From a Soft Law Process to Hard Law Obligations

The Kimberley Process and Contemporary International Legislative Process

Martin-Joe Ezeudu[*]

Abstract

Ever since its creation and coming into force in 2003, the Kimberley Process has elicited a number of academic commentaries coming from different backgrounds. Legal scholars who have contributed to the commentaries, simply projected the regulatory regime as an international soft law without further analysis, based on an evaluation of the text of the agreement. This article in contrast, explores its practical effects and the manner of obligations that it imposes on its participant countries. It argues that although the regime may have been a soft law by classification, its obligations are hard and are no different from those of a conventional treaty. Those obligations enhance its juridical force, and are a factor by which the regime on its own tends to nullify the traditional criteria for distinction between hard and soft law in international jurisprudence, because it has elements of both.

Keywords: Kimberley Process, soft law, international law, legislative process.

A. Introduction

In the contemporary history of international law, the Kimberley Process Certification Scheme (hereafter referred to as 'the Kimberley Process' or 'KPCS' for short) stands out as a unique piece of international law because it owes its making, relevance and continuity equally to the commitment of both state and non-state actors. It represents an unprecedented example of how the international community can address specific problems at an interface where resource conflict, corruption, human rights violations and global trade meet. By drawing together a wide spectrum of actors, consisting of the international civil society and NGOs,

* PhD (Osgoode Hall Law School, York University, Toronto, Canada); LLM (University of Birmingham, UK); LLB (Nnamdi Azikiwe University, Awka, Nigeria); Barrister & Solicitor, Nigeria; Solicitor, England & Wales. An articling student at the Ontario Ministry of the Attorney General (Legal Services Branch of the Ministry of Consumer Services), Toronto, Canada. I am grateful to Prof Ikechi Mgbeoji who introduced me to this line of research. My thanks to Mr Tom van der Meer for his helpful comments on an earlier draft of this article. All errors and omissions remain mine. Dedicated to the loving memory of my brother, Chukwuemeka Innocent Ezeudu – a true brother and companion.

diamond industry representatives, governments and intergovernmental institutions, it signifies a compelling shift from the traditional international legislative process, to a new and evolving prescription for enactment of international law, as well as offering a direction for the future.[1]

As a document, the Kimberley Process agreement does not hide its simplistic nature, nor is the hardness of the obligations that it imposes on its participant countries difficult to grasp, in terms of its operational modalities. These are two sides of the regime that equally deserve academic analysis. Its documentary character has been explored by some scholars to conclude that it is a soft law instrument, although the validity of this classification may still be subjected to a challenge or scrutinised further. In contrast, however, its obligatory nature has not been adequately brought into the limelight. In this article, I particularly explore the manner of obligations that stem from compliance with the KPCS agreement by the participant countries. An underlying yet profound emphasis that I make here is that despite its 'soft law process' by origin or initiation, the KPCS comes with some forms of hard law obligations that enhance its juridical force, and as such tends to unsettle and nullify the traditional criteria or bases for hard law-soft law dichotomy in international law, because it has elements of both. By the same token, the KPCS also challenges the continued relevance of Section 38(1) of the *Statute of the International Court of Justice* in dictating what instruments qualify to be sources of international law.

My approach in this article is analytical, and to achieve an optimal analysis, I have divided the article into sections. First, in Section B, I examine the way soft law is often created, particularly by the participation of non-state actors in international legal process. Second, I examine the emergence of hard law-soft law dichotomy in international law, as well as the general nature of soft law's juridical force. Further to this, I explore the status of the Kimberley Process as a soft law instrument. These are the contents of Sections C, D and E respectively. They are then followed by Section F, in which I take a closer look at the Kimberley Process specifically, by discussing its key regulatory elements as the evidence of its character and obligatory commands - hard law form of obligations for that matter. In Section G, I explore the operational modality of the Kimberley Process as further evidence of positive obligatory commands imposed on its participants. Section H examines the implementation of the KPCS agreement in some of the key diamond trading countries, to further demonstrate that the regime has obligations similar to those imposed by a conventional treaty. Section I concludes the article.

B. The Participation of Non-state Actors in International Legislative Process: An Emerging Trend

It is now commonly acknowledged that there has been a spate of modern changes and developments in international law that are currently taking place, especially

1 D. L. Feldman, 'Conflict Diamonds, International Trade Regulation, and the Nature of Law', *U. Pa. J. Int'l Econ. L.*, Vol. 24, 2003, p. 835, at 868-871.

with respect to its procedural enactment, enforcement mechanism and the involvement of actors. Under the traditional Westphalian international law as expounded by positivist theory, only states could be the subjects of international law in the sense of possessing international legal personality with the accompanying rights and duties, including the right to bring international claims.[2] This doctrine indeed influenced the theory and principles behind the formation and operation of the premier intergovernmental organisations, particularly the United Nations (UN) and the International Court of Justice (ICJ). In effect, only states are entitled to membership of the United Nations, and only states can call upon the UN Security Council when a threat to international peace and security arises. By the same token, only states may be parties to proceedings before the ICJ, and only states can present a claim on behalf of a national who has been injured by another state, if no contrary provision in a treaty exists.[3]

Impliedly, under the traditional international law framework, although the presence of non-state actors is acknowledged, they are not regarded as subjects of international law, and are rarely accorded *locus standi* to press claims before international tribunals; as only states can be players on the international legal arena.[4] In other words, the international legal system is primarily a preserve of the international community of states, represented by governments.[5] By the same implication, international agreements or treaties are binding and thus law if made by states; otherwise they are mere political documents and not law at all. An exception, however, is the customary rules of international law which evolved from widely recognised norms and regular practices of states.[6] Thus, as Claire Cutler articulately points out, the Westphalian-inspired state-centric and positivist notions of the international legal system have been incapable of capturing the place and significance of non-state actors, such as transnational corporations and individuals, informal normative structures (such as NGOs) as well as private economic powers, in the scheme of the global political economy.[7]

Over time, however, as international interactions and economic interdependence among states increase and become more complex, coupled with the ever increasing impacts of globalisation, pressing issues of international concern begin

2 P. Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th edn, Routledge, London, 1997, at 1.

3 *Ibid.*, at 2.

4 But it may be interesting to note the brave argument of some scholars who posit that international law has never been the domain of states alone, suggesting that non-state actors have been role players in the prescription, invocation and application of international law. *See* J. L. Dunoff, S. R. Ratner & D. Wippman, *International Law Norms, Actors, Process: A Problem-Oriented Approach*, 3d edn, Wolters Kluwer, Business & Law, Austin, 2010, c. 4, at 189.

5 Malanczuk, 1997, at 2.

6 K. Curtis, 'But Is It law? An Analysis on the Legal Nature of the Kimberley Process Certification Scheme on Conflict Diamonds and its Treatment of Non-State Actors', *American University International Law Review*, Spring 2007, Option III, at 14, online: Selected Works <http://works.bepress.com/kimberly_curtis/>. *See also*, S. R. Ratner, 'Does International Law Matter in Preventing Ethnic Conflict', *N. Y. U. J. Int'l L. & Pol.*, Vol. 32, 1999-2000, p. 591 at 609.

7 A. C. Cutler, 'Critical Reflections on the Westphalian Assumptions of International Law and Organizations: A Crisis of Legitimacy', *Rev. Int'l Stud.*, Vol. 27, 2001, p. 133.

to arise especially touching on trade, human rights and environment.[8] This, in turn, has led to a new challenge, the challenge of deploying the international legal framework towards integrating in an equitable, dynamic and mutually reinforcing way, an efficient legislative or regulatory process that responds timeously to tasking problems in trade, human and global security, environmental protection and enhancement, social cohesion and liberalisation. The challenge thus places an enormous strain on the inherited intergovernmental-based international legal regime[9] and casts doubt on whether the heavily legalised and bureaucratically cumbersome hard law apparatus hinging on the United Nations system, can adequately address the pressing needs of the new era.[10]

What the above scenario has resulted in is the emergence of an evolving new era in international legal forum, as informal civil society, non-governmental organisations (NGOs), international trade bodies, and multinational corporations (MNCs), who are all non-state actors, rise to the occasion, by stepping into the stead of states to fill the vacuum of regulation in the international legal machinery.[11] But more often than not, the non-state actors collaborate with international institutions. However, the manner of law or regime that normally proceeds from the participation and resources of non-state actors in the creation, operation and implementation of governance arrangements is often referred to as 'soft law', a descriptive appellation now commonly used by legal scholars in contradistinction to traditional intergovernmental 'hard law'.

8 U. Mörth, 'Introduction' *in* U. Mörth, (Ed), *Soft Law in Governance and Regulation: An Interdisciplinary Analysis,* Edward Elgar, Cheltenham, 2004, p. 1, at 3.

9 J. J. Kirton & M. J. Trebilcock, *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance,* Ashgate, Aldershot, 2003, at 10.

10 *Ibid.,* at 4.

11 *See* for instance, T. Müller, 'Customary Transnational Law: Attacking the Last Resort of State Sovereignty', *Ind. J. Global Legal Stud*., Vol. 15, 2008, p. 19, at 47 (concluding that on account of increasing globalisation, states are no longer the only participants in the creation and application of customary international law, which is since modernised by the participation of individuals, NGOs and MNCs who are now contributing greatly to its creation).

