to the wayside with time.<sup>60</sup>

Yet another problem with the Kimberley Process' effectiveness lies in its weak legal framework.<sup>61</sup> Because the United Nations wanted to incentivize as many states as possible to become signatories, the Kimberley Process was not self-executing. This is because the Process' drafters hoped that this design would allow member states to create legislation of their own, tailored to their country's specific needs and circumstances. And although executing legislation is required in order for signatories to officially join the Process, there are surprisingly few guidelines which outline the actual content or strictness of member states' implementing legislation.<sup>62</sup> Therefore, due to the United Nations precedential deference to state sovereignty, the Kimberley Process was designed in a way that

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 1429.

<sup>55</sup> *Id.* at 1432.

<sup>56</sup> Petrova, *supra* note 20, at 947.

<sup>57</sup> Winetroub, *supra* note 33, at 1432.

<sup>58</sup> *Id.*; NIGEL DAVIDSON, THE LION THAT DIDN'T ROAR: CAN THE KIMBERLEY PROCESS STOP THE BLOOD DIAMONDS TRADE? 73-126 (2016).

<sup>59</sup> HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH STATEMENT ON THE KIMBERLEY PROCESS, <https://www.hrw.org/news/2016/06/06/human-rights-watch-statement-kimberley-process> (June 6, 2016).

<sup>60</sup> *Id.*; see also Fayyad, *supra* note 39.

<sup>61</sup> Winetroub, *supra* note 33, at 1436.

<sup>62</sup> KPCS, *supra* note 40, at Section IV.

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promotes states' ability to be as severe or lenient in their executing legislative language as desired.<sup>63</sup>

Aside from these shortcomings, the Kimberley Process' perhaps most fatal flaw concerns its focus on batches of diamonds as a whole instead of the treatment of stones individually.<sup>64</sup> Because the Kimberley Process certificates apply only to large batches of diamonds – sometimes in the hundreds or thousands depending on stone size – non-ethically sourced stones often comprise at least a small portion of otherwise certified stones.<sup>65</sup> Smugglers, wholesalers, and prospective buyers intending to transport conflict diamonds across state borders can easily work around Kimberley Process regulations by adding conflict stones to previously-certified batches.<sup>66</sup> Furthermore, because individual diamonds have no bar codes, tags, or documentation of their origin past the point of certification, there is virtually no way of differentiating “blood diamonds” from a batch of hundreds of otherwise Kimberley-compliant stones once they are bundled together.<sup>67</sup>

Looking to the culmination of problems with the Kimberley Process' efficacy, it becomes apparent that the Process' multiple regulations and guidelines for compliance focus too heavily on the end product – the diamonds – instead of the root of the problem: the human rights abuses which sparked international outrage in the first place. Therefore, if future iterations of the Kimberley Process hope to be more successful in eliminating loopholes and providing for the most effective means of compliance, the United Nations must shift its focus from the diamonds themselves to the people or institutions inflicting harm.

### IV. The Issues Of “Conflict Cobalt” & “Conflict Coltan”

The Democratic Republic of Congo is similar to Sierra Leone, Angola, and other Kimberley Process member states in many ways; all have dealt with an onslaught of rebel attempts to overthrow the states' sovereign governments, all have not-so-spotless human rights records, but perhaps most strikingly, all have an abundance of natural, valuable resources.<sup>68</sup> Whereas Sierra Leone, Angola, and Zimbabwe are rich in diamonds, DRC's resource wealth lies in the soil's natural cobalt and coltan stores.<sup>69</sup> Unfortunately, DRC has been unable to overcome its own “resource curse” in a manner similar to its West African neighbors in that the country is rife with human rights abusers – specifically due to runoff

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<sup>63</sup> Winetroub, *supra* note 33, at 1436.

<sup>64</sup> KPCS, *supra* note 40.