The soft law concept has attracted a growing body of literature,[12] although its exact meaning or implications are still a subject of great contention among scholars.[13] Nevertheless, it has been defined as "the body of international instruments which *per se* do not make law [that are of non-legal character] but which still possess – variable – regulatory force [...]".[14] In another definition credited to A.J.P. Tammes, soft law is referred to as "an umbrella concept for normative phenomena that display the characteristics of law because they are influencing and restricting the will and freedom of their addressees, but on the other hand do not establish a genuine international obligation, but do leave room for a 'soft obligation'".[15] Among European Union legal scholarship, however, Francis Snyder's definition appears to be commonly cited.[16] He defines soft law as "rules of conduct which, in principle, have no legally binding force but which nevertheless may have

12 *See* for instance, J. Gold, 'Strengthening the Soft International Law of Exchange Arrangement', *Am. J. Int'l L.*, Vol. 77, 1983, p. 443; T. Gruchalla-Wesierski, 'A Framework for Understanding Soft Law', *McGill L. J.*, Vol. 30, 1984-1985, p. 37; M. Bothe, 'Legal and Non-Legal Norms – A Meaningful Distinction in International Relations?', *Nethl. Yearbook Int'l L.*, Vol. 11, 1980, p. 65; C. M. Chinkin, 'The Challenge of Soft Law: Development and Change in International Law', *Int'l & Comp. L. Q.*, Vol. 38, 1989, p. 850; C. Chinkin, 'Normative Development in the International Legal System', *in* D. Shelton, (Ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal Systems*, Oxford University Press, Oxford, 2000, p. 21; J. Sztucki, 'Reflections on International Soft Law', *in* J. Ramberg, O. Bring & S. Mahmoudi, (Eds.), *Festskrift till Lars Hjerner: Studies in International Law*, Norstedts, Stockholm, 1990, p. 549; Lawrence L. C. Lee, 'The Basle Accords as Soft Law: Strengthening International Banking Supervision', *Va. J. Int'l L.*, Vol. 39. 1998-1999, p. 1; H. Kim, 'Taking International Soft Law Seriously: Its Implications for Global Convergence in Corporate Governance', *J. Korean L.*, Vol. 1, 2001, p. 1; K. C. Wellens & G. M. Borchardt, 'Soft Law in European Community Law', *Eur. L. Rev.*, Vol. 14, 1989, p. 267; T. Meyer, 'Soft Law as Delegation', *Fordham Int'l L. J.*, Vol. 32, 2008-2009, p. 888; A. T. Guzman & T. Meyer, 'International Soft Law', *J. Legal Analysis*, Vol. 2, 2010, p. 171; G. C. Shaffer & M. A. Pollack, 'Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance', *Minn. L. Rev.*, Vol. 94, 2009-2010, p. 706.

13 Mörth, 2004, at 5.

14 Sztucki, 1990, at 573. *See also*, Mörth, 2004, at 5.

15 Wellens & Borchardt, 1989, at 272. But *see also*, A.J P. Tammes, 'Soft Law' *in* E. R. Arbor with T. M. C. Asser Instituut, (Eds.), *Essays on International & Comparative Law in Honour of Judge Erades*, Martinus Nijhoff Publishers, The Hague, 1983, p. 187.

16 M. Aldestam, 'Soft Law and the State Aid Policy Area' *in* U. Mörth, (Ed.), *Soft Law in Governance and Regulation: An Interdisciplinary Analysis*, Edward Elgar, Cheltenham, 2004, p. 11, at 16.

practical effects".[17] The soft law thesis is closely examined in Section C of this article, especially with respect to its juridical force.

Kimberly Curtis has, however, presented a further argument that helps to understand soft law as a new form of international legal prescription.[18] She argues that owing to changes in international politics and recent trends in international law, it has become more sensible to construe international law as a model occurring on a spectrum between the two binary poles of soft law and hard law, rather than through the positivist ideal.[19] In essence, she argues that international law should be seen as occurring on a spectrum weighed against the following factors: (a) obligation, referring to the parties' willingness to apportion duties to themselves; (b) specificity, referring to the preciseness of the language of an agreement; (c) delegation, referring to the level of enforcement mechanism built in an agreement; and (d) participation, referring to who takes part in the negotiation and operation of an agreement; instead of viewing it from an outdated positivist angle.[20] She further argues that most treaties are regarded as law because they meet all these criteria, and that soft laws also meet some or all of them, thus falling within the purview of international law as well.[21]

In the light of the above argument, Curtis goes further to illustrate that the collaboration of non-state actors led to the emergence of some soft law regimes in international law. The specific instruments that she discusses are the *International Cyanide Management Code for the Manufacture, Transport and Use of Cyanide in the Production of Gold*; and the *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*. But with reference to the *Convention on Combating Bribery of Foreign Officials in International Business Transactions*, she argues that even in an apparent treaty, a non-state actor can also be a participant with an obligation for which it could be held accountable.[22] She further refers to the Kimberley Process, especially with respect to its operational modality, and

17 F. Snyder, 'Soft Law and Institutional Practice in the European Community' *in* S. Martin, (Ed.), *The Construction of Europe: Essays in Honour of Emile Noël,* Kluwer Academic Publishers, Dordrecht, 1994, p. 197, at 198. *See also*, F. Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques' *Mod. L. Rev*., Vol. 56, 1993, p. 19 at 32. But what I consider to be a more thorough and comprehensive definition is given by Wellens & Borchardt, 1989, at 274, in the following words:

> [R]ules of conduct that find themselves on the legally non-binding level (in the sense of enforceable and sanctionable through international responsibility) but which in accordance with the intention of its authors indeed do possess *a legal* scope, which has to be further defined in each case. Such rules do not have in common a uniform standard of intensity as far as their legal scope is concerned, but they do have in common that they are directed at (intention of the authors) and do have as effect (through international law) that conduct of States, international organisations and individuals is influenced by these rules, however without containing international legal rights and obligations.

18 Curtis, 2007, at 15-17.

19 *Ibid*., at 15.

20 *Ibid.,* at 16-17.

21 *Ibid.,* at 17.

22 *Ibid.,* at 18-21.

contends that this regime is an indication that non-state actors' initiative can bring about a soft law regime that is almost like a conventional treaty in status.[23]

Even from a political economy viewpoint, the recognition of the ascendancy and prevalence of regulatory regimes that hinge on private sector initiatives and participation is now common. Thus, acknowledging the increasing proliferation of new global issue areas with their attendant importance for global regulation, Daniel Drezner opines that international regulatory regimes have attracted landmark political sympathy, and as such they symbolize a shift in the locus of politics.[24] He further highlights that globalisation diminishes state sovereignty in the sense that global market forces have become so powerful as to deprive governments of their autonomy and agency; and that while state autonomy is declining, globalisation further empowers a web of non-state actors, including multinational corporations, NGOs and transnational activist networks.[25]

Indeed, all these show that there is now scope under the international legal order for regulatory regimes that address specific issues to be created through initiatives that can involve non-state actors alone or both state actors and non-state actors working together.[26] They equally indicate that soft law regimes are currently wielding enormous influence in issue-areas where hard law has been remarkably redundant, especially in the trade domain. Soft law is thus changing

23 *Ibid*., at 23.

24 D. W. Drezner, *All Politics Is Global: Explaining International Regulatory Regimes,* Princeton University Press, Princeton, N.J, 2007, at 3.

25 *Ibid.,* at 4. Note that in the statement made above, Drezner is merely reviewing works of the following scholars whose opinions he critiques: T. Friedman, *The Lexus and the Olive Tree*, Farrar, Strauss and Giroux, New York, 1999, at 86; R. Falk, 'State of Siege: Will Globalization Win Out?', *Int'l Aff*., Vol. 73, 1997, p. 123; A. Schlesinger Jr., 'Has Democracy a Future?', *Foreign Aff*., Vol. 76, No. 5, 1997, p. 2 at 7-8; S. Strange, *The Retreat of the State: The Diffusion of Power in the World Economy*, Cambridge University Press, Cambridge, 1996; D. Rodrik, *Has Globalization Gone Too Far?,* Institute for International Economics, Washington, DC, 1997; R. Rosecrance, *The Rise of Virtual State,* Basic Books, New York, 1999; R. Lipschutz, 'Reconstructing World Politics: The Emergence of a Global Civil Society', *Millennium*, Vol. 21, 1992, p. 389; J. T. Matthews, 'Power Shift', *Foreign Aff.,* Vol. 76, No. 1, p. 50; M. Keck & K. Sikkink, *Activists Beyond Borders,* Cornell University Press, Ithaca, 1998; P. G. Cerny, 'Globalization and the Changing Logic of Collective Action', *Int'l Org*., Vol. 49, 1995, p. 595; P. G. Cerny, 'Globalization and Other Stories: The Search for a New Paradigm in International Relations', *Int'l J*., Vol. 51, 1996, p. 617; I. Clark, *Globalization and International Relations Theory*, Oxford University Press, Oxford, 1999; J. H. Mittelman, 'Globalization: An Ascendant Paradigm?', *Int'l Stud. Persp*., Vol. 3, 2002, p. 1; J. H. Mittelman, 'What Is Critical Globalization Studies?', *Int'l Stud. Persp*., Vol. 5, 2004, p. 219. An important twist that Drezner adds here at page 5 is that great powers (governments that oversee large international markets) are actually the forces behind global regulatory outcomes. This argument will not be explored here beyond this point to avoid distraction from the objective of this work.

26 Note that within the international relations and political science disciplines, the new international legal order within which non-state actors are recognised as part of law making, has been branded 'global governance' by some scholars. *See* for instance, V. Haufler, 'The Kimberley Process Certification Scheme: An Innovation in Global Governance and Conflict Prevention', *J. Bus. Ethics,* Vol. 89, 2010, p. 403, at 404 (arguing that "[t]he global governance literature in political science draws attention to the character and evolution of governance – not government – global regulation. Governance can be disaggregated into component steps or parts (agenda-setting, rule-making, monitoring, enforcement, adjudication), and these functions can be performed by different actors, and not just by state authorities […]").

the traditional structures of authority and traditional law-making,[27] and its beauty, in part, lies in the fact that it co-opts a wider spectrum of the society (because of the involvement of the private sector) in its initiative and implementation, making regulatory business a grassroots thing. This new international legal dynamism is indeed the hallmark of normative initiatives led by non-state actors.

By joining the league of international laws, the Kimberley Process, for its part, has become a signal that the global community appears to be concerned about problems associated with illegal trading in mineral resources, especially when such trade constitutes a threat to national or international security, and sustains corruption. It is also an indication, as much as it is a precedent, that concerted global initiative is a possibility towards redressing an apparent national problem regardless of the people or the region affected. The regime is a child of necessity born out of an alliance among the global diamond industry, international NGOs, diamond producing countries of Africa, and the United Nations. It introduced a certification process that authenticates the source of diamonds traded at the international diamond market.

The certification scheme as a regulatory regime is designed to prevent illegally mined diamonds – 'blood diamonds' – in the hands of insurgents, rebel groups and other illegitimate entities from being traded in the international market, and as such cut them off from blood diamond funds that helped sustain them in their armed rebellion.[28] This ultimately contributed to the ending of the hostilities.[29] The Kimberley Process may not be a perfect regime, but its impact in regulating the global diamond market cannot be diminished.

C. The Emergence of Hard Law–Soft Law Dichotomy

Before delving into the analysis of the Kimberley Process' unique and peculiar juridical nature under public international law categorisation, let me briefly throw some light on the nature of soft law generally, its conception and position in international law. The essence of doing this is that it would aid the contextualisation and a clearer appreciation of the normative character of the Kimberley Process.

There is an international instrument that to some extent can be regarded as an international constitution or an international legislative guide. This is the *Vienna Convention on the Law of Treaties, 1969*. It provides guidelines on formation of treaties and of their effects. In other words, it governs the making of

27 Mörth, 2004, at 3.

28 *See* J. Hummel, 'Diamonds Are a Smuggler's Best Friend: Regulation, Economics, and Enforcement in Global Effort to Curb the Trade in Conflict Diamonds', *Int'l L.*, Vol. 41, 2007, p. 1145 at 1158-1160; M. Koyame, 'United Nations Resolutions and the Struggle to Curb the Illicit Trade in Conflict Diamonds in Sub-Saharan Africa', *Afr. J. Legal Stud.,* Vol. 1, 2005, p. 80 at 95-97.

29 *See* I. Smillie, 'The Kimberley Process Certification Scheme for Rough Diamonds', Partnership Africa Canada, Comparative Case Study 1, October 2005, at 7, online: <http://www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/4470.pdf>.

international (agreements) law, which it recognises only in form treaties.[30] Again, with respect to sources of international law, Article 38(1) of *the Statute of the International Court of Justice* (hereafter referred to as Article 38(1)) refers only to treaties (conventions) and customary international law; general principles of law universally recognised; decisions of the court as applicable to particular parties in respective cases; and the teachings of most highly qualified publicists of various nations. Thus, in the realm of agreements between or among international actors, treaties are the only recognised source of international law. Impliedly, an international agreement not formalised as a treaty may not be regarded as a piece of international legislation (not governed by international law), and accordingly not legally binding.

The narrow and circumscribed nature of the enumerated sources of international law in Article 38(1) has been criticised by some scholars.[31] Their criticism is informed by the fact of the ever evolving international relations, and the expanding activities of international actors that often produce different forms of agreements that are not captured in the said Article 38(1); and that in fact represent a significant shift in the way the public international law is articulated or made by states and international organisations alike.[32] Thus, states and other international actors have continued to engage in non-conventional treaty agreements as the basis of their relationships. Hartmut Hillgenberg particularly points out that non-conventional, or rather non-treaty, multilateral agreements are rising in importance, particularly in the fields of economic relations, trade and environmental protection.[33]

Importantly, the failure to capture and name these types of agreements and other forms of international instruments within the provisions of Article 38(1), apparently, may have provided the ground for scholars to engage in a seemingly endless voyage in search of an appropriate name for them. Consequently, several names were contrived perhaps at the convenience of individual scholars and used to describe some of these agreements. Such names are gentlemen's agreements, informal agreements, *de facto* agreements, non-binding agreements, political texts (agreements), extra-legal or non-legal agreements, agreements devoid of legal force, non-obligatory agreements, international understandings and soft law

30 *See* the penultimate paragraph of the preamble to the Convention stating that "the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention". *See also*, Art. 2(1)(a) of the Convention emphasising that treaties are to be an agreement between States, and governed by international law.

31 Wellens & Borchardt, 1989, at 267.

32 *Ibid*.

33 H. Hillgenberg, 'A Fresh Look at Soft Law', (1999) 10 *E.J.I.L.*, Vol. 10, 1999, p. 499, at 503. *See also*, P. Dupuy, 'Soft Law and the International Law of the Environment', *Mich. J. Int'l L.*, Vol. 12, 1990-1991, p. 420 (arguing that soft law certainly constitutes part of the contemporary law-making process but fails to fit into the classical and familiar legal categories by which scholars usually describe and explain both the creation and the legal authority of international norms).

instruments.[34] Memorandum of Understanding (MOU) is also another name used by scholars to refer to such instruments that fall outside the purview of Article 38(1).[35]

However, as can be gleaned from the literature, the use of 'soft law' as a general term for all other international instruments not covered in Article 38(1) appears to be the vogue, and generally more acceptable among scholars as a conventional practice.[36] The usage might have been heralded by Tammes' definition of soft law in 1983, in which soft law is referred to as an umbrella concept.[37] Mona Aldestam particularly clarifies that soft law can embrace a wide range of instruments such as agreements, declarations, communication, recommendations, resolutions, guidelines, notices and positions - an endless list of course.[38] She further explains that it is suitable to use the concept of soft law when something is missing in the legal or binding nature of law,[39] obviously from the Vienna Convention perspective.

The above clarification by Aldestam is therefore another way of stating the types, forms or classes of soft law and, impliedly, the categories of international instruments obtainable outside the provisions of Article 38(1). Wellens and Borchardt further add to the list, and acknowledge that soft law presents itself also in the form of codes of conduct (citing as an example, the OECD Guidelines

34 J. Klabbers, *The Concept of Treaty in International Law,* Kluwer Law International, The Hague, 1996, at 18. But *see* particularly, C. Lipson, 'Why Are Some International Agreements Informal?', *Int'l Org.*, Vol. 45, 1991, p. 495, and A. Aust, 'Theory and Practice of Informal International Instruments', *I.C.L.Q.*, Vol. 35, 1986, p. 787, for informal agreements; F. Roessler, 'Law, De facto Agreements and Declarations of Principle in International Economic Relations', *German Y. B. Int'l L.*, Vol. 21, 1987, p. 27, for *de facto* agreements; O. Schachter, 'The Twilight Existence of Nonbinding International Agreements', *Am. J. Int'l L.*, Vol. 71, 1977, p. 296, and R.B. Bilder, *Managing the Risks of International Agreement,* University of Wisconsin Press, Madison, 1981, at 24, for non-binding agreements; O. Schachter, *International Law in Theory and Practice,* Martinus Nijhoff Publishers, Dordrecht, 1991, c. 6, for political texts (agreements); W. Wengler, '"Nichtrechtliche" Staatenvertrage in der Sicht des Volkerrechts und des Verfassungsrechts', *Juristenzeitung,* Vol. 50, 1995, p. 21, for extra-legal or non-legal agreements; M. Virally, 'La distinction entre textes internationaux de portée juridique et textes internationaux dépourvus de portée juridique: étude exploratoire', *Annuaire de l'Institut de Droit International*, Vol. 60-I, Session de Cambridge, 1983, p. 166, for agreements devoid of legal force; R. Monaco, 'Accords internationaux non obligatoires et effets juridiques preliminaires' *in* K.-H. Böckstiegel et al., (Eds.), *Law of Nations, Law of International Organization, World's Economic Law: Festschrift fur Ignaz Seidl-Hohenveldern*, Heymann, Cologne, 1988, p. 383, for non-obligatory agreements; G.I. Tunkin, 'International Law and Other Social Norms Functioning Within the International System' *in* B. Cheng & E.D. Brown, (Eds.), *Contemporary Problems of International Law: Essays in Honour of Georg Schwarzenberger,* Stevens & Sons, London, 1988, p. 282, for international understandings; and R.R. Baxter, 'International Law in "Her Infinite Variety"', *I.C.L.Q.,* Vol. 29, 1980, p. 549, Hillgenberg, 1999, and all scholars mentioned in note 12 *supra*, for soft laws.