<sup>65</sup> Michael L. Ross, *How do Natural Resources Influence Civil War? Evidence from Thirteen Cases*, 58 INT'L ORG. 35, 35-67 (2004).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*; see also Michael L. Ross, *How do Natural Resources Influence Civil War? Evidence from Thirteen Cases*, 58 INT'L ORG. 35-67 (2004).

<sup>68</sup> MARIE MAZALTO, *MINING IN AFRICA: REGULATION AND DEVELOPMENT*, 187-191, 187-242 (Bonnie Campbell, 2009).

<sup>69</sup> AMNESTY INTERNATIONAL, *THIS IS WHAT WE DIE FOR: HUMAN RIGHTS ABUSES IN THE DEMOCRATIC REPUBLIC OF THE CONGO POWER THE GLOBAL TRADE IN COBALT*, 14-18, 14 – 54 (Amnesty International Publishing, 2016).

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tension from the Rwandan Genocide of 1994.<sup>70</sup> Thus, a new generation of human rights violators have taken advantage of their country's valuable stores of cobalt and coltan and have utilized child labor to excavate both minerals from the ground as a means of financing their regimes.<sup>71</sup>

After the conclusion of the Rwandan Genocide of 1994, ethnic Hutus left Rwanda in droves across their country's border into the DRC where they felt DRC's president Mobutu Sese Seko would be sympathetic to their interests.<sup>72</sup> Once settled, DRC Hutu militia groups began their attack on ethnic DRC Tutsis. However in response, the Tutsi militia was eventually able to forcibly overthrow Mobutu's government and install its own president, Laurent Kabila, in 1997.<sup>73</sup> Despite the fact that formal fighting has since ceased, pockets of rebel groups continue to skirmish in some of the most rural regions of DRC.<sup>74</sup> However, after President Kabila's assassination in 2001 and subsequent years of rising tensions, DRC is still in a continual state of unrest, with periods of peacetime interrupted periodically by eruptions of civil instability.<sup>75</sup>

One of the most prominent rebel groups to emerge from rural DRC is M23, a militia comprised of ethnic Tutsis with alleged ties to the Rwandan government.<sup>76</sup> Relying on the wealth gained from the sale of conflict minerals – namely, cobalt and coltan – M23 leaders are able to obtain arms and fund their operations from their outposts in the most rural and mountainous regions of DRC; regions which happen to encompass the majority of DRC cobalt and coltan mines.<sup>77</sup> Because cobalt and coltan are the primary minerals needed in the manufacture of lithium ion batteries (included in electronic cars, laptops, cellular telephones, televisions, and virtually every method of renewable energy technology) it should come as no surprise that M23 leaders have taken advantage of the fact that the cobalt and coltan mining industries have reached a demand comparable to that of diamond mining.<sup>78</sup>

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<sup>70</sup> Lorna Nicholas, *Cobalt Supply Chain Needs Transparency as Human Rights Violations Continue in DRC*, Small Caps, Oct. 2, 2018, <https://smallcaps.com.au/cobalt-supply-chain-transparency-human-rights-violations-drc/>.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> Peter Eichstaedt, *Consuming the Congo: War and Conflict Minerals in the World's Deadliest Place*, 91 FOREIGN AFFAIRS 205-206 (2012).

<sup>74</sup> Lorna Nicholas, *Cobalt Supply Chain Needs Transparency as Human Rights Violations Continue in DRC*, Small Caps (2018).

<sup>75</sup> AMNESTY INTERNATIONAL, THIS IS WHAT WE DIE FOR: HUMAN RIGHTS ABUSES IN THE DEMOCRATIC REPUBLIC OF THE CONGO POWER THE GLOBAL TRADE IN COBALT 14-16 (2016).