35 A. Aust, *Modern Treaty Law and Practice*, 2d edn, University of Cambridge Press, Cambridge, 2007, at 21 & c. 3.

36 This is self-evident from literature published since the 1980s. *See* particularly, articles at note 12, *supra.*

37 Tammes, 1983.

38 Aldestam, 2004, at 16.

39 *Ibid.,* at 17. *See also*, A. Aust, 2007, at 52 (stating that soft law is generally used to describe international instruments not recognised as treaties).

for Multinational Enterprises, 1976); a gentlemen's agreement, which by their explanation corresponds with what other scholars call *de facto* agreements and informal international agreements; and sometimes it is disguised as hard law, referring to the Final Act of Helsinki, for instance.[40]

It may be instructive to note that multilateral soft law instruments have proliferated in the international system despite its apparent exclusion as a source of international law in Article 38(1). This is an indication of international actors' preference for soft law over treaty, and may not be unconnected with the obvious advantages of soft law over hard law treaty, especially with respect to legislative processes. Some notable advantages or rather reasons for such preference are that: (1) often, international players particularly states, prefer non-treaty or soft law obligations as a simpler and more flexible foundation for their future relations;[41] (2) states tend to avoid problems (tedious formalities, for instance) involved in forming and terminating treaties;[42] (3) soft law instruments will be easier to amend or replace than treaties, especially when all that is needed is the adoption of a (new) resolution;[43] (4) soft law forum enables the parties to spell out clearly their expectations, and provides some normative underpinning to support these expectations;[44] and (5) in addition to its flexibility, soft law has a bottom-up approach, which may allow states to adapt to their diverse circumstances and lower the cost of contracting between parties.[45]

D. The Juridical Force of International Soft Laws

A crucial question that arises at this juncture is whether states and other international actors who are parties to soft law instruments merely engage in agreements that they knew beforehand to amount to nothing or no law, or have no consequence, because such agreements seemingly have no legal force, having not fallen within Article 38(1) provisions. In other words, does soft law fail to have regulatory force, or consequences, for breach of its provisions? If these questions are to be answered in the affirmative, it means that diplomatic time and resources often committed in negotiating soft law instruments are a mere waste of time. But surely, that is not to be the intendment, I think.

It needs to be stated just as Hartmut Hillgenberg, a respected diplomat has enunciated, that "international law does not seem to contain a general assump-

40 Wellens & Borchardt, 1989, at 275-276.

41 Hillgenberg, 1999, at 501. But see the abstract particularly.

42 Gruchalla-Wesierski, 1984-1985, at 41.

43 A.E. Boyle, 'Some Reflections on the Relationship of Treaties and Soft Law', I.*C.L.Q.*, Vol. 48, 1999, p. 901, at 903.

44 Bilder, 1981, at 25.

45 A. Christians, 'Hard Law, Soft Law, and International Taxation', *Wis. Int'l L. J.*, Vol. 25, 2007-2008, p. 325, at 332. For more on reasons for States' preference of soft law over treaty, *see*, D. Shelton, 'Introduction: Law, Non-Law and the Problem of "Soft Law"' *in* D. Shelton, (Ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System,* Oxford University Press, New York, 2000, p. 1, at 11-13; and K.W. Abbott & D. Snidal, 'Hard Law and Soft Law in International Governance', *Int'l Org*. Vol. 54, 2000, p. 421, at 423.

tion that all agreements are of a treaty nature".[46] Richard Bilder has also argued that the fact that an agreement is not legally binding does not mean that it cannot be an effective means of achieving international cooperation.[47] Indeed, scholars tend to agree that creation of expectations is a key element of all laws.[48] As such, a soft law creates the expectation that it would be respected or that the parties thereto would comply with its provisions.[49] Oscar Schachter has already made a landmark statement on this issue. He argues that:

> The conclusion that nonbinding agreements (*meaning agreements outside Article 38(1) provisions*) are not governed by international law does not however remove them entirely from having legal implications. Consider the following situations. Let us suppose governments in conformity with a nonbinding agreement follow a course of conduct which results in a new situation. Would a government party to the agreement be precluded from challenging the legality of the course of conduct or the validity of the situation created by it? A concrete case could arise if a government which was a party to a gentlemen's agreement on the distribution of seats in an international body sought to challenge the validity of the election. In a case of this kind, the competent organ might reasonably conclude that the challenging government was subject to estoppel in view of the gentlemen's agreement and the reliance of the parties on that agreement.[50]

The erudite scholar further opines that:

> The fact that nonbinding agreements may be terminated more easily than binding treaties should not obscure the role of the agreements which remain operative. As long as they do last, nonbinding agreements can be authoritative and controlling for the parties. There is no *a priori* reason to assume that the undertakings are illusory because they are not legal. To minimize their value would be exemplify the old adage that "the best is the enemy of the good". It would seem wiser to recognize that nonbinding agreements may be attainable when binding treaties are not and to seek to reinforce their moral and political commitments when they serve ends we value".[51]

46 Hillgenberg, 1999, at 505.

47 Bilder, 1981, at 25.

48 Gruchalla-Wesierski, 1984-1985, at 46. *See also*, M.S. McDougall, 'Contemporary Views on the Sources of International Law: The Effect of U.N. Resolutions on Emerging Legal Norms', *Proc. Am. Soc. Int'l L.* Vol. 73, 1979, p. 300, at 328.

49 Bothe, 1980, at 67- 68 (arguing that "to the extent that the parties, even in the absence of a legal obligation, want to do something reasonable and sensible, they do intend, as a rule, to comply with the agreement, and expect the same from the other side. There are, thus, shared expectations formulated in a non-legal form – non-legal obligations".)

50 Schachter, 1977, at 301 (the italics are mine). However, note that "nonbinding agreement" is Schachter's term for soft law.

51 *Ibid*., at 304.

It may make a lot of sense to view the prism from another angle - the principles of good faith in international law. Generally, as Jan Klabbers has clearly explained, the elementary principles of good faith demand that agreements entered into must be intended to be binding, otherwise the conclusion of such an agreement is meaningless and absurd.[52] Thus, applying this to soft law, Frans Schram stresses that even the so-called soft law agreements normally secure the good faith of governments, and equally enjoy the general principle of *pacta sunt servanda* (agreements should be adhered to), which is a crucial element of international law.[53] The implication of this, therefore, is that even if there are usually no legal sanctions (in terms of justiciable action) for failing to comply with a soft law, it does not mean that the agreement in question is not lawful, or that a state is free, politically or morally, to violate it.[54]

Indeed, deconstructing the normative character of soft law instruments generally may be well served if such an expression as 'practical or legal consequences' is employed in their analysis. This is because just as the normative nature of treaties is well understood within the 'legal binding' paradigm, that of soft law instruments is better expressed using 'practical or legal consequences' rhetoric. But in any event, the far-reaching nature of the juridical force of soft law is still important enough to be underlined. While a treaty derives its normative force from state accession, and binds only parties thereto, a soft law instrument may derive its normative bite from moral force, reinforced by estoppel and principles of good faith, and has the capacity to modify behaviours of international actors, particularly states, irrespective of accession.

E. The Kimberley Process as a Soft Law Instrument

Agreement-wise, the Kimberley Process is a comparatively short document. It has a preamble, six chapters and three annexures. The annexures contain further details about the requirements of a certificate, recommendations on the internal control system of a participant country, and statistics. The agreement refers to its parties as 'Participants'. Couched like a conventional international treaty, however, it detracts from using the traditional treaty terminology such as 'shall', 'agree', 'undertake', 'right', 'obligation', and 'enter into force'.[55] It contains no provision relating to treaty document endorsement and/or ratification, in order to

52 Klabbers, 1996, at 249.

53 F. Schram, 'The Legal Aspects of the Kimberley Process', International Peace Information Service (IPIS), Antwerp, Belgium, January 2007, at 8, online: IPIS <www.ipisresearch.be/publications_internpapers.php>. *See also*, Shaw's following argument as cited by Schram: M.N. Shaw, *International Law*, 4th edn, Cambridge University Press, Cambridge, 1997, at 80-82 (clarifying that "the concept of good faith is one of the most important general principles of international law and implies that parties should always cooperate in terms of trust and confidence, whether while making an agreement or fulfilling an obligation stemming from that agreement. It is therefore not in itself a source of obligation, but merely a principle that informs and shapes the observance of existing rules of international law"). *See* further, Aust, 2007, at 54-55.

54 Schram, 2007.

55 Schram, 2007, at 7.

come into force.[56] This coupled with the fact that among the participants that negotiated it were NGOs and the diamond industry representatives, who in a conventional way have no legislative authority, may have led to the suggestion that it is merely voluntary rather than a binding regime of legal rules, and as such has no juridical force.[57]

Frans Schram has argued that by using phrases such as 'participants recommend', 'are encouraged', 'should ensure', and 'should be established', as well as having no formal treaty-like final clauses or registration requirement, the Kimberley Process may well pass as a political document or a Memorandum of Understanding (MOU) and not a proper treaty,[58] and that multilateral MOUs are mainly categorised or qualified as soft law.[59] Impliedly, from Schram's analysis, the Kimberley Process is a soft law MOU. The scholar, however, provides further explanation as to why the Kimberley Process took the form of soft law, thus underlining those reasons mentioned above, on the rising preference of soft law over hard law treaty. He explains that:

> It is most likely that the parties had not intended to create a scheme containing rules and obligations of too rigid a nature, and that for that reason they opted for the more flexible "MoU" or "political agreement". These options unquestionably allowed for more political leeway and swiftness, which is sometimes necessary as setting up an international agreement between more than 50 countries is not an easy feat. The Scheme was probably seen as a dynamic effort and a framework for the future that seeks to reconcile competing priorities, rather than assessing it against a set of accountability measures. Although the KPCS negotiations had many of the hallmarks of a legislative process, using the same techniques and tools, it was not set up as a proper treaty in order to restrain its lawmaking role in the international field [...]
>
> It is therefore surprising that this political agreement has nonetheless attained a certain force of law, with countries abiding by it and changing their behaviour to avoid violating its commands.[60]

With a consideration of its documentary features as Schram has done here, it is only right to conclude that the KPCS is a soft law. Nonetheless, it may be relevant to highlight that the Kimberley Process shares a crucial semblance with the 1948 Universal Declaration of Human Rights (UDHR), a soft law instrument by documentary features only, but which has metamorphosed into a customary international law (higher than a treaty in status), because states not only crave to keep

56 *Ibid. See also*, Feldman, 2003, at 836.

57 *See* for instance, J.T. Gathii, *War, Commerce, and International Law,* Oxford University Press, Oxford, 2010, at 217. *See also*, E.J.A. Rodgers, 'Conflict Diamonds, Certification and Corruption: A Case Study of Sierra Leone', *J. Financial Crime*, Vol. 13, 2006, p. 267, at 271.

58 Schram, 2007, at 7.

59 *Ibid*., at 8.

60 *Ibid.*, at 9.

its commands, but equally domesticate its provisions in national laws. Like the UDHR, the Kimberley Process agreement commands the participants to domesticate its provisions in national laws as a condition towards compliance with its obligations. Perhaps the knowledge of this might have informed Schram's further argument that at the domestic level KPCS is indeed seen as something very much legal, and internationally has wielded a surprisingly strong political influence, which has granted it a special status, thus making it more binding than most conventional treaties.[61] Comments such as this will help to appreciate the discussion on KPCS's obligations in Sections F, G and H below. Arguably, however, Schram may have alluded to the obligations imposed by the KPCS on its participants without being explicit about it.

Other scholars are now beginning to acknowledge the juridical force of the Kimberley Process, as well as its reflection of the dynamics of international law making in the contemporary world. While analysing Alvarez' argument, Price captures the heart of the matter by stating that:

> Unlike Nineteenth Century treaties, which were judged based on a snapshot in time, the Kimberley Process and other modern treaties and political agreements should be viewed as initiating ongoing processes. Arguably, the KP fits within the developing "managerial form of treaty-making", which is characterized by the implementation of a framework for the future, not just when the treaty is initially concluded. Agreements that establish a framework for the future, such as the KP, are essentially "living" treaties or agreements. "[W]hether or not they resort to harder form of enforcement such as binding dispute settlement", they often deepen over time creating a legislative enterprise capable of continuous improvement responsive to the parties' needs and advancements.[62]

What Price is saying here is that a soft law legislative process (which is what the KPCS followed), in contrast to rigid technicalities of a hard law legislative process, has become a modern way of achieving hard legislative obligations or legal obligations among international actors; and that achievement of this does not derogate from an agreement failing to have a hard form of enforcement such as binding dispute settlement mechanism.

Daniel Feldman for his part has strongly argued that even from an ordinary legislative context, that the drafting and negotiations of the Kimberley Process have many of the hallmarks of any ordinary *international* (italics mine) legislative process, and that based on the definition of law by Lon Fuller, a great American jurisprudential scholar, "the Kimberly Process is law, just as any statute becomes law if it achieves its purposes [...] illuminating modern developments in interna-

61 *Ibid.*

62 T.M. Price, 'The Kimberley Process: Conflict Diamonds, WTO Obligations, and the Universality Debate', *Minn. J. Global Trade*, Vol. 12, 2003, p. 1, at 67-68. *See also*, J.E. Alvarez, 'The New Treaty Makers', *B.C. Int'l & Comp. L. Rev.*, Vol. 25, 2002, p. 213, at 221-222.

tional law".[63] He further observes that the nations involved in the regime have begun implementing it, issuing directives and regulations, and even enacting domestic statutes to do so.[64] That is to say, as he further opines, "it has the force of law, as individuals have changed and will change their behaviour to avoid violating its commands".[65] Feldman's views are somewhat strongly supported by Boyle who argues that the nicety of the processes by which contemporary international law can be made is not any more sufficiently captured by reference to the orthodox categories of custom and treaty. He further argues that the relevance of soft law as an element in international law-making has become widely acknowledged and its influence throughout international law is now evident.[66] In other words, being a soft law is merely an inchoate or transitory position towards attainment of the ultimate 'hard law' mark, which is actualised once the law begins to accomplish its purpose(s).

Additionally reinforcing the 'hard law' or juridical force of the Kimberley Process is the fact of its ratification by the UN Security Council.[67] By Article 25 of the United Nations Charter, member states *agree* to accept and carry out the decisions of the Security Council in accordance with the provisions of the Charter. That is to say, the UN Security Council resolutions are binding on member states. The implication of this therefore is that by proxy of the UN Security Council, member states have agreed not only to abide by the Kimberley Process agreement as ratified by the Security Council, but also to apply themselves thereto, with equal obligation as any of the original or pioneer participants. To a large extent, by the UN Security Council ratification, the Kimberley Process is deemed to have been placed upon a pedestal equal in authority to any of the UN treaties, and also binding on all member states.

F. The Key Elements of the Kimberley Process as the Evidence of its Character and Obligations

While in Section E an attempt has been made to highlight that the KPCS came with some form of obligations, it is done by way of legal analysis and logic. However, in line with the objective of this article, this section is devoted to a discussion of the real and practical obligations that accompany the implementation of the KPCS by participant countries, similar to an ordinary treaty. Central to the Kimberley Process initiative is the creation of a paper trail or certificate that accompanies the export and import of legitimate rough diamonds, so as to cut off the conflict diamonds from circulation. Thus, the key elements of the agreement designed to achieve this include the internal control in the participant countries, introduced by legislation localising the agreement; containerisation and certifica-

63 Feldman, 2003, at 839.
64 *Ibid.*, at 836.
65 *Ibid.*, at 870.
66 Boyle, 1999, at 901.
67 UN SCOR, 57th Sess., 4694th Mtg., UN Doc. S/RES/1459 (2003), at paras. 1-3. *See also*, Koyame, 2005, at 97.

tion; tracking; disclosure and communication; admission and expulsion; and monitoring and review. These elements will now be examined in turn.

I. Internal Control

The internal control elements of the regime are set out in Section IV of the agreement. They are considered to be the first steps towards compliance with the Kimberley Process. They are generally designated as "Undertakings by Participants" and have three important limbs. The first limb is of a fundamental nature. It is the requirement that participant countries should enact appropriate national legislation to implement and enforce the certification scheme, and to maintain dissuasive and proportional penalties for infringement.[68]

Although the obligation to domesticate the agreement in all participant countries is expressed to be based on "meeting internationally agreed minimum standards",[69] in actual fact, the minimum standards are not minimum standards, but are pretty high. It is indeed compulsory for all participant countries to pass new legislation in order to enforce the Kimberley Process at home, something that places the regime in similar matrix as many ratified international treaties.[70] This is considered to be the greatest strength of the Kimberley Process and underscores its binding force. As Ian Smillie rightly points out, new Kimberley-specific laws have been passed in the European Community, Canada, USA and virtually in all of the participant countries.[71] These laws spell out how rough diamonds are to be handled prior to export and/or after import, as well as prescribing penalties for violations, which in most cases include fines and/or custodial sentence, plus forfeiture of any diamond seized.[72]

The second limb is the requirement that each participant country should establish a system of internal controls designed to eliminate the presence of conflict diamonds from shipments of rough diamonds, imported and/or exported from its territory.[73] The agreement further elaborates on this by its provisions in Annex II, which requires the diamond producing countries to ensure that all diamond mines are licensed and to allow only such licensed mines to mine diamonds.[74] The third limb of the internal control is the requirement that participant countries should create diamond Importing and Exporting Authorities.[75] These authorities are known in some of the participant countries as Government Diamond Office (GDO).[76] They are independent of Customs departments and do the coordination of export and import of diamonds, as well as issuance and

68 *Kimberley Process Certification Scheme Document*, s. IV, para. (d) (*KPCS Document*).
69 *Ibid.*, at preamble, para. 10.
70 *See* Smillie, 2005, at 4 (although expressing a contrary opinion).
71 *Ibid.*
72 *Ibid.*
73 *KPCS Document*, s. IV, para. (a).
74 *Ibid.*, at Ann. II, para. (9).
75 *Ibid.*, at s. IV, para. (b).
76 C. Wright, 'Tackling Conflict Diamonds: The Kimberley Process Certification Scheme', *Int'l Peacekeeping*, Vol. 11, 2004, p. 697, at 700. *See also*, Diamondfacts.org, 'Eliminating Conflict Diamonds', online: <http://diamondfacts.org/conflict/eliminating_conflict_diamonds.html#kim>.

authentication or verification of a Kimberley Process certificate. They generally superintend the implementation and compliance with the regime within each participant country.[77]

II. Containerisation and Certification

The regime requires every participant country to ensure that rough diamonds are imported and exported in tamper-resistant containers and that each shipment be accompanied by a government-issued 'Kimberley Process Certificate' and titled as such.[78] The certificate under the agreement is defined as "a forgery resistant document with a particular format which identifies a shipment of rough diamonds as being in compliance with the requirement of the regime".[79] To meet the minimum requirement of the agreement, each certificate must contain an assurance that the diamonds to which it relates are conflict-free. In addition to being tamper and forgery resistant itself, the certificate must state the diamonds' country of origin, and must include a unique serial (tracking) number, date of issuance and expiration, the issuing authority, the identification of the exporter and importer, carat weight of the diamonds, value in US dollars, number of parcels in the shipment, and Relevant Harmonised Commodity Description and Coding System.[80] But participants are also at liberty to add extra features or security elements in their own certificates.[81]

Again, each participant country is required to notify all other participants through the Chair, of the features of her certificate for the purpose of validation.[82] What this means is that each participant country maintains a register or database where the different sample designs are stored that is easily accessed whenever there is a need to verify any certificate in doubt.[83]

There is, however, no requirement that a participant country through which a rough diamonds shipment merely transits has an obligation to ensure that the shipment is accompanied by a certificate, provided that the designated authority in the transit country ensures that the shipment leaves its territory unopened and not tampered with.[84] It may be interesting to note that the scheme presupposes that the diamond trade pipeline is cautiously restricted to participant countries, and does not anticipate transit of shipments through a non-participant country to avoid infiltration of non-participants into the ranks of the regime.