<sup>76</sup> Reuben E. Brigety, II, *Violence in the Democratic Republic of the Congo*, Council on Foreign Relations, Council on Foreign Relations, Oct. 19, 2018, <https://www.cfr.org/interactives/global-conflict-tracker#!/conflict/violence-in-the-democratic-republic-of-congo>

<sup>77</sup> *Id.*; see also

<sup>78</sup> Zandi Shabalala, *Coltan to be Declared a Strategic Mineral in Congo*, Reuters, Mar. 14, 2018, [https://www.reuters.com/article/us-congo-mining-cobalt/cobalt-to-be-declared-a-strategic-mineral-in-congo-idUSKCN1GQ2RX.](https://www.reuters.com/article/us-congo-mining-cobalt/cobalt-to-be-declared-a-strategic-mineral-in-congo-idUSKCN1GQ2RX;); see also Dev Nathan & Sandip Sarkar, *Blood on Your Mobile?*, 45 ECON. & POL. WKLY., 22, 24 (2010).

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Currently, 60% of the world's cobalt and coltan stores originate in DRC.<sup>79</sup> However, despite the country's overwhelming resource wealth, DRC is the 176th poorest country – with a poverty rate of 64%.<sup>80</sup> DRC's harsh economic climate has thus incentivized DRC citizens to leave urban areas and relocate to more mountainous settlements to work in an industry that they recognize as potentially profitable: cobalt and coltan mining.<sup>81</sup> Unfortunately, human rights investigators and third party non-profit organizations, such as Amnesty International, have investigated rural DRC mines and have found there to be an overwhelming utilization of child labor.<sup>82</sup> Amnesty International reports that parents will send their children, sometimes as young as six years old, to work in the cobalt and coltan mines in order to supplement the family income.<sup>83</sup> Often, workers do not have the proper licensing or documentation identifying them as above the age of 18, and because many cobalt and coltan mines operate in rural mountainous regions of the DRC, the government employs very few regular investigations of the country's mines.<sup>84</sup>

For example, mining camps in the Kapata neighborhood of Kolwezi frequently report fatal mining accidents and a high risk of miners' injury.<sup>85</sup> These small mining operations, referred to as "artisanal mines" employ both adults and children as part of their workforce and often turn a blind eye to hazardous working conditions in favor of quick mineral recovery and cost-efficiency.<sup>86</sup> However, the cost of ignoring human rights in the workforce is extreme; high exposure levels to raw cobalt can cause irreversible harm to miners' health, often causing decreased pulmonary function, asthma, and other related respiratory problems in the mildest of cases. However, increased exposure also significantly increases miners' chances of developing "hard metal lung disease", a condition which can be fatal.<sup>87</sup> Despite global knowledge and universal medical recognition of the dangers of cobalt and coltan mining, the DRC's own mining code – the only legislation in place to regulate domestic cobalt and coltan mining working conditions – does not contain any language pertaining to safety equipment or how to handle known harmful substances, apart from mercury.<sup>88</sup>

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<sup>79</sup> Overview, THE WORLD BANK IN DRC (2018), <https://www.worldbank.org/en/country/drc/overview>.

<sup>80</sup> *Id.*

<sup>81</sup> Lorna Nicholas, *Cobalt Supply Chain Needs Transparency as Human Rights Violations Continue in DRC*, Small Caps (2018).

<sup>82</sup> AMNESTY INTERNATIONAL, THIS IS WHAT WE DIE FOR: HUMAN RIGHTS ABUSES IN THE DEMOCRATIC REPUBLIC OF THE CONGO POWER THE GLOBAL TRADE IN COBALT 28 (2016).

<sup>83</sup> *Id.* at 28.

<sup>84</sup> *Id.* at 29.

<sup>85</sup> *Id.* at 26.

<sup>86</sup> Peter Eichstaedt, *Consuming the Congo: War and Conflict Minerals in the World's Deadliest Place*, 91 FOREIGN AFFAIRS 206 (2012).

<sup>87</sup> AMNESTY INTERNATIONAL, THIS IS WHAT WE DIE FOR: HUMAN RIGHTS ABUSES IN THE DEMOCRATIC REPUBLIC OF THE CONGO POWER THE GLOBAL TRADE IN COBALT 29 (2016).