77 *KPCS Document*, at Ann. II, paras. 17-25.
78 *Ibid.*, at s. IV, para. (c) & s. III, para. (a).
79 *Ibid.*, at s. I, para. 10.
80 *Ibid.*, at Ann. I, para. A. *See also*, Hummel, 2007, at 1159-1160; J.L. Fishman, 'Is Diamond Smuggling Forever? The Kimberley Process Certification Scheme: The First Step Down the Long Road to Solving the Blood Diamond Trade Problem', *U. Miami Bus. L. Rev.*, Vol. 13, 2004-2005, p. 217, at 226.
81 *KPCS Document*, at s. II, para. (c).
82 *Ibid.*, para. (d).
83 Smillie, 2005, at 4.
84 *KPCS Document*, at s.III, para. (d).

III. Tracking System

Expeditious tracking is another key element that further strengthens the operation and effectiveness of the regime in meeting its objectives. Every Exporting Authority in an exporting country is required upon every shipment of rough diamonds to transmit detailed information by e-mail to an appropriate Importing Authority in an importing country. Such a transmission must contain relevant details of the shipment, including carat weight, value, country of provenance, importer and serial number of the certificate.[85] The Exporting Authority further keeps a record of all shipments in a computerised database.[86]

The Importing Authority in the importing country is in turn required to ensure that confirmation of receipt of every rough diamonds shipment is sent expeditiously to the Exporting Authority in the exporting country. The confirmation transmission equally refers to the details of the shipment, including the certificate number, number of parcels in the shipment, the carat weight and the details of the importer and exporter.[87] Apart from confirmation of receipt, the Importing Authority inspects the shipment to verify that the seal and the container have not been tampered with and that the export has been done in compliance with the Kimberley Process agreement.[88] It also inspects the contents of the shipment to verify the details declared on the certificate.[89] The certificate is retained and made readily accessible to Customs officials for a period of not less than three years.[90] In this way the regime tracks rough diamonds from export to import, and has provided the most extensive commodity tracking system in the global trading field.

IV. Disclosure and Communication

The regime requires the participants to provide one another with information in electronic form, relating to their Kimberley Process laws, regulations, rules, procedures and practices, along with related updates, as well as statistical data regarding their rough diamonds production, import and export. Such information is also required to be preserved.[91] Apart from this, the participants are also required to keep and publish on a semi-annual basis and within two months of the reference period the statistics on rough diamonds production by carat weight and by value.[92] And in the event that a participant is unable to publish these statistics, it should notify the Chair immediately.[93] The regime now has a centrally maintained statistical website that allows participants and observers to compare and verify exports and imports among participants.[94] This is a *de facto* monitoring

85 *Ibid*., at Ann. II, para. 19.
86 *Ibid*., at para. 20.
87 *Ibid*., at s. III, para. (b).
88 *Ibid*., at Ann. II, para. 22.
89 *Ibid*., at para. 23.
90 *Ibid*., at s. III, para. (b).
91 *Ibid*., at s. V, para. (a) & s. IV, para. (e).
92 *Ibid*., at Ann. III, para. (c).
93 *Ibid.*
94 Smillie, 2005, at 3.

and compliant arrangement through which compliance issues can be identified and raised outside the regular monitoring and review mechanism.[95]

V. Admission and Expulsion

The Kimberley Process regime operates on the basis of admission and exclusion of members. It provides that each Participant should "ensure that no shipment of rough diamonds is imported from or exported to a non-participant".[96] This provision is another element that places the regime on a pedestal higher than many conventional treaties.[97] Its obvious implication is that a country must elect to subscribe to the regime in order to participate legally in the global diamond trade.

Where a country fails to be part of the regime, it can neither export nor import rough diamonds from the global diamond market. This, in essence, is diametrically opposed to every sense of voluntariness, as compulsory membership with the attendant obligation to comply with the provisions of the regime is in fact demanded. Thus, apart from the pioneer participants who became members by partaking in the Interlaken Declaration of November 2002, subsequent members are obligated to fulfil the admission requirements and become formally admitted in order to trade rough diamonds.[98]

The admission criteria include the requirement that the applicant country must first pass law(s) to enforce the regime at home, a copy of which law(s) must be included in information set to be submitted to the Chair through diplomatic channels.[99] In addition to this, a Review Committee would visit the applicant country to inspect the compliance mechanisms she has set in place for the regime. Such a review visit took place before Lebanon was admitted into the regime in 2005.[100]

On the other hand, previous membership and/or admission as a participant is not sacrosanct or irrevocable. To continue the enjoyment of membership, a participant must continue to comply with the provisions of the agreement. There is no definite provision in the agreement relating to expulsion of a participant from the scheme. Rather, the agreement provides that dialogue should be resorted to through the Chair in the event that concerns are raised regarding compliance or implementation of the certification scheme by a participant.[101] However, in practice, the regime grew teeth that had not been there, by taking extra steps to expel defaulting participants from its membership.

As Ian Smillie reports, within six months of the commencement of the scheme, some pioneer participants who were party to the Interlaken Declaration were expelled from the regime at the instance of the Participation Committee, which examined the laws and regulations, as well as certificates of every partici-

95 *Ibid.*, at 5.
96 *KPCS Document*, at s. III, para. (c).
97 Smillie, 2005, at 4.
98 *KPCS Document*, at s. VI, paras. 8, 9, & s. V, para. (a).
99 *Ibid.*, at s. VI, para. 9.
100 Smillie, 2005, at 5.
101 *KPCS Document*, at s. VI, para.16.

pant for compliance with the regimes' minimum standards.[102] Norway, for instance, was expelled because she had no law or certificate, but was re-admitted when she later provided them. Such was the case with Brazil. Burkina Faso never came back when she was expelled on the same ground.[103] Similarly, the Republic of Congo (Brazzaville) was expelled from the scheme in 2004 following a visit by a Review team, which discovered a discrepancy between millions of dollars' worth of rough diamonds exports from the country and a minimal amount of diamond mining and documented imports into the country.[104] In this way the Kimberley Process still sets the precedent as a regime with effective power to exclude a country from trading in an important commodity.[105]

VI. Monitoring and Review

Monitoring under the regime is designed to take the form of review visitations by an ad hoc body comprising representatives of the participant and observers.[106] Annual plenary meetings that are attended by both participants and observers are held to improve the effectiveness of the certification scheme.[107] At such meetings, ad hoc working groups are established to look into specific problems that are raised.[108] Review missions are created in this fashion to investigate any "credible indications of significant non-compliance with the international certification scheme" by a participant.[109] The expulsion of the Republic of Congo in 2004, it must be remembered, was a product of a review mission.

It is important to note, however, that review missions are conducted with the consent of the participant concerned.[110] In other words, the review visit is voluntary. The implication of this is that even where non-compliance concerns are raised about a participant, a review visit may not be possible within the participant's jurisdiction until her consent is received. However, Ian Smillie, who himself worked for Partnership Africa Canada (an observer member of the Kimberley Process), has highlighted that against the perceived obstacle of 'consent' as a condition for review, several participants had freely requested for reviews that it became harder for others not to volunteer.[111] As he puts it, "[b]y mid 2005, 18

102 Smillie, 2005, at 4.
103 *Ibid.*
104 *Ibid*., at 5. *See also*, Fishman, 2004-2005, at 229-230; S.A. Malamut, 'A Band-Aid on a Machete Wound: The Failures of the Kimberley Process and Diamond-Caused Bloodshed in the Democratic Republic of the Congo', *Suffolk Transnat' L. Rev*., Vol. 29, 2005-2006, p. 25, at 41.
105 Smillie, 2005, at 4.
106 It is pertinent to note that the civil society, diamond industry and NGOs who participated in the meetings and negotiations that led to the creation of the certification scheme were reduced to mere observer status in the agreement (treaty). Nonetheless, they are still obliged to participate in plenary meetings and ad hoc working groups particularly the peer review visits. *See* the *KPCS Document*, at s.1, & s. VI, paras. 1, 10, 13(b), 15.
107 *KPCS Document*, at s. VI, paras. 1, 10.
108 *Ibid*., at para. 4.
109 *Ibid*., at para. 13(b).
110 *Ibid*., at para. 14.
111 Smillie, 2005, at 5.