<sup>88</sup> *Id.* at 22.

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As party to the International Labor organization's ("ILO") Worst Forms of Child Labor Convention (No. 182), DRC is required to implement necessary legislation and employment regulations aimed at eliminating the utilization of child labor within its borders.<sup>89</sup> The ILO Convention defines children as those under the age of 18 and further delineates that the "worst forms" of child labor are those work environments wherein children's health, safety, or morals are continually threatened.<sup>90</sup> Unsurprisingly, DRC cobalt and coltan mines often directly violate the ILO Worst Forms of Child Labor Convention; not only do children face the well-documented safety and health hazards of such mines, but children are often physically abused by mine security guards for failure or physical inability to complete tasks.<sup>91</sup>

The reasons why children often do not report their abuse or lack of adequate working conditions to DRC authorities are threefold: first, these children often realize that they are working underage and fear punishment for admitting employment.<sup>92</sup> Second, they fear that by not working in the mines, they will cause a loss of income for their families.<sup>93</sup> Third, militia leaders control the operation of many rural DRC cobalt and coltan mines, which therefore incentivizes miners' submission for fear of violence.<sup>94</sup> Consequently, rampant human rights abuses in the form of internationally-recognized wrongful child labor continue to this day in the DRC.<sup>95</sup>

### V. Application of The Kimberley Process Certification Scheme to Drc Cobalt and Coltan Industries

The Democratic Republic of Congo would benefit from the application of an amended Kimberley Process into its cobalt and coltan mining industries. However, a revitalized version of the Kimberley Process would likely have to undergo extensive remodeling in order for its provisions to succeed in curbing DRC human rights abuses related to cobalt and coltan mining.

First, and most obviously, this comment recommends that the Kimberley Process should amend its definition of minerals to which the Process shall apply. Namely, the Kimberley Process should not be restricted to diamonds, but should also include minerals that have been historically proven to accompany human rights abuses (such as coltan and cobalt, but also gold and other gemstones – perhaps even petroleum, which has been used by ISIS to fund its arms acquisi-

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<sup>89</sup> Worst Forms of Child Labor Convention, No. 182, 17 Jun 1999 ILC 87, I.L.O.

<sup>90</sup> *Id.*

<sup>91</sup> AMNESTY INTERNATIONAL, THIS IS WHAT WE DIE FOR: HUMAN RIGHTS ABUSES IN THE DEMOCRATIC REPUBLIC OF THE CONGO POWER THE GLOBAL TRADE IN COBALT 29 (2016).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 28-39.

<sup>95</sup> Carole J. L. Collins, *Congo: Revisiting the Looking Glass*, 29, *Rev. of African Political Economy* 615, 607 – 615 (2002).

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tions and military activities).<sup>96</sup> Expanding the family of substances which can apply for Kimberley Process-borne protections would not only incentivize other mineral industries to comply with the Process' regulations, but it would also lessen the need to implement new international legislation, conventions, and regulations every time a new conflict mineral arises in need of management.

Second, The Kimberley Process should reformat its legal framework to streamline the process of reaching a consensus between member states requiring an immediate decision or new course of action for punishment of newly non-complying nations. In order to remedy this quirk of the original Kimberley Process, a new amendment should be made to eliminate the requirement that every member state to the Process must reach a consensus before a decision is made. Instead, this comment offers that clusters of similar nations form groups within the Process itself so that countries that are most interested in the legal outcomes of a particular crises or cause for humanitarian concern can quickly and efficiently come to an agreement without the interference of distant (and potentially indifferent) states' input. Of course, the Process would need a singular authority with which to bind the entire Process together, and to this end, this comment proposes that one member state to the Process serve as the foremost authoritative leader for a term of four years, allowing other member states to look to this entity for ultimate decision making and resolving of in-fighting or disagreement among member states.