'voluntary' reviews had been carried out, and there was no country left in the KPCS that has not requested one".[112]

Independent of the review of the compliance system of individual participants, the Kimberley Process agreement equally provides for a comprehensive review mechanism for a thorough evaluation of the scheme's overall performance.[113] The first of such comprehensive reviews is stated to be held within the first three years after the effective starting date of the certification scheme. Again, the review meeting should normally coincide with the annual plenary meetings, and will particularly consider any continued threat posed at that time by conflict diamonds and the future of the scheme generally.[114] With such manner of review provisions in the agreement, it is therefore obvious that the participants intend that the scheme provides remedies not only for the time being, but also for the future. No wonder the Kimberley Process has been rightly referred to as a living treaty regime.[115]

G. How the Kimberley Process Works in a Nutshell: A Further Clue as to its Positive Obligation

The certification of diamonds under the Kimberley Process begins with miners or mining companies and rough diamond buyers operating in countries where the diamonds are first extracted. A mining company wishing to export its diamonds will then notify the relevant Exporting Authority (e.g., Government Diamond Office) in the country, which will validate the shipment by preparing and providing the necessary documentation (including a Kimberley Process certificate) and seal the diamonds in a tamper-resistant container.[116]

A Kimberley Process certificate consists of security paper with two detachable slips, dispatched along with the shipment, one of which is to serve as an import confirmation slip to the Exporting Authority. The certificate is also equipped with an electronic tracking system so that along with the detachable slip (receipt), the Importing Authority must send an electronic confirmation to the Exporting Authority.[117] At the importing country, the importer of the diamonds must provide Customs with a valid and authentic certificate issued and validated by the exporting government. The shipment is then subjected to a physical inspection to ensure that contents match the description on the certificate. The inspection is conducted by the Importing Authority in conjunction with Customs officials. The certificate is thereafter passed to the Importing Authority who notifies the

112 *Ibid.*

113 *KPCS Document,* at s. VI, para. 20.

114 *Ibid.*, *See also*, Price, 2003, at 42.

115 Alvarez, 2002, at 221.

116 World Diamond Council, *The Essential Guide to Implementing the Kimberley Process*, World Diamond Council, 2008, at 4, online: <www.jvclegal.org/KimberleyProcess.pdf>.

117 M. Kaplan, 'Carats and Sticks: Pursuing War and Peace through the Diamond Trade', *N.Y.U.J. Int'l L. & Pol*. Vol. 35, 2003, p. 559, at 600-601. *See also*, the *KPCS Document*, at Ann. II, para. 24, which provides that the importing authority should send the return slip or import confirmation coupon to the relevant Exporting Authority.

Exporting Authority in an appropriate manner that the diamonds were safely received, thus closing the information loop.[118]

Where the diamond importer wishes to re-export the diamonds to another party in another participating country, the importer will apply for a Kimberley Process certificate from the Government Diamond Office in its country, which now becomes the Exporting Authority.[119] In making this application, the importer provides an evidence of legal import of the diamonds in the first instance. The Exporting Authority prepares and provides the necessary documentation for the shipment, including a new Kimberley Process certificate, and seals the diamonds in a tamper-resistant container.[120] The diamonds are thus shipped again.

Within in-country trading, an industry system of warranty is further adopted. Normally, diamonds imported in compliance with the regime's provisions are sent out to be cut, and change handlers who apply them to some processing mechanisms towards eventual retailing consumption. However, whenever a diamond changes hands, that is, from the importers to in-country traders, polishers and manufacturers, it must be accompanied by a warranty verifying that the diamond is not itself a conflict diamond or from an outlawed conflict region.[121] The warranty comes as a definite statement of industry self-regulation encapsulated within the certification scheme in order to strengthen the credibility of the Kimberley Process agreement, as well as to provide the means by which consumers might more effectively be assured of the origin of their diamonds.[122] In any case, the affirmative statement of warranty prescribed by the World Diamond Council (WDC) to appear on all invoices reads as follows:

> The diamonds herein invoiced have been purchased from legitimate sources not involved in funding conflict and in compliance with United Nations resolutions. The seller hereby guarantees that these diamonds are conflict free, based on personal knowledge and/or written guarantees provided by the supplier of these diamonds.[123]

In summary, it can be said that the Kimberley Process is merely asking the participants to do the following: to meet its minimum requirements generally; to introduce a national legislation and institutions; to put in place a system of internal controls to eliminate the presence of conflict diamonds from shipments of rough diamonds; to establish import and export authorities and controls; to be transparent about the implementation of the requirements; and to compile and exchange statistical data.[124]

118 Wright, 2004, at 700.
119 *Ibid*.
120 *Ibid*.
121 Hummel, 2007, at 1160.
122 World Diamond Council, 2008, at 2. *See also*, the *KPCS Document*, at preamble & s. IV.
123 World Diamond Council, 2008.
124 Fatal Transactions, *How Does the Kimberley Process Work?*, online: <www.fataltransactions.org/Dossiers/Blood-diamonds-and-the-Kimberley-Process/How-does-the-Kimberley-Process-work>.

H. Implementation of Kimberley Process in some of the Key Diamond Trading Countries: A Treaty-Like Obligation

I. The United States

As a major diamond importing country, the United States has been a driving force towards a global implementation of the certification scheme. Before the Kimberley Process eventually emerged, the United States had already taken drastic measures to prohibit the importation of 'blood diamonds' from Angola, Sierra Leone and Liberia. These were done through Executive Orders issued at different times by Presidents Clinton and Bush.[125] However, when the Interlaken Declaration on the Kimberley Process was adopted, the US immediately set in motion the process of nationalising the agreement and eventually passed the *Clean Diamond Trade Act* (CDTA) on 25 April 2003, and the same signed into law on 30 July 2003 by President George W. Bush.[126]

The CDTA makes it clear that the legislation is an initiative of the United States to support the UN Security Council's effort to resolve conflicts in sub-Saharan Africa, which facilitates the trade in conflict diamonds.[127] It reserves in the President of the United States the power to prohibit importation into, or exportation from the United States, of any rough diamonds that are not controlled in accordance with the Kimberley Process agreement.[128] The President also has oversight power over any Authority in the United States that issues Kimberley Process certificates.[129] By these provisions, the Act integrates into its framework the pre-existing power of the President of the United States to issue executive orders. In effect, by combinations of the CDTA, the Executive Order 13312 of 29 July 2003, made by President George W. Bush, as well as the *Rough Diamonds Control Regulations*, 31 CFR part 592, made by the Bureau of Customs and Border Protection (CBP), the US government became fully committed to the Kimberley Process.[130]

With regard to the requirement of the Kimberley Process agreement that participating countries establish an Importing and Exporting Authority to issue and/or validate the Kimberley Process certificate, the CDTA provides that the US Bureau of Customs and Border Protection (CBP) and the United States Census Bureau shall be the Importing and Exporting Authorities respectively.[131] In practice, the US Kimberley Process Authority (USKPA), a non-profit trade association, is authorised by the US government to provide US Kimberley Process certificates to licensed entities for use in exporting rough diamonds from the United States.

125 Price, 2003, at 45.
126 *See* Hummel, 2007, at 1161; and Fishman, 2004-2005, at 231.
127 *See* s. 2.
128 *See* s. 4(a).
129 *See* s. 5(c).
130 U.S. Department of State, *Requirements for U.S. Importer and Exporters of Rough Diamonds*, at 2, online: <www.state.gov/documents/organization/105827.pdf>.
131 The CDTA, s. 6(a).

Thus, while the USKPA issues the Kimberley certificate, the Census Bureau validates it for exports.[132]

There are both civil and criminal sanctions under the CDTA for violating its provisions. Section 8 prescribes the imposition of a $10,000 fine as civil penalty to be handed out to any person who violates or attempts to violate the Act. However, where a person wilfully violates, or wilfully attempts to violate the provisions of the Act, such a person shall be subjected to a criminal charge, and upon conviction sentenced to a fine of not more than $50,000. If the offender is a natural person, or an officer, director or agent of a corporate entity who wilfully participates in such a violation, the individual may be given a custodial sentence of not more than ten years or both the fine and custody.[133] By providing for both civil and criminal sanctions, it means that liability for violating the provisions of the CDTA is inescapable or rather strict. As long as an infraction of the Act is established, liability and sanction nonetheless follow. Civil sanction will generally apply unless 'wilful' element accompanies the infraction, in which case criminal sanction applies. In a sense, it takes a categorical breach or a merely attempted violation to be liable to sanctions under the CDTA.

II. The European Union

The European Union participated in the negotiations, meetings and the adoption of the Kimberley Process agreement as a single participant. Likewise, it implemented the agreement within its territory as a single participating entity without internal borders. The said implementation came through the *European Council Regulation No. 2368/2002 of 20 December 2002* (*Council Regulation*).[134] As a general rule, the European Council Regulations are binding and directly applicable to all EU member states.[135] By implication of the *2002 Council Regulation* therefore, the Kimberley Process agreement which is annexed to it, became as effective as a national law in each of the member states.

The *Council Regulation* is designed to prevent conflict diamonds from coming into Europe. It therefore requires all EU member states to import and export rough diamonds into the Union only through a designated Union Authority in a member state that has met the conditions agreed with the European Commission.[136] The obligation by a member state to designate/establish a Community

132 U.S. Department of State, *supra* note 130, at 2.

133 The CDTA, s. 8(a). *See also*, A.P. Petrova, 'The Implementation and Effectiveness of the Kimberley Process Certification Scheme in the United States', *Int'l L.* Vol. 40, 2006, p. 945, at 951.

134 Schram, 2007, at 15. *See also*, the Official Journal of the European Communities, 31 December 2002, L358/28 which carries the said *Council Regulation* (EC) No 2368/2002. This is available online at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:358:0028:0048:EN:PDF>.

135 Art. 249 of the *Treaty establishing the European Community* (TEC) (providing that "[a] regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States"). Note that TEC has been amended and renamed by a recent Treaty of Lisbon, signed on 13 December 2007 at Lisbon by the EU member states, but entered into force on 1 December 2009. Under the Lisbon Treaty, TEC is renamed as the *Treaty on the Functioning of the European Union* (TFEU), and the TEC's erstwhile Art. 249 is now Art. 288 of the TFEU.

136 Schram, 2007, at 16. *See also*, Art. 19 of *the Council Regulation*.

Authority is, however, voluntary. Therefore, where a member state establishes a Community Authority, it becomes an entry and exit point for rough diamonds in the EU, and becomes responsible for full monitoring and inspection of diamond imports, verification of Kimberley Process certificates, and issuing and validating uniform Community certificate for exports.[137] As of January 2008, the EU had six Community Authorities; in Antwerp (Belgium), London (United Kingdom), Idar-Oberstein (Germany), Prague (Czech Republic), Bucharest (Romania) and Sofia (Bulgaria).[138] In any case where rough diamonds are imported into a member state where there is no Community Authority, the diamonds are put on a Customs transit system for submission in another member state with Community Authority.[139]

There are possibilities that if conflict diamonds are smuggled into the EU, they may go undetected and move across members' borders because certification scheme is not enforced within the free and borderless single community. To solve this problem, the European diamond industry established a system of self-regulation/warranties as envisaged in the certification regime, which applies to both international and national transactions within the EU.[140] For instance, under the self-regulatory system, all traders or companies exporting diamonds can make use of a 'fast-track approach' for issuing certificates if they are members of a listed diamond bourse with a certain self-regulation system, whereby a signed declaration by the exporter that the diamonds are lawfully imported are accepted as conclusive. However, if the exporting trader or company is not a member of such a bourse, then it must establish that the diamonds are not conflict diamonds when first imported into the EU before the export can sail through.[141]

The *Council Regulation* does not prescribe any Europe-wide uniform sanction for violating the regime. Rather, it commands each member state to determine the sanctions to be imposed in the event of infringement. It further demands that such sanctions should be effective, proportionate and dissuasive enough, and capable of preventing those responsible for the infringement from obtaining any economic benefit from their action.[142] In the United Kingdom, a shipment that does not meet Kimberley Process import requirements is considered to be an

137 Schram, 2007. *See also*, Art. 19 of *the Council Regulation*. Note that 'Exporting Authority' and 'Importing Authority' which the Kimberley Process agreement commands the participants to establish have been created as one entity by the *Council Regulation*, and designated as 'Community Authority. However, it is inexplicable why the *Regulation* employed 'Community' instead of 'Union' in the name, considering that the region is now appropriately called European Union but not European Community.

138 *See Guidelines on Trading with the European Community (EC) January 2008: A Practical Guide for Kimberley Participants and Companies Involved in Trade in Rough Diamonds With Europe*, at 5, online: <www.eeas.europa.eu/blood_diamonds/docs/trading_guidelines0108_en.pdf>.

139 Schram, 2007, at 16. *See also*, Art. 4 of *the Council Regulation*.

140 Schram, 2007, at 17.

141 *Ibid.*

142 Art. 27 of the *Council Regulation*. *See also*, Art. 1(7).

infringement of Customs controls and this carries severe penalties, including imprisonment.[143]

III. Canada

In Canada, the implementation of the Kimberley Process has been effected by the *Export and Import of Rough Diamonds Act, 2003* as amended (EIRDA). Without employing the KPCS terminology such as 'Exporting Authority' and 'Importing Authority', the Canadian legislation nevertheless established both Authorities in the Minister of Natural Resources, who may delegate some of the ministerial authority to be exercised by any qualified person.[144] A delegatee of the ministerial authority is designated as an Inspector or Investigator for administration and enforcement of the Act.[145]

Under the EIRDA, an exporter of rough diamonds must apply for the Canadian Kimberley certificate to the Minister, who before issuing such a certificate must be satisfied that the shipment is going to a participant country, and that the rough diamonds in respect of which the application is made originated from Canada or were imported legally into Canada from another participant country.[146] When the export is eventually made, the exporter must report the same to the Minister.[147] There is also a similar obligation to report import of diamonds to the Minister.[148] The Minister ensures that only diamonds that meet the requirements of the regime are imported into Canada. Where rough diamonds that have been imported into Canada with a valid and compliant certificate are found to come in an open container, such diamonds are ordered by the Minister to be returned to the exporter.[149] Such is also the fate of in-transit diamonds that arrive in Canada in a container that has been opened, except where such in-transit shipment is not accompanied by a Kimberley certificate, in which case it is seized.[150] Importantly, rough diamonds leave and enter Canada only through designated points of exit and entry.[151]

Unlike the CDTA of the United States, the EIRDA contains only criminal sanctions for violations of its provisions. It is an offence under the EIRDA to fail to export or import rough diamonds into Canada through the designated exit or entry points. Likewise, it is an offence to fail to report rough diamonds export or import to the Minister. These offences are punishable on summary conviction.[152] Again, importation or exportation of rough diamonds without a valid certificate, and forgery or misuse of a Canadian Kimberley Process certificate are both treat-

143 Email communication on 11 February 2011 with a member of staff of the UK's Government Diamond Office, London.
144 EIRDA, ss. 2 & 6.
145 *Ibid*., s. 7(1).
146 *Ibid*., s. 9.
147 *Ibid*., s. 13(1).
148 *Ibid*., s. 16(1).
149 *Ibid*., ss. 14(1) & 15(1).
150 *Ibid*., s. 17.
151 *Ibid*., ss. 13(2) & 16(2).
152 *Ibid*., s. 40.1(1).

ed as either an indictable offence or a summary conviction offence that may result in severe criminal sanctions.[153]

I. Conclusion

An acknowledgement that Kimberley Process despite its soft law characteristic has a certain force of law is no longer an issue, in the light of the expositions made in this article. But what is essentially underscored here, in addition, is the fact that KPCS being a law is not merely a matter of academic discourse. Its legalistic nature or juridical force arises in most part from the positive obligations that accompany its implementation, and these obligations are not any different from those imposed by any other conventional treaty.

Global governance by means of soft laws has been an acceptable practice in modern times and has brought changes in issue areas where attention is focused. In their areas of applications, soft laws come with varying degrees of impact and obligations. Where, for instance, the impact is well pronounced and the obligations involve copious positive acts, such as legislative enactment and local enforcement, it becomes irresistibly logical to opine that a particular soft law instrument may have achieved a hard law effect or obligation. This argument represents the KPCS's position. The regime achieved a hard law obligation by operation and attained this status soon after it entered into force. This conclusion equally extends to the UDHR example. It was initiated as a non-obligatory international instrument. But today, it has become a customary international law, with nations striving to live up to its expectations in addition to nationalizing it as a domestic law, just like the Kimberley Process. Furthermore, in today's world, compliance with the UDHR has often been one of the principal bases for assessing whether a nation can be accepted within the comity of nations, in the same way that the Kimberley Process compliance is the basis for accepting a nation into the global diamond trading circle. Indeed, it is only safe and appropriate to conclude that a law that comes with all manner of heavy and unrelenting obligations like those of the Kimberley Process, and is in addition elevated to the status of a UN treaty, has achieved a hard law effect.

As it is commonly said, the hood does not make the monk, but the substance of his calling. In similar fashion, while the KPCS may appear 'soft' on paper, in substance, it has hard effects. Thus, another important clue that further exhibits the 'hard law' nature of the KPCS is the fact that none of the nations that were suspended or excluded from the global diamond trade for failing to keep the terms of the agreement has challenged the legality of such an action by those

153 If charged as an indictable offence, the offender is liable to a fine of an amount fixed at the discretion of the court, or to imprisonment for a term not exceeding ten years, or to both. If charged as an a summary conviction offence, then the offender is liable to a fine not exceeding $25,000 or to imprisonment for a term not exceeding twelve months, or to both. Upon conviction, diamonds that are subject matter of the prosecution are forfeited to the state. *See* ss. 41(1) & 28 of the EIRDA.

other nations under the KPCS.[154] It is the knowledge of the obvious outcome of such an action that forestalls it.

Beyond all that has been said here, one profound contribution of this work is the point that the Kimberley Process example has impliedly and, to a large extent unsettled, nullified and rendered nugatory any distinction between soft and hard international instruments, on basis only of delineation, documentary features and the terminology used in the agreement. It has indeed become important that classification should equally, if not more importantly, contemplate the legislative effect of the international agreement concerned. What is meant here is that, considering the modern dynamics of international legislative process, classification should inevitably include as an important element for consideration, the effect an instrument is making in the area of its application as well as the obligations that accompany its compliance.

154 It is important to note that KPCS participants went as far as obtaining the WTO waiver to effectively comply with the obligations of the scheme. This is also another indication that although the agreement was simplistically couched, the participants never intended that it would be an agreement without legal effect. For more on KPCS and WTO obligations *see*, K.N. Schefer, *Chilling the Protection of Human Rights: What the Kimberley Process Waiver Can Tell Us About the WTO's Effect on International Law*, NCCR Trade Regulation, Working Paper No. 2007/03, January 2007, online: NCCR <http://phase1.nccr-trade.org/images/stories/publications/IP4/chilling%20effect%20revised.pdf>.