Third, considering the ease with which it is possible to smuggle conflict diamonds into batches of otherwise ethically-sourced diamonds, this comment proposes that the new Process should eliminate certificates attached to whole loads of stones. Although this plan would no doubt involve more time and attention, Kimberley Process authorities should instead bestow certificates upon specific *mines*, not stones. This suggestion has its root in the fact that the original certificate program enacted by the Kimberley Process in 2000 neglected to police conflict diamonds straight from the source.<sup>97</sup> However, this new proposal would ensure that before cobalt and coltan are even excavated from the earth, mine owners and facilitators are in compliance with controlling international agreements, such as the ILO Worst Forms of Child Labor Convention (No. 182) and relevant Kimberley Process regulations.

The particular challenge with the DRC is that many of its cobalt and coltan mines operate high in the rural mountainside of the country.<sup>98</sup> However, the implementation of mine-specific certifications may still be feasible even at such high altitudes and precarious terrain considering the large amount of ground covered and the size of the workforce employed in the original Kimberley Process

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<sup>96</sup> Leif Wenar, *How to End the Oil Curse: Stop Trading with Autocrats*, FOREIGN AFFAIRS <https://www.foreignaffairs.com/articles/2016-06-03/how-end-oil-curse> (June 3, 2016).

<sup>97</sup> John M. Durnovich, *This Land is My Land: Mending the Kimberley Process and Promoting Stability in Sub-Saharan Africa by Reinforcing Individual Property Rights*, 39 N.C. J. Int'l L. & Com. Reg. 885 (2013).

<sup>98</sup> AMNESTY INTERNATIONAL, THIS IS WHAT WE DIE FOR: HUMAN RIGHTS ABUSES IN THE DEMOCRATIC REPUBLIC OF THE CONGO POWER THE GLOBAL TRADE IN COBALT 15 (2016).

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diamond batch certifications.<sup>99</sup> Additionally, the presence of international authorities at cobalt and coltan mines would likely reduce the rampant child labor and worker abuse by M23 militia mine operators and deter others from engaging in similarly abhorrent business practices. Thus, because coltan and cobalt, like diamonds, obviously do not come with the ease of bar codes or any clear identifying information imprinted on them, and because the presence of a third party would likely decrease children's rights violations, extra care and attention given to the mines from which they originate will help alleviate human rights abuses and promote the health and safety of all workers.

### VI. Conclusion

The Kimberley Process Certification Scheme was a novel and effective means of corralling the ongoing diamond crises in Western Africa when it entered into force in 2000.<sup>100</sup> However, although it enjoyed multiple triumphs and ultimately led to the dramatic decrease of conflict diamonds' distribution into the global diamond market, the Process has numerous faults which prevent it from achieving complete success.<sup>101</sup> Since the age since "blood diamonds" and the Western African human rights violations following multiple civil wars and internal tension, new conflicts have arisen which require immediate international attention. Cobalt and Coltan from the Democratic Republic of Congo exhibit all the hallmarks of an exploited natural resource in need of international intervention. As such, the Kimberley Process should be revitalized and extended beyond its scope to include cobalt and coltan mining.

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<sup>99</sup> Alexandra R. Harrington, *Faceting the Future: The Need for and Proposal of the Adoption of a Kimberley Process-Styled Legitimacy Certification System for the Global Gemstone Market* 18 *TRANS-NAT'L L. & CONTEMP. PROBS.* 353 (2009).

<sup>100</sup> Matthew Hockenberry, *Demands of Supply: The Illicit Pathways of Global Supply Chains*, 66 *J. OF INT'L AFF.* 151 (2012).

<sup>101</sup> Andrew H. Winetroub, *A Diamond Scheme is Forever Lost: The Kimberley Process' Deteriorating Tripartite Structure and its Consequences for the Scheme's Survival*, 20 *Indiana Journal of Global Legal Studies* 1425, 1425 – 1444 (2013).